[JOSEPHIDES, STAVRINIDES, LOIZOU, JJ.]

1970
Oct. 23
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MICHAEL PAPA MICHAEL
v.
KLITOS CHAHOLIADES

MICHAEL PAPAMICHAEL,

Appellant-Plaintiff,

v.

KLITOS CHAHOLIADES,

Respondent-Defendant.

(*Civil Appeal No.* 4877).

Civil Procedure—Practice—Preliminary point of law—Dismissal of action—Test applicable—Summary process to stay or dismiss an action not to be resorted to if there is a point capable or worthy of being argued—The Civil Procedure Rules, Order 27, *rules* 1, 2 *and* 3—*Moreover, question raised and decided in the instant case was a point of fact or at the maximum a point of mixed law and fact—Cf. Order* 33 *of the Civil Procedure Rules.*

Point of law—Summary process of disposing of the action—Order 27 *of the Civil Procedure Rules—This procedure can only be adopted when it can be clearly seen that a claim is, on the face of it, obviously unsustainable, or that the case is clear beyond doubt—Cf.* supra.

Summary process of disposing an action—It is only in plain and obvious cases that recourse should be had to this summary process—The Civil Procedure Rules, Order 27, *rules* 1, 2 *and* 3, *Order* 33—*See also* supra.

Striking out an action in limine—*When permissible—Test applicable—See also* supra.

In this case the plaintiff (now appellant) claimed the sum of £204 alleged to have been spent by him on repairs to a house of which he was the tenant. It was alleged in the statement of claim, *inter alia*, that the defendant (now respondent) let to him the premises in question by virtue of a contract of lease by virtue of which he (the defendant) was liable to pay for repairs due to natural wear and tear. In paragraph 1 of the Defence it was pleaded that, without prejudice to the defence raised thereunder, he (the defendant) is no longer the owner of the said house and that, therefore, he has nothing to do " with same ".

When the case came on for hearing before the District Judge in Nicosia, counsel for the defendant asked the Court to decide the point raised in paragraph 1 of the defence as stated above and, there being no objection on the part of the plaintiff, the Court adopted that course. By his judgment the trial Judge found that the owner of the premises at the material time when the repairs in question were carried out was not the defendant and he ruled that the plaintiff's claim could not be maintainable, and he dismissed the action.

The plaintiff now appeals against that judgment.

Allowing the appeal, the Court :—

Held, (1). In *Dyson* v. *Attorney-General* [1911] 1 K.B. 410, at p. 419, Fletcher Moulton L.J. has said :

> " To my mind it is evident that our judicial system would never permit a plaintiff to be driven from the ' judgment seat ' in this way . . . ., excepting in cases where the cause of action was obviously and almost incontestably bad."

That is undoubtedly the test to be applied, and if there is a point capable or worthy of being argued it was clearly impossible to strike out an action *in limine*. It has been held that it is only in plain and obvious cases that recourse should be had to the summary process in question (see *Mavromoustaki* v. *Yeroudes* (1965) 1 C.L.R. 176, at p. 283 ; *Dyson* case, *ibid*).

(2) We find the procedure followed in this case rather unorthodox. If it was a preliminary point of law then the provisions of Order 27 should have been followed (see *The heirs* of *Theodora Panayi* v. *The Administrators of the estate of S. Mandriotis* (1963) 2 C.L.R. 167, at p. 170 ; and *Gregoriades* v. *Diakou* (1968) 1 C.L.R. 392, at p. 395). If it was a question of mixed fact and law, or a question of fact alone, the Judge should have followed the procedure laid down in Order 33, regarding the hearing of an action. In this case, the question raised in paragraph 1 of the defence (*supra*) was not a point of law and, consequently, we are unable to uphold the judgment of the trial Court. The Judge's finding as to the ownership of the premises does not dispose of the action finally. Several matters would have to be considered and decided regarding the liability of the defendant, apart from the ownership of the premises, before the Judge could properly come to the conclusion that the plaintiff's claim was unsustainable ; and this the Judge has failed to do.

(3) In the result the appeal is allowed, the judgment of the trial Court set aside ; it is further ordered that the respondent shall pay to the appellant the costs of this appeal. As regards the costs thrown away in the District Court we make an order that these costs be costs in cause.

Appeal allowed. Order for costs as above.

Cases referred to :

Mavromoustaki v. *Yeroudes* (1965) 1 C.L.R. 176 at p. 183 ;

Dyson v. *Attorney-General* [1911] 1 K.B. 410 at p. 419 per Fletcher Moulton L.J. ;

The Heirs of Theodora Panayi v. *The Administrators of the Estate of S. Mandriotis* (1963) 2 C.L.R. 167 at p. 170 ;

Michaelides v. *Diakou* (1968) 1 C.L.R. 392 at p. 395.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Santamas, Ag. D.J.) dated the 4th February, 1970 (Action No. 2561/69) dismissing his claim for £204.500 mils alleged to have been spent by him on repairs to a house of which he was the tenant.

L. Clerides with *M. Koumas* for the appellant.

N. Pelides, for the respondent.

The judgment of the Court was delivered by :—

JOSEPHIDES, J. : It would appear that in this case the learned District Judge purported to apply the provisions of Order 27, that is to say, to decide a point of law under rules 1, 2 and 3, whereas he was actually deciding a point of fact, or the maximum a point of mixed law and fact. This Court has considered the provisions of Order 27 in a number of cases in the past and I think we have made it clear that this jurisdiction ought to be very sparingly exercised, and only in very exceptional cases. Reference perhaps should be made to the case of *Mavromoustaki* v. *Yeroudes* (1965) 1 C.L.R. 176, at page 183, where we said that these rules empowered the Court by summary process, that is, without a trial in the normal way, to stay or dismiss an action where the pleading discloses no reasonable cause of action. In the course of our judgment in

the *Mavromoustaki* case we referred to *Dyson* v. *Attorney-General* [1911] 1 K.B. 410, at page 419, where Fletcher Moulton L.J. said :

> " To my mind it is evident that our judicial system would never permit a plaintiff to be ' driven from the judgment seat ' in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."

That is, undoubtedly, the test to be applied, and if there is a point capable or worthy of being argued it was clearly impossible to strike out an action *in limine*. It has been held that it is only in plain and obvious cases that recourse should be had to the summary process under this rule, and that this procedure can only be adopted when it can be clearly seen that a claim is, on the face of it, obviously unsustainable, or that the case is clear beyond doubt. So long as the statement of claim discloses some cause of action, or raises some question fit to be decided by a Court, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (see *Mavromoustaki* case, at pages 183–4).

In this case the plaintiff (appellant) claimed the sum of £204.500 mils which he alleged he spent on repairs to a house of which he was the tenant. In the statement of claim it is alleged that the defendant (respondent) let to him the premises in question by virtue of a contract of lease, dated 9th April, 1963, for a period of three years and that this lease was subsequently renewed for a further three years, expiring on the 30th April, 1971. It is further contended in the statement of claim that " by virtue of the contract and or otherwise " the defendant was liable to pay for repairs due to natural wear and tear.

In paragraph 1 of the defence it was pleaded that " without prejudice to the defence raised hereunder, the defendant alleges that he is no longer the owner of the building in question and therefore he has nothing to do with same ". It was further alleged in the defence that prior to the expiration of the original term of the contract of lease the defendant ceased to be the owner of the demised premises and that he " does not know whether the new owners of same have accepted a continuation of the original tenancy or not ".

When the case came on for hearing before the District Judge in Nicosia, counsel for the defendant asked the Court to decide the point raised in paragraph 1 of the defence as stated above and, there being no objection on the part

of plaintiff, the Court adopted that course. Thereupon, counsel for the defendant addressed the Court and handed to the Judge certain correspondence together with a certificate of registration (showing the new owners of the premises), but not the contract of lease. Counsel for the plaintiff addressed the Court, after handing in a letter from the defendant to the plaintiff, and he submitted that the defendant was personally liable for the cost of the repairs which he had undertaken by virtue of that letter. No witnesses were called by either side. After both counsel had addressed the Court, judgment was reserved and it was delivered some three weeks later. By his judgment the learned Judge found that the owner of the premises at the material time when the repairs were carried out was not the defendant and he ruled that the plaintiff's claim could not be maintained, and he dismissed the action. The plaintiff now appeals against that judgment.

We must say that we find the procedure followed in this case rather unorthodox. If it was a preliminary point of law then the provisions of Order 27 should have been followed (see *The heirs of Theodora Panayi* v. *The Administrators of the estate of S. Mandriotis* (1963) 2 C.L.R. 167, at page 170 ; and *Michaelides* v. *Diakou* (1968) 1 C.L.R. 392, at page 395). If it was a question of mixed law and fact, or a question of fact alone, the trial Judge should have followed the procedure laid down in Order 33, regarding the hearing of an action. In this case, as we have already said, the question raised in paragraph 1 of the defence was not a point of law and, consequently, we are unable to uphold the judgment of the trial Court, as the plaintiff was not given an opportunity of presenting his case in the normal way. The Judge's finding as to the ownership of the premises does not dispose of the action finally. Several matters would have to be considered and decided regarding the liability of the defendant, apart from the ownership of the premises, before the trial Judge could properly come to the conclusion that the plaintiff's claim was unsustainable ; and this the Judge has failed to do

In the result the appeal is allowed, the judgment of the District Court is set aside and it is ordered that the respondent shall pay to the appellant the costs of the present appeal. As regards the costs thrown away in the District Court we make an order that these costs be costs in cause. The plaintiff's action should now be heard by the District Court in the normal way.

Appeal allowed. Order for costs as above.