1988 Apnl 25

(MALACHTOS, DEMETRIADES, PIKIS, JJ)

YIANNAKIS AGAPIOU, AS EXECUTOR OF THE WILL OF COSTAS EPAMINONDAS, DECEASED,

Appellant-Plaintiff,

v.

ANNETTA PANAYIOTOU, WIFE OF PANAYIOTIS MESARITIS

Respondent-Defendant.

(Civil Appeal No. 6910).

Judgments—Reasoning of—What it entails—Credibility of witnesses—Need to make a finding as to—Question of credibility should not be confused with burden of proof.

Evidence—Burden of proof—Consolidation of separate actions or hearing together a claim and a counterclaim—The conjunction does not obliterate the separateness of the actions or the distinct burden cast on either party.

Immovable property—Adverse possession—Acquisition of right by, under the Law in force prior to the enactment of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, in respect of land in the category of Arazi Mirie—Need for positive evidence.

Constitutional Law—Determination of Judicial causes within reasonable time—Constitution, Article 30.2.

Justice—Justice delayed is justice denied.

The plaintiff by the action and the defendant by counterclaim claimed ownership of certain unregistered land by virtue of adverse possession. Possession allegedly began before the enactment of Cap. 224 and, therefore, the matter was governed by the law in force prior to such enactment. Under such law the period of prescription for land in the category of Arazi Mirie was ten years. The trial Court concluded that «..... the certainty of the events contained in each version leaves quite a lot to be desired». However, the Court thought that «it was its duty to decide with preponderance of evidence, on

one version or the other». The trial Court concluded that «the version of the defendant is more probable than that of the plaintiff». The trial Court did not make any findings as regards credibility of witnesses.

Held, *allowing the appeal*:- (1) Evidently, the Court took the view that the evidence adduced was uncertain and of doubtful value.

The statement as to the Court's duty in the face of uncertain evidence betrays a misconception.

(2) The need to reason a judgment requires the Court to sum up (though not to recapitulate) the evidence and determine whether the evidence adduced is acceptable and to what extent. The analysis of the evidence must be accompanied by concrete findings of fact, an indispensable prerequisite for the determination of the case.

The omission on the part of the Court to make findings relevant to the credibility of witnesses is fatal for the deliberations of the Court.

(3) Another defect of the Judgment appealed from is that the trial Court confused the issue of credibility with that of the standard of proof necessary to substantiate the cause litigated by the action. It is obvious from the tenor of the judgment that the trial court decided the credibility of witneses by reference to the standard of proof, a separate and distinct issue. In the absence of findings on the credibility of witnesses, it was impossible for the Court to ponder their evidence and decided on a balance of probabilities whether the plaintiff with regard to the claim and the defendant with regard to the counterclaim, discharged the burden separately cast on them.

(4) Adverse possession should be proved by positive evidence. Consolidation of separate actions or hearing together of a claim and counterclaim are procedural expedients designed to avoid multiplicity of proceedings. The conjunction does not fuse separate actions into one nor does it obliterate the separateness of the actions or the distinct burden cast on either party. In this case the Court examined the evidence adduced on behalf of the defendant with a view to determining the claim. They omitted to ponder the separate issue of deciding whether the defendant discharged the burden cast on him to establish by positive evidence the counterclaim. This is yet another serious flaw of the judgment advocated by counsel for the appellant.

Appeal allowed with costs.
Retrial ordered.

Cases referred to:

Psaras and Another v. Republic (1987) 2 C.L.R. 132;

Stokkas v. Solomi, 21 C.L.R. 209;

Arnaout v. Zinouri, 19 C.L.R. 249;

Pioneer Candy Ltd. v. Tryfon and Sons (1981) 1 C.L.R. 540;

Ioannidou v. Dikeos (1969) 1 C.L.R. 235;

Christou and Another v. Angelidou and Another (1984) 1 C.L.R. 492;

Neophytou v. Police (1981) 2 C.L.R. 195;

Parmaxi and Another v. Katsiola (1985) 1 C.L.R. 633;

Kades v. Nicolaou and Another (1986) 1 C.L.R. 212;

Charalambous v. Republic (1985) 2 C.L.R. 97.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Limassol (Hadjitsangaris, P.D.C. and Artemis, S.D.J.) dated the 28th February, 1985 (Action No. 1075/70) whereby it was decided that Plot No. 32/1/6 of Sh/Plan 54/49 at Ayia Phyla is the property of the defendant by undisputed and uninterrupted adverse possession.

Chr. Triantafyllides, for the appellant.

E. Theodoulou, for the respondent.

Cur. adv. vult.

MALACHTOS J.: The judgment of the Court will be delivered by Pikis J.

PIKIS J.: It is with trepidation we reflect on the delay in hearing and disposing of this case. The action was instituted on 16th April, 1970, whereas judgment was given on 28th February, 1985. There were numerous adjournments for some of which the parties must bear the blame. The only consolation we can draw is that the case was speedily heard when the appeal came up for hearing. The hearing of the appeal was concluded on 28th March, 1988.

Justice delayed is justice denied. This aphorism must be in the forefront of judicial thought and action. In no circumstances should courts of law countenance delays of this magnitude. The determination of judicial causes within a reasonable time is constitutionally safeguarded in Cyprus by article 30.2 of the Constitution. The right to have a judicial cause determined within a reasonable time is entrenched as a fundamental right with a corresponding duty cast on the Judiciary to ensure observance of

that right*. For our part we have done our best to prepare and deliver this judgment as early as possible.

Costas Epaminondas and Annetta Messaritou, nee Panayiotou, feuded over a plot of land of 2 donums and 2 evleks situate at Ayia Phyla. Both claimed ownership of the land by virtue of adverse personal possession or possession by their predecessors. The land was unregistered, as the parties acknowledged before the District Court, of the «arazi mirie» category. Adverse possession allegedly commenced prior to the enactment of the Immovable Property (Tenure, Registration and Valuation) Law, 1946, Cap. 224; consequently, the land was subject to the rules of prescription in force prior to 1946, namely ten years. The point was settled soon after the enactment of the law in *Christos Hadji Loizi Stokkas v. Christina Argyrou Solomi***. Failure to seek registration immediately after the completion of the requisite period does not estop the possessor or his successors from applying to have the property registered in their name at any subsequent time***.

Meantime, Costas Epaminondas passed away. The claim for the registration of the property was taken up by the executor of the estate.

By the action the executor sought a declaration for the registration of the property in the name of the estate and an order restraining the defendant, his servants or agents, from trespassing upon the land. The defendant denied the claim and asserted by counterclaim a prescriptive right to the property and sought a declaration for the registration of the property in her name, as well as an injunction restraining the plaintiff, his servants or agents, from encroaching upon her land. The nexus between the facts founding the claim and counterclaim made inevitable the trial of the two actions together. Five witness testified for the plaintiff and six for the defendant in support of the rival claims to ownership of the property.

In its judgment the Court directed itself firstly on the burden of proof cast on a party seeking a prescriptive right. Adverse possession, it was correctly pointed out, must be proved by positive evidence of acts of ownership such as the nature of the

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* *Psaras and Another v. Republic (1987) 2 C.L.R. 132.*
** *21 C.L.R. 209.*
*** *(Arnaout v. Zinouri, 19 C.L.R. 249).*

land admits. The burden of proof remains throughout on the party asserting ownership. No complaint is made with regard to the direction affecting the burden of proof and the quality of the evidence necessary to establish ownership by prescription.

The second task to which the Court adverted was the identification of the issues in dispute. No complaint is made with regard to this aspect of the judgment either.

The complaints that founded the appeal centre on the analysis made of the evidence, allegedly inadequate, the findings and the deliberations of the Court affecting the discharge of the respective burden cast on the two parties.

The trial Court concluded that having sifted the evidence «... .. the certainty of the events contained in each version leaves quite a lot to be desired». We cannot but infer that at that stage of the case, reference to the version of the parties was meant to depict the appreciation of the Court of the quality of the evidence adduced in support of the case for the plaintiff and that for the defendant. Evidently, the Court took the view that the evidence adduced was uncertain and of doubtful value.

Nevertheless, the Court proceeded with the following statement concerning its duty in the circumstances: «However, it was our duty to decide, as we have said, with preponderance of the evidence, on one version or the other « - a statement betraying an evident misconception of the duty of the Court in the face of uncertain evidence. Seemingly, the Court considered it its duty to decide the case one way or the other, notwithstanding the unsatisfactoriness of the evidence. And so they did as it emerges from the immediately succeeding passage in the judgment of the Court, «After careful consideration of the two versions, we have reached the conclusion that the version of the defendant is more probable than that of the plaintiff»; the unavoidable inference is that they decided the case on the basis of the least unsatisfactory evidence after ponderation of the degree of unsatisfactoriness of the case of each party.

Counsel for the appellant submitted that the judgment of the trial Court is not only defective for misdirection but self contradictory too, in view of the direction made at the outset of the

judgment that the evidence necessary to establish a claim to ownership through a prescriptive right must be positive. Counsel for the respondents conceded that the judgment of the trial Court is fraught with misdirection, in that the Court did not steer clear of the pitfall of confusing issues affecting credibility on the one hand and, the standard of proof, on the other. Nonetheless, he invited us to support the verdict of the Court warranted by the evidence before it particularly, on a comparison of the quality of the evidence of witnesses for the defendant and that of witnesses for the plaintiff The Court made scanty reference to the evidence of individual witnesses, though not to all of them, mostly confined to identifying specific weaknesses in their testimony. At no stage did they make findings of fact or indicate the testimony acceptable to the Court as creditworthy. Moreover, they examined and evaluated the evidence for the defendant in the context of the defence to the case for the plaintiff. At no stage did the Court advert to the testimony for the defendant in order to decide whether it provided the solid foundation necessary for the proof of a prescriptive right. The need to reason a judgment requires the Court to sum up (though not to recapitulate) the evidence and determine whether the evidence adduced is acceptable and to what extent. The case of *Pioneer Candy Ltd. v. Tryfon & Sons** itemises the form that the reasoning of the Court must take**. The analysis of the evidence must be accompanied by concrete findings of fact, an indispensable prerequisite for the determination of the case. In a subsequent case, *Neophytou v Police**** it was pointed out that observance of the minimum requirements for the reasoning of a judgment indicated in *Pioneer*, supra, is a fundamental attribute of the due administration of justice. The omission on the part of the Court to make findings relevant to the credibility of witnesses is fatal for the deliberations of the Court*****. The duty to reason a judgment is not discharged by merely recounting the conflicting versions or commenting upon them******. The failure of the trial Court to make findings respecting the credibility of the witnesses made the determination of the case vulnerable to be set aside for lack of due reasoning.

** (1981) 1 C L R 540*

*** (See, also, Theodora Ioannidou v Chanlaos Dikeos (1969) 1 C L R 235)*

**** (1981) 2 C L R 195*

***** (See, Chnstou and Another v Angelidou and Another (1984) 1 C L R 492)*

****** (See, Parmaxi and Another v Katsiola (1985) 1 C L R 633, 647)*

Another defect in the judgment of the trial Court, no less consequential for the outcome of the case, derives from the failure of the Court to examine the evidence and make findings affecting the credibility of witnesses in a proper perspective. They confused the issue of credibility with that of the standard of proof necessary to substantiate the cause litigated by the action. It is obvious from the tenor of the judgment that they decided the credibility of witnesses by reference to the standard of proof, a separate and distinct issue. A question of discharge of the burden cast on the party affirming a cause of action can only arise in the face of credible evidence. In the absence of evidence to support it, the vacuum remains wholly ungauged and the plaintiff is in no better position than he was when he started the action. As explained in *Kades v. Nicolaou and Another** «adjudication on the credibility of witnesses is a matter wholly separate and distinct from the balancing of the evidence in order to ascertain on which side it preponderates. If the evidence of a witness is rejected as unworthy of credit, there is nothing to weigh thereafter. The rules defining the burden of proof and the circumstances of its discharge, have nothing to do with the credibility of witnesses. A witness may either be believed or disbelieved (wholly or in part) according to the view taken of his credibility by the Court». A similar warning to guard against the likelihood of blurring the issues of credibility and the standard of proof was given in *Charalambous v. Republic***. It was observed: «The credibility of witnesses is always a question of fact for the fact-finding body» In this case the Court determined the issue of discharge of the burden cast on the parties without making the necessary findings respecting the credibility of witnesses. To what extent the evidence of the several witnesses who testified before the Court was accepted as creditworthy, we are wholly in the dark. What we know of are criticisms made by the Court of the evidence of particular witnesses and the general reservation of the Court with regard to the cumulative effect of the testimony of the witnesses as a whole; testimony of a kind that leaves «a lot to be desired». In the absence of findings on the credibility of witnesses, it was impossible for the Court to ponder their evidence and decide on a balance of probabilities whether the plaintiff with regard to the claim and the defendant with regard to the counterclaim, discharged the burden separately cast on them.

* *(1986) 1 C.L.R. 212 at 216.*
** *(1985) 2 C.L.R. 97 at 107.*

The consolidation of the hearing of separate actions that may be directed under Ord.14 of the Civil Procedure Rules and the hearing together of a claim and counterclaim that may be sanctioned under Ord.33, r.9, are procedural expedients designed to avoid multiplicity of proceedings and thereby save time and costs. The conjunction does not fuse separate actions into one nor does it obliterate the separateness of the actions or the distinct burden cast on either party. In this case, what happened, is that the Court examined the evidence adduced on behalf of the defendant with a view to determining the claim. They omitted to address themselves to the separate issue of deciding whether the defendant discharged the burden cast on him to establish by positive evidence the counterclaim. This is yet another serious flaw of the judgment advocated by counsel for the appellant.

Regrettable as it is we have no alternative but to order a retrial of the claim and counterclaim. In the absence of findings affecting the credibility of witnesses, we are wholly unable to ponder the evidence or draw any inferences therefrom. We say «regrettable» because an action instituted in 1970 will be litigated eighteen or more years later.

In the result the appeal is allowed with costs. The judgment of the Court is set aside and a retrial is ordered.

Appeal allowed.
Retrial ordered.