

1987 February 18

(KOURRIS J)

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

1 DORA HOURIDOU,
2 STELLA HOURIDOU,

Applicants,

v

THE IMPROVEMENT BOARD OF AYIOS DHOMETIOS,

Respondent

(Case No 565/85)

5 *Res judicata—Application for division of building—Condition of cession to public road of strip of land affected by a street widening scheme—Condition annulled—New application for division of land on which said building was standing as well as for division of said building—Same condition imposed—Matter not res judicata because the second application concerned a different matter*

10 *Streets and buildings—Application for division of land on which a building was standing—Permission granted on condition that strip of land affected by a street widening scheme be ceded to public road—Respondents entitled to impose conditions in virtue of s 9(1)(c) in conjunction with s 3(1)(c) of the Streets and Buildings Regulation Law, Cap 96*

15 The applicants, being the registered owners in undivided shares of a building site, erected on it a two-dwelling building. On 3 3 67 they applied for the division of that building into two dwellings with a view to issue separate certificates of registration - one to each owner - in severalty. The permission was granted but on condition that a strip of land, affected by a street widening scheme, be ceded to the public road.

20 The applicants challenged the said condition by means of a recourse to this Court, which annulled it as being unwarranted in law. (See *Houndou and Another v The Improvement Board of Ayios Dhometios* (1979) 3 C L R 219)

On 26 3 84 the applicants applied for the division of the said site in two separate plots as well as for the issue of separate title deeds of the flats comprising the building.

25 On 8 12 84 the District Officer wrote to the applicants that their application had been approved on condition that the said strip of land be ceded to the

public road. The applicants alleged that they never received such letter.

On 24/4/85 applicant 2 paid to an employee of the respondents, who had visited her house for the purpose of collecting the appropriate fee. Applicant 2 alleged that when the employee left she saw another paper attached to the receipt containing the said condition. As a result on 6/5/85 the applicants lodged a protest with the respondents and on 6/6/85 they filed this recourse. 5

Counsel for the respondents raised the issue that as the decision had been communicated to the applicants by letter dated 8/12/84 and the applicants paid the fee without reservation of rights, they are deemed to have accepted the condition. As regards the merits counsel contended that the condition in question could have been imposed under section 9(1)(c) in conjunction with section 3(1)(c) of Cap 96. 10

On the other hand counsel for the applicant submitted that the matter is res judicata and that in any event s 9(1)(c) applies in the case of division of land for building purposes, whereas in this case the buildings had already been built and, therefore, the application was not for the division of land for building purposes. 15

Held, *dismissing the recourse* (1) In the light of the material before the Court, the Court is inclined to accept applicants' evidence that they did not receive the letter of 8/12/84 and has reached the conclusion that the applicants did not accept the sub-judice decision and, therefore, they have not lost their legitimate interest. 20

(2) The matter is not res judicata because the application of 1967 concerned the division of the building, whereas the application of 1984 concerned the division of the site as well as the issue of separate title deeds for the flats comprising the building. 25

(3) As the applicants sought to divide the building site on which the building was standing the respondents were entitled to impose conditions in virtue of s 9(1)(c) in conjunction with section 3(1)(c) of Cap 96. 30

*Recourse dismissed.
No order as to costs.*

Recourse.

Recourse against the decision of the respondent to impose a condition for the division of applicants' land at Ayios Dhometios to the effect that a strip of land affected by the street-widening scheme should be ceded to the public road. 35

E. Efsthathiou, for the applicants.

E. Odysseos, for the respondent.

Cur. adv. vult.

KOURRIS J. read the following judgment. By the present recourse the applicants seek a declaration of the Court that the decision of the respondent authority by which they imposed a condition for the division of their plot No.31, Sheet/Plan XXI,45.V
5 under registration No.A30 at Ayios Dhometios to the effect that a strip of land, part of the plot, affected by the street-widening scheme should be ceded to the public road for the purpose of its being widened is null and void and of no legal effect whatsoever.

This case has a long history, and the facts, shortly, are as follows:

10 The applicants being registered owners in undivided shares of a building site at Ayios Dhometios, in about 1963 erected on it a two-dwelling building (diplokatikia) intended to be used as two separate, self-contained and independent residences. These buildings were erected in accordance with the terms of a permit in
15 that behalf, issued to them by the respondents who are «the appropriate authority» under the Streets and Buildings Regulation Law, Cap.96.

On March 3, 1967, the applicants applied to the respondents for a permit to divide that building into two dwellings with a view to
20 the issue of separate certificates of registration - one to each owner in severalty. On the following August the respondents wrote to the applicants informing them that the division permit was approved subject to the condition that a strip part of the plot, affected by the street-widening scheme, should be ceded to the
25 public road for the purpose of its being widened.

The applicants having complied with the conditions stipulated in the permit, other than the cession of the strip the subject of the said condition, applied to the respondents for a certificate of approval under section 10(2) of Law Cap.96. This was refused on
30 the ground of non-compliance with that condition, whereupon the applicants filed a recourse for a declaration that the refusal was null and void and devoid of any legal effect.

The Court held that the condition in question was unlawful because it was not authorised by any provision of Cap.96 and,
35 consequently, the refusal to issue the certificate of approval was unwarranted in law and that the applicants were entitled to a declaration that the refusal in question was in abuse of the respondents' powers. (See *Dora Houridou and Another v. The Improvement Board of Ayios Dhometios* (1979) 3 C.L.R. 219).

The said judgment was delivered on the 9th June, 1979 and on the 26th March, 1984 the applicants applied for the division of the said plot in two separate plots as well as for the issue of separate title deeds of the flats comprising the building. (Vide blues 1,2 and 4 of the relevant file of the District Office, Nicosia, which is Exhibit 2). 5

The appropriate authority having examined the application of the applicants communicated their decision by a letter dated 8.12.1984 informing them that their application was approved on the condition that the strip, part of the plot, affected by the street-widening scheme, should be ceded to the public road for the purpose of its being widened. (Vide blues 5 and 6 of Exhibit 2). 10

The applicants disputed that they received any communication from the District Officer, Nicosia, and particularly the alleged letter dated 8.12.84 and they claimed that the first communication they had from the Authorities in respect of their application dated 26th March, 1984 was on 24.4.85 when an employee of the Improvement Board of Ayios Dhometios called at the house of applicant 2 to whom she paid the appropriate fees amounting to £72.- whereupon a receipt was issued to her under No.2336. Applicant 2 went on to say in her oral evidence before the Court that when the employee of Ayios Dhometios Improvement Board left she saw another paper attached to the receipt which contained the conditions on which the receipt was granted. The conditions are the same as those appearing in blue 5. Thereupon, at about noon on the same day, she informed the husband of her sister, who is applicant No.1, of the fact and on 6.5.85 the applicants addressed a letter to the appropriate authority protesting about the said condition and on the 6.6.85 they filed the present recourse alleging that the said condition was unlawful. 15
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The respondent called three witnesses. One is an employee at the District Officer, Nicosia, called Maria Menikou, who has under her charge the files of fourteen Improvement Boards including Ayios Dhometios Improvement Board with regard to applications for division of land. She said that on 8.12.84 she wrote to the applicants the decision appearing as blues 5 and 6 in exhibit 2 and mailed it at the address appearing on the application which is Gregoriou Afxentiou and Iona Nicolaou, Ayios Dhometios and that the said letter was not returned to her office. She went on to 35

say that upon receipt of the fees for £72.- she issued the permit applied for on 27.4.85 and she mailed the letter at the address Iona Nicolaou 4-6, Ayios Dhometios.

5 A certain Costas Panayiotou, an employee of the Improvement Board of Ayios Dhometios, stated that when they received the decisions from the District Officer, Nicosia, to applications for the division of land, they wait for the applicants to call at his office and pay the appropriate fees. If they failed to do so within three months then this witness calls at the house of the applicants and
10 collects himself the fees and issues the appropriate receipts. He said that the applicants failed to pay the fees within the prescribed period but he does not remember whether he called at their house to collect the fees.

15 Counsel for the respondent invited the Court to find that the applicants received the decision dated 8.12.84 from the District Officer, Nicosia and alleged that the applicants have no legitimate interest to proceed with the present recourse because they accepted the decision of the respondent authority without any reservation at the material time. He explained that when the
20 appropriate authority communicated to the applicants their decision with the said condition by letter dated 8.12.84 the applicants after the lapse of four months and particularly on 24.4.85 paid the appropriate fees in respect of their application and without any protest against the said condition and on 27.4.85
25 a permit was issued to them under No.4088. He submitted that, in the light of these facts, the applicants must be deemed to have accepted the decision of the appropriate authority without any reservation and, consequently, they have divested themselves of their legitimate interest, in the sense of Article 146.2 of the
30 Constitution which would entitle them to file their present recourse. He went on to say that it is immaterial that the applicants protested against such condition by their letter of 6.5.85 because they had already accepted the condition. He contended that they knew about it and yet they paid the appropriate fees for the issue
35 of the permit without any reservation or protest at that time.

Counsel for the applicants, on the other hand, contended that the applicants never received the decision of the appropriate authority dated 8.12.84 and that the applicants came to know for the first time about the condition when applicant 2 paid the

appropriate fees on 24.4.85 whereupon within a few days thereafter and particularly on 6.5.85 they addressed their letter protesting against the said condition. He submitted that in these circumstances the applicants did not accept the condition of the appropriate authority without any protest and they have not divested themselves of their legitimate interest to bring the present recourse. 5

In view of the submissions of learned counsel for the parties it is incumbent upon me to make a finding as to the facts. It appeared from the evidence that the address inserted in the said application (blue 4 of exhibit 2) was Gregoriou Afxentiou and Iona Nicolaou. The application was signed by the applicants but was filled in by their architect. It has also been established that the address of the applicants was Iona Nicolaou street, 4-6. Although it was the fault of the applicants not to check the address inserted in the said form by their architect I do not propose to penalize them by holding that had they done so, they would have given the authorities their proper address and they would have received the sub judice decision of the 8.12.84. I think that it cannot be said that a presumption is raised against them that they received the decision of 8.12.84 because the letter was not returned to the District Office, Nicosia, because the recipient might have destroyed it. 10 15 20

Bearing in mind that the address in the said form was not the correct address of the applicants I am inclined to accept the evidence that they have not received the decision of the appropriate authority of 8.12.84. I have reached this conclusion because when in 1967 the applicants applied to the respondent authority for a permit to divide their building into two dwellings and the appropriate authority decided to grant them the permit subject to the condition that the said strip should be ceded to the public road they filed a recourse. Since the applicants were against the cession of that strip since 1967 I would find it very strange indeed that they have accepted the decision of the appropriate authority in the circumstances of the present case without any protest on their part. 25 30 35

To sum up, I find that the applicants did not receive the decision of the appropriate authority dated 8.12.84. They came to know of the said condition of 24.4.85 when applicant 2 paid the appropriate fees to the clerk of Ayios Dhometios Improvement

Board and on 6.5.85 they protested against the said condition.
(Vide blue 9 of exhibit 2).

In these circumstances I am satisfied that the applicants have not accepted the decision of the appropriate authority without any
5 protest and this ground fails.

I now propose to deal with another ground raised by counsel for the applicants. He stated in his written address that as the Supreme Court delivered a judgment in respect of the said plot and the said strip of land for the street-widening scheme the matter is res
10 *judicata* and the appropriate authority cannot refuse the issue of a permit as applied for by the applicants and a fortiori cannot impose any conditions referring to the strip of land affected by the street-widening scheme.

Counsel for the respondent alleged that the matter is not res
15 *judicata* as the applicants by their application of 26.3.84 applied for the division of land i.e. for the division of their building site into two separate plots, whereas in their former application, the subject-matter of recourse No.271/68, they applied for a permit to divide the building, which was erected on the said plot, into two
20 dwellings. He went on to say that the appropriate authority was authorized by s.9(1)(c) of the Streets and Buildings Regulation Law, Cap.96, to impose conditions and, consequently, the condition imposed was not unlawful as alleged by counsel for the applicants.

25 Having examined the facts of the recourse as they appear in the judgment of the Court in the hereinabove mentioned case as well as the facts of this case I am satisfied that the present application is of different nature from the application of 1967. By their application in 1967 they sought the division of a building whereas
30 by their application in 1984 they sought the division of their building site into two separate plots as well as the issue of separate title deeds for the various flats comprising the said building and, consequently, the matter is not *res judicata*. Therefore, this ground fails.

35 I now propose to deal with the substance of the case i.e. whether the appropriate authority was empowered by the relevant law to impose conditions in granting a permit in the circumstances of the case in hand.

Counsel for the applicant suggested that s 9(1)(c) of the Streets and Buildings Regulation Law, Cap 96, does not empower the respondent authority to impose conditions in the circumstances of the present case. He alleged that s 9(1)(c) concerns the laying out or division of any land for building purposes whereas in the present case there are buildings standing thereon and as such the application is not for the division of land for building purposes. Counsel for the respondent contended that s 9(1)(c) should be read in conjunction with s 3(1)(c) which provides that no person should lay out or divide any land (irrespective of whether any buildings other than buildings used solely for agriculture or forestry exist thereon or not) into separate sites unless they obtained a permit in that behalf from the appropriate authority and he submitted that this case is governed by the provisions of s 9(1)(c) in conjunction with s 3(1)(c) of the Law and that the respondents were empowered to impose conditions in granting the permit.

I have given the matter my best consideration and I propose to uphold the argument of learned counsel for the respondent that the respondent authority had power to impose conditions by virtue of s 9(1)(c) of the Law read in conjunction with s 3(1)(c). The applicants by their application sought not only the issue of separate titles for each flat but they also sought to divide the building site on which the said building was standing into two separate plots and the appropriate authority was authorized to impose conditions.

In these circumstances the recourse is dismissed. In exercising my discretion I order the applicants to pay half of the costs of the respondents. Costs to be assessed by the Registrar.

Recourse dismissed
Order for costs as above