1963
April 4,
June 18

ELENI ANGELI
v.
SAVVAS LAMBI
AND OTHERS

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

ELENI ANGELI,

Appellant-Plaintiff,

v.

SAVVAS LAMBI AND OTHERS,

Respondents-Defendants.

(*Civil Appeal No.* 4405).

Immovable Property—Acquisition by adverse possession—Interruption of prescriptive period—Registration of the property interrupts any prescriptive period which is running against the person who obtained that registration.

Immovable Property—Acquisition by adverse possession—Possession by a co-owner by inheritance is presumed not to be adverse against the other co-heirs not in possession.

The facts sufficiently appear in the judgment of the High Court which in dismissing the appeal :—

Held, (1) " if a person obtains registration as owner of the immovable property that registration will interrupt any prescriptive period which is running him in respect of that property at the time of his registration ". Principle laid down in *Annou Haji Kannavkia* v. *Kleopatra Argyrou and others* (1953) 19 C.L.R. 186, at p. 187, *applied.*

(2) Possession by a co-owner by inheritance will not be deemed adverse to the other co-heirs not in possession.

Chakarto v. *Liono* (1954) 20 C.L.R. Part I, 113, *followed.*
Paourou and others v. *Paourou* (Civil Appeal No. 4355, decided on 19.6.1962, unreported, *followed.*

Appeal and cross appeal dismissed.

Cases referred to :

Annou Haji Kannavkia v. *Kleopatra Argyrou and others* (1953) 19 C.L.R. 186, at p. 187, *applied* ;

Chakarto v. *Liono* (1954) 20 C.L.R. Part I, 113, *applied* ;

Paourou and Others v. *Paourou* (Civil Appeal No. 4355 decided on June 19, 1962), *followed* ;

Kyriaki v. *Kyriaki* (1895) 3 C.L.R. 145, (*distinguished*) :

Ioannides v. *Ioannides* (1957) 22 C.L.R. 225, (*distinguished*).

Appeal.

Appeal against the judgment of the District Court of Kyrenia (Evangelides D. J.), dated the 24.10.62 (Action No 362/61) in an action for a declaration regarding plaintiff's right to certain water rights.

C. S. Constantinides for the appellant.

Chr. P. Mitsides for respondent No. 3.

S. Christis for respondent Nos. 1 and 4.

Chai. Demetriades for respondent No. 8.

Cur. adv. vult.

The judgment of the Court was delivered by :

WILSON, P. : This is an appeal by the plaintiff from the judgment of the District Court of Kyrenia, delivered on October 24, 1962. The action was for a declaration that the plaintiff was entitled to the exclusive right, by virtue of long lawful possession, to certain water rights at locality " Trakhonas " or " Dimitradjia ", registration 1900 Kharcha village (plot 39/1, Sh. Pl. 13/30). She also claimed an order cancelling any registration in the name of some of the defendants (all of whom were relatives) entitling them to the use of the water rights for 28' 48" every four days and nights. Defendant 3 successfully counter-claimed for an injunction restraining the plaintiff from interfering with his share of the running water under registration 1900 and damages for the arbitrary use of it by the plaintiff. Defendants 1 and 4 counter-claimed for a share in the water which they claimed to have inherited from their mother and they appeal from the dismissal of their counterclaim.

In a very carefully prepared judgment the trial Judge dismissed the plaintiff's claim against defendants 1, 3, 4 and 8 with costs, but he cancelled registration 1900 in the name of defendants 2, 5, 6 and 7, for 28' 48" every four days and nights and directed this right to be registered in the name of the plaintiff. On the counter-claims he dismissed those of defendants 1 and 4 without costs. In respect of defendant 3 he allowed the counter claim and restrained the plaintiff from interfering with that defendant's share of the running water under registration 1900.

The plaintiff appeals from that portion of the judgment which dismissed the action against defendants 1, 3, 4 and 8 and restrained the plaintiff from interfering with the share of defendant 3 in the water, and directed the plaintiff to pay costs of all these defendants.

The Appellant contends—

(1) that the trial Court was wrong in holding that the continuous, exclusive and undisputed possession since 1924 of the water in dispute by her and her predecessor father was not adverse or was not possession which completed by prescription the division made since then between her father and his co-heirs.

(2) The trial Court erroneously found the 1924 partition was abandoned or set aside by a judgment in action No. 15/1927 of the District Court of Kyrenia.

(3) Although the Court held the disputed water was continuously, exclusively and undisputedly possessed by the appellant's predecessor and by herself in turn since 1924, it erroneously held that as against the defendants the rebuttable presumption of their implied consent to such possession was applicable. It also applied a commentary on Article 23 of the Ottoman Land Code which referred to lands of arazi miriye category whereas the water in dispute was of mulk category.

(4) There was an error in the recording by the L.R.O. Officer of an agreed partition directed by the order in action 15/1927.

(5) The Court erroneously decided that the issue of certificates of registration, to which reference will be made herein later, interrupted the running of the prescription which commenced in 1924.

(6) The Court erred in holding the provisions of the Administration of Estates Law, Cap. 189, which came into force on 1.1.1955, were applicable to the water registered in part in the name of the appellant's deceased grand-mother who died in 1934 and that in the action as framed it could not deal with the rights of her estate, if any, connected with the water in question because the estate was not represented in the action nor had it been made a party to it.

(7) The Court failed to treat the disputed water as an appurtenance of the appellant's land as used of old and solely for irrigating it.

The facts as found by Judge Evangelides, with which I agree, were as follows :—

> " A certain Lambi Hji Angeli of Kharcha died in the year 1919. He left ten heirs—9 children and his wife. The 9 children are defendants 1, 2, 3, 4, 6

and 7, defendant's 5 mother, who is now dead, the plaintiff's father, who is also dead, and a certain Kyriacos Lambi, who is not a party to this action. Lambis Hji Angeli left a good deal of property one item of which is the water the subject-matter of this action. This water is situated at locality Trachona, area of Kharcha. Lambis died intestate and when he died he owned approximately 4 hours and 50 minutes in this water (not 4 hrs 20' as stated in the statement of claim) out of 96 hours.

On the 1.12.1930, by virtue of the General Registration, each of the heirs was registered as the owner of 28' 48" of this water by inheritance from Lambis Hji Lambi, except the father of the plaintiff who was registered for 10 hrs 52' & 48". This was made up of the 28' 48" inherited from his father and of mother approximately 10 1/2 hours which he already owned by previous purchase. Certificates of registration were issued to each of the heirs.

Later the share of one of the heirs, the share of Kyriacos Lambi, who, as I have said, is not a party to the action, was sold by public auction—by virtue of J. 87/33 and it was bought by the father of the plaintiff for 6 piastres who thus became the registered owner for 11 hrs, 21 min. and 36 seconds in this water. In 1934 the wife of Lambis died intestate. Her heirs were the 9 children. No division of her property through the Lands Office appears to have been made. In 1939 the father of the plaintiff, Angelis Lambi Hji Angeli, died and he left 6 heirs including the plaintiff. By virtue of a C.R.A.L. (No. 3/47) each of the six heirs became the registered owner of 1/6th share in his or her father's water of 11 hrs 21' and 36".

In the year 1961 defendant 1 sold his share i.e. his 28' 48" to defendant 8 for £16, and he transferred it into his name on the 19th September, 1961. This defendant apparently owned more hours in this water by inheritance from his father but in any case in December 1960 he had bought the share of Kyriacos Lambi in his mother's water i.e. 1/9th share in the 28' 48". We have not been told when and how he obtained registration of his share. Apparently the other heirs did not obtain registration of their share in their mother's water.

By this action the plaintiff claims—(I put her claim shortly) that all this water which originally belonged to her grandfather belongs to her and she applies for the cancellation of any registration in the name of the defendants and for registration into her name. She further claims registration into her name of the water registered in the name of her grandmother i.e. the wife of Lambis".

I come now to deal with the grounds of appeal raised by the appellant. In my view her success depends upon establishing that her father and later succeeding him, she, herself, established title to the water by prescription from 1924. The trial Judge found that, some years after the death of Lambis, his heirs agreed to divide his property and all of them agreed and gave their respective shares of the water in question to the plaintiff's father who also took the field which could be irrigated with it, with the exception of defendant 1. I see no reason for not accepting this finding. The difficulty with the plaintiff's case is that she ignores the events which took place after 1924 and which could only have occurred with the full knowledge and consent of her father who died in 1939. At any rate her father ought to have taken steps to give effect to his non-concurrence in them, if such was the fact.

In the Action 15/1927 the District Court declared the 1924 partition was void and ordered a new partition by the Lands Office. On April 11, 1928, some of the heirs signed a new agreement which had been certified by the Mukhtar of the village earlier, namely on March 14, 1928. The plaintiff's father signed it on March 14 and 18 (See exh. 7). This agreement was made on March 14th of that year and is said to have been a return to the terms of the 1924 agreement.

However, on May 29, 1928, the water in question was recorded in the names of the heirs of Lambis as part of the survey for general registration. Having regard to the procedure followed before such registration was entered in the L.R.O. books, the plaintiff's father undoubtedly must have had knowledge of it.

Then between October 16th and 20th 1928, there was a local enquiry and a document was drawn up which the heirs, including the plaintiff, signed agreeing to the partition of the land. In this there was no mention of the

interests in the water which, of course, had already been recorded. On December 1, 1930, in the general registration, the interests in the water were recorded in accordance with the field record and title deeds were issued to each owner, including the plaintiff's father, who must be taken to have accepted the division because there is no record of any proceedings to upset it.

In 1933 Kyriacos Lambis' share was sold by public auction and purchased by the plaintiff's father. It was argued on the appeal that he purchased it for a few piastres which he would not have done if Kyriacos's share had any real value. Its relative worthlessness is to be taken as an indication that Kyriacos had no interest in the water. In my view, the proper construction to place upon this transaction is that the plaintiff's father recognized this outstanding interest and purchased it. This is more consistent with the events listed above than with the argument put forward on behalf of the appellant on the appeal.

In 1934 Lambis' wife died. Her estate was not made a party to these proceedings, and the ruling of the trial Judge that no order could affect it was correct.

In 1939 plaintiff's father died and the plaintiff continued to use the water. It was obvious from what has already been said she could not have acquired title to it by prescription since that time. Moreover, there is no evidence to prove that as against the other defendants she is solely entitled to the use of the water. She is only one of six heirs of her father and she does not claim to represent them. In fact, exhibit 3, a certificate of registration of immovable property for registration number 1900 issued in respect of a running water flowing from the ground under plot (39/1), consisting of a spring about 3 " massouria " running water, the turn being on every four nights and days, shows that as of the date of registration, namely October 21, 1947, the plaintiff is entitled to only 1/6th interest in such water.

With respect to ground of appeal number 3, I agree with the opinion of the learned Judge at the trial that even if the plaintiff's father had adverse possession against some of his co-heirs for some time after 1924 that adverse possession was interrupted by the action of 1927 and the registered agreement (exh. 7) he signed on March 14 and

18, 1928, in which he acknowledged the interests of his co-heirs. This prevents the period of prescription commencing before that date—

> " If a person obtains registration as owner of immovable property that registration will interrupt any prescriptive period which is running against him in respect of that property at the time of his registration ".

Annou Haji Kannavkia v. *Kleopatra Arghyrou and others* (1953) 19 C.L.R. 186 at p. 187. The General Registration took place on 1.12.30. The period left from 1.12.30 to 1.9.46 is more than 15 years and therefore more than the minimum period required for prescription on the assumption that it was mulk property, as the case was argued by both sides on that basis.

Concerning this I concur with the trial Judge that the adverse possession of the plaintiff's father until partition in 1928 as against his brothers, who were co-owners of land by inheritance, but with only the plaintiff's father in possession, will not be deemed adverse against the brothers not in possession because the brother in possession is presumed to be there with their consent : *Chakarto* v. *Liono*, 20 C.L.R. 113, and *Paourou and others* v. *Paourou* (Civil Appeal No. 4355, dated 19.6.1962 unreported). I approve also of the following extract from the trial Judgment :

> " Mr. Constantinides has cited *Kyriaki* v. *Kyriaki* (1895) 3 C.L.R. 145 : Digest of Cases p. 257 No. 81 but that case does not help him, it would have helped him if the division of 1924 had held good but that division was abandoned. Mr. Constantinides has also cited the case of *Ioannides* v. *Ioannides* (1957) 22 C.L.R.—p. 225, but again that case is not applicable. I cannot possibly come to the conclusion that in the partition of the property in 1928 it was intended that the plaintiff's father would take the water as part of the field which he took at the locality Demetrajia because if that were so he would not have accepted the issue of a separate registration for each heir ".

The period of prescription began to run from the date of partition in 1928. In 1930, in consequence of a General Registration under the provisions of the Law, titles were issued to the 9 heirs of Lambis including plaintiff's father who died 9 years later, *i.e.* in 1939, without completing the period of prescription. The plaintiff, who was

one of six heirs of her father, could not by herself have acquired title to the water by prescription since that time, as she was only entitled to the one-sixth of her father's share and not to the whole, and she was co-owner together with 5 other heirs. It, therefore, follows that with the death of plaintiff's father in 1939 there was interruption in the prescriptive period and the plaintiff's claim cannot succeed.

I have not overlooked the fact that defendants 2, 5, 6 and 7, have consented to judgment against them for the claims made by the plaintiff. However, no reason was given for this action on their part, and what they did cannot be allowed to prejudice the defences which were put in on behalf of the defendants 1, 3, 4 and 8.

With respect to the counter—claims, these were not seriously pressed and we find no ground for interfering with the disposition made of them at trial, nor of the plaintiff's appeal against defendant No. 3 who succeeded in her counter-claim to have the plaintiff, her employees, servants and assignees restrained from interfering with her share of the water in question. For these reasons the appeal will be dismissed with costs and the cross-appeal by the defendants 1 and 4 will be dismissed also with costs.

Appeal and cross-appeal dismissed with costs.