

In the Privy Council.UNIVERSITY OF LONDON
W.C.1.

-9 OCT 1956

INSTITUTE OF ADVANCED
LEGAL STUDIES

44465

ON APPEAL**FROM THE SUPREME COURT OF PALESTINE SITTING AS A
COURT OF CIVIL APPEAL.**

BETWEEN

RAPHAEL HABIB BEN SHALOM (Defendant)

Appellant

AND

1. SADIQA BINT AS-SHEIKH KHALIL AD-DASUKI

10 (First Plaintiff)

2. SAKDIEH BINT AS-SHEIKH KHALIL AD-DASUKI

(Second Plaintiff)

*Respondents.***Case for the Respondents.**

RECORD.

pp. 14-15.

1. This is an appeal from a judgment of the Supreme Court of Palestine sitting as a Court of Civil Appeal dated the 13th April 1945 by which the Supreme Court dismissed with LP.10 costs the Appellant's appeal from a Judgment of the Land Court of Nablus dated the 27th July 1944 whereby four "Masha" shares (i.e. shares in undivided land held in common by jointly interested co-owners) were ordered to be registered in the names of the Respondents equally upon payment to the Appellant of the price of the said shares calculated at LP.19.200 mils per dunum, and the Appellant was ordered to pay LP.30 inclusive costs.

2. The Appellant is a landowner living in Tel-Aviv Palestine. The Respondents are sisters of the whole blood being daughters of Sheikh Khalil Ad-Dasuki and Raqiyeh his wife.

3. The Respondents' mother, the said Raqiyeh, died about the 24th December 1942. At the time of her death she was the owner of one out of nine shares in each of two parcels of land registered in the Land Registry of Nataniya under "Block No. 8003, Parcels 2 and 4." Of the remaining eight shares in the said land, prior to May 1942, two shares were held by Adel Ad-Dasuki a son of Raqiyeh and of Sheikh Khalil Ad-Dasuki and two further shares were held by Youssef Ad-Dasuki, another son of Raqiyeh and of Sheikh Khalil Ad-Dasuki. The said two parcels of land were of the "Miri" category, i.e., privately owned but State Controlled.

pp. 1, 3.
pp. 18-19.

pp. 2-3. 4. Either on the 3rd June 1942 or the 3rd May 1942 Adel and Youssef, either personally or through the agency of their father the said Sheikh Khalil Ad-Dasuki, each sold to the Appellant his two shares in the said land.

5. By Article 41 of the Ottoman Land Code as amended by an addendum of 19 Sha'ban 1291, if an owner of an undivided share of land of the Miri category transfers his share or shares by way of gift or in consideration of payment, without the leave of the persons jointly interested (viz. co-owners), such jointly interested persons are, within a period of one year from such transfer, entitled to claim from the transferee of the said shares their restitution on payment to the transferee of the value of such shares at the date of the claim. This right of repurchase is known as and is hereinafter described as the right of "awlawiye." In the event of a person jointly interested dying within the said period of one year his or her heirs may within such period exercise such right of "awlawiye." 10

pp. 1-2. 6. On the death of Raqiyeh the Respondents being two of her heirs and each being entitled to a three-twentieth share of her estate including her share in any land became persons jointly interested in the land described in clause 3 hereof, in which land Adel and Youssef had sold their shares to the Appellant. The Respondents therefore claimed to exercise the right of "awlawiye" in respect of the four shares so sold by Adel and Youssef, and asserted such right in a Statement of Claim filed in the Nablus Land Court on the 8th March 1943. 20

p. 3. 7. In his defence filed in the Nablus Land Court on the 25th April 1943 the Appellant pleaded *inter alia* that Raqiyeh had before her death renounced her right of "awlawiye" in respect of the shares sold by Adel and Youssef and that the Respondents were therefore estopped from asserting such right as her heirs.

pp. 6-7. 8. The action was heard in the Land Court of Nablus on the 22nd November 1943, the 28th June 1944 and the 27th July 1944. On the 22nd November 1943 the Court heard legal argument only on the estoppel pleaded, no evidence was called on either side; the following facts were not disputed in the course of the argument:— 30

pp. 6-7,
p. 21. (A) That Raqiyeh had, on the 30th December 1932, appointed her husband the said Sheikh Khalil Ad-Dasuki her attorney with power to sell her share in the land the subject of the Respondents' claim.

(B) That Sheikh Khalil Ad-Dasuki never completed any sale in respect of Raqiyeh's share in the said land.

pp. 6-7. While conceding that no sale was ever completed, it was alleged during the argument on behalf of the Appellant that Sheikh Khalil Ad-Dasuki contracted with the Appellant to sell to him Raqiyeh's share in the said land, and it was contended that, Raqiyeh's attorney having contracted to sell her share in the said land, Raqiyeh and her heirs were at all times thereafter estopped from asserting the right of "awlawiye" in respect of the shares of the other Co-owners. 40

After hearing the legal argument the Land Court of Nablus held that as no sale of Raqiyeh's share had ever been completed, the right of "awlawiye" was never lost to Raqiyeh or consequently to her heirs, and that the Respondents had therefore established their claim subject to the assessment of the value of the land at the date of the action and payment to the Appellant of the sum so assessed. p. 7.

The Court having so decided it was agreed that the value of the shares of Adel and Youssef should be assessed by three named experts.

9. On the 27th July 1944 the Appellant's advocate called before the Court his witnesses as to value, but before doing so he sought leave to amend his Defence by pleading that the Respondents were both minors and therefore could not sue in person. The Court refused leave to amend but the Respondents' father Sheikh Khalil Ad-Dasuki gave evidence on oath as to the ages of his daughters, stating that Sadkiyeh was twenty-two and Sadiqa twenty. pp. 8-9. p. 9.

10. On the 27th July 1944 the Land Court of Nablus gave judgment reciting their decision of 22nd November 1943 that the Respondents' claim to "awlawiye" was established and assessing the value of the shares claimed by the Respondents at LP.19·200 mils per dunum, and awarding the Respondents LP.30 costs. The two learned Judges of the Court disagreed on the correct assessment, Judge Shehadeh accepting a figure of LP.22 per dunum, and Judge Baradey one of LP.19·200 mils per dunum. In these circumstances they gave judgment on the basis of the lower figure. p. 10.

11. The Appellant appealed to the Supreme Court from the above decision.

In his amended Notice of Appeal filed on the 16th December 1944 the Appellant pleaded— pp. 13-14.

- (A) that the Court below had not followed the correct procedure as laid down in the Civil Procedure Rules 1938 ;
- (B) that the Court below wrongly refused to hear witnesses summoned to attend the hearing on behalf of the Appellant ;
- (C) that the Respondents were estopped from asserting a right of "awlawiye" by reason of a contract made on behalf of Raqiyeh by Sheikh Ad-Dasuki to sell to the Appellant Raqiyeh's share in the said land ;
- (D) that the right of "awlawiye" was indivisible and could only be claimed by all heirs jointly ;
- (E) that the Court below should have allowed the Appellant's application to amend his Defence by pleading.

12. On the hearing of the appeal it was contended on behalf of the Appellant—

- (A) that his advocate at the hearing before the Court below on the 22nd November 1943 was not allowed to call certain witnesses whom he wished to call, and that his arguments were not fully heard ;

(B) that as the learned Judges in the Court below had disagreed on the correct value of the shares in question that they should have based their final assessment on the higher of the two figures ;

(c) that the Court below should have granted leave to amend the Defence by pleading the minority of the Respondents.

The Appellant did not contend before the Supreme Court that on facts admitted and arguments raised as recorded by the Court below the learned Judges should have held that the Respondents were estopped from asserting their right of "awlawiye."

13. It was contended for the Respondents before the Supreme Court of Palestine— 10

(A) that the Appellant's advocate had not in fact sought to call evidence on the 22nd November 1943, nor had he sought to address arguments to the Court other than as disclosed in the Court's official record ;

(B) that the Appellant's actions subsequent to the ruling of the Court below on the 22nd November 1943 viz. in agreeing to appoint valuers and in failing to take any step to set aside the said ruling of the 22nd November 1943, were in themselves a refutation of the contentions in the affidavit sworn by the Appellant's advocate on the 22nd November 1943. 20

(C) that the official record of the Court below was binding on the parties to the action ;

(D) that the procedure followed in the Court below was proper and in accordance with Rules 189 and 199 Civil Procedure Rules 1938, in that the Appellant was raising a preliminary plea of estoppel and therefore had the right to begin and the duty of producing any evidence he desired on the preliminary point ;

p. 7.

(E) that other than producing the power of attorney of Exh. D/1 the Appellant produced no evidence in the Court below in support of his plea of estoppel ; 30

(F) that the value of the shares were correctly assessed.

14. The Supreme Court of Palestine in dismissing the appeal, held—

(A) that the record of the Court below correctly showed the procedure followed at the hearings before them, and that, contrary to the contentions of the Appellant's advocate in his affidavit sworn on the 24th November 1943, he, the Appellant's advocate had acquiesced in the procedure adopted and that he had not invited the Court below to hear witnesses, or any argument other than as set out in the record ; 40

(B) that the Court below were correct, having regard to the learned Judges' disagreement on value in accepting the lower of the two valuations as the correct assessment ;

(C) that no other point raised on behalf of the Appellant at the hearing of the appeal disclosed any reason for reversing the judgment of the Court below having regard to the fact that the Appellant's advocate had acquiesced in the procedure adopted and the course followed in the Court below.

15. The Respondents hereby submit that the judgment appealed from is right and ought to be affirmed and that this Appeal ought to be dismissed for the following among other

REASONS.

- 10 (1) BECAUSE the Respondents as heirs of Raqiyeh were entitled to exercise the right of "awlawiye" in respect of the shares of Adel and Youssef.
- (2) BECAUSE, subject to contending (A) that the Respondents were estopped from claiming the right of "awlawiye" and (B) that a claim of "awlawiye" could only be made by all Raqiyeh's heirs jointly, the Appellant admitted before the Land Court of Nablus the Respondents' right to claim "awlawiye."
- (3) BECAUSE no evidence was adduced by the Appellant before the Land Court of Nablus to support his plea of estoppel.
- 20 (4) BECAUSE even if it was sufficiently established that Sheikh Khalil Ad-Dasuki contracted to sell to the Appellant Raqiyeh's share in the said land, such contract never having been completed Raqiyeh could not be taken to have renounced her right of "awlawiye" and her heirs were not estopped as alleged.
- (5) BECAUSE the exercise of the right of "awlawiye" by heirs need not be exercised by all heirs jointly.
- (6) BECAUSE the procedure adopted before the Land Court of Nablus was in accordance with the Palestine Civil Procedure Rules 1938, or if there was any departure from the said Rules it was acquiesced in on behalf of the Appellant who was and is not thereafter entitled to complain of any irregularity in procedure.
- 30 (7) BECAUSE even if there were any irregularity in procedure before the Land Court of Nablus it was not such as to vitiate the proceedings.
- (8) BECAUSE the Land Court of Nablus rightly refused to allow the Appellant to amend his Defence on the last day of the hearing before the Land Court of Nablus, and further because there was evidence before the Court which established that neither of the Respondents was a minor.
- 40 (9) BECAUSE the Land Court of Nablus adopted the correct principles in arriving at a final assessment of the value of the shares of Adel and Youssef.
- (9) BECAUSE the reasons given by the Supreme Court of Palestine are right and ought to be affirmed.

JAMES STIRLING.

In the Privy Council.

ON APPEAL

*From the Supreme Court of Palestine sitting
as a Court of Civil Appeal.*

BETWEEN

**RAPHAEL HABIB BEN
SHALOM** (Defendant) *Appellant*

AND

1. **SADIQA BINT AS-SHEIKH KHALIL AD-DASUKI** (First Plaintiff)
 2. **SAKDIEH BINT AS-SHEIKH KHALIL AD-DASUKI** (Second Plaintiff) *Respondents.*
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Case for the Respondents

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