1980 August 28

[TRIANTAFYLLIDES, P.]

IVONI S. IOANNOU,

Appellant-Applicant,

v.

ANDREAS DEMETRIOU AND OTHERS,

Respondents.

(*Application in Civil Appeal No.* 6057).

Civil Procedure—Practice—Jurisdiction—Dismissal of action concerning setting aside of sale and transfer of immovable property—Appeal—No stay of execution of judgment dismissing action without any order as to costs—Orders restraining dealings with said property pending determination of appeal—Though Supreme Court possesses jurisdiction to make such orders applicant ought to have applied for them, in the first instance, to the trial Court.

The appellant, who was the wife and one of the lawful heirs of the late Solon Ioannou, brought an action against the administrators of his estate, respondents 1 and 2, by means of which she, *inter alia*, sought to set aside the sale and transfer by them of certain property, which belonged to her late husband, to respondents 3 and 4. Following the dismissal of the action with no order as regards its costs the appellant filed an appeal against such dismissal together with an application seeking, pending the determination of the appeal, a stay of execution of the judgment dismissing the action, an order restraining all the respondents, and particularly respondents 3 and 4, from alienating or otherwise dealing or interfering with the immovable property in question, an order restraining respondents 1 and 2 from distributing or otherwise alienating the proceeds of the sale of the said property and an order restraining respondents 3 and 4 from evicting the appellant from such property.

Held, (1) (*on the application for stay of execution*) that there does not arise any question of granting a stay of execution of the judgment by means of which the action was dismissed,

especially since in dismissing it no order as regards its costs was made against any party thereto.

(2) (*with regard to the other reliefs*) that the trial Court possesses jurisdiction to grant the reliefs sought by the applicant by means of her present application; that she ought to have applied for them, in the first instance, to the trial Court, before applying to the Supreme Court; that, consequently, though this Court possesses jurisdiction to make the orders applied for by the applicant it should not, in the exercise of its relevant discretionary powers, proceed to make any such order until an application in this connection has been made to the trial Court; and that, accordingly, the application must be dismissed.

Application dismissed.

Cases referred to:

Otto v. *Lindford* [1881] 18 Ch. D. 394;

Wilson v. *Church* (*No.* 1) [1879] 11 Ch. D. 576;

Orion Property Trust Ltd., v. *Du Cane Court, Ltd.*, [1962] 3 All E.R. 466;

Erinford Properties Ltd., v. *Cheshire County Council* [1974] 2 All E.R. 448;

Polini v. *Gray* [1879] 12 Ch. D. 438;

Wilson v. *Church* (*No.* 2) [1879] 12 Ch. D. 454 at p. 471.

Application.

Application for, *inter alia*, a stay of execution of the judgment, by means of which applicant's action No. 5141/77 of the District Court of Nicosia was dismissed, pending the determination of Civil Appeal No. 6057 against such judgment.

C. HadjiNicolaou, for the appellant.

E. Vrahimi (*Mrs.*) with *Chr. Christophides*, for respondents 1 and 2.

A. Magos, for respondents 3 and 4.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following decision. The applicant, who is the appellant in this appeal (Civil Appeal No. 6057), was the plaintiff in action No. 5141/77, before the District Court of Nicosia, in which the respondents in this case were the defendants.

Respondents 1 and 2 are the administrators of the estate of

the late Solon Ioannou, of Nicosia, who died intestate, on February 27, 1974, leaving as his lawful heirs his wife, who is the present applicant, two sisters and one brother, who is respondent 2 in these proceedings in his capacity as one of the two administrators of the estate of the deceased.

The estate of the deceased comprised immovable property, at Strovolos, under registration No. K737 of September 28, 1967.

In September, 1977, the administrators of the estate of the deceased—respondents 1 and 2—sold and transferred the said property to respondents 3 and 4 at the agreed price of C£33,800.

By means of the aforementioned action the applicant sought the setting aside of the sale and transfer of the immovable property in question and, alternatively, damages for an illegal sale, as well as revocation of the letters of administration and other ancillary relief.

The action was dismissed on December 19, 1979, and the present appeal (No. 6057) was filed on January 28, 1980.

When the action was dismissed there was not made any order as regards its costs; and it was directed by the trial Court that the costs of the administrators should be borne by them in person and should not burden the estate of the deceased.

The administrators have filed Civil Appeal No. 6058 challenging the failure of the trial Court to adjudge the costs of the action against the appellant as an unsuccessful plaintiff.

On June 19, 1980, the appellant filed the present application seeking, pending the determination of appeal No. 6057, a stay of execution of the judgment by means of which action No. 5141/77 was dismissed, an order restraining all the respondents, and particularly respondents 3 and 4, from alienating or otherwise dealing or interfering with the property under registration K737, an order restraining respondents 1 and 2 from distributing or otherwise alienating the proceeds of the sale of the said property and an order restraining respondents 3 and 4 from evicting the applicant from such property.

Counsel for all respondents have opposed the making of all the orders applied for by the applicant.

In my view there does not arise any question of granting a stay of execution of the judgment by means of which action No. 5141/77 was dismissed, especially since in dismissing it no order as regards its costs was made against any party thereto; and thus, in this respect, the present case differs from *Otto* v. *Lindford*, [1881] 18 Ch. D. 394.

In deciding whether or not to grant the other reliefs sought by the applicant I have had to examine if it was proper for the applicant to seek such reliefs from this Court without asking, first, the trial Court to make the applied for orders.

It is correct that on the strength of *Wilson* v. *Church* (*No.* 1), [1879] 11 Ch. D. 576, it is stated in the Supreme Court Practice, 1979, vol. 1, para. 59/13/1, p. 910, that "where an action has been dismissed in the Court below, that Court has no jurisdiction, e.g., to restrain a defendant from parting with a trust fund pending an appeal: the application for that injunction must be made to the Court of Appeal", and in Halsbury's Laws of England, 4th ed., vol. 17, para. 454, p. 272, that "if the action has been dismissed the Court of first instance has no jurisdiction to stay execution (except for costs), and the application must be made direct to the Court of Appeal."

The above approach has not, however, been adopted in *Orion Property Trust Ltd.* v. *Du Cane Court, Ltd.*, [1962] 3 All E.R. 466 and *Erinford Properties Ltd.* v. *Cheshire County Council*, [1974] 2 All E.R. 448: In the *Orion* case, *supra*, Pennycuick J., after referring to the *Wilson* case, *supra*, as well as to the *Otto* case, *supra*, and to *Polini* v. *Gray*, [1879] 12 Ch. D. 438 and *Wilson* v. *Church* (*No.* 2), [1879] 12 Ch. D. 454, said the following (at p. 471):

> "I have found considerable difficulty in reconciling entirely what is said in the four cases which I have cited, and it may be that only the Court of Appeal itself can give an authoritative statement as to the principle to be applied in these cases. So far as I am concerned here, I think that it would be right for me to adopt and apply the statement of principle by Cotton, L.J., in *Polini* v. *Gray*."

The statement of principle made by Cotton L.J. in the *Polini* case, *supra* (at p. 446), which is referred to in the above-quoted dictum of Pennycuick J., is as follows:

" 'The only question we have to consider is, whether or no the Court has jurisdiction in a proper case to stay all dealings with a fund pending an appeal to the House of Lords although the Court has decided against the title of the plaintiff and dismissed the action. I see no difference in principle between staying the distribution of a fund to which the Court has held the plaintiff not to be entitled, and staying the execution of an order by which the Court has decided that a plaintiff is entitled to a fund. In that case, as in this case, the Court, pending an appeal to the House of Lords, suspends what it has declared to be the right of one of the litigant parties. On what principle does it do so? It does so on this ground, that when there is an appeal about to be prosecuted the litigation is to be considered as not at an end, and that being so, if there is a reasonable ground of appeal, and if not making the order to stay the execution of the decree or the distribution of the fund would make the appeal nugatory, that is to say, would deprive the appellant, if successful, of the results of the appeal, then it is the duty of the Court to interfere and suspend the right of the party who, so far as the litigation has gone, has established his rights. That applies, in my opinion, just as much to the case where the action has been dismissed, as to the case where a decree has been made establishing the plaintiff's title."

In the *Erinford* case, *supra*, the *Orion* case, *supra*, was referred to with approval by Megarry J. and was followed.

In my view, therefore, the trial Court possesses jurisdiction to grant the reliefs sought by the applicant by means of her present application; and she ought to have applied for them, in the first instance, to the trial Court, before applying to the Supreme Court.

In this respect useful guidance is to be found, by analogy, in rule 19, of Order 35, of the Civil Procedure Rules, which reads as follows:

"19. Wherever under these rules an application may be made either to the Court below or to the Court of Appeal, or to a Judge of either Court, it shall be made in the first instance to the Court or Judge below."

Also, in the *Erinford* case, *supra*, Megarry J. said the following (at p. 454):

> "I accept, of course, that convenience is not everything, but I think that considerable weight should be given to the consideration that any application for a stay of execution must be made initially to the trial Judge. He, of course, knows all about the case and can deal promptly with the application. The Court of Appeal will not be troubled with it unless one of the parties is dissatisfied with the decision of the Judge, in which case the Court of Appeal will at least have whatever assistance is provided by knowing how the Judge dealt with the application. Although the type of injunction that I have granted is not a stay of execution, it achieves for the application or action which fails the same sort of result as a stay of execution achieves for the application or action which succeeds. In each case the successful party is prevented from reaping the fruits of his success until the Court of Appeal has been able to decide the appeal. Except where there is good reason to the contrary (and I see none in this case), I would apply the convenience of the procedure for the one to the other."

Consequently, I have reached the conclusion that though I do possess jurisdiction myself to make the orders applied for by the applicant I should not, in the exercise of my relevant discretionary powers, proceed to make any such order until an application in this connection has been made to the trial Court.

As a result this application fails and it is dismissed for the reasons given in this Decision, but, in the light of all relevant considerations, I have decided to make no order as regards its costs.

Application dismissed.
No order as to costs.