1984 November 27

[L. LOIZOU, HADJIANASTASSIOU AND MALACHTOS, JJ.]

PANAYIOTOU CHARALAMBOUS MAKRI,

Appellant-Plaintiff,

v.

1. SAVVAS CHARALAMBOUS MAKRIS,
2. KYRIAKOS CHARALAMBOUS PAPASTEFANOU,
3. ADMINISTRATRIX OF THE ESTATE OF THE DECEASED CLEANTHIS CHARALAMBOUS MAKRIS I.E. LAMPIDONA NEOFYTOU,

Respondents-Defendants.

(*Civil Appeal No.* 5023).

Immovable property—Arazi mirie category—Possession which is not registered—Whether in 1926 *there could be devolution by inheritance—Position governed by Article* 54 *of the Ottoman Land Code.*

Immovable property—Rights in—Abandonment of—Whether for an abandonment to be valid in law it should be made in favour of a specific person or to the world at large.

Civil Procedure—Practice—Evidence—Matter not set up in terms by way of defence—But evidence given thereon without objection by the other party—Trial Court entitled in law to receive evidence as to such matter.

This was an appeal against the dismissal of plaintiff's action for a declaration that a piece of land in the area of Ypsonas village belonged to her by virtue of continuous and uninterrupted possession since the year 1904. The issues for consideration in the appeal were the following:

(a) Whether the registration in the name of the respondent under a C.P.A.L. in 1926 and any subsequent registrations were all null and void as they were not based on possession but they were all based on inheritance from the father of the litigants.

(b) Whether for an abandonment of the right to registration of immovable property to amount in law to abandonment such abandonment should be to the world at large and not to a specific person.

(c) Whether in the absence of an allegation of abandonment in the pleadings the trial Judge was in law entitled to make a finding of abandonment.

Regarding (a) above Counsel for the appellant submitted that the devolution of arazi mirie at the particular time was not governed by the Wills and Succession Law of 1895 but by Article 54 of the Ottoman Land Code, which was amended by the Law of 17 Muharrem, 1284, and so if the possession was not registered, then, there could be no devolution by inheritance; and regarding (c) above although in the defence abandonment was not specifically pleaded there was a general denial of paragraph 1 of the statement of claim where it was stated that the plaintiff was in possession of the disputed property as from 1904 till the day of the institution of the action on 6th December, 1969. Furthermore, evidence was adduced at the trial, without objection, that as regards the property in dispute there was litigation between the respondent in this appeal and the son of the appellant in Action No. 1821/65, the file of which was produced by the Registrar of the District Court and the notes of proceedings at the hearing of this action of 7.11.1966, where an allegation was put forward on behalf of the said son of the appellant, that the property in dispute was granted to him by his mother in 1938.

Held, (1) that this Court entirely disagrees with the submission of counsel that the property in question could not devolve upon the children of the deceased who had never in their possession the disputed land after his death or that if the possession is not registered there can be no devolution by inheritance (see Article 54 of the Ottoman Land Code).

(2) That the legal position is the same and makes no difference as to whether there is abandonment of one's rights in immovable property in favour of a specific person or abandonment to the world at large.

(3) That the trial Judge was in law entitled to receive evidence on abandonment and act upon it.

Appeal and cross-appeal dismissed.

Cases referred to:

Papageorghiou v. *Komodromou* (1963) 2 C.L.R. 221;

Mourmouri v. *Hji Yianni*, 7 C.L.R. 94 at p. 96;

Loizou v. *Philippou*, 6 C.L.R. 105.

Appeal.

Appeal by plaintiff and cross-appeal by defendant 1 against the judgment of the District Court of Limassol (Chrysostomis, Ag. P.D.C.) dated the 16th October, 1971 (Action No. 3279/69) whereby plaintiff's claim for a declaration that a piece of land at Ypsonas village belongs to her by virtue of continuous and uninterrupted possession was dismissed.

M. Houry, for the appellant.

Y. Potamitis, for the respondents.

Cu. adv. vult.

L. LOIZOU J.: The judgment of the Court will be delivered by Mr. Justice Malachtos.

MALACHTOS J.: This is an appeal by the Plaintiff against the judgment of a District Judge of the District Court of Limassol in Action No. 3279/69 where her claim for a declaration of the Court that a piece of land situated at locality "Mandres" in the area of Ypsonas village, described in S/P 53/62, comprising plots 330/1, 331/1 and 582/2, belongs to her by virtue of continuous and uninterrupted possession since the year 1904, was dismissed.

It is common ground that the property in dispute was of arazi mirie category and was initially possessed by a certain Charalambos Savva Makris, late of Lofou village, who died in 1912, leaving as his heirs his children, namely,

1. Savvas Charalambou Makris, defendant No. 1 in the action;
2. Andromachi Makri, wife of Papastefanos Neokleous;
3. Maritsa Charalambou Makri;

4. Panayiota Charalambou Makri, the plaintiff in the action; and

5. Cleanthis Charalambou Makris, deceased, whose wife is Lampidona Neofytou, administratrix of his estate, defendant 3 in the action.

From the evidence of the D.L.O. clerk, which was accepted by the trial Court as true and correct, it is shown that the land in dispute was never registered in the name of the said Charalambos Savva Makris but he was entitled to be registered as owner by virtue of possession. The registrations in the name of his children, were made on the basis of inheritance from their father.

For the said plots, there is a registration under No. 16267, which has been identified with the original certificate of registration under the above number. From this certificate of registration it is shown that the plaintiff in the action is the registered owner of 180/900 undivided shares in the said plots. This registration is dated 30.6.1964 and derives from inheritance from her father. There is an earlier registration in the name of the plaintiff dated 30.3.1950, No. 13846 for 180/900 undivided shares on plot No. 331/1 S/P 53/62. This registration resulted again from inheritance from her father. The plaintiff never applied to the D.L.O. for registration in her name of any share.

Defendant 2 in the action, is the registered owner of 30/900 undivided shares on all three plots described above. His registration is dated 30.6.1964.

Cleanthis Charalambou Makris, the late husband of administratrix defendant 3, is the registered owner of 180/900 undivided shares on all three plots above described, and the registration is dated 30.6.1964.

It must be noted here that both defendants 2 and 3 did not enter an appearance in the action and, in fact, at the trial gave evidence as witnesses No. 2 and 3 for the plaintiff.

From the records of the D.L.O. it appears that neither Defendant 2 nor Cleanthis Charalambou Makris, the deceased, ever applied for registration of those shares in their respective names.

It also appears that 510/900 shares in the said plots are registered in the name of the defendant 1, respondent in this appeal, under registration No. 16267. The 150/900 shares out of 510/900 shares derive from a gift made to him by Neoklis, Christoforos, Styliani and Antonis Papastefanou, being three of the children of Andromachi Charalambous Makri, and Parthenopi Kyriakou Stylianou, on 7.11.1964. The registration in the name of all the above donors is dated 30.6.1964.

A further share of 180/900 out of 510/900 shares standing registered in the name of defendant 1, derives from Maritsa Charalambous, his sister, under registration 16267 dated 30.6.1964. This registration No. 16267 derives from a previous registration No. 13846 in her name dated 30.3.1950 and is an original registration by inheritance from her father.

All the above registrations were effected after 1st September, 1946 when the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, came into operation.

As regards the remaining 180/900 shares out of the 510/900 standing registered in the name of defendant 1, the history is as follows:

Defendant 1 was for the first time registered as owner of 1/5 share in plot 331 on 19.1.1926 by virtue of C.P.A.L. No. 365 of 1925. The D.L.O. recorded these shares as deriving from inheritance from his father. This is an original registration and refers to S/P 53/62 of an extent of 5 donums. This share of defendant 1 was sold by public auction by his judgment creditors and was registered on 15.7.1927 under registration No. 8189 in the name of various persons. Another registration followed on 30.5.1950 No. 13846.

On 30.6.1964 the remaining 180/900 shares were transfered in the name of defendant 1 and in the D.L.O. books is stated that this registration derives partly from a previous registration dated 17.10.1950 which defendant 1 purchased and partly by inheritance from his father.

In support of the case for the plaintiff before the trial Court, seven witnesses gave evidence, including the plaintiff herself, and two of her five sons, namely, Christofis Antoni Papa and Charalambos Antoni Papa as P.W.6 and P.W.7, respectively.

The defendant gave evidence himself and called only one witness in support of his case, namely, the Registrar of the District Court of Limassol who produced the file of Civil Case No. 1821/65 which was instituted by him against Chrostofis Antoni Papa, P.W.6 in the present proceedings. In that action the subject matter was the disputed property and the defendant Christofis adduced a counterclaim alleging that the said property was given to him by his mother, the present appellant in 1938 when he got married by way of dowry.

On the evidence adduced the trial Judge made the following findings, which appear at page 38 of the record and which, as stated by him, would help him to find the true facts of this case:

"(1) I do not accept that the plaintiff was married in 1904 as alleged by P.W.6 and on this point I prefer the evidence of the plaintiff which is based on computation of time calculated from the time of the happening of certain important matter such as the death of her father than the date which was expressly stated by the Plaintiff, which must have been meaningless to her due to her impaired memory. I watched her demeanour and I am satisfied that I cannot rely on the express mention of dates to which she referred. I therefore accept that she got married in 1910 or 1911.

(2) Having accepted that plaintiff got married in 1910 or 1911 then any allegation by the plaintiff as to the year she started possessing the land in dispute must be brought forward to 1910 or 1911 as her firm allegation was that she started possessing the land from the time she got married when her father gave it to her.

(3) As to whether the plaintiff was in fact in possession of the disputed land as from 1910 or 1911 or later or at all, having in mind the above findings, the evidence as a whole and in particular that of P.W.3 who impressed me as a truthfull and reliable witness, I arrive at the conclusion that the plaintiff was not in possession of the land in dispute earlier than her father's death. No question of dowry arises and learned counsel for the Plaintiff stated that Plaintiff does not rely on this ground. I accept that her

father's heirs were holding the property of their father jointly and that from 1917 upto 1920, following an agreement between them, they divided the inherited property between themselves.

(4) Following this agreement plaintiff started occupying the said land to the exclusion of her brothers and sisters since 1920.

(5) It was not safe to accept the evidence of P.W.5, P.W.6 and P.W.7 due to their young age at the material time. I watched their demeanour and they gave me the impression that they were exaggerating and I could not rely on the whole of their evidence and, in particular, as to the time when plaintiff started possessing the land in dispute. I accept, however, their evidence that plaintiff was in possession from 1920 onwards and not earlier.

(6) The allegation of defendant 1, that he was in possession of the land in dispute and not the plaintiff, cannot stand. In the course of his evidence it became clear that he was only claiming 2 donums of the land in dispute and not the whole extent as initially alleged. At a later stage he said that he gave those 2 donums to his daughter Theonitsa as a dowry in 1921 when she got married. That the property he said, which he gave to Theonitsa as above and was cultivated by her husband Zacharias from 1921 to 1935 or 1955, was whatever he gave them in the land in dispute. Then he said that this property, which he gave to his daughter, is adjoined to the land in dispute and it is this property which he gave to Maritsa in exchange for her share in the land in dispute and of which he is now the registered owner".

As to what were the true facts of the case, the trial Judge, at page 39 of the record, concluded as follows:

"The plaintiff started possessing the land in dispute as from 1920, following an agreement for partition with her brothers and sisters. This property was inherited from her father who died in 1912. The deceased was never registered as owner of the said land but was entitled to be registered as such. The deceased father had five children. This land from 1920 onwards was cultivated by plaintiff

and her husband and later by her children and other labourers on her behalf. On 19.1.1926 by virtue of a C.P. A.L. No. 365 of 1925, 1/5 share in the property in dispute was registered in the name of defendant 1, by virtue of inheritance from his father. This was an original registration. The said share of defendant 1 was sold by public auction by his judgment creditors and was eventually registered on 15.7.1927 to various persons. Other registrations followed on 30.3.1950, on 17.10.50 and on 30.6. 1964, defendant 1 purchased back his share sold by public auction and on the aforesaid date 180/900 undivided shares in the land in dispute were transfered in his name. All the children of Charalambos Savva Makris including the plaintiff or their children were registered on various dates after 1st September, 1946 as stated by P.W.1, the Land Clerk, of their respective share in the land in dispute by virtue of inheritance. Certain of those shares were transfered later in the name of defendant 1, who is now standing registered of 510/900 undivided shares in the land in dispute. Plaintiff is standing registered of 180/900 undivided shares in the land in dispute.

The Plaintiff continued possessing the land in dispute upto 1938 and from then on she gave it to her son Christofis Antoni Papas when he got married and since then, as she put it, 'he is in possession and he cultivates it'. I do not accept that plaintiff since then acted as owner of the land in dispute but on the contrary her said son did, and this is apparent from the evidence adduced".

The trial Judge then posed the following question: "Has the plaintiff acquired a prescriptive right which can be legally enforced? And, if so, has she abandoned her right or not?"

The trial Judge then proceeded and considered the legal position prior to and after the 1st September, 1946, the day of coming into force of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 and made extensive reference to the case of *Papageorghiou* v. *Komodromou*, (1963) 2 C.L.R. 221 and the cases referred to therein and concluded, at page 43 of the record, as follows:

"Plaintiff possessed the land in dispute from 1920 upto 19.1.1926 when it was registered for the first time in the name of Defendant 1. Another registration was issued on 15.7.1927. So, due to these registrations the computation of any period of prescription has to start afresh from 1927. In fact Plaintiff completed upto 1938 10 years possession, the time required by Law. But can it be said that she acquired prescriptive rights against the other heirs including Defendant 1? Excluding the agreement for partition, the answer is in the negative. Griffith William J., in the case of *Olga N. Hj.Louca* v. *Stella Savvides* (Civil Appeal No. 4122, dated 8.3.1955 had this to say:

> 'There is no authority before us that members of the same family who inherited from a common ancestor undivided shares in property can acquire prescriptive rights against each other'.

That possession by a co-owner by inheritance will not be deemed adverse to the other co-heirs not in possession, was followed in the case of *Chakarto* v. *Liono* (1954) 20 C.L.R. Part I, 115.

However, if there is partition coupled with possession then the co-heir is entitled to possession. In the present case there was an agreement for partition in 1920 coupled with possession. But due to the subsequent registration, the computation of time must start afresh from 1927. From 1927 upto 1938 the plaintiff completed the period of ten years required and hence she would have been entitled to the prescriptive title over the land in dispute provided that this was what she claimed in the Statement of Claim. In fact this is not so as Plaintiff does not rely on partition and inheritance. (*Kyriaki* v. *Kyriaki* (1895) III C.L.R. 145).

But plaintiff irrespective of the pleadings although she would have been entitled to apply for registration on the basis of the facts as found by me, failed to do so and instead she abandoned her rights to her son Christophis Antoni Papa. From 1938, upto the date of this action, 31 years elapsed and in the meantime other registrations followed".

The grounds of appeal, as argued by counsel for the appellant, may be summarised as follows:

1. The registrations referred to by the trial Court of the disputed property are nullities since they are all based not on possession but on a supposed devolution by inheritance from the father of the parties, who at no time was a registered owner of the said property which was of arazi mirie category; and

2. The finding of the trial Court that the appellant lost her right because she did not apply for registration in her name and that she abandoned this right in favour of her son Christofi Antoni Papa from 1938 upto the date of the action, is wrong and is against the weight of the evidence adduced, and

3. The trial Court was precluded by the pleadings to find abandonment of the rights of the appellant since this allegation was never pleaded by the respondent.

As regards the first ground, counsel for the appellant submitted that the registration in the name of the respondent under a C.P.A.L. in 1926 and any subsequent registrations are all null and void as they were not based on possession but they were all based on inheritance from the father of the litigants. He further submitted that the devolution of arazi mirie at the particular time was not governed by the Wills and Succession Law of 1895 but by Article 54 of the Ottoman Land Code, which was amended by the Law of 17 Muharrem, 1284, and so if the possession is not registered, then, there can be no devolution by inheritance.

We must say straight away that we entirely disagree with the submission of counsel that the property in question could not devolve upon the children of the deceased who had never in their possession the disputed land after his death or that if the possession is not registered there can be no devolution by inheritance. Article 54 of the Ottoman Land Code is clear on this point. This Article reads as follows:

"Art. 54. On the death of a possessor of State or mevqufe land of either sex the land devolves in equal shares, gratuitously and without payment of any price, upon his

children of both sexes, whether residing on the spot or in another country. If the deceased leaves only sons or only daughters, the one or the other inherit absolutely without the formality of purchase. If the deceased leaves his wife pregnant the land remains as it is until the birth".

The amendment of this Article by Article 1 of the Law of 17 Muharrem 1284, did not affect or alter the rights as regards devolution of State land by inheritance under the above Article but its main object was to extend the right of inheritance to various other classes of persons as regards State and mevqufe land. This Article reads as follows:

"Art. 1—The provisions of the Land Code which established the right of succession with regard to State and mevqufe lands possessed by title-deed in favour of children of both sexes in equal shares are preserved. In default of children of either sex (who constitute the First Degree) the succession to such land shall devolve on the heirs of subsequent degrees in equal shares without payment of any price as follows:-

2nd. Grandchildren, that is to say sons and daughters of children of both sexes.

3rd. Father and mother.

4th. Brothers and half-brothers by same father.

5th. Sisters, and half-sisters by the same father.

6th. Half brothers born of the same mother.

7th. Half sisters born of the same mother.
and, in default of heirs of all the above degrees,

8th. Surviving spouse".

As regards the other grounds of appeal, counsel for the appellant submitted that there is no evidence on record to support a finding of abandonment. But even if we assume, he argued, that the appellant granted the disputed property to her son in 1938, this does not amount in law to abandonment as abandonment should be to the world at large and not to a specific person, as in the present case. This proposition, he said, finds support in the case of *Mourmouri* v. *Hji Yianni*, 7 C.L.R. 94 at page 96.

Finally, he submitted, that since there was no allegation of abandonment in the pleadings of the respondent, the trial Judge was not in law entitled to make such findings.

As we said earlier in this judgment, the finding of the trial Judge that the appellant was in possession of the disputed property from the year 1920 to 1938, by virtue of an agreement for division between the heirs of the father of the litigants, is subject to a cross appeal, we consider it appropriate to deal with this matter at this stage.

Counsel for the respondent submitted that it was not reasonably open for the trial Judge, on the evidence adduced, to make such finding.

As to the findings of fact by the trial Judge, we must say that we have not been persuaded by counsel for the parties to disturb such findings on the ground that they are against the weight of evidence or that they are not supported by the evidence adduced. On the contrary, having gone through the record of proceedings we hold the view that it was reasonably open for the trial Judge to make such findings. There is ample evidence that the appellant started possessing the disputed property in or about 1920 and held it up to 1938, when she gave it to her son and in our view the trial Judge was right in deciding that this amounted to renunciation of her rights in favour of her said son, and, consequently, she could not come back after the lapse of so many years and claim registration in her name.

We also reject the submission of counsel for the appellant that the case of *Mourmouri*, supra, supports the proposition that abandonment in law means that it should be to the world at large only and does not include renunciation of rights in favour of a specific person. What was decided in *Mourmouri* case, appears at page 96 of this report and reads as follows:

> "It is we think an undoubted proposition that, if a person, who is entitled to set up a prescriptive right against another person, expressly renounces his prescription, or does an act which is by implication equivalent to renunciation, he cannot afterwards assert the prescription against the person in whose favour he had renounced it.
>
> It may also be true (though we reserve our opinion until the case actually arises), that if a person, who by

prescription has acquired a right of registration to mulk immovable property, deliberately abandons that property without any intention of returning to it, he cannot afterwards assert his right to registration as against a person who subsequently assumes possession of it.

We do not think that in this case the act of the plaintiff in pulling down the rafters and ceasing to make any use of the property amounts either to renunciation of her rights in favour of her brother, or to its abandonment to the world at large".

It follows from the above that the legal position is the same and makes no difference as to whether there is renunciation of ones rights in immovable property in favour of a specific person or abandonment to the world at large.

Useful reference may be made to the case of *Loizou* v. *Philippou*, 6 C.L.R. page 105, where it was held that the person who is entitled to be registered as owner by possession, but has abandoned his rights and since the land is in possession by a third person, he cannot be in a position ab infinitum to claim registration by possession in his name and cancellation of the registration of the registered owners. There must be a finality of these rights if they are expressly or impliedly abandoned.

As regards the submission of counsel for the appellant that abandonment has not been pleaded by way of defence and so the trial Judge was not in law entitled to find abandonment, we must say that although in the defence abandonment is not specifically pleaded, yet, there is a general denial of paragraph 1 of the statement of claim where it is stated that the plaintiff was in possession of the disputed property as from 1904 till the day of the institution of the action on 6th December, 1969. Furthermore, evidence was adduced at the trial, without objection, that as regards the property in dispute there was litigation between the respondent in this appeal and the son of the appellant in Action No. 1821/65, the file of which was produced by the Registrar of the District Court and the notes of proceedings at the hearing of this action of 7.11.1966, where an allegation was put forward on behalf of the said son of the appellant, that the property in dispute was granted to him by his mother in 1938.

In the case of *Manoli* v. *Evripidou* (1968) 1 C.L.R. 90 at page 100, the following is stated:

"In the present case the question of the condition of the respondent's hearing prior to the accident was not set up in terms by way of defence; the appellant denied generally the particulars of injuries and the incapacity alleged in the statement of claim and put the respondent to the strict proof thereof (para. 3 of the Defence); but it was made an issue without objection before the trial Court. Three out of the four witnesses called for the defendant gave evidence to the effect that the respondent was hard of hearing since his childhood. Not only there was no objection to this evidence on the part of the respondent but on the contrary he applied and was granted leave to call evidence in rebuttal and thereupon proceeded and called six witnesses on this issue. It seems to us quite impossible in those circumstances for counsel for the respondent to say in this Court that he was taken by surprise and not given an opportunity of contradicting such evidence and that that issue was one which ought not to have been taken into consideration in view of the pleadings. *Tomlinson* v. *The London, Midland and Scottish Railway Co.* [1944] 1 All E.R. p. 537; see also *Christodoulou* v. *Menicou* (1966) 1 C.L.R. 17 at p. 35".

It is clear, therefore, that the trial Judge was in law entitled to receive such evidence and act upon it.

In the result, both the appeal and the cross-appeal are dismissed.

There will be no order as to costs either of the appeal or the cross appeal.

Appeal and cross-appeal dismissed.