

1982 May 19

[MALACHTOS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PANAYIOTIS CHIRATIS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF INTERIOR,

Respondent.

(Case No. 255/78).

Act or decision in the sense of Article 146.1 of the Constitution—Which can be made the subject of a recourse thereunder—Only an act or decision in the domain of public law and not of private law can be made the subject of such a recourse—Encroachment by respondent on immovable property of the applicant—A clear case of trespass to land which is in the domain of private law and cannot be made the subject of a recourse under the above Article. 5

Time within to file a recourse—Article 146.3 of the Constitution—Executory act—Confirmatory act—Decision subject matter of recourse out of time—Because it is a confirmatory one of previous decisions which have not been challenged by recourse within the time limit provided by the above Article. 10

The applicant was the owner of a piece of land of three evleks in extent situated at Ayia Napa village. In 1963 the Committee of Ayia Napa Irrigation Division constructed a dam in the river next to the above property of the applicant. In 1969 applicant applied to the D.L.O. to be granted government land in exchange of his above property which, as he alleged, has been granted to the government for the construction of the above dam and his application was dismissed. On November 26, 1976, by his letter to the District Officer Famagusta applicant renewed his above claim but it was rejected by letter of the District Officer dated 14th December, 15 20

1976 By his letter to the Ministry of Interior dated 8th October,
 1977 applicant reverted on the same subject matter and his
 claim was again turned down by letter* of the District Officer
 Famagusta dated 28th March, 1978 As against the decision
 5 embodied in this last letter applicant filed the above recourse
 for a declaration that the "decision of the respondent not to
 grant to him government land in exchange of property of the
 applicant that he granted to the government for carrying out
 irrigation works at Ayia Napa, was null and void"

10 Counsel for the respondent raised the preliminary objection
 that the act or decision complained of was not an executory
 act which could be attacked by a recourse under Article 146.1
 of the Constitution as it did not fall within the domain of public
 law; and that even if the said act was of an executory nature then
 15 the recourse should again fail as it was out of time.

Held, that an act or decision in the sense of paragraph 1 of
 Article 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; that the complaint of the applicant is for encroach-
 20 ment on his immovable property by the respondent authority
 and it is a clear case of trespass to land which is in the domain
 of private law, and, therefore, the applicant should pursue his
 right in the District Court; accordingly the act complained of
 cannot be made the subject of a recourse under Article 146.1
 25 of the Constitution

Held, further, that even if it is assumed that the act or decision
 complained of is of an executory nature, again it cannot be
 entertained by this Court as the decision contained in the letter
 of the District Officer of the 28th March, 1978, is a confirmatory
 30 one of previous decisions and it is, therefore, out of time.

Application dismissed

Cases referred to:

Achilleas HadjiKyriakou and Theologia HadjiApostolou, 3
 R.S.C.C 89 at p 90;

35 *Valana v Republic*, 3 R.S.C.C 91 at p. 93

Recourse.

Recourse against the refusal of the respondent to grant appli-

* The letter is quoted at p 544 post

cant government land in exchange of property of his that he granted to government for carrying out irrigation works.

A. Papacharalambous, for the applicant.

R. Gavrielides, Senior Counsel for the Republic, for the respondent.

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Cur. adv. vult.

MALACHTOS J. read the following judgment. In this recourse the applicant claims a declaration of the court that the decision of the respondent not to grant to him government land in exchange of property of the applicant that he granted to the government for carrying out irrigation works at Ayia Napa, which decision was communicated to him by letter of the District Officer dated 28.3.1978, should be declared null and void and of no legal effect whatsoever.

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The relevant facts of the case are the following: The applicant is the owner of a piece of land comprising three evleks in extent situated at Ayia Napa village at locality "Arkambelos" and is plot 246 of S/P 42/22. In 1963 the then Committee of the Ayia Napa Irrigation Division constructed a dam in the river next to the above property of the applicant for the enrichment of the underground waters. On 2.11.1963 the applicant applied to the District Officer of Famagusta claiming that part of government land which was situated next to his immovable properties under plots 38, 39, 40 and 41 of S/P 42/23 be granted to him in order to gain access to his said properties. He was also applying that part of the same government land be granted to him in exchange of his property under plot 246 of S/P 42/22 which was, according to his allegations, utilised for construction of the said irrigation works.

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By letter dated 17.3.1964, exhibit 2, the District Officer informed the applicant that his application was accepted in principle and called upon him to apply to the District Lands Office and pay the relevant fees for the carrying out of a local inquiry for the purpose of proceeding further with his application. From the elements existing in the D.L.O. file under No. A 6288/69 which was rescued from the catastrophe as a result of the Turkish Invasion in 1974, it appears that there was continuity of the above application of the applicant by a new application to the D.L.O. on 24.9.1969 which concerned the granting of parts of government forest land to an extent of 29 donums

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and 3,000 square feet for amalgamation with the land of the applicant under plots 38, 39, 40 and 41 of S/P 42/23 and for the exchange of his other property under Plot No. 246 of S/P 42/22 situated at Ayia Napa. This application was dismissed because
5 the parts of government forest land for which the applicant applied to be granted to him were required for public utility purposes and about this the applicant was informed by letter through the D.L.O. dated 20.5.1975, exhibit 9. This letter reads as follows:

10 "With reference to your application under No. A 6288/69 by which you claim the granting to you of certain parts of government forest land situated at Ayia Napa village, I have been instructed by the Director of Lands and Surveys Department to inform you that it cannot be proceeded
15 further since the parts of government and forest land claimed by you are necessary for purposes of public utility, and, in addition, the granting of the part of forest land is not covered by the existing policy of the Government as regards the disposing of government lands".

20 The applicant by application dated 26.11.1976, exhibit 12, to the District Officer of Famagusta, brought up the same subject matter claiming the granting to him of access to his above properties through government land, as well as the granting to him of part of the same government land in exchange of his property
25 under Plot 246 which was utilised for irrigation works in 1963. This application of the applicant was forwarded to the District Lands Office for examination and, finally, was rejected, the applicant being informed by letter of the District Officer under No. 82/74/55, exhibit 13, dated 14.12.1976. This letter reads as
30 follows:

"I wish to refer to your application dated 26.11.1976 by which you apply that part of government land at Ayia Napa near your properties under Plot Nos. 38, 39, 40 and 41 of S/P 42/23 be granted to you for the creation of a road
35 leading to your above properties and that part of the same government land be granted to you in exchange of other property of yours under plot No. 246 of S/P 42/22, which has been utilised for irrigation works and to inform you the following:

40 (a) As the archives of the District Lands Office of Fama-

gusta are held by the Turks and because of that it is impossible to be verified beyond any doubt the ownership of the immovable property on which you claim the creation of a road, for this reason your application cannot be accepted for examination; and

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- (b) as regards your claim for the grant to you of government land situated near the above mentioned properties of yours, I wish to inform you that it is rejected. A similar application has been rejected also in 1969”.

The applicant by letter dated 8.10.1977, exhibit 3, addressed to the Minister of Interior, reverted again on the same subject matter in which particular reference was made to plot 246 which was utilised, according to his allegation, by the Government for the water works by the Committee of the Irrigation Division of Ayia Napa. To this letter he received the letter dated 28.3.1978, exhibit 5, from the District Officer Famagusta, by which his claim was again rejected. This letter reads as follows:

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“I wish to refer to the subject of your claim for granting to you government land in exchange of your property which, as you allege, has been granted to the Government for the construction of irrigation works at Ayia Napa and to inform you that it has been ascertained, after a local inquiry being carried out, by the District Lands Office, that no encroachment has been made on the adjacent property of yours under plot No. 246 S/P 42/22 by the construction of the dam at locality ‘Arkambelos’ and, consequently, your claim is unjustified”.

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As a result, the applicant filed on 22.5.1978, the present recourse.

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The grounds of law on which this recourse is based, as stated therein, are:-

1. The decision of the respondent was taken without careful study and full ascertainment of all facts concerning the above case of the applicant, but was based only on a local inquiry carried out by the District Lands Office, years after the granting by the applicant of his property; and
2. The decision of the respondent was taken under circum-

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stances amounting to excess of power as it was based on wrong facts and amounts to wrong exercise of the discretionary powers of the respondent.

5 Counsel for applicant in his address to the court, besides stating the facts of the case, did not put forward any allegations of substance in support of the above grounds.

10 On the other hand, counsel for the respondent, both in the opposition and in his address, submitted that even if we accept the allegations of the applicant as true and correct, the act or decision of the respondent to refuse to grant to him government land in exchange of his land that was utilised for irrigation works is not an executory act which can be attacked by a recourse under Article 146.1 of the Constitution as it does not fall in the domain of public law. He also submitted that even
15 if we assume that the act or decision contained in the letter of the District Officer dated 28.3.1978, exhibit 5, is of an executory nature, then the recourse should again fail as it is out of time.

20 In the case of Achilleas *Hjikyriakou and Theologia Hadji-Apostolou*, 3 R.S.C.C. 89 at page 90, it is stated that "an 'act' or 'decision' in the sense of paragraph 1 of Article 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".

25 This case was followed in the case of *Savvas Yianni Valana and The Republic of Cyprus* through the Director of Lands and Surveys, 3 R.S.C.C. 91, where at page 93 it is stated that "civil law rights in immovable property are, as a rule, matters in the domain of private law".

30 In the present case the complaint of the applicant is for encroachment on his immovable property by the respondent authority and it is a clear case of trespass to land which, in my view, is in the domain of private law, and, therefore, the applicant should pursue his right in the District Court.

35 Even if we assume that the act or decision complained of is of an executory nature, again it cannot be entertained by this Court as the decision contained in the letter of the District Officer of 28.3.1978, is a confirmatory one of previous decisions taken in 1969, on 20.5.1975 and on 14.12.1976.

Article 146.3 of the Constitution provides that “a recourse shall be made within seventy-five days of the date when the decision or act was published or, if not published and in the case of an omission, when it came to the knowledge of the person making the recourse”.

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It is clear, therefore, that this recourse is out of time.

Whether there is encroachment on the land of the applicant or not by the respondent authority, is of no significance as regards this recourse as the respondent authority made it clear to the applicant since 1969 that no government land would be granted to him.

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For the reasons stated above, this recourse fails and is dismissed with no order as to costs.

*Application dismissed. No order
as to costs.*

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