

1988 March 12

[LORIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

VASILIA GEORGHIOU HADJITHEODOSSI,

*Applicant,*

v.

THE MINISTER OF INTERIOR, THROUGH  
THE DIRECTOR OF LANDS AND SURVEYS,

*Respondent.*

*(Case No. 442/84).*

5 *Acts or decisions in the sense of Art. 146.1 of the Constitution—Immovable property held in undivided shares—Application for partition under section 29 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224—Refusal on ground of inability to serve the notice on the co-owner—A decision in the domain of private law—Even if considered as decision in the domain of public law, the matter would have fallen within the exclusive jurisdiction of Art. 155.4 of the Constitution.*

The facts of this case appear sufficiently in the judgment of the Court.

10 *Recourse dismissed.  
No order as to costs*

*Cases referred to:*

*Pitsillides and Another v. Nasif and Another (1982) 1 C.L.R. 426;*

*Valana v. The Republic*, 3 R.S.C.C. 91;

*Re Moschatos* (1985) 1 C.L.R. 381;

*Ramadan v. E.A.C. and Another*, 1 R.S.C.C. 49.

**Recourse.**

Recourse against the refusal of the respondent to partition applicant's immovable property under registration No. 2520 dated 29.9.72 under the provisions of section 29 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224. 5

*K. Talarides with E. Mitsingas*, for the applicant.

*Cl. Theodoulou (Mrs)*, Senior Counsel of the Republic, for the respondent.

*Cur. adv. vult.*

LORIS J. read the following judgment. The applicant in the present recourse is and was at all material times the registered owner by virtue of Registration No. 2520 dated 29.9.72, of 3/4 shares undividedly in immovable property situated at Prodromi village of Paphos District, at the locality "Latsi", covered by Survey Reference: Plot 143 of Sheet/Plan XXVI/50. The remaining 1/4 share undividedly is and was at all material times registered in the name of a certain Sherife Hanoum Moulla Ahmet Sherif, a Turkish Cypriot lady who, according to the version of the applicant, is residing ever since the Turkish invasion in the occupied by the Turkish invaders, area of the Republic of Cyprus. 15 20

On 22.5.84 the applicant applied to District Lands Office Paphos, (vide Appendix A) where her aforesaid property is situated and applied for the partition of same pursuant to the provisions of s. 29 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224. 25

On 16.6.84 the District Lands Office Paphos addressed a letter to counsel acting for applicant, (vide Appendix B) refusing the partition applied for on the ground that no service of the notice could be effected to all concerned as provided by the Law, (obviously the notice envisaged by s. 32 Cap. 224).

On 4.7.84 counsel acting for applicant submitted another application (Appendix Γ), addressed this time to the Director of Lands and Surveys, Nicosia, suggesting service of the notice on the Committee set up for the Administration of Turkish Cypriot's properties.

On 16.7.84 the Director of Lands and Surveys replied (Appendix D) to counsel acting for applicant turning down their request and indicating his adherence to the stand taken by the District Lands Officer of Paphos, on the matter.

The applicant filed the present recourse praying for annulment of the refusals of both the District Lands Officer Paphos and the Director of Lands and Surveys set out in their letters of 16.6.84 and 16.7.84 respectively.

Before proceeding further, I must say that I hold the view that the prima facie executory decision is that of the District Lands Officer Paphos dated 16.6.84 and that the decision of the Director of Lands and Surveys is merely confirmatory of the former and cannot therefore be impugned by present proceedings. Nevertheless the present recourse which was filed on 9.9.84 impugning the decision of 16.6.84, was filed in time.

The gist of the present recourse is the "refusal" of the respondent to carry out the partition applied for, by applicant.

In the case of *Christos Pitsillides & Another v. Andreas Nasif & Another* (1982) 1 C.L.R. 426, an appeal from the judgment of a first instance civil Court, on the subject of the declared inability-refusal of the Director of Lands & Surveys to decide on a dispute as to the boundaries of adjoining properties on the ground "of ab-

sence of any material" enabling him to decide the dispute, our Court of Appeal held that the Director is bound according to s. 58 of Cap. 224, to determine the dispute and settle the boundaries, and nothing short of that will relieve him of his responsibilities; the Court of Appeal having considered the sub-judice matter in that case held that it was primarily a matter in the domain of private Law (relying on *Valana v. The Republic*, 3 R.S.C.C. 91) and proceeded to direct the Director to examine the matter afresh and determine it, as required by Law. 5

In *Re Moschatos* (1985) 1 C.L.R. 381, an application for the issue of Mandamus Order directed against the refusal of the District Lands Officer Nicosia to deal with a transfer of immovable property from one registered owner to another on the ground that a judgment under s. 53 of Cap. 6 had been registered in relation to the property sought to be transferred, the learned President of this Court granting the aforesaid Order of Mandamus, held that it was the public duty of the District Lands Officer Nicosia to deal with the matter of the transfer of the aforesaid property although the public duty had to be performed in relation to a matter in the domain of private, and not a public Law. 10 15 20

The relevant part of the decision in *Re Moschatos* (supra) at p. 385 reads as follows:

"It is well settled that an order of mandamus is granted in order to enforce the performance of a public duty (see, inter alia, *Leftis v. The Police*, (1973) 2 C.L.R. 87, In re *S. & G. Colocassides Co. Ltd.* and *President of Industrial Disputes Court*, (1977) 1 C.L.R. 59, and *Haritonos v. Chief of Police*, (1979) 1 C.L.R. 616. 25

In this case it was the public duty of the District Lands Office in Nicosia to deal with the matter of the transfer of the aforesaid property of the applicant in accordance with the provisions of section 8 of the Immovable Property (Transfer and Mortgage) Law, 1965 (Law 9/65); and it was mandatory, and 30

not merely discretionary, to deal with the matter of the transfer of the property of the applicant under the said section 8 (see, inter alia, *In re Malikides*, (1980) 1 C.L.R. 472).

5 The aforementioned public duty had to be performed in relation to a matter in the domain of private, and not of public, Law (see, inter alia, *The Republic v. M.D.M. Estate Developments Ltd.*, (1982) 3 C.L.R. 642) and, therefore, it cannot be said that the remedy for its enforcement is a recourse under Article 146 of the Constitution and not an order of mandamus under  
10 Article 155.4 of the Constitution (see, inter alia, *In Re Asdjian*, (1981) 1 C.L.R. 470, and *In Re Kalathas*, (1982) 1 C.L.R. 835).

15 Moreover, I am of the view that not only an order of mandamus can be made in the present instance but that, also, such order is the most effective remedy in the circumstances (see, inter alia, the *Leftis* case, supra)."

Having considered carefully the two judgments referred to above, I hold the view that they are conflicting on the issue which is common to both: the refusal of the Director to deal with his  
20 public duty. In the case of *Pitsillides v. Nasif (supra)* the Court of Appeal held that the alleged inability of the Director and his consequential refusal to decide on the disputes as to boundaries was within the domain of private Law whilst the learned President held that the refusal of the Director to deal with the matter was  
25 within the domain of public Law although such public duty had to be performed in relation to a matter in the domain of private Law.

In the circumstances I am bound by the judgment of the Court of appeal (supra) whose ratio decidendi covers the legal aspect in connection with the "refusal" of the Director in the case under  
30 consideration. As the refusal of the Director in the instant case is in the domain of the private Law such refusal is not justiciable under Article 146; therefore the present recourse cannot be proceeded with.

But even if I were to follow the ratio decidendi in *Moschatos case (supra)* - and I must say with respect, that I am in full agreement with the learned President of this Court - then, again the present recourse is not justiciable under Article 146, for the following reason:

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It is clear from the last paragraph of the *Moschatos* application (supra), as cited above, that "not only an Order of Mandamus can be made in the present instance but that, also, such order is the most effective remedy in the circumstances." And in the case under consideration we have the same "refusal" of the Director as in the *Moschatos* decision (supra) and I hold the view that what has been stated by the learned President in the last paragraph thereof, applies a fortiori in the case under consideration independently of the reasoning given by the Director for his refusal to deal with the matter, in the *Moschatos*, decision (supra) or in the case under consideration.

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Thus, if I were to hold that the "refusal" of the Director in the instant case, was within the domain of Public Law I would have held as well, that the instant case is clearly within the jurisdiction of Article 155.4 like *Moschatos* application (supra).

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But in such a case, in view of the mutual exclusivity of the jurisdiction under Article 146.1 and Article 155.4 (vide *Housein Ramadan v. E.A.C. & Another*, 1 R.S.C.C. 49 at pages 53 - 55) the present application filed under Article 146 of the Constitution could not have been proceeded with.

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In the result present recourse fails and is accordingly dismissed. Let there be no order as to costs.

*Recourse dismissed.  
No order as to costs.*