

1981 January 23

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

KOULLA LOIZOU IOAKIM,

Applicant.

v.

THE DIRECTOR OF THE LANDS AND SURVEYS
DEPARTMENT,

Respondent.

(Case No. 309/80).

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- 5 *Provisional order—Rule 13 of the Supreme Constitutional Court Rules, 1962—Sale of mortgaged property—Recourse against refusal to review for the second time reserve price of—Application for provisional order suspending sale—Merits of the recourse—Serious doubts whether recourse likely to succeed—Applicant not exhibiting genuine urgency—Court not convinced that this is a case in which, as envisaged by the above rule 13, the justice of the case requires the making of a provisional order—Application dismissed.*
- 10 *Sale of mortgaged property—Reserve price—Review of—Whether further review possible—Sections 6, 8 and 9 of the Immovable Property (Restriction of Sales) Law, Cap. 223 (as amended by Law 60/66).*

15 The applicant in this recourse challenged the refusal of the respondent to review the amount of C£1,325 which was fixed as the reserve price in respect of the sale by public auction of property of the applicant in relation to a mortgage debt due by her to the interested party. The refusal complained of was communicated to applicant on August 29, 1980 and this recourse was filed on September 19, 1980. The sale was fixed on January 25, 1981 and on January 13, 1981 applicant applied for a provisional order postponing the sale till after the determination of the recourse.

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The respondent Director did, by a decision communicated to applicant by letter dated September 28, 1978, review initially the reserve price but applicant sought a further review; and it was against the refusal of such further review that this recourse was filed. No recourse was filed against the initial review of the reserve price. 5

On the application for a provisional order:

Held, that taking into account that the mortgage debt, in respect of which it is sought to sell the property of the applicant, has become also a judgment debt by means of a consent judgment in the District Court of Nicosia and that by means of such consent judgment, which was given on September 14, 1978, the applicant undertook, in effect, to pay off the debt to the interested party by instalments, but she has failed to do so; that, furthermore, taking into account that the applicant knew from December 18, 1980, that the sale was due to take place on January 25, 1981, but she did not file the present application for a provisional order until January 13, 1981, not exhibiting, thus, genuine urgency, a factor which forces this Court to look at the present application as yet another attempt to delay the interested party in securing what is legitimately due to him; that as at the present stage of the proceedings, and without pronouncing finally in this connection, this Court has serious doubts whether the present recourse of the applicant is really likely to succeed eventually, because it appears that it was not open to the applicant to seek a further review of the reserve Price (see sections 6, 8 and 9 of the Immovable Property (Restriction of Sales) Law, Cap. 223 (as amended, *inter alia*, by Law 60/66)); that as one of the main considerations in granting or refusing a provisional order are the merits of the case in which the provisional order is applied for, this Court has not been convinced that this is a case in which, as envisaged by rule 13 of the Supreme Constitutional Court Rules, 1962, the justice of the case requires the making of a provisional order as applied for by the applicant; consequently, this application is dismissed with an order that the applicant should bear the costs which have been incurred by the interested party in respect of it but there will be no order against the applicant regarding the costs of the respondent. 10 15 20 25 30 35

Held, further, that, in the light of the history of the events 40

in this case, it appears, at this stage, that the administrative action complained of by the applicant is of a confirmatory nature and it could not, therefore, be challenged by means of the present recourse under Article 146 of the Constitution.

5 *Application dismissed.*

Cases referred to:

Cyprus Industrial and Mining Co. Ltd. (No. 1) v. The Republic (1966) 3 C.L.R. 467;

10 *Galip v. The Minister of Interior and Another* (1974) 3 C.L.R. 94;

M.D.M. Estate Developments Ltd. v. The Republic (1980) 3 C.L.R. 54;

Cyprus Industrial and Mining Co. Ltd. (No. 2) v. The Republic (1966) 3 C.L.R. 474;

15 *Galazi v. The Minister of Education* (1967) 3 C.L.R. 577 at p. 580;

Miltiadous v. The Republic (1972) 3 C.L.R. 341 at p. 352;

Petrolina Ltd. v. The Republic (1977) 3 C.L.R. 173 at p. 179;

Markitsis v. The Attorney-General (1980) 3 C.L.R. 369, 376.

20 **Application for a provisional order.**

Application for a provisional order postponing the sale of property of applicant at Kalopanayiotis village until the final determination of a recourse against the refusal of the respondent to review the reserve price in respect of the above sale.

25 *A. Eftychiou*, for the applicant.

M. Florentzos, Counsel of the Republic, with *D. Prastitis*, for the respondent.

C. HadjiIoannou, for the interested party.

Cur. adv. vult.

30 TRIANTAFYLLIDES P. read the following decision. In this recourse the applicant is challenging the refusal of the respondent to review the amount of C£1,325 which was fixed as the reserve price in respect of the sale by public auction of property of the applicant at Kalopanayiotis village, in relation to a mortgage
35 debt due by her to the interested party.

The recourse was filed on September 19, 1980, and the complained of refusal was communicated to the applicant by the respondent by a letter dated August 29, 1980.

At the time when the recourse was filed the sale by public auction was fixed to take place on September 28, 1980, but the applicant managed, through proceedings before the Nicosia District Court, to which I need not refer in detail, to postpone the sale and it is now been fixed on January 25, 1981. 5

The applicant was notified of the said new date of the public auction by means of a letter addressed to her on December 8, 1980, which was received by her on December 18, 1980.

She did not take any steps in the present proceedings in relation to the said sale until January 13, 1981, when she filed an application asking for a provisional order postponing the sale till after the determination of this recourse. 10

As our law stands at present, it appears that when a decision fixing the reserve price is challenged, this Court has, prima facie, jurisdiction, under Article 146 of the Constitution to entertain a recourse against such decision (see *Cyprus Industrial and Mining Co. Ltd. (No. 1) v. The Republic*, (1966) 3 C.L.R. 467, *Galip v. The Minister of Interior and another*, (1974) 3 C.L.R. 94, and *M.D.M. Estate Developments Ltd. v. The Republic*, (1980) 3 C.L.R. 54). The judgments in all these cases are first instance judgments of Judges of this Court, but by means of Revisional Jurisdiction Appeal No. 223, which has been filed against the judgment in *M.D.M. Estate Developments Ltd., supra*, the Supreme Court is being asked to hold that there is no jurisdiction to challenge by recourse the fixing of the reserve price in a case such as the present one; as, however, that appeal is still being heard I have, for the time being, to take it that this Court possesses jurisdiction to entertain the present recourse of the applicant. 15
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It is correct that by means of this recourse there is not being challenged the decision of the respondent to fix the reserve price of the property in question, or to proceed with its sale by public auction, but there is challenged only the refusal of the respondent to review the said reserve price; I do not think, however, that this would be an obstacle to granting a provisional order suspending the effect of the decision fixing the reserve price of the applicant's property and, thus, rendering impossible, for the time being, the carrying out of the sale, by public auction, of such property, "if the justice of the case so requires", in the sence of rule 13 of the Supreme Constitutional Court Rules 30
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of Court; the position was similar in the case of *Cyprus Industrial and Mining Co. Ltd., (No. 2) v. The Republic*, (1966) 3 C.L.R. 474, where on an application for a provisional order suspending the sale by public auction of the property concerned, a provisional order was made suspending the operation of the decision fixing the reserve price in relation to the said sale.

What makes the present case different, as regards both its factual and legal aspects, from the cases of the *Cyprus Industrial and Mining Co. Ltd., (No. 1)*, *supra*, and *Cyprus Industrial and Mining Co. Ltd., (No. 2)*, *supra*; is that in the said cases there had been challenged the decision of the Director of the Lands and Surveys Department fixing the reserve price after an application for the review of the said price had been made by the mortgagor, under section 6 of the Immovable Property (Restriction of Sales) Law, Cap. 223, whereas in the present case the review of the reserve price has not only been made, but has, also, been confirmed—as it appears from the material before me—by a decision of the respondent which was communicated to the applicant by a letter dated September 28, 1979.

The applicant has, then, sought, later, by means of a letter dated August 14, 1980, which was received by the respondent on August 21, 1980, a further review by the respondent of the reserve price and it is against the refusal of such further review that the present recourse has been filed; and no recourse was filed against the initial review of the reserve price under section 6 of Cap. 223.

At the present stage of the proceedings, and without pronouncing finally in this connection, I must say that I have serious doubts whether the present recourse of the applicant is really likely to succeed eventually, because it appears that it was not open to the applicant to seek a further review of the reserve price, as she has done by means of her aforesaid letter of August 14, 1980; and I say this, in the light of the relevant provisions of Cap. 223, such as, in particular, sections 6, 8 and 9 of Cap. 223, as amended, inter alia, by the Immovable Property (Restriction of Sales) (Amendment) Law, 1966 (Law 60/66).

It is well established that one of the main considerations, in granting or refusing a provisional order, are the merits of

the case in which the provisional order is applied for (see, *inter alia*, *Galazi v. The Minister of Education*, (1967) 3 C.L.R. 577, 580, *Miltiadous v. The Republic*, (1972) 3 C.L.R. 341, 352, *Petrolina Ltd., v. The Republic*, (1977) 3 C.L.R. 173, 179, and *Markitsis v. The Attorney-General*, (1980) 3 C.L.R. 369, 5 376.

As I have already indicated, I am, to say the least, not satisfied, on the basis of the material and arguments at present before me, that this recourse is likely to be successful in the end; and this is a consideration which I have to take into account for the purpose of deciding on this application for a provisional order. 10

I would, also, add that, in the light of the history of the events in this case, it appears, at this stage, that the administrative action complained of by the applicant is of a confirmatory nature and it could not, therefore, be challenged by means of the present recourse under Article 146 of the Constitution. 15

Needless to say, my view, at this stage, as to the merits of this case, does not prejudge, in any way, what the final outcome of this recourse will be after a full hearing of arguments on the part of counsel for the parties. 20

I have, also, taken into account that the mortgage debt, in respect of which it is sought to sell the property of the applicant, has become also a judgment debt by means of a consent judgment in action No. 5095/77 in the District Court of Nicosia and that by means of such consent judgment, which was given on September 14, 1978, the applicant undertook, in effect, to pay off the debt to the interested party by instalments, but has failed to do so. 25

Furthermore, though the applicant knew from December 18, 1980, that the sale was due to take place on January 25, 1981, she did not file the present application for a provisional order until January 13, 1981, not exhibiting, thus, genuine urgency; and this factor forces me to look at the present application as yet another attempt to delay the interested party in securing what is legitimately due to him, through the sale of the property of the applicant for purposes of satisfaction of the debt due to him. 30 35

For all the foregoing reasons I have not been convinced that this is a case in which, as envisaged by the aforesaid rule 13, the justice of the case requires the making of a provisional order as applied for by the applicant and, consequently, this application is dismissed with an order that the applicant should bear the costs which have been incurred by the interested party in respect of it. I am not, however, making an order against the applicant regarding the costs of the respondent.

Application dismissed. Order for costs as above.

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