[TRIANTAFYLLIDES, J.]

1965
Mar. 22,
Nov. 6
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PARASKEVI YIANNAKI
and
THE REPUBLIC OF CYPRUS, THROUGH THE DISTRICT OFFICER NICOSIA-KYRENIA

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PARASKEVI YIANNAKI,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE DISTRICT OFFICER NICOSIA-KYRENIA,

Respondent.

(Case No 148/62).

Wells—Wells Law, Cap. 351, *sections* 3(1), 4(1)(5), 5, 7, 8 *and* 13—*Refusal of Respondent to grant Applicant permit to deepen a well—Well unlawfully sunk and in dry state—Deepening of such well, a matter properly within section* 4(1) *of Law—Area of well a water conservation area for purposes of section* 4(1) *of Law—Proper for Respondent to treat the deepening of well as the sinking or construction of a new well, which would affect water supplies in the said area—Effect on sub judice decision of Respondent's seeking of the concurrence of the Director of Water Development, under section* 4(1) *of Law—Reasonably open to Respondent to refuse permit on the ground that neighbouring wells would be affected.*

Constitutional Law—Constitution of Cyprus—Legitimate interest, Article 146.2—*Applicant had not in* 1962 *"any existing legitimate interest" in the sense of Article* 146.2, *which was affected through the refusal to allow, in* 1962, *the deepening of her illegal well.*

The Applicant applied to the Kyrenia District Officer, on 3.4.62 for a permit to deepen her well, which is in a property of hers at the Kazaphani village area, Kyrenia District.

On the 16th June, 1962, the said District Officer replied to the Applicant stating that the permit for the deepening of her well could not be granted because "there exists a probability of affecting the neighbouring wells through such deepening".

In consequence of this reply the Applicant filed this recourse, seeking the annulment of the decisions in question.

Held, I. On the state of the well of Applicant at the material time:

On the factual issue of what was at the material period the state of the well of the Applicant, and particularly whether it was a well in use or a dry well not in use I have reached the conclusion that at the material period the said well was dry and not in use.

II. On whether Applicant had in 1962 *any existing legitimate interest, in the sense of Article* 146.2, *which was affected through the refusal to allow the deepening of her well.*

(a) The well as sunk in 1953, was a well sunk unlawfully, in contravention of the relevant permit and, consequently, of sections 3 and 13 of Cap. 351. It was therefore, also, an illegal well when it was sought to deepen it in 1962.

(b) It could not be said that the Applicant had in 1962 "any existing legitimate interest" in the sense of Article 146(2), which was affected through the refusal to allow, in 1962, the deepening of this illegal well, and this recourse, therefore, cannot be entertained and it should fail.

III. On the merits:

(a) The deepening of the well of Applicant was a matter properly within section 4(1) of Cap. 351.

(b) The District Officer was right in treating the deepening of the well of Applicant as the sinking or construction of, in fact, a new well which would affect water supplies in the area.

(c) The course adopted by the District Officer, in seeking the concurrence of the Director of Water Development under S.4(1) has not resulted in the exercise of his eventual discretion in such a manner as to lead to the annulment of his sub judice decision.

(d) In any case, there is nothing wrong in taking into account the views of the Director of Water Development in a case where his concurrence is not necessary. The District Officer is entitled to consult the views of the Department which is dealing in an expert manner with the preservation of water supplies.

(e) It was, to say the least, reasonably open to the District Officer, on the basis of the facts before him, to refuse—as he did—the permit applied for, on the ground that neighbouring wells would be affected. Such wells were in use at the time whereas the well of the Applicant was a dry well and it was to be deepened with a view to find new water. It was not a mere likelihood, but a serious probability, bordering on certainty, that such course would affect the water supply in the neighbouring wells.

(f) Sections 7 and 8 are not restrictive of the discretion of the District Officer under section 3 or of the Director of Water Development under section 4. But, in any case, the protection of water supplies in any area, whether private or public, constitutes a matter of public interest of the greatest importance, because water, in whatever manner it is brought to the surface, is a commodity vital to the life of the country.

IV. As regards costs.

I award against Applicant only costs amounting to £12, being costs which were thrown away on the 2nd October, 1962, through her fault.

Recourse dismissed.

Cases referred to:

Christodoulou and The Republic, 1 R.S.C.C. p. 1;

Costi and The District Officer Famagusta, 1964, C.L.R. 432;

Christofides and The District Officer Nicosia-Kyrenia 1962 C.L.R. 43.

Recourse.

Recourse against the decision of the District Officer Kyrenia dated the 16th June, 1962, refusing to grant to applicant a permit of deepening a well in her property at Kazaphani village in the District of Kyrenia.

L.N. Clerides for the applicant.

K.C. Talarides, Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following order was given by:—

TRIANTAFYLLIDES, J.: This recourse was filed against "The Republic, through the Ministry of Interior", apparently because the District Officer Nicosia-Kyrenia, against whose decision Applicant complains, comes under the Ministry of Interior. As, however, the competence concerned, under sections 3 and 5 of the Wells Law, Cap. 351, is vested directly in the District Officer, it appears to me more proper that the description of Respondent should read: "The Republic, through the District Officer Nicosia-Kyrenia"; and I hereby order that the title of the proceedings should be treated as amended accordingly. I have taken this course in the light of the analogous precedent of *Christodoulou and The Republic*, 1 R.S.C.C. p. 1, and, as in that Cese, I am of the opinion that ordering the amendment now, at this stage, *ex proprio motu* of the Court, does not prejudice either of the parties in these proceedings or the interests of justice, in any way.

The facts of the case sufficiently appear in the following judgment delivered by:

TRIANTAFYLLIDES, J.: In this Case the Applicant, in effect, seeks a declaration that the decision of the Respondent District Officer, as contained in a letter to Applicant, dated 16th June, 1962, (vide *exhibit* 2)—refusing to grant her a permit to deepen her well in her property in the area of Kazaphani—is *null* and *void.*

The Applicant applied to the District Officer, for a permit to deepen her well, on the 3rd April, 1962 (vide *exhibit* 1).

Her well is in a property of hers which on the relevant survey map of the Kazaphani village area is described as plot 408/2 (vide map attached to *exhibit* 1).

Her said application was dealt with by the Kyrenia office of the District Officer and the relevant file, W37/62, is *exhibit* 4 in this Case.

On the 16th June, 1962, the District Officer replied to the Applicant stating that the permit for the deepening of her well could not be granted because "there exists a probability of affecting the neighbouring wells through such deepening".

This recourse was filed on the 3rd July, 1962, and has been through Presentation before me, prior to coming up for Hearing.

There is an issue of fact which has to be resolved outright, as being relevant to other issues of law and fact, which are dealt with later in this judgment. It is the issue of what was at the material period, i.e. in April to June, 1962, the state of the well of Applicant, and particularly whether it was a well in use or a dry well not in use.

I have reached the conclusion that at the material period the said well was dry and not in use.

Counsel for Applicant, himself, has stated at the Presentation that the deepening of the well became necessary because the water had disappeared therefrom (vide contention (*b*) of Applicant in the Statement of Case, p. 3).

Furthermore, the evidence adduced at the Presentation bears out such conclusion, as follows:

Witness Andreas Naziris, called by Applicant, gave evidence on the 19th December, 1962. He said that he was the well-digger who dug the well in 1953. He said: "As far as I can remember, after 10 years, I dug this well to a depth of 40-50 feet. We then struck water".. "It is not correct that the depth of the original well I dug was only 18 feet..... we found ample quantity of water". Elsewhere in his evidence he said: "Two or three years ago I visited the land of Applicant.....I went there at the time when the Court inspected the well. I do not think there was water in the well then"..... "When I went there, two or three years ago, this well was covered up. I do not know if it was filled in, because I did not look"..... "The last time I saw this well, there was no pulley installed at it". Earlier he had said that in 1953 when, according to him, water was struck, a pulley had been installed at the well to draw up buckets.

Mr. Yiangos HadjiStavrinou, at the time the Assistant Director of Water Development, visited the property of Applicant on the 1st October, 1962. Giving evidence on the 8th November, 1962, he spoke of his visit on the spot and added: "This well today is closed up. There is no pump there and there is no water in the well itself. It is just covered on top; it has a depth of 18 feet and it is dry. By deepening it they would reach the water table".

Leaving aside that witness Naziris appeared to be a most unreliable witness, the fact remains, even if his evidence is believed, that about 1959 or 1960, when he went on the spot

for the last time, the well appeared not to be in use and covered up; a few months after the material period of April to June 1962, witness HadjiStavrinou found the well only 18 feet deep and dry, its depth of 18 feet being less than half of the depth at which Naziris said that water had been found. So, as already indicated, the only reasonable conclusion is that during the material period the well was dry and not in use.

The relevant documentary record confirms the oral evidence: The report of the Assistant District Inspector, Kyrenia, dated 9th April, 1962, states: "The well is covered but I am informed that its depth is about 18 feet" (vide blue 4 in *exhibit* 4). On the other hand, the fact that in 1960 the Lands Office entered on the title-deed of the Applicant the well in question (vide *exhibit* 5) does not necessarily imply that it was a well in use or with water in it.

Having dealt with the above factual issue it is useful to deal now with an issue going to the validity of this recourse as a whole:

The well concerned was dug in 1953. This is the time to which all relevant evidence points; there is no real proof that this well was dug as far back as 1918, as originally alleged by Applicant.

The permit under which the well was sunk in 1953 is dated 29th August, 1953 (vide copy, *exhibit* 3). It specified that the well should be sunk not less than 80 feet from the nearest well. As a matter of fact, however, this well was sunk only 60 feet away from the closest neighbouring well, that of a certain Nedjati Ozkan. This is confirmed by witness Hadji-Stavrinou and witness Costas Stephanides, the Assistant District Officer, Kyrenia, who gave evidence as to the history of this well, *inter alia*. The evidence of witness Naziris, is to the contrary, but I reject it as unreliable.

Thus, the well as sunk in 1953, was a well sunk unlawfully, in contravention of the relevant permit and, consequently, of sections 3 and 13 of Cap. 351. It was, therefore, also, an illegal well when it was sought to deepen it in 1962.

In my opinion, in the circumstances, it could not be said that the Applicant had in 1962 "any existing legitimate interest" in the sense of Article 146(2), which was affected through the refusal to allow, in 1962, the deepening of this

illegal well, and this recourse, therefore, cannot be entertained and it should fail.

It is true that this ground of absence of legitimate interest was not expressly raised by Respondent, but as it is apparent on the face of the proceedings this Court has to take cognizance of it, because litigation under Article 146 is a public law, and not a private law, matter; though, unless the contrary is alleged, it may be presumed that the person to whom an administrative act refers has an interest in the matter, the legitimacy of such interest, when it calls for closer examination due to circumstances established in a case, is a matter to be gone into by an administrative Court, *ex proprio motu*, if necessary.

Irrespective of the fact that this recourse fails, and has to be dismissed, as above, I will, nevertheless, deal also with the merits of the matter, as this Case has been heard thereon. I shall deal in this respect with the main contentions put forward by Applicant.

The first contention of counsel for Applicant is that the Respondent District Officer erroneously sought the concurrence of the Director of Water Development, under section 4(1) of Cap. 351, and so was wrongly affected by the refusal of such concurrence, in refusing himself the permit to deepen the well in question.

It is not in dispute that the area in question is a water conservation area, for the purposes of section 4(1) of Cap. 351, and, thus, for the issuing of a permit for the sinking or construction of a well or for the variation or modification of any condition or restriction imposed in any such permit the concurrence of the Director of Water Development is essential.

Section 5 of the same Law states that for the purposes of such Law, widening, deepening or otherwise extending any existing well shall be deemed to be an operation in respect of which a permit must be obtained under the provisions of the Law. Provision for the granting of permits is made by section 3 of the Law.

There remains the question whether the deepening of a well, under section 5, is to be deemed to be "the sinking or construction" of a well within the provisions of sub-section (1) of section 4; we are not concerned here with a variation or modification of any condition or restriction imposed in

the original permit because the depth of the well of Applicant was not specified in the permit, *exhibit* 3.

I am of the opinion that, in the light of the circumstances of the present Case, the deepening of the well of Applicant was a matter properly within section 4(1) of Cap. 351.

As the well to be deepened was at the time a dry well what was really involved was a new effort to bring water to the surface by means of sinking a well in an already existing hole in the ground. It must be borne in mind that the obvious intention of sub-section (1) of section 4 is to safeguard the water supplies in areas where such safeguarding is needed.

So, the District Officer was right in treating the deepening of the well of Applicant as the sinking or construction of, in fact, a new well which would affect water supplies in the conservation area concerned.

I am of the opinion that my above view is, also, consistent with the tenor of the judgment in *Kosti and The District Officer Famagusta*, 1964, C.L.R. 432.

In reaching this view I have, further, borne in mind the judgment in *Christofides v. District Officer Nicosia-Kyrenia* 1962 C.L.R. 43. It is true that there it was held that the use of the term "proposing" in section 3(1) of Cap. 351 relates to the sinking of a new well and not merely to the deepening of an existing one, even if it were to be dry; this appears to be so from the judgment when read in the light of the record of that case. It is also true that the term "proposed" is to be found in sub-section (5) of section 4 in relation to a well for which the concurrence of the Director of Water Development is required. Thus, at first sight, it might be argued that a "proposed" well does not include an existing dry well which it is being sought to deepen. But, in my opinion, such argument loses sight of the object to be served by section 4. Though the term "proposing" in section 3(1) was properly interpreted—in view of the object behind such provision and its correlation to section 13—as not relating to a dry well about to be deepened, the term "proposed" in sub-section (5) of section 4 cannot, on the other hand, be treated, in view of the object behind sub-section (1), as excluding from the ambit of such sub-section the deepening of a dry well in order to reach the underground water level.

Assuming, in the alternative, that Applicant's contention

that the concurrence of the Director of Water Development was not required under section 4(1), is right, I am of the view that the course adopted by the District Officer, in seeking such a concurrence, has not resulted in the exercise of his eventual discretion in such a manner as to lead to the annulment of his sub judice decision.

The view expressed by the Director of Water Development, even though regarded as binding, under sub-section (1) of section 4, by the District Officer, did not, in my opinion, actually lead to any different outcome of the exercise of the discretion of the District Officer, than what such outcome would have been if the District Officer were not to be under the impression that he was bound by the Director's refusal of his concurrence.

It is clear from *exhibit* 4 (blue 4), that the Assistant District Inspector, who examined the case, does not appear to recommend the granting of a permit to Applicant and the Assistant District Officer himself, Mr. Stephanides, who has dealt with this matter, stated in his evidence, in the most clear terms, that the Assistant District Inspector recommended the refusal of the permit to deepen. I have no reason at all to think that the District Officer would not have acted on this recommendation had he not consulted the Director of Water Development.

So, the view expressed by the Director of Water Development merely coincided with how the District Officer was about to act in the matter on the basis of the other material before him.

In any case, there is nothing wrong in taking into account the views of the Director of Water Development in a case where his concurrence is not necessary. The District Officer is entitled to consult the views of the Department which is dealing in an expert manner with the preservation of water supplies.

The second contention of counsel for Applicant was that the manner of approach, to the question of the deepening of the well of Applicant, of the District Officer ought to have been different from that to be adopted in the case of the sinking of a new well; he submitted that in the case of deepening the presumption ought to be in favour of allowing the deepening of an existing well.

In the particular circumstances, however, of the present Case, I am of the opinion that it was quite proper for the District Officer to treat the deepening of the well of the Applicant, in the dry state in which it was to be found, as being on equal footing, for the purposes of, at any rate, the preservation of the water supplies in the area, with the sinking or the construction of a new well. It was not a case of deepening in order to increase the holding capacity of a well which was already in contact with the underground water level but a case of an intention to strike water by going deeper down.

The third contention of counsel for Applicant was that it was wrong to refuse the permit to deepen on the basis of the "likelihood"—as he put it—of affecting other wells in the neighbourhood, and that it was also wrong, in this respect, to treat Mr. Ozkan, the owner of the closest neighbouring well, as a prior user.

I am of the opinion that it was, to say the least, reasonably open to the District Officer, on the basis of the facts before him, to refuse—as he did—the permit applied for, on the ground that neighbouring wells would be affected. Such wells were in use at the time whereas the well of the Applicant was a dry well and it was to be deepened with a view to find new water. It was not a mere likelihood, but a serious probability, bordering on certainty, that such course would affect the water supply in the neighbouring wells. This is clear from blue 4, in *exhibit* 4, and from the evidence of Mr. Stephanides; the official view, taken at the time, is confirmed as correct by the expert evidence of Mr. Hadji-Stavrinou.

It should also be borne in mind, in this respect, that the area concerned has been declared a water conservation area, indicating thus that water supplies there need particular protection.

It must not also be lost sight of that the well of Applicant had been dug at less than 80 feet distance from the neighbouring well of Mr. Ozkan, thus increasing the danger of affecting such neighbouring well.

In relation to this ground of affecting neighbouring wells it has been submitted by Applicant that this was a matter which could not be taken into account in refusing the permit

to deepen her well because it was a consideration relating to private interests, which could be protected under sections 7 and 8 of Cap. 351, and that only considerations of public interest could be taken into account in refusing, under sections 3 to 5, a permit to deepen a well.

I am not prepared to agree with this submission; sections 7 and 8 are not restrictive of the discretion of the District Officer under section 3 or of the Director of Water Development under section 4. But, in any case, the protection of water supplies in any area, whether private or public, constitutes, in my opinion, a matter of public interest of the greatest importance, because water, in whatever manner it is brought to the surface, is a commodity vital to the life of the country.

Regarding the contention that Mr. Ozkan was wrongly treated as a prior user I have only to say this: At the material time it was proper to treat him in such a manner because his well was—and this is not in dispute—in use, whereas Applicant's well was a dry one. According to the letter and spirit of section 4(5) of Cap. 351, in the same way in which the well of Applicant was to be considered as a "proposed" well in the sense of section 4(5), in view of the deepening, Mr. Ozkan should have been treated as a "prior user", in the sense of the same provision, who would have been "affected". The possibility of affecting "the general water situation in the area" or "the requirements of prior users" are the governing considerations under section 4(5), pointing to "prior user" meaning "already using".

For all the reasons given in this judgment, I have reached the conclusion that this recourse fails and it is dismissed accordingly.

Regarding costs, I am of the view that, as the recourse of Applicant raised issues which merited examination, she should not be penalized with costs and, therefore, I award against her only costs amounting to £12.-, being costs which were thrown away on the 2nd October, 1962, through her fault.

Recourse dismissed.
Order as to costs as afore-said.