1984 July 19

[TRIANTAFYLLIDES, P., HADJIANASTASSIOU, MALACHTOS, DEMETRIADES, SAVVIDES, JJ.]

EKATERINI EPAMINONDA AND OTHERS,

Appellants,

v.

THE CHAIRMAN AND MEMBERS OF THE MUNICIPAL COMMITTEE OF LIMASSOL,

Respondents.

(*Revisional Jurisdiction Appeal No.* 230).

Compulsory acquisition—Non attainment of purpose—Legal and constitutional obligation of an acquiring authority for return of property—Independently of the fact that such obligation may be of a continuing nature, cannot be subject to a challenge indefinitely once there has been an express refusal by the administrative organ concerned to perform what has been omitted to be done.

Time—Within which to file a recourse—Article 146.3 *of the Constitution—Omission—Continuing omission—When a decision refusing to do something is taken and is brought to the knowledge of the person affected, the continuing effect of such omission is terminated and the time of* 75 *days period for filing a recourse commences to run from the date of such refusal.*

The appellants were the heirs of the deceased Takis Epaminonda, who was the registered owner of immovable properties ("the properties") situated at Limassol. In June 1961 the Council of Ministers sanctioned the compulsory acquisition of the properties by the respondent for the purpose of creating within the Municipal limits of Limassol of a wholesale market of perishable goods and parking place for vehicles.

In November 1966 the appellants filed a recourse complaining against the omission of the respondents to offer the properties to them on the ground that the purpose of the acquisition had

not been attained. This recourse was withdrawn on July 21 1977 by means of a letter* which was addressed to the Chief Registrar by Counsel for both sides.

On October 19, 1968 the appellants, through their advocates, asked the respondents to offer to them the properties, in accordance with the law and the Constitution, on the ground that they had not been put to the uses for which they had been expropriated but to unauthorised uses. The respondents replied by letter of their advocate dated the 8th November, 1968, whereby they rejected appellants' claim for the return to them of the acquired properties and referred to the settlement reached between the parties to this recourse and to the written notice dated the 21st July, 1967 signed by both Counsel on the basis of which the recourse was withdrawn.

On March 6, 1978, counsel for the appellants addressed a further letter to the respondents in which it was stated that the purpose of the acquisition had been definitely abandoned and that the respondents were under an obligation to return the properties to their lawful owners. The respondents replied by letter dated the 15th March, 1978 confirming, inter alia, their aforesaid letter dated 8th November, 1968 by means of which appellants' claim for the return of the properties was rejected.

On September 16, 1978 appellants addressed a further letter to the respondents in which it was stated that they (appellants) were not bound by the settlement reached in the previous recourse and that they had a right to take back their property. The respondents replied by letter dated the 4th December, 1978 and informed the appellants that they had no reason to revert to the subject.

There followed a recourse by the appellants which was filed on the 15th February, 1979. The trial Judge dismissed the recourse as being out of time and hence this appeal in which it was mainly contended that the omission to return the property in question was a continuing one as it was an omission to return the property as bound by law to do so.

* The letter is quoted at pp. 1538–1539 post.

Held, that the legal and constitutional obligation of an acquiring authority to return properties compulsorily acquired to their owners when the purpose of the acquisition has not been attained, independently of the fact that such obligation may be of a continuing nature, cannot be subject to a challenge indefinitely once there has been an express refusal by the administrative organ concerned to perform what has been omitted to be done; that when a decision refusing to do something is taken and is brought to the knowledge of the person affected, the continuing effect of such omission is terminated and the time of 75 days period for filing a recourse commences to run from the date of such refusal; accordingly the appeal must be dismissed (*Papasavva* v. *The Republic* (1979) 3 C.L.R. 563 followed).

Appeal dismissed.

Cases referred to:

Mustafa v. *Republic*, 1 R.S.C.C. 44 at p. 47;

Papasavva v. *Republic* (1979) 3 C.L.R. 563 at pp. 568, 569;

Papasavva v. *Republic* (1973) 3 C.L.R. 467 at pp. 475–476.

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (A. Loizou, J.) given on the 14th June, 1980 (Revisional Jurisdiction Case No. 86/79)* whereby appellant's recourse against the decision of the respondents not to offer back to appellant immovable properties, which belonged to the deceased Takis Epaminonda and which had been compulsorily acquired, was dismissed.

G. Cacoyiannis with *P. Pavlou*, for the appellants.

Y. Potamitis with *A. Triantafyllides*, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal against the decision of a Judge of this Court sitting in the first instance whereby he

* Reported in (1980) 3 C.L.R. 280.

dismissed the recourse of the appellants by which they were praying for—

> "A declaration that the omission of the Respondents to offer and/or their decision not to offer to the Applicants the immovable properties described in Schedule I annexed hereto (hereinafter referred to as 'the properties') which belonged to the deceased Takis Epaminonda, late of Limassol, and had been compulsorily acquired by the Respondents or their predecessors, the Municipal Corporation of Limassol, ought not to have been made and/or that it is null and void and of no effect whatsoever, as being contrary to the provisions of the Constitution and in particular of paragraph 5 of Article 23 thereof and/or of the Compulsory Acquisition of Property Law, of 1962 (No. 15/1962) and in particular of section 15(1) thereof and/or that it was made or taken in excess and/or in abuse of their powers".

The facts of the case which have not been contested, are as follows:

The appellants are the heirs of the deceased Takis Epaminonda, who was the husband of appellant 1, and the father of the others. He was the registered owner of the aforesaid properties when on the 29th June, 1961, the Council of Ministers by Notification No. 338 published in Supplement No. 3 to the official Gazette of the Republic, dated the 22nd September, 1961, (Exhibit 'L') sanctioned the compulsory acquisition of the aforesaid properties by the respondents or their predecessors, the Municipal Corporation of Limassol.

The purpose for which the said properties were compulsorily acquired was the "creation and/or establishment within the municipal limits of Limassol of a Wholesale Market of Perishable Goods and Parking Place for vehicles".

The compensation for such properties was subsequently agreed at £20,000.—which was paid to the appellants.

In November, 1966, the appellants filed in the Supreme Court Recourse 286/66 (the file of which has been produced as exhibit 'O'), by which they sought a declaration, framed almost verbatim as the one claimed by the present recourse, i.e. that the

omission of the respondents to offer the said properties to them at the price at which they were acquired was contrary to the Constitution and/or the Law and was in excess and/or in abuse of the powers of the respondents. This relief sought was based on the fact that the purpose of the acquisition had not been attained within three years from the date of such acquisition, in fact it had not been attained until the date of the filing of that recourse, nor had any work been commenced for the attainment of such purpose.

That recourse was preceded by correspondence exchanged between the parties, by which the appellants by letter through their advocate, dated the 30th August, 1966, requested the respondents to offer to them the said properties in accordance with the provisions of the Constitution and the Compulsory Acquisition of Property Law, 1962, (Law No. 15 of 1962) on the ground that the said acquisition had not as yet been attained. The respondents by letter dated the 7th September, 1966 replied that they did not agree with the contents of the said letter of the appellants and they could not accept their claim. The opposition to the said recourse was filed setting out the relevant grounds of Law on which the claim of the appellants was opposed. In the statement of facts the respondents stated, inter alia, that they had been actively engaged on the project of the municipal market since the date of the acquisition and had engaged for that purpose, an architect to prepare the necessary plans and after referring to several steps taken it concluded by saying that it would be seen from such steps that far from the purpose having become unattainable they were about to commence fulfilling the purpose of that acquisition.

The case came up for hearing on the 27th March, 1967 and counsel appearing for both sides addressed the Court on the issues. It was then adjourned for the purpose of calling evidence. As the record goes, by letter dated the 21st July, 1967, counsel appearing for both sides informed the Chief Registrar of the Supreme Court as follows:

"Please take notice that the above Recourse has been settled out of Court as follows:

The Respondents have agreed and undertaken the obligation to pay to the Applicants the sum of £4,500.000 mils

(Four Thousand and Five Hundred Pounds) in consideration for the withdrawal by the Applicants of this Recourse which shall be deemed to have been settled accordingly.

In view of the above promise and undertaking this Recourse is hereby withdrawn and we pray that it be dismissed with no order as to costs".

Thereupon, the case was struck out with no order as to costs.

The appellants through their then advocates Messrs. M.M. Hourry & Co., by letter dated the 19th October, 1968 (exhibit 'Q') asked the respondents to offer to them the said properties in accordance with the Law and the Constitution. The appellants were themselves prepared to return the £20,000.—and £4,500.—which they had received from the Municipality, as compensation and by way of settlement respectively. It was mentioned therein that the Municipality had not put the land so far to the uses for which it had been expropriated but on the contrary the land had been put to unauthorised uses; it was also added that in the meantime the Municipality had accepted a large area of land in Limassol (Ayia Philaxi) from Mr. Petros Tsiros, as a gift, for the purpose of establishing the projected market and parking grounds for which their clients' land had been acquired, which virtually meant—as stated in the said exhibit—that the Municipality had abandoned the scheme for which their clients' land was acquired.

The respondents, by letter through their advocate dated the 8th November, 1968, (exhibit 'F'), replied to the aforesaid letter and referred to the settlement reached between them and the appellants, and to the written notice dated the 21st July, 1967, signed by both counsel and on the basis of which Recourse No. 286/68 was withdrawn. It appears that sometime between 1973–1974 the respondents built the wholesale market for perishable goods with parking space for vehicles in the outskirts of the town on the property donated by Mr. Tsiros. There is a further letter dated the 6th March, 1978, (exhibit 'J') which was addressed to the respondents on behalf of the appellants through one of their present Counsel, in which after reference is made to the compulsory acquisition of the property in question it is stated:

"In accordance with the provisions of the Constitution immovable property that has been acquired compulsorily can be used only for the purpose for which it was so acquired. In addition, the acquiring authority is under obligation to offer the immovable property to its owner, if within three years from the date of the acquisition the purpose of the acquisition has not been attained.

In the case of the immovables of the late Takis Epaminonda, the purpose of the acquisition has neither been nor in the future can be attained because the project which was programmed to take place in the space of this immovable property has already been executed in another place.

As it is known in 1966 the heirs of the late Taki Epaminonda asked the return of the aforesaid immovables and when the Municipality refused they filed a recourse in the Supreme Court. In the opposition filed in that recourse, the Municipality of Limassol alleged that its intention was to attain the purpose of the acquisition and based its case on the allegation that the purpose continued to be attainable. As you know that recourse was withdrawn after the payment to the applicants of additional compensation of £4,500.-.

To-day when it is unquestionable that the purpose of the acquisition has been definitely abandoned, we believe that the Municipality is under obligation to return the properties to their lawful owners. For this purpose, in accordance with the Constitution, we ask you to offer the property to our clients without any delay and we inform you that they are ready to return the whole compensation they collected from the Municipality".

On the 15th March, 1978, counsel for the respondents sent the following letter (exhibit 'K') in reply thereto.

"____Your letter dated 6th March, 1978, addressed to the Municipal Committee has been given to me with the instruction that in reply thereto I confirm my letter addressed to you, dated the 7th September, 1966 and my letter to Messrs. M.M. Hourry and Co., advocates of your clients, dated 8th November, 1968, copy of which I attach hereto".

Reference has already been made to the contents of the letter of the 8th November, 1968, (exhibit 'F'). It may be added, however, here that by that letter the respondents were rejecting the claim of the appellants for the return to them of the acquired properties. The stand of the respondents was obvious. The payment of the £4,500.—compensation in return of which the appellants withdrew their recourse No. 286/66 took away from the appellants according to the respondents, the right to claim the return of the said properties. The matter however, did not rest at that.

A further letter, dated the 16th September, 1978, was addressed to counsel of the respondents. After referring to the reasons for the delay in answering the letter of the respondents of the 15th March, 1978, (exhibit 'K') and that they understood the stand of the Municipality as contained in their letter to their colleagues Messrs. Hourry, attached thereto, as being a matter of res judicata, because the same dispute was the subject of recourse No. 286/66, which was settled and withdrawn, they went on to say the following:

"We believe that our clients are not bound by the settlement reached in recourse No. 286/66 for the following reasons:

(a) the sub judice dispute in the aforesaid recourse was the omission of the Municipality to attain the purpose of the acquisition within three years from the date of the compulsory acquisition of the property. The objection of the Municipality was based on the allegation that the purpose continued to be attainable. To-day it is clear that this purpose is not attainable once the whole project was executed in another place.

(b) In section 15 of Law No. 15 of 1962 there are two instances when the acquiring authority must return the property to its owner. The first instance is when the purpose for which the acquisition was made is not 'attained' and the second when 'the attainment of such purpose was abandoned by the acquiring authority.' We do not think that there is room for arguing that in fact in the case we are discussing the purpose has been abandoned. The claim, therefore, of our clients is based on this basis which was not the object of the previous proceedings.

(c) But in addition to the aforesaid we have the fundamental provision of paragraph 5 of Article 23 of the Constitution and of section 14 of Law 15 of 1962 which prohibits the use of property which was acquired for a purpose other than that for which the acquisition was made. Is there an allegation that the property for which we are arguing has not been acquired by the Municipality by means of compulsory acquisition?

For all the aforesaid reasons we apply that our clients have a right to take back their property and return the whole amount which they collected.

For that reason we ask you to inform us which is the final decision of the Municipality so that we shall advise our clients accordingly".

Counsel for the respondents replied on the 29th September, 1978 (exhibit 'H') that although he was of the view that the appellants did not have the rights mentioned in the last paragraph of the aforesaid letter, yet, he would refer same to the Municipal Committee and would inform them accordingly about the latter's decision.

Finally, by letter dated the 4th December, 1978 (exhibit 'I'), counsel for the respondents informed counsel for the appellants that the Municipality of Limassol saw no reason to revert on this subject, i.e. of the heirs of Takis Epaminonda, which had been settled already since many years.

A number of legal grounds were set out in the recourse in support of the prayer. The recourse was opposed and one of the grounds set out in opposition, was that the recourse was filed out of time and in consequence it was not amenable to the jurisdiction of the Court.

The learned trial Judge after hearing lengthy argument by counsel on both sides, considered it expedient to examine whether the recourse was out of time as the determination of such issue should have put an end to the proceedings.

After reviewing the various authorities cited by the parties, and expounding at some length on the issue involved, the learned trial Judge concluded as follows:

"On the totality of the aforesaid authorities and bearing in mind the facts and circumstances of this case and in particular relying on the authority of *Papasavvas case* (supra) as decided by the Full Bench of this Court, I have come to the conclusion that this recourse is out of time as, to say the least, the decision of the respondents communicated to the applicants by their letter of the 15th March, 1978 (exhibit 'K') rejecting the claim of the applicants for the return to them of the acquired property on the ground that the matter had been settled earlier amounted to a definite refusal with its own legal consequences, same should have been challenged by the applicants under Article 146 of the Constitution as an executory act and as from the communication of which to them the mandatory time of 75 days prescribed by para. 3 of Article 146 of the Constitution started running.

I do not subscribe to the view that because there exists a legal and constitutional obligation to return properties to their owners when the purpose, for which same had been acquired compulsorily, has not been attained, such an obligation constitutes a continuing omission which can be challenged by a recourse indefinitely and that a definite express refusal by the administrative organ concerned, as in the present case, to perform what was omitted, does not set the time limit, prescribed by para. 3 of Article 146 of the Constitution, in motion.

Moreover, no different legal principles, regarding the commencement or the running of the time within which a recourse may be filed govern an omission to perform a legal or constitutional duty, and different ones govern an omission to exercise a discretion when in either instance there supervenes an express definite refusal to perform what until then had been omitted to be done".

As a result of such decision of the trial Court, the present appeal was filed, in which a number of grounds have been set out in the notice of appeal in support of same.

Learned counsel for appellants in arguing this appeal based his argument on the following propositions: The first one is that the omission is a continuing one, as it is an omission to

return the property as bound by law to do so. The second one, that by operation of law, on the happening of certain events, a right is vested in the appellants, which is a right in property and vested rights in property cannot be defeated by procedural formalities. And the third one, that the letter under exhibit 'K', which is the letter that according to the trial Judge set the time of 75 days running, does not constitute any decision and there has been a failure by the Municipality to decide anything.

Learned counsel for the respondents, on the other hand, submitted that in this case we are concerned with a definite decision not to return the property or with a final omission to return it and not with an omission of a continuing nature. Counsel laid stress to the fact that the appellants as far back as 1966 realised that the object for which the property had been acquired had not been attained and as a result filed Recourse No. 286/66 by which they were claiming that the property should be delivered back to them. Such recourse was finally settled by the payment of £4,500.- to the appellants which was accepted by them without any reservation of any rights at all and they withdrew their recourse. As a result, counsel submitted, the position as to the return of the property crystalised and finalized in July, 1967 and in the result, the respondents were free to utilise this property for any other purpose. Counsel contended that irrespective of the finalization of the applicants' claim as already explained, this recourse was filed out of time as the respondents in reply to a new claim raised by appellants about a year later, by letter dated 8th November, 1968 (exhibit 'F'), brought to their notice that they did not intend to return the properties and referred to the settlement reached between the parties as a result of which the previous recourse of the appellants was abandoned. It was the contention of counsel for the respondents that the appellants if they wished to challenge such final decision of the Municipality they should have filed their recourse within 75 days from the communication to them of such letter. Expounding further on the facts of the case, counsel for respondents pointed out that the appellants allowed 10 years to elapse without having taken any step to challenge the omission of the respondents to return the property and they reverted back in March, 1978 by submitting the same request for the return of their property to which the respondents

replied by letter dated 15th March, 1978 rejecting their claim and referring to and repeating what they wrote to them on the 7th September, 1966 and to their advocates on the 8th November, 1968. No recourse was filed within the prescribed period by the appellants if such letter could be considered by the appellants as a new decision.

In the course of their arguments counsel made reference to a number of cases decided by this Court and the previous Supreme Constitutional Court dating as far back as the early stages of the Independence of Cyprus, such as *Hassan Mustafa* v. *The Republic*, 1 R.S.C.C. 44 in which at p. 47, the following were stated:

> "Leaving aside 'decisions' or 'acts', with which the Court is not concerned in this case, and dealing only with 'omissions', a distinction must be made between a non-continuing omission (e.g. the failure of a competent authority to issue a permit in respect of something to be done on a particular date) and an omission which is of a continuing nature".

The above dictum has been referred to and clarified by the Full Bench of this Court in Revisional Jurisdiction Appeal No. 124 in the case of *Papasavva* v. *The Republic* (1979) 3 C.L.R. 563 in which Triantafyllides P. in delivering the judgment of the Full Bench affirming the judgment of A. Loizou, J. said at p. 569:

> "We are of the view that the *Mustafa* case is clearly distinguishable on the basis of its particular facts from the present case and that the abovequoted dictum of the Court in that case has to be read and understood by reference to the said facts----------".

A. Loizou, J. sitting in the first instance in the above case had this to say in his judgment (*Papasavva* v. *The Republic* (1973) 3 C.L.R. 467 at p. 475-476):

> "It is a prerequisite, therefore, to the non-commencement of the running of the time provided for by Article 146.3 of the Constitution as enunciated in the aforementioned judgment of the Supreme Constitutional Court that the omission be of a continuing nature. Otherwise the period commences to run from the date that a non-continuing

omission or when a re-examination takes place comes to the knowledge of the person making the recourse.

It appears, however, that the present case is one where by the re-examination of the matter the continuing nature of the omission was terminated. This was done by the decision taken by the Chief of Police in the light of the judgment of the Supreme Court in Recourse No. 21/69 by the 1st May, 1970 and as a result of which exhibit 3 hereinabove set out, was addressed to the Nicosia Divisional Commander of Police".

This approach was upheld by the Full Bench of this Court *Papasavva* v. *The Republic* (1979) 3 C.L.R. p. 563 at p. 568 where it was held:

"It has often been pointed out by this Court that when a decision refusing to do something is taken it cannot be said that it amounts, also, to an omission to do the same thing (see, inter alia, *Vafeadis* v. *The Republic*, 1964 C.L.R. 454).

We are of the view, on the basis of the facts of the present case, that the decision of the Chief of Police of May 1, 1970, constituted a refusal to reappoint the appellant as an acting police sergeant and that it could not be, therefore, treated as an omission of a continuing nature to do so; and, consequently, that it was rightly held that the time of seventy-five days provided for under Article 146.3 of the Constitution began to run as from August 6, 1970; thus, the appellant's recourse No. 431/72 was out of time".

We need not review the authorities referred to by counsel as this task has already been undertaken by the learned trial Judge in his elaborate judgment (see (1980) 3 C.L.R. pp. 283-294) which we indorse.

On the totality of such authorities and in particular bearing in mind the dicta in *Papasavva* case (supra) we are in agreement with the learned trial Judge that the legal and constitutional obligation of an acquiring authority to return properties compulsorily acquired to their owners when the purpose of the acquisition has not been attained, independently of the fact that such obligation may be of a continuing nature, cannot be

subject to a challenge indefinitely once there has been an express refusal by the administrative organ concerned to perform what has been omitted to be done. We are of the opinion that when a decision refusing to do something is taken and is brought to the knowledge of the person affected, the continuing effect of such omission is terminated and the time of 75 days period for filing a recourse commences to run from the date of such refusal.

We uphold the finding of the trial Judge that the recourse was out of time and that it should fail. In the result, the appeal is dismissed but in the circumstances we make no order for costs.

Appeal dismissed with no order as to costs.