1985 February 22

[A. LOIZOU, DEMETRIADES, LORIS, JJ.]

MICHAEL HJIPETROU,

Appellant-Defendant,

v.

LOUKAS DEMETRI PETSOLOUKAS

Respondent-Plaintiff.

(Civil Appeal No. 5975).

Immovable property—Adverse possession—Unregistered land—Burden of proof—Property in dispute recorded in the name of plaintiff's grandmother but not registered in her name—Trial Judge holding that it was upon the defendant to satisfy the Court that he was entitled to have the property in question registered in his name—Since adverse possession should be proved by positive evidence as to the acts of ownership which amount to possession which the nature of the land admits and the plaintiffs have to rely on the strength of their case and not on the weakness of the adversary's case, above direction of trial Judge as to the burden of proof was wrong—Retrial ordered.

New trial—Immovable property—Claimed by virtue of adverse possession—Trial Judge misdirecting himself as to the burden of proof—New trial ordered.

The respondent-plaintiff ("the plaintiff") brought an action against the appellant-defendant ("the defendant") praying for a declaratory judgment to the effect, inter alia, that he was the owner of a piece of land ("the plot in question") at Ayii Trimithias village; and the defendant raised a counterclaim for a declaratory judgment to the effect that he was the owner of the plot in question. Before the trial Court there was evidence that emanated from the D.L.O. that the plot in question was recorded (καταχωρημένον) during the general survey around the years 1920-1925 in the name of the grandmother of the plaintiff; and on this

evidence the trial Judge held that "due to the fact that plot 66 (the plot in question) was recorded in the name of the grandmother of the plaintiff since 1920 or 1925 until 1959, it is the defendant that has to satisfy the Court that he is entitled to have plot 66/2 registered in his name". After directing his mind to the burden of proof as above stated the trial Judge examined only the evidence adduced by the defence which he found unsatisfactory in order to support the counterclaim; and he failed to examine the evidence adduced by the plaintiff, or if he did so he failed to record his findings. Thereupon the trial Judge gave a declaratory judgment in favour of the plaintiff as prayed; and hence this appeal which was argued on the ground that the trial Judge misdirected himself as to the burden of proof.

Held, that the plot in question was simply recorded for tax purposes in the name of the grandmother of the plaintiff and it was never registered in anybody's name as a whole up to 1959; that once it was established that the plot in question was unregistered land the relevant direction of the trial Judge in connection with the burden of proof was wrong; that since the plaintiff and the defendant were claiming the plot in question by virtue of adverse possession such adverse possession should be proved by positive evidence as to the acts of ownership which amount to possession which the nature of the land admits and in claims of this kind the plaintiffs have to rely on the strength of their case and not on the weakness of the adversary's case; that since the trial Judge having directed his mind to the burden of proof as above stated, examined only the evidence adduced by the defence which he found unsatisfactory in order to support the counterclaim and he failed to examine the evidence adduced by the plaintiff, there is no alternative but to order a retrial by another Judge.

Appeal allowed.
Retrial ordered

Cases referred to:

Aradipioti v. *Kyriakou and Others* (1971) 1 C.L.R. 381;

Andrea and Others v. *Dourmoush,* 1962 C.L.R. 7.

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Ioannides, D.J.) dated the 31st May, 1979 (Action No. 1135/76) whereby it was declared that the plaintiff is the owner of plot No. 66/2 of sheet/plan XXX/9 at Ayii Trimithias and defendant's counterclaim was dismissed.

A. Ladas, for the appellant.

N. Pelides, for the respondent.

Cur. adv. vult.

A. LOIZOU J: The judgment of the Court will be delivered by Loris, J.

LORIS J.: This is an appeal directed against the judgment of a Judge of the District Court of Nicosia in action No. 1135/76 (A. Ioannides, D.J.) whereby declaratory judgments were entered in favour of the plaintiff-respondent in the present appeal declaring in effect the ownership of the plaintiff over plot 66/2 of sheet/plan XXX/9 at Ayii Trimithias village (Nicosia District), and dismissing the counterclaim of the defendant-appellant who was likewise praying in respect of the ownership of the aforesaid plot.

The salient facts of the present case under appeal are very briefly as follows:

The plaintiff-respondent during the year 1959 applied to the D.L.O. under Appl. No. 3448/59 (included in a bundle of files produced at the trial as exh. 2) for the registration in his name of a field situated at "Passalos" Locality of Ayii Trimithias village (Nicosia District) covered by plot 66 of the Sheet/plan XXX/9 of the Official Survey Map. The extent of the plot in question was 5 donums and 3 evleks; the aforesaid property was described in the D.L.O. application in question as property gifted to the plaintiff by his father namely Demetris Louca ever since 1944.

The D.L.O. carried out a local inquiry in connection with the said application and eventually issued a title deed

in the name of the plaintiff under No. 7220 dated 10.3.60 (ex. 6).

It must be noted here that as it transpired from the evidence of the D.L.O. clerk (P.W.1), who carried out the local inquiry pursuant to the Court's Order in the case under consideration, when the D.L.O. enquiry was carried out pursuant to D.L.O. Appl. No. 3448/59 the then local enquiry clerk, proceeded (a) to divide plot 66 in to 2 parts; plot 66/1 of 4 donums, 1 evlek and 1200 sq. feet in extent which was registered subsequently in the name of the plaintiff under registration No. 7220 dated 10.3.60 and plot 66/2 of an extent of 1 donum 1 evlek and 2400 sq. feet which was not registered in anybody's name and it is still so unregistered; (b) to alter the original recording with reference to plot 66, which was recorded as a whole at the General Survey in the name of a certain Maritsa HjiCharalambous, the grand-mother of the plaintiff, so that plot 66/2 revised by him was recorded in the name of a certain HjiPetros HjiMichael, the father of the defendant.

We shall be reverting to the nature and effect of a record made in the D.L.O. books during the General Survey in somebody's name, later on in the present judgment; suffice it to say at this stage that the whole plot 66 was unregistered and that the only registration effected in respect of part thereof i.e. plot 66/1 was title-deed 7220 dated 10.3.60 in the name of the plaintiff; the other portion i.e. plot 66/2 was never registered in the Land Register of the D.L.O.

During the year 1975, the defendant applied to the D.L.O. under App. No. 2584/75 (which is also one of the files included in the bundle produced as ex. 2) with a view to registering in his name plot 66/2 of same Survey reference, on the ground that it was possessed by him and his predecessor in title for the full period of prescription; the plaintiff submitted to the D.L.O. an objection in connection with Appl. No. 2584/75 and the D.L.O. after examining the matter informed the litigants on 15.3.76 (vide ex. 5) that it was not intending to proceed with A2584/75 and that they could vindicate their rights through the Court.

As a consequence thereof the plaintiff instituted the present action under appeal; in his statement of claims the plaintiff alleges that whole plot 66 (including plot 66/2) belongs to him (a) by virtue of inheritance from his father, who in turn had inherited it from his mother Maria HjiCharalambous (b) "by virtue of undisputed uninterrupted adverse possession from time immemorial and in any way for over 50 years".

The plaintiff prays for a declaratory judgment to the effect (a) that he is the owner as aforesaid of the whole plot 66 (including plot 66/2) (b) that plot 66, was wrongly sub-divided into plots 66/1 and 66/2, and that plot 66/2 was wrongly registered in the name of the defendant; (c) that the D.L.O. should register in the name of the plaintiff both plots 66/1 and 66/2 and cancel any other inconsistent registration.

The defendant by his defence denies that plot 66/2 belongs to the plaintiff and alleges that he is the owner of the property covered by plot 66/2 by virtue of possession by him and his predecessors in title for the full period of prescription and/or for over 70 years; the defendant also set up a counterclaim praying for (a) a declaratory judgment to the effect that he is the owner of plot 66/2; (b) that the D.L.O. wrongly and unreasonably accepted the cancellation by the village committee of its original certificate (the one which was given in support of Appl. No. 2584/75); (c) An order of the Court directing the D.L.O. to register in the name of the defendant plot 66/2 and the cancellation of any inconsistent registration.

The learned trial Judge after hearing the evidence of the plaintiff and two other witnesses, including the D.L.O. clerk who carried out a local enquiry pursuant to the Court's Order in this case, and after hearing the defendant and his four witnesses (including another D.L.O. clerk) gave judgment for the plaintiff as per the prayer in the claim and dismissed the counterclaim.

The defendant, feeling aggrieved, attacks the aforesaid judgment of the Court below, relying on six grounds appearing in the notice of appeal which we do not intend

repeating one by one. The gist thereof is that they umpugn the decision of the trial Judge on the ground that he misdirected himself as to the burden of proof.

We have considered carefully the record and the judgment of the trial Court; we hold the view that the learned trial Judge misconceived a certain fact emanating from the evidence of both D.L.O. clerks which inevitably resulted in a misdirection in connection with the burden of proof.

Both D.L.O. clerks in giving the history of plot 66 (prior to its revision in 1959 into 66/1 and 66/2 spoke of the said plot as being recorded (καταχωρημένο) during the the General Survey around the years 1920 - 1925, in the name of the grand - mother of the plaintiff; it is abundantly clear to us that the record in question was not a registration within the meaning of "registration" envisaged by the provisions of s. 2 of Cap. 224; it was not a registration entered in the Land Register envisaged by s. 51 of Cap. 224. It was a mere record kept at the General Survey a long time before the enactment of Cap. 224, which was designed for fiscal purposes and had nothing to do with the registration of immovable property. It is clear from the evidence of both D.L.O. clerks that plot 66 was never registered until some time in 1959 when the plaintiff applied by virtue of Appl. 3448/59 for registering same in his name and the D.L.O. clerk holding the local enquiry at the time decided for some reasons which were not made clear before the trial Court to revise it into plots 66/1 and 66/2; it is crystal clear though that plot 66/1 was registered in the name of the plaintiff under Registration No. 7220 dated 10.3.60 whilst plot 66/2 remained unregistered and it is so unregistered till the present day, the relevant efforts of the defendant to have it registered in his name by virtue of Appl. No. 2584/75 having failed for the reasons already stated earlier on in the present judgment and clearly appearing in ex. 5.

So plot 66/2 the disputed property in the present case is not registered in anybody's name; and we must say with respect that reference by learned counsel for the plaintiff-respondent, in part B of the prayer, to plot 66/2 as being registered in the name of the defendant-appellant is incorrect; and so is the relevant reference to plot 66/2 by

the learned counsel for the appellant-defendant in ground 2A of the appeal.

Once therefore it is established that the disputed land covered by plot 66/2 is unregistered land the relevant direction of the trial Court appearing on page 57 (letters A - B in connection with the burden of proof is wrong. (The relevant passage in Greek reads as follows:

"λόγω ὅμως τοῦ γεγονότος ὅτι το τεμάχιο 66 ἦτο καταχωρημένο ἐπ' ὀνόματι τῆς μάμμης τοῦ ἐνάγοντος ἀπὸ τοῦ 1920 ἢ 1925 μέχρι τοῦ 1959, εἶναι ὁ ἐναγόμενος ποὺ πρέπει νὰ ἱκανοποιήσῃ τὸ Δικαστήριο ὅτι δικαιοῦται εἰς τὴν ἐγγραφὴν τοῦ τεμαχίου 66/2 ἐπ' ὀνόματι του".

("but due to the fact that plot 66 was registered in the name of plaintiff's grand mother as from 1920 or 1925 up to 1959, it is the defendant who has to satisfy the Court that he is entitled to the registration of plot 66/2 in his name").

With respect, plot 66 was simply recorded (καταχωρημένο) for tax purposes in the name of the grand-mother of the plaintiff; it was never registered in anybody's name as a whole up to 1959; and in 1959 it was revised, as stated earlier on in the present judgment, by the D.L.O. clerk who then carried out the local enquiry under A3448/59 and in consequence thereof plot 66/1 was registered in the name of the plaintiff under registration No. 7220 of 10.3.60, whilst the remainder i.e. plot 66/2 remained unregistered and it is so unregistered till the present day. Plot 66/2 is the disputed land which the plaintiff and the defendant are claiming by virtue of possession according to Law; this is the effect of their pleadings. Such adverse possession should be proved by positive evidence as to the acts of ownership which amount to possession which the nature of the land admits *(Aradipioti* v. *Kyriakou and Others* (1971) 1 C.L.R. 381. And in claims of this kind the plaintiffs have to rely on the strength of their case and not on the weakness of the adversary's case *(Andrea & Others* v. *Dourmoush*, 1962 C.L.R. 7).

It is obvious that the learned trial Judge having directed

his mind to the burden of proof as above stated, examined only the evidence adduced by the defence which he found unsatisfactory in order to support the counterclaim; and he failed to examine the evidence adduced by the plaintiff; or if he did so he failed to record his findings.

Under the circumstances, we have no other alternative but to order a retrial by another Judge. The costs of this appeal will be costs in the cause in the new trial.

Appeal allowed. Retrial ordered. Order for costs as above.