[WILSON, P., ZEKIA, VASSILIADES AND JOSEPHIDES, JJ.]

1963
April 30

THE HEIRS OF THE LATE THEODORA PANAYI
i.e. ANDREAS FOTI AND TWO OTHERS,

Appellants-Defendants,

v.

THE ADMINISTRATORS OF THE ESTATE OF THE LATE STYLIANOS GEORGHI MANDRIOTI,
i.e SOCRATES STYLIANOU MANDRIOTIS and ANOTHER,

Respondents-Plaintiffs.

THE HEIRS OF THE LATE THEODORA PANAYI v. THE ADMINISTRATORS OF THE ESTATE OF THE LATE STYLIANOS MANDRIOTIS

(*Civil Appeal No.* 4417).

Practice—Preliminary objection—When an objection is taken in the defence, the interested party must apply to have a particular point of law under Order 27 of the Civil Procedure Rules formulated and set down for hearing before the date of the trial—Such application should normally be made on the summons for directions.

Practice—Misjoinder of parties—Parties objecting should apply under the Civil Procedure Rules, Order 9, r. 10, to have their names struck out on the ground of misjoinder before the day of the trial.

Administration of Estates—Proper person to sue or be sued on behalf of the estate—The heirs, if the deceased died before the 1st January, 1955—The personal representative if the deceased died thereafter—The Administration of Estates Law, Cap. 189.

This is an appeal against two rulings of the trial Judge overruling two objections on behalf of the appellants (defendants 3 in the action). The facts of the case sufficiently appear in the judgment of the High Court.

The High Court in dismissing the appeal made the following two observations as to the proper procedure to be followed as regards : (*a*) objections taken in the defence, (*b*) misjoinder of parties.

1st observation : We would like to add that in cases where an objection is taken in the defence, the interested party must apply to the Court to have a particular point of law under Order 27 formulated and set down for hearing before the date of trial, and he should not wait until the day of trial when all

the parties and their witnesses are before the Court, when considerable costs may be incurred An application under Order 27 should normally be made on the summons for directions

2nd observation With regard to the present case we are of the view that the correct course would have been for the appellants (defendants 3) to have applied under Order 9, rule 10, to have their names struck out on the ground of misjoinder, before the day of hearing, if they thought that they had been improperly joined as parties

Appeal.

Appeal against the judgment of the District Court of Limassol (Loizou P.D.C. and Malachtos D.J.) dated the 21.1.1963 (Action No. 198/61) over-ruling two objections taken at the commencement of the hearing of the action.

Chr. Demetriades for the appellant.

St. G. McBride for the respondent.

The facts sufficiently appear in the judgment of the High Court.

WILSON, P. : We think it is unnecessary to call on you Mr. McBride, as I indicated. Mr. Justice Josephides will deliver the judgment of the Court

JOSEPHIDES, J. : In this case the plaintiffs brought an action in January, 1961, originally against four defendants including one Theodoulos Panayi of Limassol (defendant 3) which, presumably, is Theodora Panayi of Limassol. The claim was for a declaration that a piece of property belonged to the plaintiff estate by virtue of adverse possession and that they were entitled to have it registered in their names, and for an order directing the registration of the aforesaid property in their names.

On the 11th February, 1961, the plaintiffs filed an application to the Court under Order 9, rule 10, asking for an order of the Court directing the amendment of the title of the action by deleting the name of defendant No. 3 and adding the following as defendants 3 : " The heirs of the deceased Theodora Panayi of Limassol, i.e. (*a*) Andreas Photi of Limassol, (*b*) Miltiades Photi of Limassol and (*c*) Photis Constantinou of Limassol " This application was granted on the 22nd February, 1961.

No notice was given to the persons who were added as defendants but the writ of summons as amended was served on them and in due course they entered an appearance. The statement of claim was delivered and filed on the 28th February, 1961, and the aforesaid defendants 3, now appellants, in paragraph 1 of their defence, took the preliminary objection that the action could not proceed in its "legal form" as all the parties were not properly before the Court and/or that the action was bad in law.

Defendants 3 (appellants) did not move the Court under Order 27 to hear and determine their objection before the day of hearing nor did they move the Court under Order 9, rule 10, to have their names struck out on the ground of misjoinder.

On the day of hearing—the 7th January, 1963—when all the parties were ready for the hearing of the action in Court, objection was taken on behalf of defendants 3 (appellants) that (*a*) they were wrongly joined, in that under the provisions of the Administration of Estates Law, Cap. 189, the person who should be joined as a defendant should be the administrator of the estate of the deceased Theodora Panayi and not her heirs, the present defendants 3 (appellants), and (*b*) that the claim disclosed no cause of action against the said defendants in the sense that in the statement of claim it was neither alleged that their consent was asked and refused nor was it shown what interest they had in the property

The District Court, after hearing arguments, stated in their ruling that, with regard to the first point, the point in issue was whether Theodora Panayi died before the 1st January, 1955, the date on which the Administration of Estates Law, Cap. 189, came into operation, in which case the proper defendants should be her heirs, or, after that date, in which case the provisions of the said Law were applicable; and under those provisions no person may represent the estate of a deceased person except the personal representative.

The date of death of Theodora Panayi was not stated in the statement of claim but the Court was asked to infer from paragraph 2 that she died after 1955. Although the Court were of the view that the drafting of that paragraph left much to be desired and that, on reading it, one might "form that impression", in the absence of any

definite evidence on the point and in the light of the provisions of Order 9, rule 10, they were not prepared to dispose of the matter at that stage.

With regard to the second point, the Court ruled that the pleadings reasonably showed the grounds on which the defendants (appellants) were joined in the proceedings.

Having heard learned counsel for the appellants to-day we are satisfied that the ruling of the trial Court was right. We would like to add that in cases where an objection is taken in the defence the interested party must apply to the Court to have a particular point of law under Order 27 formulated and set down for hearing before the date of trial, and he should not wait until the day of trial when all the parties and their witnesses are before the Court, when considerable costs may be incurred. An application under Order 27 should normally be made on the summons for directions.

With regard to the present case we are of the view that the correct course would have been for the appellants (defendants 3) to have applied under Order 9, rule 10, to have their names struck out on the ground of misjoinder, before the day of hearing, if they thought that they had been improperly joined as parties.

For these reasons the appeal is dismissed with costs.

Appeal dismissed with costs.