

1988 January 25

(TRIANAFYLLIDES, P., MALACHTOS, STYLIANIDES, JJ.)

GEORGHIOS TSAPPIS ISORROPIMENE ZOOTROFE LTD.,

Appellants - Plaintiffs,

v.

KYRIACOS KALOUCES,

Respondent - Defendant.

(Civil Appeal No. 6794).

5 *Appeal — Refusal to grant ex parte application to issue an interlocutory injunction — Whether the notice of appeal from such refusal should be served on the defendant — Question determined in the affirmative — Such defendant is a «party» directly affected by the appeal — The Civil Procedure Rules, O.35, Rules 17, 5 and 2.*

Civil Procedure — Ex parte applications — The modern practice of an opposed ex parte motion.

10 The question that arose for determination in this appeal from a ruling of a District Judge dismissing an ex parte application for an interlocutory injunction is whether the Notice of appeal should be served on the defendant to the action or not.

15 Held, (1) *An appeal from a refusal to grant an ex parte application lies in virtue of Rule 17 of 0.35 of the Civil Procedure Rules. This Rule provides, inter alia, that «the provisions relating to appeals from interlocutory orders shall apply» to such an appeal. Rule 5 of 0.35 applies, also, to interlocutory appeals. The material part provides that the notice of appeal should be served on all parties directly affected by the appeal.*

20 (2) *The word «party» means a litigant in Court. The defendant is a litigant who in the District Court in an ex parte application for purposes of promptness, convenience and effectiveness is not served and is absent. The fact that the motion is ex parte ought not to be allowed to obscure that there are two parties - the party who moves the Court and the party moved against. The defendant is*
25 *directly affected by the appeal.*

Directions that notice of the appeal should be given to the defendant.

Cases referred to:

- Gerling-Konzern Allgemeine Versicherungs A.G. (No. 2) v. The Ship «DIMITRAKIS» and Another (1976) 1 C.L.R. 408;
- Gillooly v. Gillooly* [1950] 2 All E.R. 1118;
- Papastratis v. Petrides* (1979) 1 C.L.R. 231; 5
- Johnson v. Pole* (1987) 1 C.L.R. 311;
- The Queen v. The Registrar of Greenwich County Court* [1885] 15 Q.B.D. 54;
- Grapulin v. Cartons and Corrugated Papers Property Ltd.* (1961) S.R. (N.S.W.)348; 10
- Pickwick International Inc (GB) Ltd. v. Multiple Sound Distributors Ltd. and Another* [1972] 3 All E.R. 384.

Appeal.

Appeal by plaintiff against the ruling of the District Court of Lamaca (Eliades, D.J.) dated the 9th August, 1984 (Action No. 2143/84) whereby their ex parte application for an interlocutory order restraining the defendant from selling alienating or parting with the ownership and possession of 25 cows until the final determination of the action was dismissed. 15

A. Andreou, for the appellants. 20

Cur. adv. vult.

TRIANTAFYLLIDES P.: *The Decision of the Court will be delivered by Mr. Justice Stylianides.*

STYLIANIDES J.: The appellant applied by an ex parte application for an interlocutory order restraining the defendant from selling, alienating or parting with the ownership and possession of 25 cows, the ownership of the defendant, until the final determination of the action. 25

The claim of the applicant in the action is for goods (animal fodder) sold and delivered. 30

The District Judge of Lamaca in a well considered Ruling dismissed this application. Hence this appeal.

On the directions of counsel for the appellant neither notice of appeal, nor notice of a date of hearing was served on the defendant.

5 At the commencement of the hearing of this appeal the question whether notice of appeal should be served upon the defendant was taken preliminarily.

10 Counsel for the appellant submitted that, as the proceedings before the District Court were on an *ex parte* application, the appeal, also, must preserve the same character and be heard in the absence of the defendant. If the notice of appeal is served on the defendant and he is allowed to take part in these proceedings, the rights of the appellant would be prejudiced. The defendant may, in the meantime, after being served with the notice of this appeal, take such measures that may derogate the effectiveness of any order that this Court may make in the exercise of its jurisdiction and thus the appellant would be deprived of the fruits of his success.

20 He argued that rule 5 of Order 35 of the Civil Procedure Rules, requiring service of the notice of appeal, should be construed as excluding from its application appeals in *ex parte* applications; and that the defendant in this case is not «a party directly affected by the appeal» as the only party in the proceedings is the appellant.

25 Order 35, rule 17 provided that when an *ex parte* application had been refused by the Court below, an application for a similar purpose might be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as the Judge of the Court below or of the Court of Appeal might allow.

30 Therefore, no appeal lay, but a similar application could have been made, within the time appointed by the rule, to the Court of Appeal.

By the Rules of Court (No. 2), 1953, the said rule was repealed and substituted by the present rule which reads:-

35 «17. Where an *ex parte* application has been refused by the Court below, an appeal shall lie to the Court of Appeal. Such appeal shall be brought within four days from the date of the refusal of the Court below or within such enlarged time as a Judge of the Court below or of the Court of Appeal may

allow, and the provisions relating to appeals from interlocutory orders shall apply.»

The matter, therefore, is governed by the provisions of the rules relating to appeals from interlocutory orders.

Rule 5 of Order 35 applies, also to appeals from interlocutory orders. The material part thereof provides that the notice of appeal shall within the appropriate period prescribed by rule 2 of this Order, be served together with an office copy of the judgment or order appealed from upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected. 5 10

This rule corresponds to rule 2 of Order 58 of the Rules of the Supreme Court obtaining in England until 1956.

In *Gerling - Konzern Allgemeine Versicherungs A.G. (No. 2) v. The Ship «DIMITRAKIS» and Another*, (1976) 1 C.L.R. 408, the appellant applied by ex parte application for an order restraining any dealing with the defendant ship under s. 32 of the Courts of Justice Law 1960 (No. 14 of 1960). The trial Judge refused to make such an order ex parte and the plaintiff appealed. The Court of Appeal in determining whether the appeal should be heard ex parte, without giving an exhaustive definition of what is «a party directly affected» by an appeal, in the sense of rule 5 of Order 35, in view of the circumstances and the history of the proceedings in that case, decided that the defendants were parties directly affected by the appeal. Reliance was placed by the Supreme Court on *Gillooly v. Gillooly* [1950] 2 All E.R. 1118. 15 20 25

In *Papastratis v. Petrides* (1979) 1 C.L.R. 231, the appeal was directed against the Order of a District Judge dismissing an ex parte application for interlocutory injunction. Counsel appeared for the defendant in the action, who in the meantime had been served with a copy of the writ of summons and the notice of hearing of the appeal, and applied to take part in the proceedings. As counsel for the appellant objected, after hearing arguments, the Court, on the authority of *Gerling - Konzern Allgemeine Versicherungs A.G. v. The ship «DIMITRAKIS» and Another*, (1976) 1 C.L.R. 408, allowed counsel for the defendant to appear. 30 35

This Court in *Major Thomas Bromley Johnson v. Felix John Clewett Pole*, (1987) 1 C.L.R. 311 decided that, in an appeal against an order dismissing an ex parte application for

interlocutory injunction, the defendant is a party directly affected by the appeal and he should be served with a notice of appeal.

In the administration of justice the rule *audi alteram partem* is well embedded. The Court in determining disputes, or in granting
5 a remedy, normally hears both sides. Deviation from this rule is exceptionally permissible as provided by Law in certain specified cases. This is done mainly for the issue promptly and effectively of some orders.

The word «party» means a litigant in the Court. (*The Queen v.*
10 *The Registrar of Greenwich County Court* [1885] 15 Q.B.D. 54, 57; *Grapulin v. Cartons & Corrugated Papers Property Ltd.*, (1961) S.R. (N.S.W.) 348, at pp. 350, 351).

The defendant is a litigant who in the District Court in an *ex parte* application for purposes of promptness, convenience and
15 effectiveness is not served and is absent.

In an *ex parte* application there are two parties - the applicant and the person against whom the remedy is sought - though the application is heard in the absence of the latter.

The fact that the motion is *ex parte* ought not to be allowed to
20 obscure that there are two parties - the party who moves the Court, and the party moved against. It may be said that in the early part of the last century, though not usual, it was permissible with the party moved against being silently present and taking no part in the proceedings unless an injunction was granted, in which case he
25 thereupon moved *ex parte* to vary or discharge that injunction. Now, under the present procedure, the party moved against is not present and similarly he can move to vary or discharge the injunction when he learns of it. The modern practice of what may be termed an *opposed ex parte motion*, as developed in
30 comparatively recent practice, was commended by Megarry J., as he then was, in *Pickwick International Inc (GB) Ltd., v. Multiple Sound Distributors Ltd., and Another* [1972] 3 All E.R. 384.

This Court, under rule 8, has power to give any judgment and make any order which ought to have been made and to make such
35 further or other order as the case may require.

The defendant is directly affected by the appeal.

In view of all the aforesaid the defendant is a party directly affected by the appeal and he should be served with the notice of appeal.

We direct that notice of the appeal should be given to the defendant as respondent and then the appeal to take its normal course. 5

Order accordingly.