

[SMITH, C.J. AND MIDDLETON, J.]

HELENE KYRIAKI

*Plaintiff,*

v.

NICOLA KYRIAKI

*Defendant.*SMITH, C.J.  
&  
MIDDLE-  
TON, J.  
1895.  
—  
March 16.

IMMOVABLE PROPERTY—INFORMAL DIVISION, WITHOUT THE ASSENT OF THE COMPETENT OFFICIAL, OF LAND INHERITED—PRESCRIPTION—SALE OF LAND FALLING TO THE SHARE OF ONE HEIR FOR THE DEBT OF ANOTHER—ARAZI-MIRIE—ARAZI-MEVAT—THE LAND CODE, ARTICLES 17 AND 20.

A division of land not made in the manner required by Article 17 of the Land Code has no effect in law. But where such a division has been made and each party has had undisturbed possession for 10 years of the land taken by each, in accordance with that division, each has a right to be registered as the sole possessor of the land each took under such division.

APPEAL from the District Court of Kyrenia.

*Pascal Constantinides* for the appellant.

*Artemis* for the respondent.

The facts and arguments sufficiently appear from the judgment.

*Judgment*: In this action the plaintiff and defendant were sister and brother, and their father Kyriaki died in the year 1878. In the year 1879 the plaintiff and defendant agreed privately to divide the inheritance of their father, and from that time up till the year 1892, the parties respectively had possession of the properties that had been so divided. None of these properties had been registered in their names, but the registration remained in the books of the Land Registry Office in the name of their father Kyriaki.

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Amongst the properties so divided, were one olive tree at Ayios Epiktitos, two donums of land called Armenos, two donums of land at Vikla, a piece of land called Stephania, one olive tree at Ayios Pavlos and a piece of land called Ayios Elia.

It was alleged on behalf of the plaintiff, and not denied by the defendant, that the lands at Armenos and Ayios Elia fell to the share of the defendant, and that the land at Vikla and half of the land at Stephania was taken by the plaintiff, while the allotment and possession of the olive trees were disputed.

About the year 1891, the defendant appears to have got into money difficulties, and as a consequence judgment was recovered against him by one of his creditors, and subsequently certain of the properties registered in the name of Kyriaki, including Vikla and Stephania and a moiety of Armenos, were put up for sale in satisfaction of the judgment.

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The plaintiff's husband appears to have attended the sale, and alleges that he purchased all that was sold : though we observe that the defendant also alleges that he himself purchased some of the property. This man also seems to have come down to Kyrenia to stay the sale, but says, " I had not had possession for 20 years, so I did not get it " stayed. I made no application to the Court to stay the " sale." The land at Ayios Elia was not put up for sale as it was not registered in the name of Kyriaki. The two olive trees also were for some reason or other not included in the sale. The plaintiff now brings this action claiming that the defendant should be restrained from interfering with the olive tree at Ayios Epiktitos and one donum of the land Armenos, and further an order that the land Ayios Elia and the olive tree at Ayios Pavlos should be partitioned between the plaintiff and defendant.

The District Court, after hearing evidence on both sides, principally as to the possession of the olive tree at Ayios Epiktitos (the plaintiff having withdrawn his claim for the tree at Ayios Pavlos), found that the evidence on both sides, but especially on the side of the plaintiff, was extremely vague, inconclusive and unsatisfactory, and came to the conclusion that the plaintiff had failed to make out his case, and dismissed the action.

The plaintiff now appeals.

It appears to us that the facts as regards the division, appropriation, possession and sale of the lands are undisputed. The plaintiff's advocate, however, contends as to the land that, inasmuch as the division made in 1879 was without the sanction of the Land Registry Office it cannot now hold good, and that, as portions of the land which fell to plaintiff's share on that division have since been sold for the debt of the defendant, the plaintiff is entitled to claim, in substitution of them, from the defendant, those portions which were taken by him on the division. It was also urged that prescription would not run in favour of the defendant, as the Land Registry Office not having given its assent to the private division, the same argument applied as in the case of mevat land acquired without the permission of the Sovereign.

It was further contended that the defendant had admitted unlawful possession, according to Article 20 of the Land Code, and that his possession was conditional, which would debar him from availing himself of a claim by prescription ; and that as regards the plaintiff not having intervened to stay the sale, that fact made no difference to his case. With respect to the olive tree, plaintiff's advocate maintained that he had fully proved that it belonged to plaintiff by virtue of 16 years' uninterrupted possession.

To this the defendant's advocate replied, that it was a question of fact as to the possession of the tree, and the District Court had rightly come to the conclusion from the confusing nature of the plaintiff's evidence, that the defendant and not the plaintiff was entitled to it. As to the land he admitted that both " Armenos " and " Ayios Elia " had fallen to defendant on the division which was unconditional, that the defendant could not be said to have declared he had taken his share of the land unlawfully, inasmuch as it had come to him by inheritance.

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He then urged that as plaintiff had, in fact, acquired a right to be registered on the ground of prescription for those portions of land which had fallen to her share, and had not, when entitled to do so, intervened to stay the sale of them for defendant's debt, she was not entitled now to claim any of the property taken by the defendant, to which he had by prescription acquired a right to be registered.

We think it is quite clear that the division itself of this property, not being made in the manner required by Article 17 of the Land Code, could not be held to have any effect in law, but it seems to us that the undisturbed possession for ten years by each of the parties of the land taken by each, in accordance with that division, gave to each a right to be registered as the sole possessor of the land each took.

This being so, the plaintiff, had she chosen, might have prevented the sale of her share in the land by applying to the Court and proving her title thereto. [*Ali Eff. Hassan Eff. v. H. Paraskevou Sava, ex parte H. Eleni Papa Yanni*, Vol. II., C.L.R., p. 58.] This she has not done, and consequently she appears to have lost, by her neglect, her right to part of the land which fell to her share on the private division.

This loss, in our opinion, will not entitle her to take from the defendant the land that fell to him on that division and which has not been sold, as he has also acquired a title to it by prescription.

It cannot be said here that there was any unlawful taking in the sense used in Article 20 of the Land Code, as each took a share of what had devolved, as a whole, upon both, by way of inheritance from their father, and each took with the other's consent. Nor does there appear to have been any condition imposed on either side beyond the stipulation, that one should take one piece and one another, of the land divided ; and, apparently, no dispute arose until some time after the period prescribed by law had elapsed.

As regards the argument that prescription will not run in this case, owing to the fact that the Land Registry Office had not sanctioned the division on the same principle that it was held in a recent case [*Sava Hj. Kyriako v. the Principal*

SMITH, C.J. *Forest Officer, ubi supra*, p. 87, Vol. III., C.L.R.] not to  
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 MIDDLE- run in the case of mevat land taken possession of without  
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 --- are similar.

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In this case it is arazi-mirié possessed by one co-heir against another, and this Court has held that, in the case of arazi-mirié, prescription will run against the State, while, as regards mevat land, its possession being given subject to the consent of the Sovereign as Caliph, the rule of *nullum tempus occurrit regi* must be observed.

We are, therefore, of opinion that the plaintiff is not entitled to succeed, as regards her claims in this action for the land at Armenos, or partition of the land Ayios Elia.

As regards the olive tree at Ayios Epiktitos, there appears to us no reason that we should interfere with the decision of the District Court.

This appeal, therefore, must be dismissed with costs.

*Appeal dismissed.*