[ZEKIA, P., TRIANTAFYLLIDES, JOSEPHIDES, JJ.]

MARIA N. EROTOKRITOU AND 2 OTHERS,
Appellants-Plaintiffs,

v.

NICOS COSTI SOUTSOS,
Respondent-Defendant.

(*Civil Appeal No.* 4490)

Immovable Property—Right of way—Failure of appellants to establish uninterrupted 30 *years user of a right of way over alleged servient land—Whether such right was recognised by an old judgment of the District Court—Nature, effect and scope of such judgment.*

Advocates—Professional conduct—Reiteration of statement made in earlier case concerning advocates who give evidence in a case in which they appear as advocates.

This appeal relates to an alleged right of passage by appellants-plaintiffs in respect of certain plots of land over a piece of land of the respondent-defendant bearing plot No. 107/1/1 Registration No. 1142 at Ayios Georghios.

The appellants-plaintiffs based their claim for a right of passage over the said land of the respondent, other grounds having been abandoned at the final stage of the proceedings in the Court below, on two grounds :

(1) By exercising a right of way for 30 years and over.

(2) By virtue of a judgment in Action No. 133/22 of Kyrenia Court which, it is alleged, has recognized the right of way in favour of the aforesaid appellants' lands.

The trial Court went at length into the evidence adduced by both sides and came to the conclusion that appellants-plaintiffs failed to satisfy the Court that they had exercised a right of way over the said property of the respondent for 30 years and over.

The Court of Appeal *held* :

(1) *On the claim for a right of passage over the land of the respondent by exercising a right of way for* 30 *years and over* :

(*a*) We find ourselves in agreement with the learned judge that the evidence before him, after the assessment he had made of such evidence, was not sufficient to establish 30 years uninterrupted user by plaintiffs of a right of way over the alleged servient land of the respondent.

(*b*) The result, however, does not amount to a finding that plaintiffs if they had a right of passage by virtue of a judgment in 1922 such right had lapsed on account of not having been exercised for the full period of 30 years without interruption. The learned judge in fact did not go to such an extent and, in our view, it would have been very unsafe for him to do so.

(*II*) *On whether the claim for a right of passage by appellants over plot* 107/1/1, *was recognised by the Judgment of the Court in Action No.* 133/22 *of the Kyrenia District Court :*

(*a*) Appellants having failed to establish uninterrupted 30 years user of a right of way, we pass now to consider whether such right was recognized by the judgment of the Court in Action No. 133/22 of the Kyrenia District Court.

(*b*) What is material before us, however, is whether appellant has the right of way on the land of the respondent. In our opinion the judgment of Action No. 133/22 quoted above recognizes such right for the owners of the dominant tenement and their successors-in-title unless such successors had either by notice or by non-user of 30 years abandoned such right.

(*c*) The Judge found that plot 34 now belonging by half to plaintiff-appellant No. 1 belonged in 1922 to defendant No. 2 in action No. 133/22. Plot 107/1/1 was part of plaintiff's land in the old action over which the right of passage was contested and by judgment recognized. In other words appellant No. 1 is entitled in respect of plot 34 to a right of way over the land of the respondent.

(*d*) It is correct that the old judgment does not specifically refer to plot No. 107/1/1 or to the area actually covered by this plot but from the evidence and surrounding facts it is clear that the track existing in 1922 was allowed by the plaintiff, the then owner of the servient land and his successors-in-title to follow the same route as before on part of land now delineated as plot No. 107/1/1.

(*e*) The right of way recognized by the judgment of 1922 applied therefore to this particular plot and respondent being the successor-in-title of a servient land is bound by the judgment of 1922.

(*f*) Appellants No. 2 and No. 3 failed to show that by virtue of the aforesaid judgment they acquired any right of passage in respect of plots 144 and 145.

(*g*) We think, therefore, that the appeal should be allowed in respect of appellant No. 1 and dismissed in respect of appellants Nos. 2 and 3 in the following terms :

(1) Defendant-respondent is hereby restrained from interfering with the right of way of plaintiff-appellant No. 1 through the track indicated on the sketch exhibited (*exhibit* 2) on plot 107/1/1, Reg. No. 1142 at Ayios Georghios village, in respect of her land property plot 34 Reg. No. 267 at the village of Karmi for using same for agricultural purpose. The track to be wide enough to allow a single loaded animal.

(2) Defendant is ordered to remove any obstruction existing on the aforesaid track.

(3) Defendant to pay half of 1st appellant's costs here and in the Court below.

No order as to costs concerning the remaining appellants. The proceedings were unduly protracted by plaintiff No. 1 on the alternative grounds to establish the right of way in which she failed and therefore we allowed her only half of her costs.

The joinder of plaintiffs Nos. 2 and 3, daughter and son of plaintiff 1, as parties to the action did not entail to an appreciable degree the protraction of the proceeding or the increase of the costs of action we did not, therefore, allow costs against them.

Appeal allowed in respect of appellant No. 1. *Appeal dismissed in respect of appellants Nos.* 2 *and* 3.

Statement on advocates who give evidence in a case in which they appear as advocates :

(*a*) We wish to reiterate what was stated in the judgment of Thomas J. in *Mavrovouniotis* v. *Nicolaides* (1933) 14 C.L.R. 272, at p. 290, that it is highly undesirable that an advocate in a case should be allowed to be sworn and give evidence. As was stated in the above-quoted case, " if an advocate does give evidence in a case in which he appears as advocate, he must retire from the case and on no account should he be permitted to continue in his capacity as advocate " (p. 290). In the present case Mr. Christis retired from the case to give evidence and a colleague replaced him while he was doing so, but he was permitted to continue after he finished with his evidence.

(*b*) We appreciate that there were very exceptional circumstances in the present case which compelled Mr. Christis to follow this course and that he did so out of a desire to help the Court in the administration of justice and, consequently, the view we expressed above should not be taken as reflecting in any way on Mr. Christis's integrity or professional conduct. Nevertheless, this should not be considered as a precedent to be followed in future.

Cases referred to :

Mavrovouniotis v. *Nicolaides* (1933) 14 C.L.R. 272 at p. 290 ;

Gordon v. *Conda* (1955) 2 All E.R. 762.

Appeal.

Appeal against the judgment of the District Court of Kyrenia (Savvides, D.J.) dated the 23rd May, 1964 (Action No. 124/62) whereby it was declared *inter alia* that plaintiffs Nos. 1, 2 and 3 are not entitled to any right of passage through the property of defendant No. 1, situate at Ayios Georghios village in the District of Kyrenia.

S. Christis, for the appellants.

A. Christofides, for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court which was read by :

ZEKIA, P.: This appeal relates to an alleged right of passage by appellants-plaintiffs in respect of certain plots of land (namely plot 34 of Registration No. 627 at the village of Karmi, plot 144 of Registration No. 569 at the village of Ayios Georghios, plot 145 of Registration No. 571 at the same village) over a piece of land of the respondent bearing plot No. 107/1/1 Registration No. 1142 at Ayios Georghios.

Out of the alleged dominant tenement half of plot 34 is registered in the name of appellant No. 1, plot 144 and half of plot 145 are registered in the name of appellant No. 2. Appellant No. 3 owns the remaining half of plot 145.

On the other hand the alleged servient tenement plot 107/1/1, registered in the name of the respondent, was before the year 1951 part of a bigger plot, No. 107/1, which plot was also prior to 1929 and in 1922 included still in a larger plot.

The appellants based their claim for a right of passage over the said land of the respondent, other grounds having been abandoned at the final stage of the proceedings in the Court below, on two grounds :

(1) By exercising a right of way for 30 years and over.

(2) By virtue of a judgment in Action No. 133/22 of Kyrenia Court which, it is alleged, has recognized the right of way in favour of the aforesaid appellant's lands.

Plaintiffs, with a view to establishing their claim under ground 1, summoned before the trial Court a number of witnesses, including Mr. Savvas Christis, counsel in the present action and appeal who happened to be also counsel for the defendants in the old action No. 133/22 in 1922. When a local inspection was held by the Court in the trial of the old action Mr. Christis was present and he, being a resident of Kyrenia and owner of lands situated in the neighbouring villages, was and is familiar with the locus *in quo* and of the localities involved in the present action.

The trial Court went at length into the evidence adduced by both sides and came to the conclusion that appellants-plaintiffs failed to satisfy the Court that they had exercised a right of way over the said property of the respondent for 30 years and over.

We find ourselves in agreement with the learned judge that the evidence before him, after the assessment he had made of such evidence, was not sufficient to establish 30 years uninterrupted user by plaintiffs of a right of way over the alleged servient land of the respondent.

The result, however, does not amount to a finding that plaintiffs if they had a right of passage by virtue of a judgment in 1922 such right had lapsed on account of not having been exercised for the full period of 30 years without interruption. The learned judge in fact did not go to such an extent and, in our view, it would have been very unsafe for him to do so. Apart from the evidence of plaintiffs and their witnesses there was the evidence of Mr. Christis, a respectable member of the Kyrenia Bar, who definitely deposed to the effect that before 1922 and after that year until 1960 there was a track along the western boundary of plot 107/1/1 which track was made use of by passers-by. Mr. Christis himself passed through that track at least on 30 occasions during the period 1922–1960. The very existence of a track on the aforesaid land of the respondent coupled with the fact that the starting point of this track reaches the yard of

plaintiffs No. 1 and 3 (plot 199.5) corroborates the evidence of the plaintiffs that they did not abandon their right of passage over the land in question during the period 1922–1960.

Appellants having failed to establish uninterrupted 30 years user of a right of way, we pass now to consider whether such right was recognized by the judgment of the Court in Action No. 133/22 of the Kyrenia District Court.

We have to examine the nature, effect and scope of this judgment and to ascertain how far it supports the claim to a right of passage by appellants over plot 107/1/1, the property of respondent. We proceed to give hereunder the accompanying facts of the judgment of 1922 and the form of judgment as recorded and the one as formally drawn up. As to the surrounding facts, as well as the form of judgment recorded, we quote from the judgment of the trial Court :

> " Plaintiff No. 1 is registered owner in an undivided share of 1/2 in plot 34 by virtue of Reg. No. 267 within the boundaries of Karmi village. The remaining 1/2 share belongs to her sister Anna Georghiou Hji Costa not a party in these proceedings.
>
> Both of them acquired title to this property on 11.1.61 by gift from their mother Chrystallou Demetri Hji Markantoni who in her turn purchased it on 29.11.43 from Michalis N. Fieros registered owner of this plot since 8.5.39. Prior to that day and as from 6.5.39 *i.e.* for two days it was registered in the name of Christodoulos Nicola Toouli Shimona by inheritance from his father Nicolas Tooulou Shimona who appeared as registered owner of this plot at the general survey and registration in or about 1930 having acquired same by inheritance from his father Tooulos Shimona.
>
> Defendant No. 1 became registered owner of plot 107/1/1 on 25.9.51 under Reg. 1142 by inheritance and division from his father. Before that date plot 107/1/1 together with plots 107/12, 107/1/3 and 107/1/4 were one plot, plot 107/1, covered by previous registration under No. 411 in the name of Costis Nicola Lefkaritis, father of defendant No. 1, since 3.5.32. The same person appears as owner of same in the field book of the general registration in 1929 in respect of which he was owner partly under Registration 230, 226, 227, 231 partly by inheritance and division from his father Nicolas Georghiou and partly by exchange and amendment of title. So prior to 1929 as it appears from the Field Book, Exhibit 3, Plot 107/1 was part of a larger area and became plot 107/1 as a result of previous registrations,

inheritance and exchange and later on or about 1951, plot 107/1/1 originated from the said plot 107/1 after further divisions and exchanges.

In the year 1922 an action was brought by Costis Nicola Spanou of Ayios Georghios against Tooulis Nicola Tooulou and Nicolaos Tooulou of Ayios Georghios the record of which has been produced as exhibit 1 in these proceedings and in which the then plaintiff's claim was for an injunction restraining the defendants from interfering with plaintiff's properties under Registration Nos. 7772, 8850, 9020 the interference being that the defendants passed through the said fields without any right of way with their beasts. The defendant No. 2 by his defence alleged the existence of a track starting from the main road and passing through the property of the plaintiff over which the defendant No. 2 had acquired a right of way to reach his fields. He further alleged that the plaintiff had planted some trees on the track and blocked the passage and counterclaimed for the uprooting of the trees which were planted on the old track and which were obstructing the free passage.

On 27.10.22 the Court viewed the *locus in quo* in action 133/22 and as a result the following statement appears on the record :

' Case settled.

Plaintiff to allow defendants to pass his property by a route to be shown by plaintiff to defendants only a track for a single loaded animal to pass. Each party his own costs.'

From the evidence of Mr. Christis who was the advocate of the Defendants in action 133/22 I am satisfied that plot 107/1/1 now registered in the name of defendant No. 1 was part of the properties of the plaintiff in that action who was the father of the defendant No. 1 in the present action. It was a larger area described under different plot and covered by different registrations. Also I am satisfied that plot 34 now belonging to plaintiff No. 1 belonged in 1922 to defendant No. 2 in action 133/22."

Judgment Book No. 15 of the Kyrenia Court could not be traced at the trial but upon directions made by this Court and after a new search the Book in question was found and made available to us.

The judgment in action No. 133/22, as formally drawn up, reads as follows :

"The claims of the plaintiff for an injunction restraining the defendants from interfering with the following lands which belong to plaintiff under title deeds Nos. 7772, 8850, 9020, the interference being that defendants pass with their animals through the said lands without any right, and the defendants to be ordered to pay the costs of this action ; properties in dispute valued up to £100.

1. Field 6 donums, at Karmi, locality 'pouspoutis' bounded by Elengou Heraclides and heirs of Nicola Georghi Spanou and Yiannis Georghi Faouta, Attieh Hannum Osman Agha, Yancos Mitides and Mariou Constanti and Gregori Hji Yianni and Achilleas Hji Nicola and Lambros Larkou, Nicolas Lambri and Papayiannis Hji Christofi, Registration 7772.

2. Field 2 donums at Karmi, locality 'Veli' bounded by road, Costi Nicola, Savva Constandi, Hji Tallou Stassi, Registration No. 8850.

3. Field 2 donums at Karmi, locality 'pouspoutis' or 'Veli', bounded by Papamarcos Hji Pieri, heirs of Nicoli Georghi, Costi Nicola, Tallou Stassi, Registration No. 9020, coming on for hearing in the presence of Mr. Chacalli for the plaintiff and of Mr. Christis for the defendants, *upon hearing what was alleged by or on behalf of the parties respectively and upon hearing the settlement between the parties, this Court Doth Order and Adjudge that* the Plaintiff shall allow the defendants to pass his *property by a route to be shown by the plaintiff to the defendants, only a track for a single loaded animal to pass*—each party to pay his own costs."

The underlined part of the above-quoted judgment, which constitutes the operative part of the said judgment, leaves no doubt in our mind that an order restraining plaintiff from interfering with the then defendants from passing through his property was embodied in a judgment. The extent of user is stated in the same document, namely, a track to allow a single loaded animal to pass. The judgment does not disclose the dominant tenement and the missing part was supplemented by referring to the issues and pleadings of Action No. 133/22 and there is no doubt that in order to ascertain what was in issue between the parties the pleadings may be examined and evidence not inconsistent with the record may be admitted (see

Gordon v. *Conda* (1955) 2 All E.R., 762). The evidence of Mr. Christis was allowed partly with a view to ascertaining the scope of the judgment in question. It is true that the judgment contains the words " to pass his property by a route to be shown by the plaintiff to the defendants."

The plaintiff, it seems, did not bother to indicate to the defendants in the old action any definite route of his choice but he left them use the existing old track. From the evidence of Mr. Christis, whose evidence was not disputed it is clear that a track was already in existence prior to 1922 and the fact that the track was allowed to remain as such up to 1960 indicates that the plaintiff in the old action by his conduct impliedly elected to keep the old track for the passing of the dominant owners. Plaintiff at the time was given the right, if he wished, to change the pathway to his advantage. It might be that he considered it more advantageous to himself to stick to the existing track.

What is material before us, however, is whether appellant has the right of way on the land of the respondent. In our opinion the judgment of Action No. 133/22 quoted above recognizes such right for the owners of the dominant tenement and their successors-in-title unless such successors had either by notice or by non-user of 30 years abandoned such right.

The Judge found that plot 34 now belonging by half to plaintiff-appellant No. 1 belonged in 1922 to defendant No. 2 in action No. 133/22. Plot 107/1/1 was part of plaintiff's land in the old action over which the right of passage was contested and by judgment recognized. In other words appellant No. 1 is entitled in respect of plot 34 to a right of way over the land of the respondent.

It is correct that the old judgment does not specifically refer to plot No. 107/1/1 or to the area actually covered by this plot but from the evidence and surrounding facts it is clear that the track existing in 1922 was allowed by the plaintiff, the then owner of the servient land and his successors-in-title to follow the same route as before on part of land now delineated as plot No. 107/1/1.

The right of way recognized by the judgment of 1922 applied therefore to this particular plot and respondent being the successor-in-title of a servient land is bound by the judgment of 1922.

Appellants No. 2 and No. 3 failed to show that by virtue of the aforesaid judgment they acquired any right of passage in respect of plots 144 and 145.

We think, therefore, that the appeal should be allowed in respect of appellant No. 1 and dismissed in respect of appellants Nos. 2 and 3 in the following terms :

(1) Defendant-respondent is hereby restrained from interfering with the right of way of plaintiff-appellant No. 1 through the track indicated on the sketch exhibited (*exhibit* 2) on plot 107/1/1, Reg. No. 1142 at Ayios Georghios village, in respect of her land property plot 34 Reg. No. 267 at the village of Karmi for using same for agricultural purpose. The track to be wide enough to allow a single loaded animal.

(2) Defendant is ordered to remove any obstruction existing on the aforesaid track.

(3) Defendant to pay half of 1st appellant's costs here and in the court below.

No order as to costs concerning the remaining appellants. The proceedings were unduly protracted by plaintiff No. 1 on the alternative grounds to establish the right of way in which she failed and therefore we allowed her only half of her costs.

The joinder of plaintiffs No. 2 and No. 3, daughter and son of plaintiff No. 1, as parties to the action did not entail to an appreciable degree the protraction of the proceeding or the increase of the costs of action we did not, therefore, allow costs against them.

Before concluding this judgment we wish to reiterate what was stated in the judgment of Thomas J. in *Mavrovouniotis* v. *Nicolaides* (1933) 14 C.L.R. 272, at page 290, that it is highly undesirable that an advocate in a case should be allowed to be sworn and give evidence. As was stated in the above-quoted case, "if an advocate does give evidence in a case in which he appears as advocate, he must retire from the case and on no account should he be permitted to continue in his capacity as advocate" (page 290). In the present case Mr. Christis retired from the case to give evidence and a colleague replaced him while he was doing so, but he was permitted to continue after he finished with his evidence. We appreciate that there were very exceptional circumstances in the present case which compelled Mr. Christis to follow this course

and that he did so out of a desire to help the court in the administration of justice and, consequently, the view we expressed above should not be taken as reflecting in any way on Mr. Christis's integrity or prefessional conduct. Nevertheless, this should not be considered as a precedent to be followed in future.

Appeal allowed in respect of appellant No. 1. *Appeal dismissed in respect of appellants Nos.* 2 *and* 3. *Order and order as to costs, in the terms stated above.*