HUTCHINSON, C.J. & MIDDLETON, J. 1899 Dec. 19

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

MEHMED AND KEZIBAN JUMA, *Plaintiffs*,

*v.*

MEHMED HALIL IMAM, *Defendant.*

ARAZI-MIRIE—SALE WITHOUT REGISTRATION—DEATH OF PURCHASER BEFORE TAKING POSSESSION LEAVING MINOR HEIRS—PRESCRIPTION—CULTIVATION BY PURCHASER'S HEIRS AFTER LAPSE OF TEN YEARS—CULTIVATION BY THIRD PARTY—MAHLOUL—KHALI—TITLE—LAND REGISTRY OFFICE AS REPRESENTING THE STATE—ART. 68 LAND CODE—THE LAW CONCERNING THE CONFISCATION OF PUBLIC LANDS NO. XIV. OF 1885.

*J. in* 1882, *purchased by private agreement from M. O. a piece of Arazi-mirié and died the same year without registration in his name or taking possession, leaving minor heirs. The land remained uncultivated till* 1893, *when the heirs of J. in conjunction with M. H., as the husband of one of them, proceeded to clear and cultivate the land. M. H. claimed to have opened and cultivated the land on his own account. In an action brought by the heirs of J. against M. H. to restrain him from interfering with the land and to obtain the cancellation of any registration for the land in the name of M. H.*

HELD (*reversing the judgment of the District Court*); *that the land in question was apparently confiscable to the State as Mahloul subject, however, to the tapou right of the heirs of M. O. but even if that were not so, that the heirs of J. had no such title to the land either by prescription or registration as would enable them to maintain an action against any person who had proceeded to open and cultivate it.*

APPEAL from the District Court of Larnaca.

*Artemis* (with him *Pascal Constantinides*), for the Appellant.

*Economides* for the Respondent.

The facts and arguments sufficiently appear from the judgments.

1900 Jan. 5

HUTCHINSON, C.J. The claim in this action is to restrain the Defendant from interfering with land which the Plaintiffs claim as their own.

The Plaintiffs' case is that their father, Juma, bought this land 20 years ago and that, although it was never registered in his name or in theirs, they have acquired a title to it by possession for upwards of ten years.

The District Court found, and I think rightly, that Juma bought the land from Mehmed Osman about 1882; that he died soon afterwards, leaving the Plaintiffs his heirs; that the Plaintiffs were then infants; that the land remained uncultivated for the next ten or eleven years, and that it was then cultivated by the Plaintiffs, (the Defendant, who was the husband of one of the Plaintiffs, assisting to clear and cultivate the land on his wife's behalf.)

The issues settled were, (1) before the land was broken up and cultivated six years ago, was it the land of the Plaintiffs? and (2) was it broken up and cultivated by or on behalf of the Plaintiffs or by or on behalf of the Defendant? The District Court found that the land was the Plaintiffs' and that it had been broken up and cultivated on their behalf, and gave judgment restraining the Defendant from interfering with the land.

The Defendant alleged that he had cultivated it on his own account; but the Plaintiffs contended that he had only cultivated it on behalf of his wife, from whom he is now divorced: and the Court decided against the Defendant on this point. In my opinion the evidence proves that Juma bought this land from Mehmed Osman; that Juma never cultivated or occupied or used it, and that it was never registered in his name; and that it was never possessed or cultivated or used by the Plaintiffs or any one through whom they claim until about six years ago. They have not proved possession or cultivation for ten years, and therefore they have not acquired a title by length of possession. The mere agreement to buy the land, even if Juma paid for it, does not constitute "possession." It was suggested that the Plaintiffs can obtain an order against the Defendant restraining him from trespassing, even though they are not registered owners and have not acquired a title to be registered, because the Defendant has no title or claim of any kind but is a mere trespasser, whereas the Plaintiffs are in possession. In my opinion the Plaintiff in an action to restrain trespass on land must, if his right to the land is disputed, prove that he is either registered or entitled to be registered as the owner. That I think follows from Art. 1 of the Tapu Sened Regulations of 7 Shaban, 1276.

The judgment appealed from must be set aside and the action dismissed, and Plaintiffs must pay the costs of this appeal.

MIDDLETON, J. This was an action to restrain Defendant from interfering with a piece of land at Mari called Voupes of about 8 donums.

The facts as alleged by the Plaintiffs were, that their father Juma in 1882, had purchased this land by private sale from one Mehmed Osman, that he died shortly after the purchase, that from the date of the purchase till 1893, the Plaintiffs being minors, the land was uncultivated, that Defendant having married, the Plaintiff Keziban then shared in the clearing and cultivation of the land, but having subsequently divorced her, Defendant set up a claim to the land on the ground that he had opened it up from khali land on his own account.

The Defendant denied the cultivation by the Plaintiffs, and that he had done so on behalf of his wife, but asserted he himself had opened the land from khali.

The issues settled by the Court were:

(1). Before the land was broken up and cultivated was it the land of the Plaintiffs?

(2). Was it broken up and cultivated by or on behalf of the Plaintiffs or by or on behalf of the Defendant?

The District Court having heard evidence on both sides, found that the facts were as alleged by the Plaintiffs, and gave judgment in their favour for an injunction upon their obtaining registration.

The Defendant appealed, and before us it was contended on his behalf that the Court were wrong in finding that the Plaintiffs had acquired a title to be registered on the ground of inheritance, that possession had never been taken by Juma, that the evidence shewed that the land had become khali, and that Defendant as its first cultivator was entitled to preferential registration, but if not, then, in any case, the Plaintiffs were not entitled to maintain this action against him as having no title.

For the Respondent it was argued that the land in question was "*tapoulou*" land which had been possessed by the Plaintiffs for upwards of 10 years, and that the Court below were fully justified in their judgment; that even if it were khali, the Plaintiffs on the facts would be entitled to succeed as the original cultivators, the Court having found that the cultivation of the Defendant was undertaken on behalf of his wife, and that the Plaintiffs as possessors could maintain the action as against the Defendant as a trespasser not alleging title in himself.

We have now to consider what is the Plaintiffs' position as regards the land upon the facts which have been proved. Upon a perusal of the evidence I think the District Court were justified in finding that the land was bought by private sale by Juma in 1882, but I do not think that there is any evidence that Juma ever took possession of it.

I think that the land remained uncultivated, but respected by adjoining owners till the year 1893, and I agree with the District Court that the cultivation which then took place was on behalf of the Plaintiff Mehmed, and so far as the Defendant was concerned in it on behalf of the Plaintiff Keziban his wife.

It was clear that the sale to Juma was not a legal one, and that no possession or cultivation of the land by or on behalf of anyone is shewn from 1882 to 1893.

I think also that the registration deposed to by the Tapou Clerk, dated August, 1292, refers to the land in dispute.

In 1893, then, this land registered in the name of Mehmed Osman, who was then alive, was confiscable as Mahloul or vacant land by the State had it chosen to do so under Law XIV. of 1885, repealing Article 68 of the Land Code.

The State, however, did not confiscate the land, and the evidence shews that Mehmed Osman and his heirs made no claim to it, but looked on it as the property of the Plaintiffs.

The Plaintiffs, however, never acquired any title by registration nor by prescription, and under these circumstances I must hold that the legal ownership of the land lies in the heirs of Mehmed Osman, who is now dead, subject, however, to the right of the State to confiscate the land as Mahloul.

The disposition then of this land appears to me to rest with the Land Registry Office as representing the State.

If they permit the heirs of Mehmed Osman to become registered and to transfer the land legally to the Plaintiffs, then there is no doubt that the Plaintiffs would be entitled to maintain an action to protect their interests.

To my mind the proper course for the Plaintiffs to have pursued was to have endeavoured to have obtained registration from the heirs of Mehmed Osman.

If, however, the Land Registry Office, as representing the State, insist upon their strict rights that the land is Mahloul, in that case the Plaintiffs, it appears to me, have no greater rights on the land legally than the Defendant. Morally they have, no doubt, a greater claim than the Defendant, but assuming that the heirs of Mehmed Osman had chosen to repudiate their father's private sale to Juma, it seems to me that the Plaintiffs would then only be in the position so frequently occupied by persons who are negligent or foolish enough to rely on the efficacy of private sales of Arazi-mirié not followed by registration.

In other words, they would neither have a legal right to the land nor to the return of the purchase money paid by their father.

In my judgment, therefore, the Plaintiffs have no such title to the land as will enable them to maintain this action.

*Appeal allowed with costs. Each party to pay their own costs in the District Court.*