

1981 December 19

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION.

SILENTSIA FARMS LTD.,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE MINISTER OF INTERIOR
2. THE DIRECTOR OF LANDS AND SURVEYS,

Respondents.

(Case No. 312/80).

*Act or decision in the sense of Article 146.1 of the Constitution—
Granting route of access by Director of Lands and Surveys—
In exercise of powers under section 11(A) of the Immovable
Property (Tenure, Registration and Valuation) Law, Cap. 224
(as amended)—A matter regulating civil law rights which fall
within the domain of private law—And cannot be made the subject
of a recourse under the above Article.*

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The interested party in these proceedings was the registered owner of a plot of land situated at Episkopio village. This property was surrounded by other properties and had no access to any road. On account of this she applied to respondent 2, the Director of Lands and Surveys, Nicosia, for a grant to her property compulsorily of a right of passage over plot 215 which was registered in the name of the applicant company. The application was made under the provisions of section 11(A) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 (as amended by Law No. 10 of 1966 and Law No 16 of 1980). The Director decided to grant the right of passage as applied for and when the applicant challenged this decision by means of this recourse counsel for the respondent raised in the opposition the preliminary legal point that the *sub judice* decision and/or act of the respondents was not an executory administrative act in the sense of Article 146 of the

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Constitution and as such it could not be challenged by a recourse for annulment as it was intended to regulate civil law matters that fell within the domain of private and not public law.

5 *Held*, that resolving the issue as to whether or not an act or decision comes within the scope of paragraph 1 of Article 146 of the Constitution, is one which must be decided on the merits and in the circumstances of each particular case and having due regard to such relevant factors as the office and status of the organ, as well as to the circumstances and context in which
10 such act was performed or decision taken; that the exercise of the powers by the Director given to him by section 11(A) of Cap. 224 (as amended) is a matter regulating civil Law rights, which fall within the domain of private Law as it serves no public purpose but only the purpose of the owner seeking such a right
15 under section 11(A), subsection 1, of Cap. 224, whereby same is granted when a property is so surrounded by other immovable properties with no passage to the public road or, if the existing passage is insufficient, for its proper use, development or exploitation; that such matters are obviously matters relating to the
20 enjoyment of his private property by an individual, as such, and serve no public purpose; that, therefore, the subject decision is a decision that falls within the domain of private Law regulating civil law rights, and as such cannot be the subject of a recourse under Article 146.1 of the Constitution; accordingly this Court
25 has no competence to entertain this recourse which must be dismissed.

Application dismissed.

Cases referred to:

30 *HadjiKyriacou and Theologia HadjiApostolou & Others*, 3 R.S.C.C. 89 at pp. 90 and 91;
 Valana v. The Republic, 3 R.S.C.C. 91 at p. 93;
 Greek Registrar of the Cooperative Societies v. Nicolaidis (1965) 3 C.L.R. 164 at p. 170;
 Charalambides v. The Republic, 4 R.S.C.C. 24;
35 *I.W.S. Nominee Co. Ltd. v. The Republic*, (1967) 3 C.L.R. 582;
 Moustafa v. The Republic (1973) 3 C.L.R. 47;
 Boyadjis v. The Republic (1975) 3 C.L.R. 378;
 M.D.M. Estate Developments Ltd. v. The Republic (1980) 3 C.L.R. 54.

Recourse.

Recourse against the decision of the respondents whereby a right of passage over applicants' property was granted to a certain Anna Fr. Koulermou.

Chr. Triantafyllides, for the applicants. 5

M. Flourentzos, Counsel of the Republic, for the respondent.

I. Typographos, for the interested party.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By this recourse the applicant company seeks: 10

"(a) Declaration that the decision or act of the respondents to decide on Application No. A.1513/80 in respect of a right of passage over applicants' property in the absence of applicants and without affording them the opportunity of being heard is null and void and of no effect whatsoever. 15

(b) The decision contained in *exhibit 1* attached hereto defining the right of way over applicants' property at Episkopio in favour of a certain Anna Frixou Koulermou of Episkopio, is null and void and of no effect whatsoever". 20

When the case came up for hearing the legal point raised in the opposition that the *sub judice* decision and/or act of the respondents was not an executory administrative act in the sense of Article 146 of the Constitution and as such could not be challenged by a recourse for annulment as it was intended to regulate civil law matters that fall within the domain of private and not public law, was heard preliminarily as a decision thereon would determine the competence of this Court in the matter. 25 30

The interested party in these proceedings is the registered owner of plot 222, Sheet/Plan XXX/50, village of Episkopio, under Registration No. 3522, dated 26th May, 1973. This immovable property was surrounded by other properties and had no access to any road. On account of this she applied to respondent 2, the Director of Lands and Surveys, Nicosia, for a grant to her property compulsorily of a right of passage over plot 215, Sheet/Plan XX/50, registered in the name of the 35

applicant company. The application was made under the provisions of section 11(A) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, as amended by Law No. 10 of 1966 and Law No. 16 of 1980.

5 I need not reproduce this statutory provision here. Suffice
it to say that thereby the owner of an immovable property,
which is surrounded in such a manner as to be devoid of a
passage to a public road or if its existing passage is insufficient
for its proper use, development or exploitation, is entitled to
10 demand a passage over the adjacent property on payment of
a reasonable compensation. The direction of the passage
and the extent of the use of such right as well as the compensa-
tion payable are fixed by the Director after prior notification
to all interested parties.

15 In support of the proposition that the right of easement and/or
privilege for the benefit of and over other immovable property
granted under and regulated as such by the whole of Cap. 224,
is a civil law right and falls within the domain of private and
not public law, I have been referred to a number of authorities
20 where the test for the distinction between the domain of private
and public law came up for examination by the then Supreme
Constitutional Court and this Court in the exercise of its present
revisional jurisdiction. In fact the authorities in question were
relied upon by both sides as to the said test.

25 The first one was that of *HadjiKyriacou and Theologia Hadji-
apostolou & Others*, 3 R.S.C.C., p. 89, where at pp. 90 and 91,
it was held:

30 "The determination of disputes as to boundaries of immo-
vable property is a matter in the domain of private law.
In so far as a public officer, i.e. the Director in a case of
this nature, is vested with competence to take action in
connection with the determination of such disputes as to
boundaries, with the primary purpose of regulating private
rights, then such action is a matter in the domain of private
35 law and not in the domain of public law; consequently
this is not a matter within the ambit of Article 146".

The test laid down in the aforesaid case that when a public
officer is vested with competence to take action in connection
with civil law rights and the primary object of such action

is not the promotion of a public purpose but the regulation of such civil law rights and that then such action is a matter within the domain of private law and does not amount to an act or decision in the sense of para. 1 of Article 146, was reiterated also in the case of *Savvas Yianni Valana and The Republic*, 3 R.S.C.C. 91 at p. 93. 5

This test was further followed in the case of the *Greek Registrar of The Cooperative Societies and/or The Commissioner of Greek Registrar of Cooperative Societies v. Nicos A. Nicolaidis* (1965) 3 C.L.R., p. 164, where at p. 170 it is stated: 10

“In the opinion of the Court it is primarily the nature and character of a particular act or decision which determines whether or not such act or decision comes within the scope of paragraph 1 of Article 146 of the Constitution. Such an issue is one which must be decided on the merits and in the circumstances of each particular case and having due regard to such relevant factors as the office and status of the organ, authority, person or body performing such act or taking such decision, as well as to the circumstances and context in which such act was performed or decision taken. As pointed out by the learned Judge in his Ruling (at p. 16 of the appeal record) the ‘same organ may be acting either in the domain of private law or in the domain of public law, depending on the nature of its action’. Ultimately, what is the important and decisive factor in this respect is the nature and character of the particular function which is the subject-matter of a recourse”. 15 20 25

Reference may also be made to the case of *Charalambides and The Republic*, 4 R.S.C.C. 24, where an application had been made to the Supreme Constitutional Court to grant a provisional order restraining the public sale of mortgaged property pending the determination of the recourse, by which the decision of the District Lands Officer refusing to postpone the date of such sale was being challenged. The Court refused the provisional order applied for, as the decision of the Director involved the exercise of a power which did not have as its primary object the promotion of any public purpose, but it only concerned Civil Law rights inasmuch as it was designed to ensure that the sale of mortgaged property took place in a proper manner for the purpose of safeguarding the interest 30 35 40

of the parties concerned. The question of the promotion of a public purpose as a determining factor whether a matter falls within the domain of public or private law, was also examined in the case of *I.W.S. Nominee Co. Ltd. and The Republic of Cyprus, through The Registrar of Trade Marks* (1967) 3 C.L.R., 582; *Moustafa v. The Republic* (1973) 3 C.L.R. 47; and the case of *Boyadjis v. The Republic* (1975) 3 C.L.R. 378; and finally in the case of *M.D.M. Estate Developments Ltd. v. The Republic* (1980) 3 C.L.R. p. 54, now under appeal before the Full Bench.

It is clear from the aforesaid statement of the law that resolving the issue as to whether or not an act or decision comes within the scope of para. 1 of Article 146 of the Constitution, is one which must be decided on the merits and in the circumstances of each particular case and having due regard to such relevant factors as the office and status of the organ, as well as to the circumstances and context in which such act was performed or decision taken.

Guided by these authorities and applying the aforesaid test so adopted and consistently followed by this Court to the circumstances of this case, I have come to the conclusion that the exercise of the powers by the Director given to him by section 11(A) of Cap. 224, as amended, is a matter of regulating civil Law rights, which fall within the domain of private Law as it serves no public purpose but only the purpose of the owner seeking such a right under section 11(A), subsection 1 of Cap. 224, whereby same is granted when a property is so surrounded by other immovable properties with no passage to the public road or, if the existing passage is insufficient, for its proper use, development or exploitation. Such matters are obviously matters relating to the enjoyment of his private property by an individual, as such, and serve no public purpose.

For all the above reasons I find that the subject decision is a decision that falls within the domain of private law regulating civil law rights, and as such cannot be the subject of a recourse under Article 146.1 of the Constitution.

Once, therefore, this Court has no competence to entertain the recourse, same is dismissed but in the circumstances I make no order as to costs.

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Application dismissed. No order as to costs.