

1986 December 12

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

"AFTOMATA ELEOURGIA LYTHRODONTA LIMITED",

Plaintiffs,

v.

HOLY MONASTERY OF MAHERA,

*Defendants.**(Appl. in Civil Appeal No. 7275).*

Civil Procedure—Judgments and Orders—Stay of execution—The Courts of Justice Law 14/60, section 47—The Civil Procedure Rules, Ord. 35, r. 18—No power to stay further proceedings in the action pending appeal—Contempt proceedings—Ruling that applicants guilty of contempt—Adjournment of proceedings to enable applicants to purge the contempt—Appeal from said ruling—Application for its suspension pending appeal—No power to grant it.

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On 27.11.86 upon application by the plaintiffs in action 3511/84 D.C. Nicosia applicant 1, the Acting Director of the Department of Lands and Surveys, and applicant 2, an official of the same Department, were found guilty of contempt of Court by a Full District Court of Nicosia for failing to enforce and give effect to a consent order, issued in the said action, ordering the registration of the defendants' (The Holy Monastery of Mahera) immovable property (Reg. Number 31328, plot 927 in the village of Lythrodonta) in the name of the plaintiff. The reason why the two applicants did not effect the transfer was that the approval of the Holy Synod of Cyprus was not produced.

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The said Full Court adjourned on its own motion the proceedings against the two applicants to the 12.12.86, so that they would comply in the meantime with the said consent order, thus purging the contempt.

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The two applicants appealed against the said decision of the 27.11.86 and on 1.12.86 filed an application for the suspension of the judgment pending appeal. The Full District Court turned down this application on 3.12.86.

5 As a result the two applicants communicated with plaintiffs' counsel for the purpose of arranging the transfer in question in compliance with the consent order. Counsel said that his clients would attend for the transfer on the 4.12.86. On 4.12.86, however, no one appeared in the
10 D.L.O. In reply to an inquiry by applicant 1 counsel said that the reason of non attendance was the need to prepare certain documents, which were essential prerequisite to the transfer.

In the meantime the Holy Synod of Cyprus filed action
15 10146/85 in D.C. Nicosia against both parties to action 3511/84 seeking the annulment of the judgment and order in the latter and on 5.12.86 obtained, upon an ex parte application, an interlocutory injunction, restraining the applicants from transferring the said immovable property.

20 On the 6.12.86 counsel for the plaintiffs attended the D.L.O. for the transfer, but the applicants, acting on the advice of the Attorney-General refused to effect it as there was in force that subsequent interlocutory injunction.

25 By the present application to this Court, based on Order 35, rr. 18 and 19, Order 48, rr. 1, 2 and 8 of the Civil Procedure Rules, on section 47 of the Courts of Justice Law, on the practice of the Courts and the general principles of Law the applicants seek an order suspending
30 the effect of the ruling of the Court given on 27.11.86 pending the final determination of the appeal filed as aforesaid by the two applicants.

Held, dismissing the application: A) Per A. Loizou, J.
35 (1) It should be stressed that s. 47 of Law 14/60 empowers the Court to direct "that execution of such judgment be suspended for such time and subject to such terms or otherwise as to such Court may seem just". The question as regulated by Ord. 25, r. 18 of the Civil Procedure Rules was considered in *Photiou and Another v.*

Petrolina Ltd. (1984) 1 C.L.R. 708, where it was held that same does not confer any power to stay further proceedings in the action pending the determination of an appeal.

(2) On the totality of the circumstances and the meaning and effect of s. 47 and Ord. 35, r. 18, the conclusion is that the proceedings before the Full District Court of Nicosia have not been completed as the committal for contempt has not been decided upon. For this reason the application cannot be granted as no question of execution of the ruling dated 27.11.86 arises. 5 10

(3) In any event even if the Court had power to grant the stay applied for, the application would again be dismissed, because by reason of the interlocutory injunction, which had been granted on the application of the Holy Synod, any order suspending the effect of the said ruling would have been superfluous. 15

(B) Per Demetriades, J.: The proceedings have not been completed and, consequently, no order for stay can be granted. As regards the rest I agree with the reasoning and observations of A. Loizou, J. 20

(C) Per Pikis, J.: (1) Ord. 35, rr. 18 and 19 confer discretion to stay execution of an appealable order under r. 2 of Ord. 35, whether final or interlocutory. Execution encompasses the enforcement of the remedial measures sanctioned in judicial proceedings. The very object of stay is to put off the enforcement of an order of the Court. 25

(2) The remedy applied for in these proceedings is wholly outside the ambit of Ord. 35, r. 18. There is no enforceable order of the Court. A verdict of guilty is not of itself enforceable. There is nothing to execute. Order 35, r. 18 confers no power to stay further proceedings in the action (*Fotiou and Another v. Petrolina*, supra). Why this is so is obvious. Order 35, r. 18 is no substitute or an alternative remedy to a writ of prohibition. 30 35

(3) The interlocutory injunction issued in action 10146/85 by Demetriou, Ag. P.D.C., directing the suspension of

1 C.L.R. **Aftomata Eleourgis v. Monastery of Mahera**

the enforcement of the execution of the consent order made in action 3511/84 by Boyadjis, P.D.C. was in effect an order of prohibition, made by an inferior Court, respecting the order of a Court of co-ordinate jurisdiction,⁴ and, prima facie, such order was made in excess of jurisdiction. This matter, however, is not presently under review.

Application dismissed with costs.

Cases referred to:

10 *Photiou and Another v. Petrolina Ltd.* (1984) 1 C.L.R. 708;

Re E. S. (an infant) (1986) 1 C.L.R. 119;

Phoenix v. Al Khalaf Exhibition (1981) 1 C.L.R. 673;

Attorney-General v. Ibrahim Kur Ahmed, 1962 C.L.R. 177.

15 **Application.**

Application for an order to suspend the effect of a ruling given on the 27th November, 1986, pending the final determination of the appeal filed by the applicants.

Gl. Hadjipetrou, for the applicants.

20 *Chr. Kitromelides*, for the respondents.

The following judgments were given:

25 A. LOZOU J.: By this application the two applicants apply "for an order of the Court to suspend the effect of the ruling given by the Court on the 27th November, 1986, pending the final determination of the appeal filed by the above applicants". The application is based on Order 48 rr. 1, 2, and 8, Order 35, rr. 18, 19, on the Courts of Justice Law 1960, section 47, on the Practice of the Courts and the General Principles of Law.

30 The facts relied upon are set out in the accompanying affidavit sworn by Krini Papachristodoulou, a clerk second grade, serving in the Office of the Attorney-General of the Republic who has made the application on behalf of the two applicants.

Applicant Kotsonis is the Acting Director and M. Tsangarides an official of the Department of Lands and Surveys. In Civil Action No. 3511/1984 of the District Court of Nicosia the plaintiffs were the "Aftomata Eleourgia Lythrodonta Limited" and the defendants the Holy Monastery of Mahera. On the 29th May, 1984, a consent judgment was given ordering the registration of immovable property under Reg. No. 31328, plot 927 S/p XXXIX/36 of the village of Lythrodonta in the name of the plaintiffs. When an attempt was made to have the property in question transferred as ordered through the District Lands Office Nicosia, the latter refused to do so on the ground that the approval of the Holy Synod of Cyprus had not been produced. By letter dated the 13th January 1986, counsel for the plaintiffs called the Director of the Department of Lands and Surveys to comply with the order of the Court. The Director passed this on to the second applicant who handled the matter who in his turn sought the legal advice of the Attorney-General of the Republic. On the basis of that legal advice he replied to counsel by letter dated 23rd January 1986.

On the 24th February 1986, the application for contempt of Court by the two applicants was on behalf of the plaintiffs and on the 27th November 1986, they were found guilty for contempt of Court by a Full District Court of Nicosia for failing to enforce and give effect to the said order of the District Court of Nicosia, made earlier. The Full Court adjourned on its own motion, the proceedings, to the 12th December 1986, so that as stated by the Court, the respondents would comply in the meantime with the order of the Court. The applicants then filed an appeal against the said decision of the Full Court and by application dated 1st December 1986, sought from the Full District Court suspension of the judgment until the hearing of the appeal. This application was refused on the 3rd December 1986. Thereupon the applicants communicated with counsel for the plaintiffs so that the latter would attend at the District Lands Office for the transfer of the property in question, so that there would be compliance with the order of the Court. In fact counsel said that they would attend on the 4th December 1986, for transfer. As, however, no-one appeared on that date applicant Kotsonis

telephoned to him to inquire what was the matter and they did not turn up for the transfer. Counsel informed him that he did not attend as he had to prepare certain documents which were an essential prerequisite to the transfer.

5 In the meantime the Holy Synod of Cyprus filed an action in the District Court of Nicosia under No. 10146/85 against the "Aftomata Eleourgia Lythrodonta Limited" and the Holy Monastery of Mahera seeking the annulment of the judgment and order of the Court given on the 29th
10 May, 1984. Upon their ex parte application another Judge of the District Court of Nicosia gave on the 5th December 1986, an interlocutory injunction restraining the applicants from transferring the said immovable property. Counsel for the plaintiffs attended on the 6th December 1986 for the transfer and the two applicants on advice from the
15 Attorney-General of the Republic refused to proceed with the transfer as there was in force that subsequent interlocutory injunction. The main point for determination in the present case is whether the pronouncement of the Full
20 Court by which it came to the conclusion that there had been committed a contempt of Court by the applicants on account of their refusal to transfer the properties in question could be the subject of an application for stay of execution under Order 35, rules 18 and 19, being an
25 order under rule 2 of the same order against which an appeal can be filed whether final or interlocutory.

Section 47 of the Courts of Justice Law reads as follows:

30 "47. The judgment of every court shall, subject to any direction contained therein to the contrary and notwithstanding that the same shall have been made in default of pleading or of appearance of any party, be binding on all parties to the action immediately on the making thereof and notwithstanding any
35 appeal against the same, but the court by which such judgment is given, or any court having jurisdiction to hear such judgment on appeal, may at any time, if it shall so think fit, and whether an order for execution shall have been issued or not, direct
40 that execution of such judgment be suspended for such time and subject to such terms or otherwise as to such court may seem just."

It should be stressed that it empowers the Court to direct "that execution of such judgment be suspended for such time and subject to such terms or otherwise as to such Court may seem just."

The question as regulated also by Order 35 rule 18, was considered in *Photiou and Another v. Petrolina Ltd.*, (1984) 1 C.L.R. 708, where it was held that same confers no power to stay further proceedings in the action pending the determination of an appeal.

On the totality of the circumstances before me and the meaning and effect of section 47 and rule 18 of Order 35 as interpreted in the *Photiou case* (supra), I have come to the conclusion that the process before the Full District Court of Nicosia has not been completed as the committal for contempt has not been decided upon. For that reason the order for a suspension of the effect of the ruling given by the Court applied for, cannot be given as no question of execution in the sense explained above arises in this case. (See also, *In Re E.S. (an infant)* 1986 1 C.L.R. 119).

In any event even if I had power to grant the stay applied for, I would have declined to do so, for any order in this direction would have been superfluous. This is so, because following the interlocutory injunction which had been granted on the application of the Holy Synod, the two applicants found themselves confronted with two conflicting orders and they could not thus purge their contempt however much they wished, and indeed evinced the intention to do.

Such being the situation, I am confident that the Full Court would have either to defer imposing sentence until the situation was clarified, or it would have to take into consideration this development if it decided to proceed with the contempt as it stood until their verdict had been reached.

Indeed I would not have deprived the Full Court in question of the opportunity to demonstrate, as I am certain they would have done, their common sense and their sense of justice, which is expected of them particularly so

by litigants faced with conflicting orders issued by two different Judges of the same Court.

5 Having said this I do not intend to pronounce, at this stage, on the legality of any of the two orders as neither of them is before me on appeal and I would not like to pre-
10 5 judge, with anything that might be said here, the outcome of pending cases which appear to be of great importance both for the litigants and for the constitutional structures as provided in Article 110 of the Constitution in relation to the competence and powers of the Greek
10 Orthodox Church of Cyprus and the competence of the Courts on such matters.

15 In conclusion I would like briefly to say that I feel sorry for the predicament in which these two officers have found themselves who are now faced with the dilemma as to which of the two orders they should obey.

For all the above reasons I would dismiss this application with costs.

20 DEMETRIADES J.: I have come to the conclusion that the proceedings have not been completed; consequently, no order for stay can be granted.

As regards the rest, I agree with the reasoning and observations of my brother Mr. Justice A. Loizou.

25 PIKIS J.: This is an application to suspend further proceedings in an extent and as yet uncompleted judicial proceeding pending the determination of an appeal. Applicants, A. Kotsonis, Ag. Director, and M. Tsangarides, an official of the Department of Lands and Surveys, were found by the Full District Court of Nicosia (Nikitas, P.D.C. and Supashis, D.J.) guilty of contempt of Court for failing
30 to enforce and give effect to an order of the District Court made earlier in the same cause by Boyadjis, P.D.C. After coming to its verdict the Full District Court of Nicosia adjourned the proceedings to 12/12/86 evidently
35 in an effort to give the applicants an opportunity to purge their contempt.

Meantime, applicants took an appeal against their conviction and moved under Ord. 35 rr. 18 and 19 the Court

of trial to stay proceedings before passing sentence pending the determination of the appeal. The application was dismissed as ill founded. Thereafter, they renewed their application before us, as they had a right to do in view of the provisions of rr. 18 and 19 of Ord. 35, conferring jurisdiction on the Supreme Court to deal with an application for stay after a similar motion is dismissed by the District Court¹. The proceedings before the Supreme Court for stay are not by way of appeal against the judgment of the District Court refusing stay; they are original in the sense that they confer discretionary powers on the Supreme Court to deal with the question of stay afresh. 5 10

Ord. 35, rr. 18 and 19, confer discretion to stay execution of an appealable order under r. 2 of Ord. 35, whether final or interlocutory. Execution encompasses the enforcement of the remedial measures sanctioned in judicial proceedings. The very object of stay is to put off the enforcement of an order of the Court. That this is the ambit and purport of Ord. 35 r. 18 was recently acknowledged by this Court in *Re E. S. (an Infant)*². The following extract from the judgment indicates the compass of r. 18 of Ord. 35:- 15 20

(a) The execution of the order or judgment under appeal. "Execution" in the context of the Civil Procedure Rules encompasses every proceeding designed to enforce a judgment or order. And this is the sense in which "execution" should be understood and applied under the rule here under consideration. 25

(b) Proceedings under the decision. Here, again, we are concerned with proceedings incidental to the decision appealed, such as garnishee proceedings and proceedings under the Fraudulent Transfers Avoidance Law—Cap. 62." 30

Recitation of the order sought in the present application immediately discloses that the remedy asked for is wholly 35

¹ (See, inter alia, *Phoenix v. Al Khalaf Exhibition* (1981) 1 C.L.R. 873, 878-877).

² (1986) 1 C.L.R. 119

outside the ambit of Ord. 35 r. 18 relied upon in support of the application. We are asked to "suspend the effect of the Ruling given by the Court on 27.11.86 pending the final determination of the appeal filed by the above applicants". There is no enforceable order of the Court. A verdict of guilty is not of itself enforceable. There is nothing to execute. As Triantafyllides, P., pointed out in *Fotiou and Another v. Petrolina Ltd.*¹, Ord. 35 r. 18 confers no power to stay further proceedings in the action pending the determination of an appeal. Why this is so, is obvious to me. Ord. 35 r. 18 is no substitute or an alternative remedy to a writ of prohibition. Further, judicial proceedings in a pending cause or matter can only be stayed in exercise of the original jurisdiction vested in the Supreme Court by para. 4 of Article 155 of the Constitution by way of a writ of prohibition. What applicants seek in the present case, is an order prohibiting further conduct of the proceedings pending the determination of the appeal. We have no power to make such order in proceedings for stay under Ord. 35 r. 18. Therefore, the application must necessarily be dismissed.

However, certain developments that occurred after the dismissal of the application for stay by the Full District Court of Nicosia, cannot remain unnoticed because of their repercussions upon the administration of justice. First, the readiness of the applicants expressed on 3.12.86, and on the day following, to purge the contempt by giving effect to the order of the transfer, and their inability to do so because the parties concerned did not, seemingly for reasons of inconvenience, attend before the Lands Department. And the dilemma with which the applicants were faced on 6.12.86 when the interested parties appeared before the L.R.O. to effect the transfer. By that date they were confronted with another order of the District Court of Nicosia, an order of Demetriou, Ag. P.D.C., made in a fresh action, directing the suspension of the enforcement of the execution of the order made by Boyadjis, P.D.C., on 29.5.84. In effect, it was an order of prohibition, made by an inferior Court, respecting the

¹ (1984) 1 C.L.R. 708, 710-711.

order of a Court of co-ordinate jurisdiction. Because of the repercussions of the order on the administration of justice, I feel I would be failing in my duty if I were not to observe that prima facie it appears to me that the order of Demetriou, Ag. P.D.C., was made in excess of the jurisdiction of the District Court though I hasten to add that the matter is not presently under review.

Certainly, the applicants could not assume responsibility to judge between conflicting orders of the Court. Though such responsibility may be assumed by a court of law charged with the enforcement of an order, as indicated in *The Attorney-General v. Ibrahim Kur Ahmed*¹. These facts will no doubt be brought to the notice of the Full District Court when it resumes the hearing of the case for contempt. And no doubt they will be duly pondered in passing sentence. Particularly the readiness expressed, be it at that stage, by the applicants to purge the contempt and the dilemma with which they were subsequently confronted when faced with two conflicting orders of the Court.

A. LOIZOU J.: In the result the application is dismissed with costs.

Application dismissed with costs.

¹ (1962) C.L.R. 177