

**Keren Kayemeth Leisrael Limited and  
Palestine Land Development Company Limited - - Appellants**

*v.*

**Muhammad Mussa Saleh Mansour and others - - Respondents**

FROM

**THE SUPREME COURT OF PALESTINE**

---

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 3RD MAY, 1948**

---

*Present at the Hearing:*

LORD UTHWATT

LORD MACDERMOTT

SIR JOHN BEAUMONT

[*Delivered by* LORD MACDERMOTT]

---

This appeal is from a judgment, dated the 29th January, 1945, of the Supreme Court of Palestine (Rose and Plunkett JJ.) sitting as a Court of Appeal, Jerusalem, which affirmed (with certain variations) a judgment, dated the 27th March, 1944, of the Land Court of Jerusalem upholding the claim of the plaintiff and first respondent to the right of awlawiyeh or prior purchase as owner of certain shares in four parcels of land in the village of Ein Karem and directing, on terms, a consequential amendment of the tapu register.

The salient facts may be shortly stated. The plaintiff and the other respondents are the children of one Musa Mansour who died some 20 years before the present suit leaving certain undivided shares in the four parcels of land already mentioned. The respondents inherited these shares but the plaintiff did not become registered in respect of his inheritance until the 27th December, 1943, which was after he had filed his statement of claim. From 1935 onwards the second appellant (hereinafter called the Development Company) acquired by purchase various shares in the lands other than those inherited by the respondents from their father. In June, 1942, the Development Company, then co-owners with the respondents, purchased the shares of all the respondents except the plaintiff. It was in relation to this purchase that the plaintiff claimed the right of awlawiyeh. By two mortgages dated the 2nd and 4th September, 1942, respectively, the Development Company mortgaged the lands in question, with others, to the first appellant (hereinafter called the mortgagee) to secure advances made by it.

The right of awlawiyeh arises under certain provisions of the Ottoman Land Code. The material portions of these (taken from Fisher's Translation) are as follows:

“ Art. 41.—The owner of an undivided share in State land cannot transfer his share, by way of gift or in consideration of payment, without the leave of the persons jointly interested. If he does so the latter have the right . . . to claim from the transferee the restitution of his share on paying him its value at the time of the claim . . . ”

“ Art. 42.—If amongst three or more co-possessors there is one who wishes to transfer his share, he may not give preference to any one of those jointly interested. If the latter wish to acquire the share they can take it in common. If one co-possessor disposes of the whole of his share to one of the other co-possessors the others can take their proportionate shares in it. The provisions of the preceding Article are also applicable in this case.”

The Land Court, having found in favour of the right, treated the plaintiff as entitled to exercise it in respect of a moiety of the purchased shares on the basis that there were two co-possessors, the plaintiff and the Development Company, and that “ their proportionate shares ” were determinable for the purposes of Art. 42 by their number. The Land Court then fixed the price to be paid by the plaintiff and ordered his registration subject to this payment and also to payment of a portion of the mortgage debt. The Supreme Court relieved the plaintiff of this mortgage payment and directed his registration free of the mortgage; but subject to this variation it affirmed the judgment of the Land Court.

In support of the present appeal the appellants raised several points of a procedural nature which it will be convenient to dispose of now. It was said that the judgment of the Land Court affected the rights of the mortgagee and was defective in that the mortgagee was not represented at the trial. Their Lordships are not disposed to think that the mortgagee was a necessary party to the suit at any stage. Apart from that, however, the facts supply an adequate answer to the point under consideration. The mortgagee was named as an original defendant, but in an application to strike out the statement of claim the advocate for both defendants was at pains to point out the nature of the mortgagee's interest and, as appears from the note, to contend that:—

“ A claim of prior purchase cannot be made against the Keren Kayemeth Leisrael Ltd. because it is not the purchaser, and therefore the Keren Kayemeth Leisrael Ltd. is not to be a party to these proceedings.”

The plaintiff's advocate then stated his desire to confine his case to a claim against the purchaser, the Development Company, alone. Thereafter the suit proceeded without the mortgagee until, for some reason which is not stated, the mortgagee was made a respondent in the appeal to the Supreme Court. In these circumstances the mortgagee cannot well complain for the course followed was of its own choice.

It was then contended that the judgment of the Land Court had lapsed by reason of the plaintiff's alleged failure to comply with the provisions of Art. 38 of the Ottoman Law of Execution and section 6 (2) of the Land Law (Amendment) Ordinance. Their Lordships do not think it necessary to detail these provisions or to trace the course of the somewhat involved execution proceedings which took place but which have no ultimate bearing on the rights of the parties. They are not satisfied that Art. 38 was applicable to any essential step in the suit and they are unable to find any ground for holding that the plaintiff made default in the completion of the transfer of his shares so as to determine the right to such transfer under section 6 (2).

The other points taken on behalf of the appellants related to the nature of the right claimed. First of all it was urged that the right ceased to be exercisable once the Development Company had mortgaged its purchase of shares and, alternatively, that the right could not operate to reduce the extent of the mortgagee's security. In the opinion of the Board these submissions are untenable. The Development Company took subject to the right and it could not mortgage more than it had purchased. It was not suggested that the plaintiff knew of or in any way consented to the mortgages and it is clear that his right of *awlaiyeh* was not prejudicially affected by them.

The next point made against the judgment appealed from was that the right could not be exercised by one who was in default under section 13 (1) of the Land Transfer Ordinance. That subsection reads:—

“ When any immovable property passes by operation of a will or by inheritance, the legatees or heirs, as the case may be, shall be jointly and severally responsible for the registration of the immovable property in the name of the legatees or heirs within a year of the death.”

It is true that the plaintiff's share of his father's property was not the subject of registration in accordance with the terms of this enactment. This, however, is far from saying that the plaintiff thereby forfeited his inheritance or the rights attaching to it. In their Lordships' view that is not the effect of the subsection. They agree with the Land Court and the Supreme Court that the tardiness of the plaintiff's registration did not preclude him from asserting his co-ownership and his right of prior purchase.

The last point taken for the appellants was that the right claimed was only exercisable by the plaintiff in respect of a share proportionate to his holding and not to the number of co-owners. The divisor, it was said, should not be two (as held by the Courts in Palestine) but a greater number which would divide the shares in question to the ratio of the pre-purchase holdings of the two co-owners. The question so raised is one of the true construction of Articles 41 and 42 of the Land Code and, in particular, of the words “ their proportionate shares ” in Article 42. Their Lordships have not been referred to, nor are they aware of, any authority on this matter; but after a careful consideration of the terms of these Articles they are of opinion that the right of prior purchase cannot be measured by reference to the size of the holdings of the co-owners concerned. No preference is to be given to any of those jointly interested and that injunction is best obeyed by adopting a basis of personal equality and making distribution according to the number of claimants. The appeal must, therefore, fail on this ground also.

For these reasons their Lordships find themselves in agreement with the conclusions reached by the Supreme Court. They will therefore humbly advise His Majesty that the appeal be dismissed. The respondents did not appear and there will be no order as to costs.

In the Privy Council

---

KEREN KAYEMETH LEISRAEL LIMITED  
AND  
PALESTINE LAND DEVELOPMENT  
COMPANY LIMITED

2.

MUHAMMAD MUSSA SALEH MANSOUR  
AND OTHERS

---

DELIVERED BY LORD MACDERMOTT

Printed by His Majesty's Stationery Office Press,  
DRURY LANE, W.C.2.

1948