

1988 March 15

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

1. ANTONIS MAVROUDES AS TREASURER OF THE
IRRIGATION DIVISION OF KALOPANAYIOTIS-IKOS,
2. ANTONIS MAVROUDES,
3. ANDREAS HADJISAVVAS,

Applicants,

v.

- THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF AGRICULTURE,
 2. THE DIRECTOR OF WATER DEVELOPMENT DEPARTMENT,
 3. THE DISTRICT OFFICER, NICOSIA,

Respondents.

(Case No. 549/86).

Legitimate interest—Irrigation Division and members of—Sinking of borehole at short distance from the division's spring—Whether and in what circumstances the Division and its members possess a legitimate interest to challenge the decision in respect of the sinking of the borehole.

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Legitimate interest—The issue may be raised by Court ex proprio motu.

The Irrigation Division of Kalopanayiotis-Ikos, through its treasurer, and applicants 2 and 3, who are members of such division, challenge by means of this recourse the decisions to sink and to grant a permit to a borehole at a distance of less than 600 feet from "Antonias Spring". The water of this spring is used for the irrigation of the gardens of the members of the said division. The applicants challenge, also, the omission of respondent 2 to allow them to take legal proceedings against the respondent.

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The question that arose for determination is applicants' legitimate inter-

est.

Held, *dismissing the recourse*: (1) Though *Demetriou v. The Republic* (1971) 3 C.L.R. 1 was reversed on appeal on another ground, its approach was correct.

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(2) Applicants' legitimate interest can only be based on section (4) of the Wells Law, Cap. 351. The applicants should establish that as a result of the sinking of the borehole in question (a) the yield of their spring has diminished, or (b) is unavoidably bound to diminish. The evidence in this case did not establish these facts.

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Recourse dismissed.
No order as to costs.

Cases referred to:

Christofides v. CYTA (1979) 3 C.L.R. 99;

Demetriou v. The Republic (1971) 3 C.L.R. 1;

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The Republic v. Demetriou (1971) 3 C.L.R. 271;

Constantinides v. The Republic (1974) 3 C.L.R. 416.

Recourse.

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Recourse against the decision of respondent 2 to grant a permit to respondents 1(a) and 1(b) to sink a borehole at Moudoullas at a distance of less than 600 feet from "Antona Spring" which belongs to Kalopanayiotis - Icos Irrigation Division.

A. Pandelides, for the applicants.

C. Kyriakides, Counsel of the Republic, for the respondents.

Cur. adv. vult.

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A. LOIZOU, J. read the following judgment. Applicant 2, Antonis Mavroudes, is the treasurer of the Irrigation Division of Kalopanayiotis - Icos. He is the owner of a garden of one donum in

extent, which is irrigated from "Antonias Spring". He instituted the present proceedings both in his personal capacity and as treasurer - as applicant 1 - of the said Irrigation Division.

Applicant 3 is the owner of a garden of one half donums in extent which is irrigated from the above spring. The above Irrigation Division was established in 1933 and applicants 2 and 3 are amongst its members. In 1933 the above spring was ceded to the said Irrigation Division and since then its water is being used for the irrigation of the gardens of its members, including applicants 2 and 3. The said spring is situated on the left bank of "Antonias Stream".

On or about the 28th August 1986, the employees of the respondent started the sinking of a borehole at a distance of less than six-hundred feet from the above spring. According to the facts in support of the recourse there is a great risk and/or it is likely for the water of the spring to be affected and/or affected its yield in water to diminish and applicants to be prejudicially affected in the irrigation of their gardens. On the 27th August 1986, the Committee of the said Division decided to seek recourse to the Courts against the sinking of the borehole and to obtain in this connection the consent of the District Officer. In pursuance of this purpose it addressed a letter to the District Officer dated 27th August 1986, but the District Inspector orally declined to give his consent.

On the 30th August 1986, the applicants filed the present recourse whereby they prayed for the following relief:

(a) "That the decision and/or act of the respondents and/or each one of them to proceed with the sinking of a borehole at Moutoulas village, locality Paou, (Koufou stream) near "Antona Spring" ("Antona Stream") which belongs to the Kalopanayiotis - Icos irrigation Division and whose water the Kalopanayiotis - Icos irrigation Division and the remaining applicants are entitled to use, be declared null and void and/or of no effect whatsoever, because the borehole is being sunk at a distance less than 600 feet from

applicants spring and their spring will be substantially affected and/or because it is probable that the yield in water of the spring will substantially diminish.

5 (b) That the decision of respondents 2 to grant a permit to respondents 1(a) and (b) to sink a borehole at a distance less than 600 feet from the above existing spring be declared null and void and of no effect whatsoever and/or as taken in breach of section 7 of Cap. 351 and/or as taken in excess and/or abuse of power.

10 (c) That the omission of the District Officer to give his consent to applicant 1, and/or to Kalopanayiotis - Ikos Irrigation Division for the taking of legal proceedings against them, in respect of the sinking of the above borehole, be declared null and void and/or that the District officer Nicosia ought to have given his consent.

Learned counsel for the respondent raised the following preliminary objections:

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1. That neither the Minister of Agriculture nor the Director of the Department of Water Development decided the sinking of a borehole at the village of Moutoullas near the spring known as Spring of Antona or Stream of Antona so that their decision and/or act may be challengeable by recourse and contend that this recourse cannot proceed against them and pray for its dismissal.

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2. Respondents 2 never issued a permit to sink the borehole complained of or any other borehole under section 3(1) of the Wells Law Cap. 351 and Laws 47/61, 19/62 and 88/84 and he alleges that this recourse should be dismissed against him also.

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3. All the respondents allege that applicants have no legitimate interest under Article 146 because the water of the Spring of Antona or the Stream of Antona does not constitute their own property but this water under section 3(1) of the Government Waterworks law Cap. 341 and Laws 129/68, 51/62 and 1/77 as well as by Article 23(1) of the Constitution belongs to the Government of the Republic of Cyprus.

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4. However, it is an acknowledged fact that the Government of the Republic of Cyprus in its attempt to help out the landowners to exploit their lands to the maximum possible height not only helps out in the administration of the formation of such Irrigation Divisions but also finances them by contributing 2/3 towards the costs of the works of such Irrigation Division and grants long term loans for the 1/3 portion of the contribution which the Irrigation Division undertakes to pay.

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5. It is an admitted fact that the Government formed the Irrigation Division of Kalopanayiotis and Icos under the Irrigation Division (Villages) Law, Cap. 342 and allowed them to use the water of the "Spring of Antona" or "Stream of Antona" to irrigate their land. This does not entail that the said Irrigation Divisions have acquired any legal rights on the said water of the spring beyond the right to use such water.

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6. Respondents contend that even if they concede that applicants have any beneficial interest under Section 8(1) of the Wells law, Cap. 351 and Laws 47/61, 19/62, and 88/84, which they deny, this interest is for compensation only and for nothing else and this right can only be sought through the filing of a court action in District Courts."

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It is established by case-law that legitimate interest must exist both at the time of filing and the hearing of a recourse; and that these requirements are satisfied where such interest though not yet actually adversely and directly affected is unavoidably bound to be so affected eventually (see *Christofides v. CYTA* (1979) 3 C.L.R. 99). In the case of *Demetriou v. Republic* (1971) 3 C.L.R. 1 in which the applicant challenged the decision of the respondent to grant a permit for the deepening of an existing well Stavrinides J., said the following at pp. 6-7:

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"A person applying to this Court under Art. 146 of the Constitution must establish that some 'subsisting legitimate interest' of his 'is injuriously affected in a direct manner by the decision, act or omission' complained of. What is the appli-

5 cant's 'legitimate interest' here? It can only be an interest based on sub-sec. (4) of Cap. 351. Thus in order to succeed he must establish (a) that the pumping of water from Mr. Theocleous' well reduced the yield of his own well and (b) that such affection is due to work covered by the subject permit. Clearly if the injurious affection, though due to work carried out in Mr. Theocleous' land, is not due to work covered by the subject permit, it is of no consequence to these proceeding.

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It follows that, in order to succeed, the applicant must establish injurious affection to his well caused by work on Mr. Theocleous's well other than tunnelling. But this he has entirely failed to establish.:"

15 Though the above decision was reversed on appeal and retrial was ordered, - see p. 231 of the same report - on the ground that the existence or not of legitimate interest was closely connected with factual issues regarding which no findings were made by the trial Judge there was no quarrel with his approach on the question of *legitimate interest*.

20 Now, what is the applicants' legitimate interest in this case? In my opinin for the applicants to possess legitimate interest they must establish that as a result of the sinking of the borehole in question (a) the yield of their spring has diminished or (b) is unavoidably bound to diminish eventually.

25 In order to resolve issues (a) and (b) above both affidavit and oral evidence were adduced. Having carefully gone into such evidence I find that it is not established thereby, even on the balance of probabilities that as a result of the sinking of the borehole,

(a) the yield of applicants' spring has diminished, or

30 (b) is unavoidably bound to diminish eventually.

Therefore applicants lack the requisite legitimate interest to

pursue this recourse which, for this reason, must fail.

It should be stressed that the Court can enquire ex proprio motu into the presence of legitimate interest (see *Constandinides v. The Republic* (1974) 3 C.L.R. 416), and it is for this reason that the Court - felt free to enquire into the presence or not of legitimate interest on grounds other than those relied upon in the relevant preliminary objection of the respondents.

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Having concluded as above I need not deal with the remaining issues raised in the recourse and the opposition.

In the result the recourse fails and is hereby dismissed but in the circumstances there will be no order as to costs.

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Recourse dismissed.
No order as to costs.