1972
Febr. 3

OLGA CHARALAMBOUS ROUSSOU v. CHRISTODOULOS THEODOULOU AND OTHERS

[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

OLGA CHARALAMBOUS ROUSSOU,
Appellant-Plaintiff,

v.

CHRISTODOULOS THEODOULOU AND OTHERS,
Respondents-Defendants.

(*Civil Appeal No.* 4949).

Appeal—Findings of fact and credibility of witnesses—Principles upon which the Court of Appeal will act in appeals turning on findings of fact and credibility of witnesses—In the instant case, Court of Appeal not convinced to reverse trial Judge's decision because the reasoning behind such findings is neither unsatisfactory nor defective—Appeal dismissed.

Findings of fact—Credibility of witnesses—Appeals turning on findings of fact etc. etc.—See supra.

The facts sufficiently appear in the judgment of the Court dismissing this appeal turning on findings of fact and the credibility of witnesses.

Cases referred to :

Dafnis Thomaides and Co. Ltd. v. *Lefkaritis Brothers* (1965) 1 C.L.R. 20, at p. 21 ;

Kyriacou v. *Aristotelous* (1970) 1 C.L.R. 172 at pp. 176–177 ;

Gross v. *Lewis Hillman Ltd. and Another* [1969] 3 All E.R. 1476, at p. 1481 ;

Breen v. *Amalgamated Engineering Union and Others* [1971] 1 All E.R. 1148, at p. 1161.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Paphos (Pitsillides, D.J.) dated the 30th November, 1970, (Action No. 909/66) dismissing her claim for a declaration that she was the person entitled to registration of a disputed piece of land, and for other consequential relief.

A. Hadjioannou, for the appellant.

L. Papaphilippou with *A. Drakos*, for the respondents.

The judgment of the Court was delivered by :—

HADJIANASTASSIOU, J. : This is an appeal by the plaintiff from the judgment of the District Court of Paphos, dated November 30, 1970, dismissing her claim for a declaration that she was the person entitled to registration of a disputed piece of land, and for other consequential relief. The plea on which the appellant-plaintiff based her claim to the exclusive ownership of that property was that of undisputed and uninterrupted adverse possession for a period over 30 years by her.

The property in dispute, is a piece of land of 3 donums in extent, and is situated at the locality of Vodou, within the area of Yialia village. The value of this property is, according to the appellant, about £200.

The facts as found by the trial Judge and not challenged by the other side on appeal were as follows :— On the 15th February, 1967, a D.L.O. clerk, Andreas Constantinou carried out a local enquiry by virtue of a Court Order, in the presence of all interested parties. He prepared a sketch (*exhibit* 1), and the disputed field is shown in colour red. The whole property shown in *exhibit* 1 was originally belonging to a certain Ratip Effendi, under Registration 2576, and 2577, and was identified as plot 10. This property was sold at a public auction, and was jointly purchased by Charalambos Christofi Roussos, (plaintiff's father) and Theodoulos Hadjitoouli (now deceased) in 1928, and was transferred and registered into their joint names in undivided shares by one half share, under registration No. 2890 dated 29.5.28. This property was privately divided during the year 1928.

In the meantime, the plaintiff in 1934–35 got married to Kleopas Theodoulou, who was one of the sons of Theodoulos Hadjitoouli, and her father, in 1943, transferred and registered into her name plots 10/1 and 10/3, as a whole, of an extent of 13 donums, under registration Nos. 3762 and 3760, dated 28.12.43. This was ascertained under a previous local enquiry carried out in 1943.

Apparently, there was a dispute among the heirs of Theodoulos Hadjitoouli regarding his lands including colour red and yellow, in *exhibit* 1, and Kleopas Theodoulou (husband of the plaintiff) brought an action in 1963 against his co-heirs, seeking a declaration in action No. 147/63, that he was entitled to be registered as co-owner of those properties including plot 10/2/2. That action was finally settled,

and by an order of the Court of Paphos, the husband of the plaintiff—who admittedly was not a party to those proceedings—became entitled to a share out of the property, plot 10/2/2.

However, four years later, the plaintiff brought the present action, and as is usual in these land cases, there were two conflicting versions. It was the version of the plaintiff regarding the disputed land that her father gave it to her as dowry, and before her marriage 35 years ago, her brother Theocharis cultivated the disputed area and she was helping him to do so. After her marriage this property was cultivated both by herself and her husband. She tried to get registration of the disputed land after the settlement of action 147/63, in order to join it with the area which her husband got by virtue of that settlement, in order to give both fields to one of her daughters. It is to be observed that, it has been conceded by plaintiff that this piece of land was not covered by her registration, and although she claimed in her evidence that she was not present at the settlement in action No. 147/63, nevertheless, the finding of the trial Judge, in our view, that she was present at the settlement, is fully justified by the evidence before him.

In accordance with the evidence of Charalambos Christofi Roussos, who was 86 years of age, in 1928 the whole property was agreed to be divided and the deceased asked him to choose which part he wanted. The field was divided into three parts, one on the east, the other on the west, and the third in the middle ; but because the two parts on the side were not as good as the other, he separated from the middle part an area and added it to the eastern part so that one of them would take that piece together with the other two parts on the side. He (the witness) chose the two sides with the piece added to it, and the deceased got the middle part and placed an oktos along the three sides, there being road on one side. Ever since 1928 up to 1934 his son Theocharis was cultivating his land, and in 1934 he gave it to the plaintiff who continued cultivating it ever since.

In cross-examination the witness said that they did not sign a contract about the division of the land, and admitted that he did not cultivate that field himself but only his son, and later on the plaintiff and her husband did so. Although he denied that he gave the fields by way of dowry, later on he added that he did not remember if he did so. He did not remember if he registered the property to the plaintiff, but again, later on he said that the registration in the name of the plaintiff regarding his own share was made as per the

agreed division with the deceased Theodoulos Hadjitoouli. Questioned further, he said that he did not make any declaration of gift to the plaintiff with the D.L.O., and that he considered the disputed portion of land to be of an extent of one donum. He further said that the plaintiff, during the local enquiry pointed out to the clerk the part of the field which he gave to her.

The evidence of this witness was corroborated by his son Theocharis regarding the division of the land between the co-owners in 1928, and stated that he cultivated the land under colour blue and red (in *exhibit* 1) from the date of the said division until 1934. When the plaintiff got married in 1934, their father gave the said fields to his sister, and ever since she and her husband were cultivating them.

In support of the case for the defendants that the plaintiff did not possess the disputed land, Savvou Theodoulou (defendant No. 4) in the present action No. 909/66, said that she was present at the division of the fields purchased by her father and Charalambos Roussos, and she knew that the father of the plaintiff got one portion to the east and another portion to the west, and that her father got the middle part who continued cultivating it until his death two or three years afterwards. After his death it was left to her mother for her life, and no other person took possession of the said fields. Her mother died about 20 or 21 years after the death of her father, and the said field was divided between her brothers and sisters temporarily. The part, she said, which the plaintiff claimed was taken by her brother Costis (now deceased) and by Kleopas, the husband of the plaintiff. The version of this witness was corroborated by Procopis Stylianou who said that his father-in-law Theodoulos Hadjitoouli died after their marriage to his daughter Katerina Theodoulou (now deceased). When his father-in-law died the field was sown with cereals and they harvested it.

Moreover, in accordance with the evidence of Fahri Kayia, who carried out the local enquiry in 1943, he said that the purpose of that enquiry was because of a declaration of gift No. 612/43 made by Charalambos Christofi (the father of the plaintiff) to Olga Charalambous Roussou (the plaintiff). Her father donated to her the property covered by his certificate of registration No. 2890 dated 29.5.28, which was the one half undivided share of a field of an extent of 27 donums and 3 evleks at the locality of Vous of Yialia area of plot No. 10. He carried out the local enquiry because the donor declared that plot No. 10

was divided, and he asked for separate certificates of registration in accordance with the said division. On the basis of what was said by those who were present, he prepared a sketch in which three separate plots, *i.e.* 10/1, 10/2 and 10/3 appear. In consequence of the said declaration of gift, and after that local enquiry, the said donee, Olga Charalambous Roussou acquired plots Nos. 10/1 and 10/3 as a whole. The extent of 10/1 was 6 donums and 2 evleks, and that of 10/3 had exactly the same extent. Although the extent of plot 10/2 was 14 donums and 3 evleks, there was no registration of that plot. In cross-examination, he said he did not remember that any person pointed out to him any piece of land attached to plot 10/1.

The trial Court, after reviewing and weighing the evidence given by both sides, arrived at his findings of fact that the plaintiff was not in possession of the disputed area of land. I quote :—

> " As to who possessed the disputed area from Theodoulos' death, I believe defendant No. 4, Savvou Theodoulou (D.W.8) and defendant No. 8, Procopis Stylianou (D.W.9) that it was in the possession of Theodoulos' wife Chrysi from his death up to her death in 1948. I also believe the said two witnesses and the son of defendant No. 2, Kleopas Christou (D.W.5) that the disputed area was in the possession of plaintiff's husband from his mother's death in 1948 when plot 10/2 was divided among his brothers and sisters, and I believe the said defence witnesses 8 and 9 that from the date of the settlement in Action No. 147/63, plaintiff's husband abandoned his rights on the disputed area. I, therefore, do not believe the plaintiff or her witnesses that she was ever in possession of the disputed area."

Mr. Hadjioannou today has tried to show that these findings were wrong or not supported by the evidence. It has been said in a number of cases that an appeal on a matter of law has, as a rule, a greater chance of success than an appeal on any question of fact. If matters of fact only are involved, the Judges of the Court of Appeal are naturally reluctant to disturb the finding of a Judge who saw and heard the witnesses and had the opportunity of judging their demeanour in the witness box. Both in Cyprus and in England when the action is tried by a Judge, the Court of Appeal must decide whether, not having those advantages, they are in a position to say that the trial Judge was plainly wrong. If, however, the appellant convinces them of that,

the decision will be reversed, even though the Judge has clearly relied on the demeanour of the witnesses in deciding the facts.

The principles, therefore, which govern the Appellate Court regarding an appeal as regards questions of findings of fact and the credibility of witnesses, have been laid down in a number of decisions of this Court. In *Dafnis Thomaides & Co. Ltd.* v. *Lefkaritis Brothers* (1965) 1 C.L.R. 20, Vassiliades, J., said at p. 21 :—

> " It is now well settled in Cyprus that before the findings of the trial Court can be disturbed, an appellant must satisfy the Court of Appeal that the reasoning behind such findings, is unsatisfactory, or that they are not warranted by the evidence, considered as a whole. This is so, both in civil and criminal appeals. And it is for the party challenging a finding, to satisfy this Court that the finding is wrong."

In *Kyriacou* v. *Aristotelous* (1970) 1 C.L.R. 172, Hadjianastassiou, J., after stating the facts and reviewing the evidence as well as the relevant judicial pronouncements said at pp. 176–177 :—

> " Undoubtedly, matters of findings based on credibility are within the province of the trial Judge, and this has been laid down in a number of cases by this Court ..... However, that does not mean that if the reasoning behind the learned trial Judge's finding is wrong this Court will not interfere with such finding."

In a recent case in England, Cross L.J. said in *Gross* v. *Lewis Hillman Ltd.* and *Another* [1969] 3 All E.R. 1476 at p. 1481 :—

> " A Court of Appeal is not entitled to disturb findings of fact made by the trial Judge which depend to any appreciable extent on the view that he took as to the truthfulness or untruthfulness of a witness whom he has seen and heard and the Court of Appeal has not, unless it is completely satisfied that the Judge was wrong. It is not enough that it has doubts—even grave doubts—as to the correctness of the Judge's finding. It must be convinced that he was wrong."

In *Breen* v. *Amalgamated Engineering Union and Others* [1971] 1 All E.R. 1148, Edmund Davies, L.J. in a majority judgment had this to say at p. 1161 :—

> " But in this Court we are in a position of quite exceptional difficulty in dealing with them. Not only have

we (unlike the learned Judge) seen and heard none of the witnesses, but (and this I stress) we do not have even a transcript of their evidence. But, assuming we had, the House of Lords decision in *Onassis* v. *Vergottis** affords a recent and striking illustration of how difficult it is for an Appellate Court to disturb findings dependent on the credibility of witnesses. In *Steamship Hontestroom (Owners)* v. *Steamship Sagaporack (Owners)*** Lord Sumner said :—

> ' What then is the real effect on the hearing in a Court of Appeal of the fact that the trial Judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses ..... It is not, however, a mere matter of discretion to remember and take account of this fact ; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage as against the trial Judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case .... If his estimate of the man forms any substantial part of his reasons for his judgment the trial Judge's conclusions of fact should, as I understand the decisions, be let alone.'
>
> Directing myself accordingly, while I confess my inability to understand how the learned trial Judge arrived at his vital conclusion of fact, I regard myself as unable to disturb it."

Having read the whole of the evidence of the father of the plaintiff, in our judgment, one comes to the view that Mr. Roussos was not only a most unsatisfactory witness, but in some respects has succeeded in demolishing the case for the appellant. In our opinion, therefore, there is no room for the complaint by counsel that in view of the age of the witness the trial Judge ought not to have given too much weight to his evidence. We would, with respect to counsel,

---

* [1968] 2 Lloyd's Rep. 403.

** [1927] A. C. 37 at p. 47.

point out that it is well-known that the fact of calling a witness is supposed to represent him to the trial Court as worthy of credit, and although we appreciate his difficulties—not having appeared in the Court below—nevertheless, in our view, the assessment by the trial Judge of his evidence was a correct one.

Having had the advantage of hearing both learned counsel for the parties, and having considered the whole evidence as well as the decision of the trial Judge, we are satisfied that the findings of fact regarding the question of adverse possession of the disputed land were clearly open to the trial Judge on the evidence before him, and we have not been convinced to reverse his decision, because the reasoning behind such findings is neither unsatisfactory nor defective.

Having reached this conclusion which disposes of the main point in the appeal, we are of the opinion that it makes it unnecessary to consider the argument which was advanced by counsel for the appellant that the trial Judge wrongly decided that the plaintiff was bound by the terms of settlement reached in Action No. 147/63.

For these reasons, we are of the view that the appeal should be dismissed with costs in favour of the respondents.

Appeal dismissed with costs.