1984 April 12

[HADJIANASTASSIOU, SAVVIDES, STYLIANIDES, JJ.]

MARKIDES EUROPA FURNITURE EXHIBITION LTD,
Appellan

v.

VASSOS ELIADES LTD.,
Responden

(*Application in Civil Appeal No. 64*

Civil Procedure—Appeal—Application for re-opening of hearin— Respondent's counsel absent on date of hearing and Court aft hearing appellant reserved judgment— Absence of Counsel du to his non receiving the notice of hearing of the appeal—Whi was served on counsel, who was his address for service at Nicos and was posted by him to respondent's counsel in Larna —Though there is no provision in the Rules enabling the Cou to reopen the hearing of an appeal it is within the inherent pow of the Court to do so—Counsel for appellant not opposing appl cation—Desirability that litigation should come to an end as soo as it is reasonably practical—Application granted in the speci circumstances of the case.

Civil Procedure—Address for service.

When the above appeal came up for hearing counsel for t appellant attended the hearing whereas counsel for the re pondent failed to attend. The Court having been satisfied th notice of the hearing of the appeal had been served at the addre of service of counsel for the respondent proceeded, in complian with rule 14 of Order 35 of the Civil Procedure Rules, to he the appeal in the absence of the respondent. Counsel fo appellant addressed the Court in support of the appeal and th judgment was reserved. When counsel for the respondent cam to know about this situation he filed an application for leav to address the Court or be heard in this appeal. The applicatio was based on the ground that the notice of hearing of this appe was received by the office which was the address for service o

counsel for the respondent in Nicosia and was posted forthwith to his law office at Larnaca, but such notice never reached its destination and as a result, counsel for respondent was not aware of the date of the hearing of this appeal.

Counsel for the appellant did not contest these facts, did not oppose the application and left the matter at the discretion of the Court. 5

Held, that though there is no provision in the rules enabling the Court to excercise jurisdiction in the matter it is within the inherent power of the Court to deal with an application in 10 the nature of the present one; and that though it is desirable that litigation should come to an end as soon as it is reasonably practical, in the special circumstances of this case and bearing in mind that the alleged facts have not been contested by counsel appearing for the appellant and the application has 15 not been opposed by counsel for appellant who is concerned with the speedy outcome of this appeal, this Court has decided, though not without great reluctance and without laying down a general rule in this respect, to grant the application and allow the applicant to address the Court in this appeal. 20

Application granted.

Observations: Before concluding, however, we wish to draw the attention of advocates from other districts who have an office for address of service in Nicosia, that they have a duty to make such arrangements through such 25 office to be kept informed in time about the date when an appeal in which they appear is fixed, or make inquiries through the Registry of the Court as to the position of their appeal, especially in view of the fact that civil appeals are fixed well ahead of the date of 30 hearing.

Cases referred to:

Kyriacou v. *Georghiades* (1970) 1 C.L.R. 145;

HjiPanayi v. *HjiPanayi* (1974) 1 C.L.R. 60;

Georghiou v. *Republic* (1968) 1 C.L.R. 411; 35

Ataliotis v. *Police* (1963) 1 C.L.R. 111;

Orphanides v. *Michaelides* (1968) 1 C.L.R. 293;

Hession v. *Jones* [1914] 2 K.B. 421;

Edwards v. *Edwards* [1968] 1 W.L.R. 149.

Application.

Application by the plaintiff, respondent in the appeal, for
5 leave to address the Court or be heard in this appeal in which judgment has been reserved.

M. HjiChristophi, for the applicant.

A. Dikigoropoullos, for the respondent.

Cur. adv. vult.

10 HADJIANASTASSIOU J.: The decision of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an application on behalf of plaintiff, the respondent in this appeal, for leave to address the Court or be heard in this appeal in which judgment has been reserved.
15 It is, in fact, an application to reopen the hearing of the appeal. The material facts to the present application are briefly as follows:

The appellant-defendant before the trial Court - filed this appeal challenging the judgment given against him in an action
20 brought by the applicant in the District Court of Nicosia. The appeal came up for hearing on the 17th October, 1983. Counsel for the appellant attended the hearing, whereas counsel for the respondent failed to attend. The Court having been satisfied that notice of the hearing of the appeal had been served at the
25 address for service of counsel for the applicant, proceeded, in compliance with rule 14 of Order 35 of the Civil Procedure Rules, to hear the appeal in the absence of the respondent. Counsel for appellant addressed the Court in support of the appeal and the judgment was reserved. When counsel for the
30 applicant came to know about this situation, filed this application on the 23rd January, 1984, asking for leave to be heard. The facts relied upon in support of the application are set out in three affidavits, one sworn by him, the other by his partner Mr. Zacharias Mylonas and the third one by Lysandros Hadji-
35 Demetriou, an advocate of Nicosia, whose office was the address for service of counsel for applicant. The contents of such affidavit are to the effect that the notice of hearing of this appeal was received by the office which was the address for service of

applicant in Nicosia and was posted forthwith, to his law office at Larnaca, but such notice never reached its destination and as a result, counsel for applicant was not aware of the date of the hearing of this appeal.

This application was not opposed by counsel for the appellant who left the matter at the discretion of the Court. 5

Under the Civil Procedure Rules when an appeal is called for hearing, if the respondent appears and the appellant does not, the appeal may, on the application of the respondent, be dismissed or otherwise dealt with as the Court of Appeal may think right. (Order 35, rule 13). If, on the other hand, the appellant appears and the respondent does not, the Court of Appeal may upon proof of service on the respondent, hear the appellant and dispose of the appeal as though the respondent were present. (Order 35, rule 14). The Court exercising its powers and discretion under rule 14, heard counsel for the appellant and reserved its judgment which till the hearing of the application had not been delivered and is still pending waiting for the outcome of this application. 10 15

The application is based on Order 35, rules 12, 13 and 14, Order 48, rules 1 - 9, Order 50, rule 1, Order 51, rule 1 and Order 64. 20

We wish to point out straightaway, that none of these rules contains any provisions as to what remedy is open to a respondent if he fails to attend at the hearing of the appeal and the Court proceeds to hear the appeal as though the respondent were present, and we have been unable to trace any other provision in the rules applicable to such cases. Rules 12, 13 and 14 of Order 35, provide for the course open to the Court of Appeal to dispose of an appeal when either party is absent when the appeal is called on for hearing. Rules 1 - 9 of Order 48 deal with the form of applications to be made under the Rules and Order 50 rule 1 for the need to furnish an address for service within the municipal limits of the town within which the Registry of the Court in which an action was instituted, is situated, and in case of appeal before the Supreme Court an address for service in Nicosia. Order 51 provides as to how service has to be effected. 25 30 35

It should be noted that under rule 1 of Order 51 it is provided that -

> "........ and everything done on any proceeding whereof notice has been served or given according to these rules shall be binding on a person so served or notified, whether he attends on the proceeding or not."

Order 64 has no application either, as it deals with the effect of non-compliance with the rules and with irregularities in the proceedings.

Counsel for applicant has submitted that the matter is within the discretion of the Court in the exercise of its inherent jurisdiction and that in the present case bearing in mind all the circumstances of the case as verified by the affidavits in support of the application and which have not been contested by the other side and also the fact that judgment has not yet been delivered and no injustice will be caused to the appellant if this application is granted, the Court should exercise such discretion in favour of the applicant.

The cases referred to by counsel for applicant in support of his argument that this Court has a discretion in the case and the mode as to how such discretion may be exercised, that is *Kyriacou* v. *Georghiades*, (1970) 1 C.L.R, 145, *Hj.Panayi* v. *Hj.Panayi* (1974) 1 C.L.R. 60 and *Georghiou* v. *The Republic* (1968) 1 C.L.R. 411, cannot render any assistance to the applicant, because such cases were cases in which the discretion of the Court was exercised under the relevant provisions in the Civil Procedure Rules. The first two cases were cases of reinstatement of an appeal which was dismissed for failure to take the steps mentioned in Order 35, rule 1, within the period of three months of lodging a notice of appeal and for which provision is made under Order 35, rule 22 that the Court of Appeal may, if it so deems fit, to reinstate the appeals upon such terms as may be just. The third case, was a case of extension of time to file an appeal after the date for filing same had expired and Order 57, rule 2 was relied upon in support of the application which provides that the Court has power to extend the time fixed by the Rules upon such terms as the justice of the case may require.

In *Ataliotis* v. *The Police* (1963) 1 C.L.R. 111, which was a criminal appeal and counsel for appellant failed to attend the

hearing of the appeal although notice of the hearing was duly served on his agent and as a result the appeal was dismissed and the conviction affirmed, the Court of Appeal after it had ascertained that notice of the hearing of the appeal was duly served on the address for service of counsel for the appellant, had this to say at page 113: 5

"We take the view that advocates from other districts, when they give a lawyer's office or any place in Nicosia as address for service, they must be sure that they have made sufficient arrangements for the agent here to take the responsibility involved. On the other hand, any person in charge of an office given as an address for service for Court documents connected with proceedings, presumably with his knowledge and consent, must bear in mind that there are certain responsibilities involved, which he must bear." 10 15

Orphanides v. *Michaelides* (1968) 1 C.L.R. 293, to which reference was made by counsel for applicant, is distinguishable from the present case. The application in that case was for an order that an appeal which had already been heard and in which judgment had been delivered, should be heard further on its merits by the Judges of the Supreme Court, who had already heard and decided the appeal in the exercise of the Supreme Court's appellate jurisdiction. The application which was heard by the Full Bench of the Supreme Court was dismissed and Triantafyllides, J. (as he then was), after reviewing English case law on the question as to whether the Court which has delivered a judgment can hear further argument and alter its judgment, had this to say at page 299: 20 25

"It appears to be now well-established in England that until a judgment or order has been completed and perfected, through being drawn up and entered, the Court which has delivered it has the right, in a proper case, to reconsider it. 30

It is quite clear that the English Courts have taken the view that a judgment is not completed and perfected until it has been drawn up and entered, because of the existing practice in England regarding trial of civil cases, where judgment is usually delivered orally, without it being reserved." 35

And then he proceeded to draw a distinction between the

position in England and in Cyprus and concluded as follows at pages 302, 303:

"The practice in Cyprus regarding delivery of reserved judgments on appeal is radically different from the practice regarding oral judgments in England. In each case where judgment has been reserved in Cyprus, such judgment is prepared and printed finally, and, as soon as it has been read in open Court, it is signed by the Judges who have delivered it, and the original is filed as a matter of record in the official Court file (as it has been done in this case on the 15th December, 1967); and copies are given out at once, there and then, to the parties in the appeal, as, again, it has been done in the present case.

We are of the view, therefore, that looking at the essence of things, and not losing sight of it through procedural technicalities, the position in Cyprus, in relation to a reserved judgment is that such judgment is completed and perfected (just as it happens in England when an orally pronounced judgment is drawn up and entered) when it is delivered, signed and filed, and whatever there remains to be done by way of formally entering it, on the application of a party, is not necessary for its completion or perfection, but it may well be a formality necessary for other purposes.

Therefore, once, in Cyprus, a judgment has been delivered, signed and filed, there can be no possibility for the Court which has delivered it to rehear argument and to change it, or set it aside, except, of course, to the extent to which it has, always, been possible to correct an error in a judgment under the provisions of Order 25, rule 6 (which is known as the 'slip' rule and corresponds to Order 20 rule 11 of the Rules of the Supreme Court in England) and under the inherent jurisdiction of the Court".

Notwithstanding the fact that *Orphanides* case is distinguishable from the present one, nevertheless as it appears from the dictum of Triantafyllides, J., (as he then was), in England it is well established that there is inherent power in the Court to exercise a discretion in a proper case and reconsider its judgment before such judgment has been perfected through being drawn up and entered. A point which was earmarked in that

case was the distinction between the English practice and our practice, concerning the time when a judgment is finalised and also that after such stage, there is no possibility for the Court which has delivered it, to re-hear argument and to change it, except only in the case of correcting an error under the "slip rule". 5

That there is inherent jurisdiction to the Court to deal with this matter, reference may be made also to the case of *Hession* v. *Jones* [1914] 2 K.B. 421, in which an application on behalf of the plaintiff, the respondent on an appeal, to restore the appeal 10 after the appellant had appeared and argued his appeal in the absence of the respondent and the Court had heard the appeal and came to a decision, was dismissed.

The application was dismissed on the ground that after the order of the Divisional Court had been passed and entered, the 15 Court had no jurisdiction to grant the application. Bankes J. in delivering the judgment of the Court, had this to say at pp. 425, 426:

> "Our jurisdiction therefore is in part a statutory jurisdiction regulated by the Rules of the Supreme Court, 1883, and 20 partly an inherent jurisdiction which we possess as judges of the High Court. The question is whether either by the rules or by reason of our inherent jurisdiction we have the power to reinstate this appeal. Order XXXVI., r. 33, is one of a number of rules dealing with the trial of an 25 action and applies only to verdicts and judgments at the trial. It might be contended that the existence of such a rule is rather against the plaintiff than in his favour, because, if there was an inherent jurisdiction to set aside an order where one party does not appear at the trial, 30 the rule would not have been necessary. On the other hand it might be said that the rule was made ex abundanti cautela, and so in my view that point is not of much weight. Then does this application come within the special rules regulating the procedure of the Divisional Court in appeals 35 from inferior Courts? Read in their widest sense the words of Order LIX., r. 16, that the Court may 'make any other order, on such terms as the Court shall think just, to ensure the determination of the merits of the real questions in controversy between the parties', might afford 40

grounds for the present application, but having regard to the position and context of those words, I think that it would be straining their meaning to make them cover this case. The rule is not aimed at applications of this class. 5 In my opinion the rules do not confer on us the jurisdiction we are asked to exercise.

Then as to the inherent jurisdiction of the Court. Before the Judicature Acts the Courts of common law had no jurisdiction whatever to set aside an order which had been 10 made. The Court of Chancery did exercise a certain limited power in this direction. All Courts would have power to make a necessary correction if the order as drawn up did not express the intention of the Court; the Court of Chancery, however, went somewhat further than that, 15 and would in a proper case recall any decree or order before it was passed and entered; but after it had been drawn up and perfected no Court or judge had any power to interfere with it".

The present case is distinguishable from *Orphanides* case and 20 *Hession* case in that the judgment in the present case has been reserved and is still pending. There is no provision, as already mentioned, in the rules enabling the Court to exercise jurisdiction in the matter. It is clear, however, from the above authorities, that it is within the inherent power of the Court to deal with 25 an application in the nature of the present one.

Having so found, we are now coming to consider whether in the circumstances of the present case, we are justified to exercise our discretion in granting this application.

To the facts of the case, already related, we have to add the 30 following, after a perusal of the record of this appeal. This appeal was originally fixed for hearing on the 13th July, 1983 and it had to be adjourned for want of time in the presence of counsel, for the 5th September, 1983. Counsel for applicant was present on that day for the purpose of the hearing of the 35 appeal. On the 1st September, 1983 counsel were informed that the appeal was taken off the list of cases fixed on the 5th September, 1983 and was to be fixed on a future date. It was finally fixed on the 17th October, 1983 and the notice for hearing

was served on the address for service of counsel appearing in this case.

It is clear from the argument advanced by counsel for the applicant that he was opposing this appeal and this is manifested by his attendance on the day when the appeal was originally fixed for hearing. The fact that the notice of the hearing of the appeal was served at the law office which was the address for service of counsel for the applicant in Nicosia is not disputed and according to the affidavits in support of the application, such notice was mailed to counsel for applicant to his office at Larnaca. It appears also from the affidavit sworn by counsel for applicant and his partner, that such letter never reached its destination. These facts have not been contested by counsel for the appellant who, in fairness to his colleagues, did not oppose this application and left the matter at the discretion of the Court.

It is a well established principle that "interest reipublicae ut sit finis litium" (it is in the interest of the State that litigation should come to an end). Such principle has been safeguarded by our Constitution which provides for a speedy trial and has been repeatedly pronounced in our case law. In *Edwards* v. *Edwards* [1968] 1 W.L.R. 149 the President of the Probate Divorce and Admiralty Division of the High Court in England is reported to have said at page 150:

> "Most relevant of all to this application, it is desirable that disputes within society should be brought to an end as soon as is reasonably practical and should not be allowed to drug festeringly on for an indefinite period".

In the special circumstances of this case and bearing in mind that the alleged facts have not been contested by counsel appearing for the appellant and the application has not been opposed by counsel for appellant who is concerned with the speedy outcome of this appeal, we have decided, though not without great reluctance and without laying down a general rule in this respect, to grant the application and allow the applicant to address the Court in this appeal.

Before concluding, however, we wish to drawn the attention of advocates from other districts who have an office for address

of service in Nicosia, that they have a duty to make such arrangements through such office to be kept informed in time about the date when an appeal in which they appear is fixed, or make inquiries through the Registry of the Court as to the position 5 of their appeal, especially in view of the fact that civil appeals are fixed well ahead of the date of hearing.

The costs of this application to be in favour of the appellant.

Application granted. Costs of application in favour of appellant.