

CASES

DECIDED BY

THE SUPREME COURT OF CYPRUS

ON APPEAL

AND

IN ITS ORIGINAL JURISDICTION

Cyprus Law Reports

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[A LOIZOU, DEMETRIADES, PIKIS, JJ]

MOBIL OIL CYPRUS, LTD,

Appellants-Respondents

v

STAVROULLA TH ELLINA & OTHERS,

Respondents-Applicants

--- (Civil Appeal No 6765)

Appeal—Fresh evidence—Leave to adduce—The first test is that the evidence could not have been obtained with reasonable diligence for use at the trial

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The appellants applied for leave to adduce «further documentary evidence in support of the reasoned decision of the Land Registry Office», that is the written consent for the replacement of the documents in a mortgage under s 28 of the Immovable Property (Transfer and Mortgage) Law 9/65, which had not been produced before the trial Judge

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Held, *dismissing the application* (1) On the totality of the circumstances it is obvious that the existence of the document in question was known to the applicants/appellants, who could, with reasonable diligence, have obtained it for use at the trial

(2) It follows that the applicants/appellants failed to satisfy the first test governing the issue of when this Court grants leave to adduce fresh evidence,

that is they failed to show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.

*Application dismissed
with costs.*

Cases referred to:

Pavlides and Another v. Yerolemou (1982) 1 C.L.R. 912; 5

Hadjisoteriou v. The Director of Lands and Surveys and Another (1983) 1 C.L.R. 567.

Application.

Application by respondents for leave to adduce further documentary evidence in support of the reasoned decision of the Land Registry Office which is the subject of this appeal. 10

A. Dikigoropoulos, for the applicants.

E. Theodoulou, for the respondents.

A. LOIZOU J. gave the following judgment of the Court. This is an application for leave to adduce «further documentary evidence in support of the reasoned decision of the Land Registry Office» which is the subject of the present appeal. The application is made under Rules 13 and 17 of the Immovable Property Rules 1956 and Order 48, rule 2, Order 35, rule 8, and section 25(3) of the Courts of Justice Law 1960, (Law No. 14 of 1960). 15
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The facts relied upon are set out in the affidavit of Kyriacos Theocharides and they are the following:-

“2. On page 4 of the judgment His Honour the trial Judge, refers to the need for the production of all relevant documents, to the non production of the consent of a mortgagee before the 31st December, 1982, by which date, according to His Honour the lease of the immovable property in question ought to have been registered in accordance with the provisions of the law, and His Honour rejects the evidence of Loucas Filis, the Land Clerk in question, that the production of this consent was delayed on purpose so that the registration of the lease would be frustrated, on the ground that no evidential facts supporting such allegation were produced. 25
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3. In as far as the affidavit evidence of Mr. Loucas Filis to which 35

5 His Honour the trial Judge refers was repeated orally before
His Honour the trial Judge when he (Filis) testified as to the
above named Respondents' witness and no suggestion was
made to him that his inferences as to the nonproduction of
10 the mortgagee's consent before the 31st December, 1982,
were unjustified, the Appellants had no reason to question
the accuracy of the D.L.O.'s reasoned decision and affidavit
evidence so as to require him to produce the said written
consent of the mortgagee at the date of the trial before His
15 Honour the trial Judge, especially since no reference was
made to the mortgage in question in the search obtained
from the L.R.O on the 19th July, 1983. photocopy of which
is attached hereto and marked 'A'.

15 4. After the judgment of His Honour the trial Judge and in view
of his comments as to the lack of evidence in support of the
conclusion of the District Land Officer, the Appellants
applied to the D.L.O. Limassol under cover of a letter dated
21.6.1984 for a copy of the relevant consent of the
20 mortgagee in Mortgage No. Y.961/81 and copy of this was
made available to the Appellants/Applicants. A photocopy
of his consent is attached hereto and marked Exhibit 'B'.»

The application has been opposed and the facts relied upon are
set out in the accompanying affidavit which are in effect these.

25 «B. The said document was in the hands of the Land's Office as
from the 3rd January 1983, and consequently its
production on the day of the hearing the 9th March, 1984,
was easy and possibly more so as it is mentioned in the
reasoned decision of the Director of the Department of
Lands and Surveys dated 5th November 1983, signed by
30 Mr. Petrakis Vassiliou, yet no search and/or the proper
inquiry was made by the applicants in respect of this
document which they allege was essential for their case.

35 C. The certificate of search applied for under Item B showed
that the applicants asked particulars of any mortgage in
respect of the properties under Registration 6750 and
8139. They did not, however, ask particulars for the
property under Registration 8140 for which Item B, speaks.

D. Irrespective of the aforesaid the Court in page 5 of its

judgment says that 'but even if matters were so I do not think that this would have affected the issue due to the express and mandatory provision of section 65 1Ea as to the date by which registration had to be effected'. In other words the Court had this in mind but it did not affect its decision. 5

E. Mr. Loucas Philis the only witness in the case was not the one who prepared the reasoned decision and therefore any allegations in it were allegations of the author of the decision who was not summoned as a witness by the appellants in order to make possible his cross-examination on all the allegations. 10

The sole issue turns on whether a document which is the written consent for the replacement of the documents in a mortgage under s.28 of the Immovable Property (Transfer and Mortgage) Law 1965 (Law 9/65), which is appended to the affidavit filed in support of the application marked 'B', and which has a bearing in the case, could with reasonable diligence have been obtained for use at the trial. 15

Reference to the document in question is to be found in the reasoned decision filed by the Director of the Department of Lands and Surveys at the outset of the proceedings under the relevant rules and also in the affidavit of Loucas Philis who was also called and testified orally at the trial. 20

The complaint of the applicants/appellants is that the reference to another registration, namely, registration No.8140, could not have been foreseen except after an inspection of the document in question as the case had proceeded by reference to two other registrations. 25

On the totality of the circumstances before us and bearing in mind also the findings and conclusions drawn thereon by the learned trial Judge, it is obvious that this piece of evidence was a supporting document to the line pursued by the applicants all along at the trial and the existence of the document in question was evidently known to them. They could, with reasonable diligence, have obtained same for use at the trial which they failed to do. 30 35

On the principles governing the issue of when this Court grants

leave to adduce fresh evidence on appeal, which have been expounded in a number of decisions, inter alia, *Pavlidis and Another v. Yerolemou* (1982) 1 C.L.R. 912, and more recently in *Xanthos Hadjisoteriou v. The Director of Lands and Surveys, and Another* (1983) 1 C.L.R. 567, we have come to the conclusion that the applicants have failed to satisfy the first test, that is, to show that the evidence could not have been obtained with reasonable diligence for use at the trial. Therefore, we dismiss the application with costs.

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*Application dismissed
with costs.*