1982 November 22

[LORIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

HOLY MONASTERY OF KYKKO

*Applicants,*

*v.*

THE REPUBLIC OF CYPRUS, THROUGH
1. THE COUNCIL OF MINISTERS,
2. THE MINISTER OF INTERIOR,

*Respondents.*

(*Case No.*191/82).

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*Administrative Law—Administrative acts or decisions—Executory act—Preparatory act—Is not an executory act and cannot be made the subject of a recourse—Division of land into building sites—Appropriate authority granting application for, on condition that Council of Ministers will approve abolition of public roads situated within the land under division—Applicants applying to Director of Lands and Surveys for cession of said public roads—Reply of Director asking them to make a deposit representing the market value of the roads in question a preparatory act which cannot be made the subject of a recourse—Even though the applicants may have an existing legitimate interest, such interest has not been adversely affected—Article* 146.2 *of the Constitution.*

*Administrative Law—Recourse for annulment—Administrative body not reaching or communicating any administrative decision nor ratifying sub judice decision—Recourse against it not maintainable.*

The applicants applied to the appropriate authority for a division permit pursuant to the provisions of the Streets and Buildings (Regulation) Law, Cap. 96. The appropriate authority granted the division permit subject to the condition that applicants would secure the approval of the Council of Ministers for the abolition of public roads situate within the land under division. In order to be enabled to comply with the above

condition applicants applied to the Director of Lands and Surveys for the cession to them of these parts of the public road and pathway indicated on the relevant plans.

The Director of Lands and Surveys by his letter dated 10.2.82 asked applicants to make a deposit of an amount representing the market value of the roads in question; and hence this recourse.

Counsel for the respondents raised the preliminary objection that the sub judice decision is not executory, being simply a preparatory act; and that the applicants have no existing legitimate interest adversely and directly affected by such act or decision as envisaged by Art. 146.2 of the Constitution.

*On the preliminary objection:*

*Held,* that the recourse under Article 146 of the Constitution lies only against executory acts; that acts of a preparatory nature are not executory acts; that the decision of the Director of Lands and Surveys is merely an act of preparatory nature; that though an "existing legitimate interest" may exist because the applicants are the registered owners of the property in question and furthermore the sub judice decision was communicated to them as well, they cannot be said to have been adversely affected as the decision in question is not of an executory character as same definitely does not aim at producing a legal result; accordingly the preliminary objection must be sustained.

*Held,* further, that the recourse against respondents is doomed to failure, also, for the simple reason that they did not reach or communicate any decision nor did they make any act at all.

*Application dismissed.*

Cases referred to:

*Kolokassides v. Republic* (1965) 3 C.L.R. 549;

*Papanicolaou (No.1) v. Republic* (1968) 3 C.L.R. 225;

*Gavriel v. Republic* (1971) 3 C.L.R. 185;

*Vassiliou v. Police Disciplinary Committee* (1979) 3 C.L.R. 46;

*Chryssafinis v. Republic* (1982) 3 C.L.R. 320;

*HadjiKyriacou v. Hadjiapostolou,* 3 R.S.C.C. 89;

*Valana v. Republic,* 3 R.S.C.C. 91;

*Asproftas v. Republic* (1973) 3 C.L.R. 366;

*Republic v. M.D.M. Estate Developments Ltd.* (1982) 3 C.L.R. 642;

*Charalambides v. Republic* (1982) 3 C.L.R. 403;

*Chiratis v. Republic* (1982) 3 C.L.R. 540;

*Tekkis and Another v. Republic* (1982) 3 C.L.R. 680.

**Recourse.**

Recourse against the refusal of the Director of the Department of Lands and Surveys to cede to applicants parts of the public road and pathway in order to be enabled to comply with certain conditions of the division permit granted to them by the appropriate authority.

*G. Triantafyllides*, for the applicants.

*A. Vladimirou*, for the respondents.

*Cur. adv. vult.*

LORIS J. read the following judgment. The applicants applied to the appropriate authority for a division permit pursuant to the provisions of the Streets and Buildings Law, Cap. 96, as amended.

The appropriate authority granted the division permit subject to certain conditions which appear in Appendix 'E'; one of these conditions set out in paragraph 3 of the Appendix requires "the securing of the approval of the Council of Ministers for the abolition of public roads situate within the land under division".

The applicants in order to be enabled to comply with the aforesaid condition applied (vide Appendix 'ΣΤ') to the Director of Lands & Surveys for the cession to them of those parts of "the public road and pathway" indicated on the relevant plans in blue colour (vide Appendix 'B').

The reply of the Director of Lands & Surveys dated 10.2.82 (exhibit 1 attached to the recourse) is the so presented sub judice decision of the respondents which is being challenged by means of the present recourse.

The respondents opposed to present recourse raising three preliminary legal objections to the effect that the recourse

discloses no litigable cause because the act or decision impugned:-

(a) Does not fall within the domain of public law;

(b) Is not executory, being simply a preparatory act;

(c) The applicants have no existing legitimate interest adversely and directly affected by such act or decision, as envisaged by Art. 146.2 of the Constitution.

I have decided, both sides consenting to this course, to set down for determination the validity of the objection to the jurisdiction preliminary to an inquiry into the merits of the recourse; I shall, therefore, proceed to decide the cognizability of the recourse in the light of the revisional jurisdiction conferred on this Court by Art. 146.

I intend to deal first with the preliminary objections 2 and 3 together, leaving objection 1 to be decided last.

In the case of *Kolokassides* v. *The Republic*, (1965) 3 C.L.R. 549 (decided on appeal) it was held that a recourse under Art. 146 of the Constitution lies only against executory acts.

An executory act or decision was defined in the case of *Papanicolaou (No. 1)* v. *The Republic* (1968) 3 C.L.R. 225, as "an act by means of which the 'will' of the Administration is made known on a given matter, and which aims at producing a legal situation concerning the person affected. (See the Conclusions from the Jurisprudence of the Council of State in Greece, 1929–1959, pp. 236–237); and the executory nature of an act is closely linked to the requirement under paragraph 2 of Art. 146 of the Constitution, that a person can make a recourse only if an existing legitimate interest of his has been adversely and directly affected by the act complained of".

In the aforesaid case the following were also held, inter alia:

(a) Acts of a "preparatory nature" are not executory acts (see Conclusions from the Jurisprudence of the Council of State in Greece, 1929–1959, p. 239); they merely prepare the ground for the making of executory acts.

(b) An executory act forming part of a composite action may be challenged by a recourse on its own, so long

as the said composite action has not yet been completed by a final act or decision.

The case of *Papanicolaou* (supra) was followed in *Gavriel* v. *The Republic*, (1971) 3 C.L.R. 185, and in *Platon Vassiliou* v. *The Police Disciplinary Committee*, (1979) 3 C.L.R. 46. It was distinguished in the case of *Chryssafinis* v. *The Republic* (1982) 3 C.L.R. 320, and it is true that my brother Judge Pikis, J., expressed his disagreement with the ratio decidendi in *Papanicolaou's case* (supra) but such a disagreement was confined to the legal results produced from the same set of facts; in effect Pikis, J., decided that "disciplinary proceedings although composite in the sense that they envisage a series of steps before a final decision, none of the acts precedent to the final act is executory. Therefore, the disciplinary process does not amount to a complete administrative act as the notion is accepted in administrative law". (Vide p. 327, lines 28–33 in the case of *Chryssafinis* v. *The Republic* (supra) ). It must be emphasized that the disagreement goes only to the disciplinary process and does not extend to the broad legal principles laid down in *Papanicolaou's case* (supra) which are being adopted in the *Chryssafinis* case as well.

Turning now to the facts of this case.

Can exhibit 1 be considered as a composite administrative act of an executory nature which is cognizable by a Court exercising revisional jurisdiction under Act. 146 of the Constitution in view of the fact that the Council of Ministers did not give so far his final decision? Having given the matter careful consideration, I feel that the answer should be in the negative. It is abundantly clear that the decision of the Director of Lands and Surveys is merely an act of preparatory nature; this can be deduced clearly from the third paragraph of the sub judice decision contained in exhibit 1; and, as already stated, a preparatory act is not justiciable.

An "existing legitimate interest" may exist because the applicants are the registered owners of the property in question and furthermore the sub judice decision was communicated to them as well but they cannot be said to have been adversely affected as the decision in question is not of an executory character as same definitely does not aim at producting a legal result.

For all the above reasons preliminary objections 2 and 3 are sustained and the present recourse is, therefore, bound to fail; the recourse against respondents 1 is doomed to failure anyway for another simple reason: respondents 1 did not reach or communicate any decision nor did they make any act at all.

The preparatory act of the Director of Land Registries and Surveys was not in any way ratified or employed by respondents 1.

In view of my above decision on the preliminary legal issues 2 and 3, I do not think I should proceed to pronounce on specific legal objection under 1 above. Nevertheless I shall confine myself in dealing as briefly as possible with the crucial issue raised, leaving it open whether the act complained of would have been in the domain of public or private law if otherwise justiciable, before concluding my present ruling.

It was held as early as 1962 (*Achilleas Hji Kyriakou and Theologhia Hji Apostolou*, 3 R.S.C.C. 89) that "an act or decision" in the sense of paragraph 1 of Art. 146 is an act or decision in the domain only of public law and not an act or decision of a public officer in the domain of private law. Ever after this principle was reiterated in a number of cases (*Valana* v. *The Republic*, 3 R.S.C.C. 91; *George Asproftas* v. *The Republic*, (1973) 3 C.L.R. 366; *Republic* v. *M.D.M. Estate Developments Ltd.*, (1982) 3 C.L.R. 642; *Charalambides* v. *The Republic*, (1982) 3 C.L.R. 403; *Panayiotis Chiratis* v. *The Republic*, (1982) 3 C.L.R. 540; *Kyriakos Michael Tekkis and Another* v. *The Republic*, (1982) 3 C.L.R. 680). In the latter case of *Tekkis* it was held that the acts of the administration issued not in exercise of public authority but relating to the management of the private property of the State create disputes falling within the domain of civil law.

Learned counsel appearing for the respondents vehemently argued that the decision of the D.L.O. was relating to the management of property of the State; he cited most of the authorities referred to above and made also extensive reference to Greek authorities on this point; he maintained that the decision of the D.L.O. was consonant with the approved Policy of the Government expressed in Appendix 'D' and invited the Court to pronounce in favour of the view that the decision

in question was falling within the domain of the private law and as such it was not justiciable.

Learned counsel appearing for the applicants submitted that the gist of this case is not whether the decision of the D.L.O. (a department under the control of respondents 2) is one that refers to management of property of the State but touches a far more delicate point of public law, notably excess or abuse of power by the D.L.O. Counsel embarked at length on the provisions of s. 18 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, and made several submissions thereon. The relevant section reads as follows:-

> "18. The Governor may grant, lease, exchange or otherwise alienate any Crown property or immovable property vested in the Crown by virtue of the provisions of this Law, other than a public road or the foreshore, for any purpose and on such terms and conditions as he may deem fit:
>
> Provided that the Governor may exchange or alienate any part of any public road if satisfied that other adequate public road has been provided in the place thereof or that such exchange or alienation will improve such public road:
>
> Provided also that the Governor in Council may lease any part of the foreshore for the purposes of harbours, jetties, piers, wharves, fisheries and any other purpose of public utility subject to such conditions as he may think fit".

The submissions of counsel are in effect the following:-

(a) The Government's power to exchange or alienate public roads and pathways stems under s. 18 of Cap. 224;

(b) The only criteria for the alienation or exchange of public roads and pathways by the Government are those envisaged by the first proviso to s. 18, i.e. the Council of Ministers will proceed to such an exchange or alienation if satisfied—

(i) that other adequate public road has been provided in the place thereof, or

(ii) that such exchange or alienation will improve such public road.

Consideration of any other criteria, such as the payment of money—learned counsel submitted—is impermissible and same would lead to a decision entirely outside the ambit of the law and any decision so taken would lead to excess of authority or abuse of power by the Administrative organ in question, rendering thus the relevant decision vulnerable. Excess of authority or abuse of power in respect of a matter of such great importance falls within the domain of public law and it is, therefore, justiciable, counsel concluded.

Counsel for the applicants submitted further that the Government Policy expressed in Appendix 'D' is inapplicable in the present case as the policy in question simply applies to Government property other than public roads.

In all other cases, except public roads, s. 18 of Cap. 224 enables the Council of Ministers to impose such terms and conditions as they may deem fit whilst in the case of public roads the discretion of the Council is being fettered by the express provisions of the first proviso to s. 18.

As already stated above, it is not my intention to pronounce on preliminary objection under 1 above, as I have decided that the present recourse is not justiciable on other grounds; I feel it my duty though, to state that, as at presently advised, I am inclined to agree with learned counsel appearing for the applicants that the only criteria which could have been relied upon in a proper decision of the appropriate Administrative organ, are those envisaged by the provisions of the first proviso to s. 18 although I feel that I should leave the matter open as to whether deviation from such a course will affect matters of paramount public importance, thus bringing the eventual abuse of powers into the domain of public law.

For all the above reasons the present recourse fails and it is accordingly dismissed; under the circumstances I shall make no order as to costs.

*Recourse dismissed. No order as to costs.*