

1973
Nov. 29

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IN RE
ELENI
MICHAEL
HJI PETRI

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

IN THE MATTER OF ELENI MICHAEL HJI PETRI,
Deceased,

and

IN THE MATTER OF GEORGHIOS ALETRARIS,
Appellant-Applicant.

(Civil Appeal No. 5207).

Civil Procedure—Appeal—Discretion—Principles upon which the Court of Appeal will interfere with the exercise by the trial Courts of judicial discretion.

Administration of Estates—Administrator's application for sale of immovable property forming part of the estate of the deceased—Section 33 of the Administration of Estates Law, Cap. 189—Application served on beneficiaries who failed to enter appearance—Their consents to sale not filed—Court's discretion exercised against sale applied for—No valid grounds upon which the Court of Appeal could interfere with trial Court's discretion.

Discretion—Judicial discretion—Principles upon which the Appellate Court will interfere with the exercise of such discretion—Cf. supra.

Dismissing this appeal the Supreme Court :—

Held, (1) The principles upon which the Court of Appeal acts in cases where the exercise of judicial discretion is concerned have been laid down in a line of authorities and we do not consider it necessary to elaborate on this issue. Put very briefly the duty of an Appellate Court is to set aside such a decision where the Court below has erred in principle or where it is satisfied that such decision is improper, unjust or wrong. (See the decision of the House of Lords in the case *Evans v. Bartlam* [1937] 2 All E.R. 646).

(2) On the material before us we have not been satisfied that there are any valid grounds upon which we could interfere with the trial Court's discretion.

Appeal dismissed.

Cases referred to :

Evans v. Bartlam [1937] 2 All E.R. 646, H.L.

Appeal.

Appeal by the applicant-administrator against the order of the District Court of Kyrenia (Pitsillides, D.J.) dated the 29th May, 1973, (Application No. 62/72) whereby his application for an order of the Court directing the sale of the immovable property forming part of the estate of the deceased Eleni Michael Hji Petri, late of Karpashia, was dismissed.

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M. Vassiliou with *P. Petrakis*, for the appellant.

The judgment of the Court was delivered by :—

L. LOIZOU, J.: The appellant is the administrator of the estate of the deceased Eleni M. Hji Petri late of Karpashia who, as it appears from the record, died in 1932.

On the 23rd January, 1973, he applied to the District Court of Kyrenia, presumably under section 33 of the Administration of Estates Law, Cap. 189, for an order of the Court that the immovable property forming part of the estate of the said deceased be sold by the administrator for purposes of distribution of the estate. The immovable property in question, according to the affidavit filed by him, consisted of five pieces of land out of which one was seven donums in extent and the rest two to three donums each.

Section 33 (1) of the Administration of Estates Law, Cap. 189 reads as follows :—

“ 33. (1) For the purpose of facilitating the distribution of the estate of a deceased person among the beneficiaries according to law the Court may in respect of any part of the estate order the sale, lease, mortgage, surrender or release, division or other disposition thereof, as in the opinion of the Court expedient, where the same cannot be effected by the personal representative because of the absence of any power for that purpose vested in him :

Provided that the Court shall not order any division or partition of land which would contravene the provisions of section 27 of the Immovable Property (Tenure, Registration and Valuation) Law.”

According to the affidavit filed in support of the application there are eight heirs out of whom two are the children of the deceased and six are grand-children. It is quite clear

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that the property in question could not be divided without contravening the provisions of section 27 of The Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 as amended by s. 2 of Law 51 of 1971.

The application was served on the beneficiaries and none of them entered an appearance.

In the affidavit filed by the administrator in support of his application it is clearly stated that it was the desire of all heirs that the property should be sold. Probably due to the scanty material set out in the affidavit the trial Judge thought it desirable to ask that the written consents of the beneficiaries be produced and filed in Court ; and for this purpose the hearing of the application was adjourned to another date to enable the applicant to comply with the Court's direction. On the adjourned date, according to the record, learned counsel appearing for the administrator submitted to the Court that such consents were not necessary but we understand that the Court was at the same time informed that not all of the beneficiaries consented to the sale.

During the hearing before the trial Court learned counsel argued that as the Court could not order the division of the immovable property concerned because such division would contravene the provisions of section 27 of the Law then the Court had to resort to the provisions of section 33 and he submitted that as the beneficiaries did not appear the Court had no alternative but to order the sale of the property, as the registration of the land in the name of the beneficiaries in undivided shares does not amount to distribution.

The learned trial Judge having considered the argument refused to make an order for sale which in effect means that the only way left open to the administrator for distributing that part of the estate is to have it registered in undivided shares in the names of the various beneficiaries according to their respective shares.

The administrator now appeals from the Court's decision ; there are several grounds of appeal but in effect the appeal turns on the exercise by the trial Court of its discretionary powers.

Learned counsel for the appellant repeated before us substantially the same arguments advanced at the hearing of the application and submitted, *inter alia*, that the registration of the property in the names of the beneficiaries was

not the best solution and this because if anyone of the beneficiaries wanted to sell his share of the property at any time in the future he would have to invoke the provisions either of section 28 or 29 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, whereas, if the property was sold by the administrator at this stage it would be more advantageous as he would have more room for manoeuvre in so far as the sale price was concerned.

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The principles upon which the Court of Appeal acts in cases where the exercise of judicial discretion is concerned have been laid down in a line of authorities and we do not consider it necessary to elaborate on this issue. Put very briefly the duty of an appellate Court is to set aside such a decision where the Court below has erred in principle or where it is satisfied that such decision is improper, unjust or wrong. In this respect useful reference may be made to the decision of the House of Lords in *Evans v. Bartlam* [1937] 2 All E.R. 646.

Having considered this case in the light of the material before us we have not been satisfied that there are any valid grounds upon which we could interfere with the trial Court's decision.

In the result this appeal fails and is hereby dismissed.

Appeal dismissed.