1985 February 28

[TRIANTAFYLLIDES, P., LORIS, PIKIS, JJ.]

ELENI KYRIAKOU PANAYIOTOU,

Appellant-Plaintiff,

v.

KRISOS PANAYIOTOU KYRIAKOU,

Respondent-Defendant.

(Civil Appeal No. 6567).

Credibility of witnesses—Appeal turning thereon—Approach of Court of Appeal.

Immovable Property—Division of property held in undivided shares—Dispute as to whether the delineation of the official survey plan was correct or not—Not an "error" or "omission" within the ambit of section 61 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224—Said dispute could not have been decided by the Director but only by a Court of Law on the evidence adduced. 5 10

These proceedings arose out of a division of a field of 37 donums and 1 evlek owned at the time of the division by two registered owners holding in undivided shares of ½ each. The appellant-plaintiff ("the plaintiff") contended that the D.L.O. in issuing title deeds for the divided land in the name of the respective owners wrongly revised the plot in question so that the title deeds issued did not represent the actual state of the land as possessed and enjoyed by the owners thereof ever since the division took place; and brought an action for a declaration to the affect that she was the owner of a portion of land covering part of the field in question and for an order of the Court directing the rectification of the alleged error in the D.L.O. books, the relevant survey plans and the registration in her name and in that of the defendant so that the disputed portion would be included in the registration in her name 15 20 25

consonant to the agreement for the division of the original plot.

The trial Judge after accepting the evidence of the defendant and rejecting that of the plaintiff dismissed 5 the action: and hence this appeal, which turned on the credibility of the witnesses.

Held, after stating the principles on which the Court of Appeal decides appeals directed against credibility of witnesses-vide pp. 163-164 post, that this Court is not satis- 10 fied that the appellant had discharged the burden cast on her to the effect that the trial Judge was wrong in evaluating the evidence; and that, accordingly, the appeal must fail.

Held, further, on the question whether, in view of the 15 allegation of the appellant that there was an error in the D.L.O. books and registers, she should have resorted to the Director of the D.L.O. availing herself of the provisions of section 61 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 and should 20 not vindicate her alleged rights by action:

That the error alleged in this case is not an "error" or "omission" within the ambit of s. 61 of Cap. 224; that what is actually in dispute is not a dispute as to where the physical boundary should run on the land according 25 to the official survey plan, but a dispute as to whether the delineation of the official survey plan is correct or not, having regard to the agreement made between the parties i.e. the alleged error is incidental to the main issue which concerns the legal rights of the parties ema- 30 nating from their agreement in respect of the division, which could not have been decided by the Director but only by a Court of Law on the evidence adduced (vide *Chrysanthou & Others* v. *Antoniades* (1969) 1 C.L.R. 622).

Appeal dismissed.

35 Cases referred to:

Chrysanthou and Others v. *Antoniades* (1969) 1 C.L.R. 622;

Kyriacou v. *Kortas and Sons* (1981) 1 C.L.R. 551.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Paphos (Miltiadou, D.J.) dated the 18th April, 1983 (Action No. 1082/81) whereby her claim in relation to a portion of land at Ayia Marinouda village, Paphos District, was dismissed and defendant's counterclaim was sustained. 5

E. Komodromos, for the appellant.

A. Magos, for the respondent.

Cur. adv. vult. 10

TRIANTAFYLLIDES P.: The judgment of this Court will be delivered by Loris J.

LORIS J.: By means of the present appeal, the appellant -plaintiff impugnes the judgment of a Judge of the District Court of Paphos in Action No. 1082/81 (A. Miltiadou, D.J.) 15 whereby, the claim of the appellant-plaintiff in relation to a portion of land (coloured red in ex. 1 in the Court below) covering part of plot 93/2/1 of Sheet/Plan LI/13, at Ayia Marinouda village, Paphos District, was dismissed, whereas the counterclaim of the respondent-defendant in 20 respect of the said portion of land was sustained.

The dispute, subject-matter of the case under appeal, sprung up out of a division of a field of 37 donums and 1 evlek, at Ayia Marinouda village, Paphos District, covered by plot 93/2 of Sheet/Plan LI/3 of the Official 25 survey Map, owned at the time by two registered owners holding in undivided shares of ½ each.

The time of such division, as well as the agreement by virtue of which the division was effected on the land are highly controversial. 30

The appellant alleges that the agreement took place around 1950 between her father namely Kyriakos (now deceased, and his brother, the respondent, who were the registered owners of plot 93/2 by virtue of registrations in their names for ½ undivided share each of the whole plot; 35 she further maintains that according to the private division

agreement, each registered co-owner in undivided share would be getting approximately a portion equal to ½ in extent upon the division which was ultimately so effected and delineated on the land with an 'ohto' running from North to South of the whole property.

It is further the contention of the appellant that the D.L.O. in issuing title deeds for the divided land in the name of the respective owners, wrongly revised plot 93/2 so that the title deeds issued do not represent the actual state of the land as possessed and enjoyed by the owners thereof ever since the division took place in 1950; this error in her title deed, the appellant maintains, was realised as late as 1980 when her uncle—the respondent—was parsellating his said field into smaller holdings.

The respondent on the other hand maintains that the agreement for the division was in fact made with his brother Kyriakos (the father of the appellant—now deceased) some time in 1965 when the undivided share of his brother in the field though already given as dowery to the appellant and registered in her name, was still possessed and enjoyed by her father.

It is the contention of the respondent that according to the agreement for the division he would be getting the portion of land to the west which would be greater in extent due to the fact that it was stony and unsuitable for cultivation as contrasted to the portion of the appellant to the east which was fertile. This agreement the respondent alleges, was carried into effect, the division having been delineated with his brother on the land in question with stones forming a sort of ohto, a physical delineation which has been indicated in 1968, on the spot, to the D.L.O. clerk who carried out a local inquiry with a view to effecting registration of the division in question.

According to the evidence of the D.L.O. clerk (P.W.1) who carried out a local enquiry on 16.6.82 pursuant to the Court's Order in the present case, in the presence of the parties, according to the pleadings plot 93/2 of Sheet/plan LI/3 at locality "Moutti tis Ayias Marinas" of Ayia Marinouda village, Paphos District, of an extent of 37 donums and 1 evlek was originally registered by virtue

of Registration No. 1581 in the names of Kyriakos Panayiotou (the father of the appellant) and the respondent for ½ undivided share each.

In 1961 the father of the appellant tranfered his ½ undivided share in the name of the appellant, under a declaration of gift No. D.G. 2753/61, in whose name it was eventually registered under Registration No. 1581 dated 6.9.61. 5

In 1968 appellant and respondent submitted to the D. L.O. Paphos a joint application (A1701)/68—ex. 2), to 10 which title deed under No. 1581 in their respective names was appended, praying the D.L.O. to carry out a local enquiry with a view to issuing new title deeds in the name of each one separately according to the division carried out by them "as it is on the land with ohtos". 15

On the basis of the aforesaid application a D.L.O. clerk, who was called by the defence and gave evidence before the trial Court as D.W.1, proceeded on 28.12.68 to the said property of the litigants, and in the presence of the appellant, her husband and the representative of the chair- 20 man of the village committee took measurements on the spot, *on the basis of which he prepared a plan which* was eventually used for the issue of new separate registrations in the name of each one of the litigants in respect of their holdings according to their physical delineation on the 25 spot.

It is significant to note at this stage that the said D.L.O. clerk (D.W.1) stated in the Court below the following inter alia:

(i) that the property was divided on the land, into 30 two holdings. with stones forming an 'ohto'

(ii) that the property on the spot was not divided into two equal portions

(iii) that the plan he has prepared on the basis of the measurements he has taken on the spot, 35 was corresponding to the existing on the spot state of the property.

After the said local enquiry by D.W.1, the D.L.O.

Paphos following the established practice asked the litigants to give their written consent so that new title deeds could be issued in their names for the property as divided.

5 This written consent was given by both litigants on 29. 1.1969 and appears in the file of D.L.O. A1701/68 (ex. 2); the relevant form, on which the signatures of the litigants appear duly certified by the village committee, states inter alia the description and the extent of the property to be registered dividedly in their respective names.

10 After compliance with the aforesaid procedure the D. L.O. issued to each one of the litigants a title deed as follows:

(a) In the name of the appellant: Registration No. 1739 dated 7.3.69 at Ayia Marinouda village co-
15 vering a field of 16 donums and 3300 sq. ft. in extent under plot 93/2/2 of sheet/plan LI/13 with a right of way over plot 93/2/1 (the property allotted to the respondent).

(b) In the name of the respondent: Registration No. 1738
20 dated 7.3.69, at Ayia Marinouda village, covering a field of 21 donums and 300 sq. in extent, under plot 93/2/1 of sheet/plan LI/13 subject to a right of way in favour of plot 93/2/2 (the property alloted to the appellant).

25 In short the original field under plot 93/2 of 37 donums and 1 evlek in extent which was registered in the name of each one of the litigants for ½ share undividedly was divided into plot 93/2/1 of an extent of 21 donums and 300 sq. ft. and plot 93/2/2 of an extent of 16 donums
30 and 3,300 sq. ft. and was registered in the name of the respondent and appellant respectively.

In order to complete the picture, we may add that in 1980, when seemingly the present dispute arose, the respondent filed with D.L.O. and application (A842/80) for
35 the determination of the dispute as to boundaries according to the provisions of s. 58 of the Immovable Property Law, Cap. 224 which was decided in favour of the respondent by the Director of the D.L.O. and there was no appeal from the said decision.

40 It may be observed that the subject-matter of the dispute decided by the Director according to the provisions of s. 58 of the Immovable Property Law, Cap. 224 refers

to the same portion of land which is the subject matter in the case under the present appeal. As already stated earlier on in the present judgment the disputed portion of land is that part of plot 93/2/1 which is indicated by red colour in ex. 1, the sketch produced by P.W.1; the disputed portion according to the D.L.O. evidence is covered by the registration in the name of the respondent effected as aforesaid on 17.3.69.

The appellant maintaining as aforesaid that the alleged agreement of 1950 for the division of plot 93/2 into two separate holdings was wrongly implemented by D.L.O. instituted the present case under appeal claiming inter alia a Declaratory Judgment to the effect that she is the owner of the disputed portion of land and an Order of the Court directing the rectification of the alleged error in the D.L.O. books, the relevant Survey Plans and the registrations in her name and in that of the respondent so that the disputed portion would be included in the registration in her name consonant to the alleged agreement for the division of the original plot 93/2.

We consider it pertinent at this stage to dispose of a point of Law, which although not raised in the defence, was argued in the Court below by learned counsel appearing for the respondent and brief reference to it was made before us on appeal. The point is this: As the appellant alleges an error in the D.L.O. books and registers she should have resorted to the Director of the D.L.O. availing herself of the provisions of s. 61 of Cap. 224 and should not vindicate her alleged rights by action.

Having considered the effect of the pleadings we hold the view that the error alleged in this case is not an "error" or "omission" within the ambit of s. 61 of Cap. 224; what is actually in dispute here is not a dispute as to where the physical boundary should run on the land according to the official survey plan, but a dispute as to whether the delineation of the official survey plan is correct or not, having regard to the agreement made between the parties i.e. the alleged error is incidental to the main issue which concerns the legal rights of the parties emanating from their agreement in respect of the division, which could not have been decided by the Director but only by a Court of Law on the evidence adduced (vide *Chrysanthou & others* v. *Antoniades* (1969) 1 C.L.R. 622.

The appellant gave evidence (P.W.2) before the trial Court and called several witnesses including the D.L.O. clerk who carried out the local enquiry pursuant to the Court's Order (P.W.1), her husband (P.W.3) her mother (P.W.6) and her sister (P.W.7).

The respondent gave evidence himself (D.W.2) and called one more witness namely the D.L.O. clerk (D.W.1) who carried out the local enquiry in 1968 pursuant to A1701/68 (ex. 2) by virtue of which the registrations in the names of the litigants for divided holdings were issued.

The learned trial Judge who had the opportunity of hearing the witnesses and watching their demeanour in the witness box accepted the evidence of both D.L.O. clerks, the one called by the appellant and the other called by the respondent, as well as the evidence of the respondent himself, considering their evidence reliable and truthful. Relying on the evidence as he has accepted it, the trial Judge made his findings of fact and drew his inferences from such facts, which appear on record and which we consider unnecessary to repeat. In the result the plaintiff's-appellant's claim was dismissed and judgment was entered in favour of the respondent on the counter-claim.

The appellant feeling aggrieved filed the appeal under consideration relying on 11 grounds which appear on record and boil down to credibility of the witnesses.

The principles upon which this Court decides appeals directed against credibility are well settled and have been stated time and again.

In the case of *Kyriacou* v. *Kortas & Sons* (1981) 1 C.L.R. 551, the position emerging from the case Law was summed up as follows:

> "It must be shown that the trial Judge was wrong in evaluading the evidence and the onus is on the appellant to persuade the Court that that is so. Matters relating to credibility of witnesses fall within the province of the trial Judge who has the opportunity to see and hear the witnesses. If on the evidence before him it was reasonably open to him to make the findings to which he arrived at, then this Court will not interfere unless the inferences drawn therefrom are not warranted by the findings, whereupon this

Court can draw its own conclusions".

Having considered the submissions of learned counsel for the appellant in the light of the judgment of the trial Judge and the record, we are not satisfied that the appellant had discharged the burden cast on her to the effect that the trial Judge was wrong in evaluating the evidence. 5

We see no reason and in fact none was suggested, why the trial Judge should not accept the evidence of both D. L.O. clerks; the submission of learned counsel for appellant, which is also included in ground 11 of appeal notably that the evidence of the D.L.O. clerk (D.W.1) who carried out the local enquiry in 1968 was "vague" and "unconvincing" is not warranted by the record. 10

This witness stated clearly inter alia that on 28.12.68 when he visited the property in question in the presence of the appellant and her husband he saw that the property which was divided on the spot with stones was not divided into two equal portions; and further he stated in clear and unambiguous terms that the plan he has prepared after taking measurements on the spot was corresponding to the existing on the land state of affairs. 15 20

The reason why the land was not divided into two equal portions was explained by the respondent, whose evidence was accepted by the trial Judge for the reasons stated in his judgment. The respondent explained that according to the oral agreement for the division which was made in 1965 he would take the portion to the west which was stony and unsuitable for cultivation as contrasted with the portion taken by appellant which was fertile. 25

As regards the complaint of the appellant that the trial Judge drew the wrong inference and "wrongly" reached at the decision that the D.L.O. did not err in issuing title deeds under Nos. 1738 and 1739" (vide ground 7 of the notice of appeal) we hold the view, having carefully gone through the record, that the aforesaid inference was open to the trial Judge as it was warranted by the evidence as he had accepted it; in fact we should go even further and say that the inference in question was the only inference open to him in view of the D.L.O. evidence before him and in particular the evidence of D.W.1. 30 35 40

For all the above reasons the appeal fails and is hereby dismissed; the costs hereof will follow the event.

Appeal dismissed