

49, 1945

In the Privy Council.

No. 72 of 1945.  
UNIVERSITY OF LONDON  
W.C.1.  
-9 OCT 1955  
LEGAL STUDIES

**ON APPEAL**

FROM THE SUPREME COURT SITTING AS A COURT OF APPEAL  
APPEAL JERUSALEM.

44459

BETWEEN—

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1. KHALIL RAJIH KHALIL and 239 Others as stated in the Schedule attached to the Memorandum of Claim.
2. FARID SALEH KHADR and 38 Others as stated in the Schedule attached to the Memorandum of Claim.
3. TAHER 'AWAD MANNA and 52 Others heads of families representing 226 persons.
4. MUSTAFA MUHAMMAD GHUDIYA and 182 Others.
5. HUSNI ABDALLAH HASSAN NA'AMAN and 48 Others heads of families representing 289 persons.
6. NEJIB EL HAJ MOHAMMAD KHALIL UMAR HAMMAD and 10 Others.
7. YASIN YUSUF ZETAWI and 11 Others.
8. MUHAMMAD AHMAD MUHAMMAD, ABD EL GHANI NI'MAN and 7 Others (Plaintiffs) *Appellants*

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— AND —

1. TOVA RUTMAN of Hadera.
2. RIFKA ARONSON of Zichron Yacob.
3. EPHRAIM LTD., private company.
4. YA'AQOV RUTMAN of Kfar Brandes.
5. RAHEL RUTMAN of Kfar Brandes, and 87 Others whose names are set out in the original application for leave to appeal (Defendants) *Respondents.*

RESPONDENTS CASE

**CASE FOR RESPONDENTS 1 to 5.**

RECORD.

1. This is an Appeal from the Judgment of the Supreme Court, sitting as a Court of Appeal, Jerusalem, dated the 21st July, 1943, setting aside the decision of the Settlement Officer, Haifa Settlement Area, dated the 30th March, 1943, in favour of the Appellants.

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p. 175.  
p. 157.

2. The main question in this Appeal is the ownership of a tract of land formerly known as Khor al Wasa' and now known as Kfar Brandeis in the immediate vicinity of the Colony of Hudeira.

3. The Respondents have been Kushan holders and registered owners in the Land Registry of the said land and in possession thereof since 1926. The Appellants nevertheless claim that the land is part of the Musha' land of the village of Zeita.

p. 405. The dispute between the parties as to this land has been before the Palestine Courts since the year 1930. Once previously it has been before His Majesty in Council (P.C.A. No. 19 of 1935) when, 10 reversing the judgment of the Supreme Court of Palestine, it was held that it was not open to the Settlement Officer settling the village Hudeira who had come to the conclusion that Khor al Wasa' was outside the boundaries of the village he was settling, to decide the nature of the land or to whom it belonged.

p. 191. 4. In these proceedings great reliance has been placed throughout by the Appellants on a judgment of the Land Court, Nablus, given in the following circumstances. In 1922 an action was commenced in that Court by certain villagers of Zeita against certain persons who held kushans (Tabu Sanads) over the lands known as 20 Raml Zeita claiming that the registration was by way of trust only and that the said lands were Musha' to all the Zeita villagers. On the 13th March, 1923, judgment in that action was given in favour of the Plaintiffs in these terms:—

p. 192.  
l. 24. We declare that the land in dispute is Musha' to all the inhabitants of the village and we order that it should be left as it stood from time immemorial without it being assigned to anybody.

We also order the cancellation of the Tabu Sanads in the name of the Defendants (by inheritance from their ancestors) 30 and the registration of the land in dispute in the Tabu as general Musha' to every cultivator of the Village pending settlement by Government.

p. 199. This judgment, had it been allowed to stand, would have had the effect of a judgment, *in rem*, but it was appealed, and on appeal it was pointed out that the Court had no power to give such a judgment. All that it could do was to give a judgment *inter partes*. The judgment of the Land Court was accordingly set aside, and a re-trial ordered for the Plaintiffs to establish the individual shares 40 in the land to which they were respectively entitled. On the re-trial the Land Court on the 14th April, 1924, in obedience to the direction of the Court of Appeal, instead of its first order directing the cancellation of the Tabu Sanads in the names of the Defendants and the

registration of the Lands in dispute as general Musha' made an order that the Tabu Sanads held by the Defendants should be rectified by registering certain shares in the names of the Plaintiffs, thus making in quite clear that the second judgment had no more the characteristics of a judgment *in rem*, but was purely a judgment *inter partes*. This judgment was also appealed to the Court of Appeal where, on the 20th January, 1925, it was confirmed.

p. 201.

10 No question ever arose in the Nablus Court as to the boundaries or extent of the land covered by the registration, the subject matter of the litigation. No attempt has ever been made to execute the judgment of the Nablus Court, and under Arts, 143 and 144 of the Ottoman Execution Law of 1330 it is now barred by prescription. Had any attempt ever been made to execute this judgment during the time that it was enforceable the effect of execution would have been to substitute some other registered owners for the trustees in whose names the land then stood registered. Had it then appeared that a further dispute existed as to the possession of any land or as to the area and boundaries of the land covered by the registration of Raml Zeita a further action in a Magistrate's Court would

20 have been necessary to obtain possession of any land or an action in the Land Court to ascertain the area and boundaries of the registered title. It is to be further emphasised that there is nothing whatever in either judgment of the Nablus Court or in the judgments on appeal even to suggest that the land known as Raml Zeita covered the lands for which the Respondents hold kushans, that is, Khor al Wasa'.

5. In March 1925, one Abdel Fattah es Samara and others instituted an action in the Haifa Land Court against one Samsonoff, one Yamani, and one Madursky, registered land owners of Hedeira, complaining that the Defendants in an attempt to re-possess themselves of the land were trespassing on the land specifically described as Khor al Wasa', which the Plaintiffs had occupied and cultivated for more than thirty years, and asked for an order that the lands should be registered in their names. The Court appointed an Inspection Committee to inspect the land and its boundaries and to compare the entries in the relevant Land Register and with the report of this Committee before it the Land Court on the 6th May, 1925, gave judgment directing that the land should be registered in the names of the Plaintiffs. Execution of this judgment was ordered and after inspection by the Land Registrar, who was accompanied by a member of the Land Court who had tried the action,

30 the land was duly registered in the Haifa Land Registry in the names of the Plaintiffs and a payment of 5 per cent. of the "Bedl el Misl" (that is the fair value of the land) made to the Government.

p 204.

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p. 242.

p. 205.

p. 429.  
p. 430.

6. Shortly after, an opposition to the judgment of the Land Court, Haifa, in the preceding paragraph referred to was filed in that

Court on behalf of two villagers of Zeita, alleging that Khor al Wasa' was not in Hudeira, but was part of the Musha' land of Zeita covered by the Nablus judgment. On the 7th August, 1925, this opposition was dismissed with liberty to the opposer "to institute a separate action against any person in order to prove the ownership to the land in question". This judgment was confirmed by the Supreme Court on the 6th May, 1926. No "separate action" was ever brought by the opposer or by any other person claiming similar rights.

p. 421/424. 7. In 1925/1926 the then registered owners, that is Abdel Fattah 10  
 es Samara and others, by divers registered transfers sold the land  
 to the Respondents, but on the Director of Lands being approached  
 p. 278. for his consent to an intended sale by the Respondents of part of the  
 land, he refused his consent. Proceedings were then commenced  
 p. 280. by the Respondents in the Supreme Court, sitting as a High Court  
 of Justice, calling upon the Director of Lands to give his consent to  
 the transfer. After a preliminary hearing on the 25th January, 1927  
 the proceedings were adjourned for fourteen days for the Attorney  
 General to decide whether he proposed to take steps to re-open the  
 p. 243. Haifa case. On the 26th January, 1927, the Attorney General filed 20  
 an opposition in the Haifa case, and on the 28th January, 1927,  
 obtained an interlocutory attachment on the land. This he followed  
 p. 244. up on the 5th February, 1927, by himself initiating an action in the  
 Land Court, Haifa, asking that the judgment of that Court of the  
 6th May, 1925, the entries in the Haifa Land Registry made and the  
 Kushans issued thereon be all cancelled. The grounds alleged by  
 the Attorney General were that the lands were a part of the Musha'  
 lands of Zieta Village and further that the Government claimed that  
 they were Mahlul. The Attorney General also alleged that the plan  
 on which registration had been effected in the Haifa Land Registry 30  
 following the judgment of 6th May, 1925, was a forged plan.

p. 246. 8. On the 28th April, 1927, an agreement was concluded between  
 His Excellency Lord Plumer, High Commissioner for Palestine, on  
 behalf of the Government of Palestine and Toba Rutman and Rifka  
 Aaronson, the registered owners of the land in question, reciting  
 shortly the proceedings in the preceding paragraph referred to and  
 agreeing that in consideration of the sum of LE. 1,000 paid by the  
 said Rutman and Aaronson to the Government, the Government  
 renounced its claim to treat as Mahlul the specific parcel of land  
 herein referred to, that is, Khor al Wasa', and agreed to apply to the 40  
 Land Court, Haifa, for the withdrawal of its action for the cancella-  
 tion of the entries in the Land Registry and the other reliefs herein-  
 before referred to. This agreement also appears to have terminated  
 the High Court proceedings brought by these Respondents against

the Director of Lands and the intended sale proceeded to registration on the 10th May, 1927.

p. 425.

9. On the 17th January, 1929, the Attorney General of Palestine who had himself witnessed the signature of the High Commissioner to the agreement in the preceding paragraph referred to, whereby the proceedings in which was raised *inter alia* the question of the validity of the plan on which registration was effected as aforesaid were compromised, presented a charge in the Magistrates Court, Haifa, against Nissan Rutman for having, so it was alleged, prepared the said plan. After a very careful investigation and after the prosecution's own witnesses had testified that the plan in question corresponded as regards boundaries and area with the said judgment of the Land Court, Haifa, of the 6th May, 1925, and further that Khor al Wasa' belonged to the village of Hudeira and not to the Musha' lands of Zeita, the Magistrate dismissed the charge. Not satisfied with this decision the Attorney General on the 4th April, 1929, under powers vested in him by Section 26 (ii) (a) of the Trial Upon Information Ordinance, 1924, himself committed the said Rutman for trial before the District Court of Haifa on the same charge. This charge also was dismissed on the 4th February, 1930.

p. 250/252.

p. 246.

p. 277.

10. In the meantime, Hudeira had been declared a Settlement Area, and in due course the Settlement Officer began his investigations regarding the settlement of Khor al Wasa'. In his decision dated the 26th June, 1931, he held, as pointed out in paragraph 3 above, that Khor al Wasa' was outside the boundaries of the Hudeira lands and therefore not within the area under settlement. When this decision came for review before His Majesty in Council the Judicial Committee confined itself purely to the question of the jurisdiction of the Settlement Officer; the judgment expressly stated that "it does not involve any expression of opinion on the merits of 'the appellants' claim to part of Khor al Wasa'. The matter will 'be entirely open to the Settlement Officer when the villages of Zeita 'and Attil are under settlement."

p. 286.

p. 377.

11. Zeita and Attil have now been settled. The settlement of Zeita did not extend beyond the limits of lands admittedly within the area of Raml Zeita. A claim by the villagers of Attil to share in Khor al Wasa' was dismissed and the decision is now final. On the 20th December, 1939, the 18th December, 1940 and the 15th January, 1942 the High Commissioner, by various proclamations declared Kfar Brandeis (or Khor al Wasa') to be a village within the sub-district of Haifa, and in 1941 it became a separate settlement area.

12. Memoranda of Claims were duly lodged by the parties towards the end of the year 1941 and the beginning of the year 1942,

p. 16.

and on the 4th May, 1942, the Settlement Officer formally began the hearing of the claims. The Appellants were made Plaintiffs in the proceedings and the Respondents (that is, the Respondents on behalf of whom this Case is presented and those parties to whom they had from time to time transferred parts of the land) were made Defendants. The hearing was protracted and a great number of witnesses were called on either side. At the close of the evidence written submissions were addressed to the Settlement Officer on behalf of the parties. On behalf of the Respondents reliance was placed on the following:—

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(1) The judgment of the Land Court, Haifa, which had been executed and was final and still subsisting.

(2) That such part of the decision of the former Settlement Officer as purported to decide the nature of the land had been set aside by the judgment in the Privy Council.

(3) The purchase by the Respondents in the Land Registry from the then registered owners.

(4) The fact that their predecessors in title had paid the fee amounting to 5 per cent. of the value of the land to the Government.

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(5) Possession since 1925/1926 the date of the purchase.

(6) Payment of Werko and Rural Property Tax since the date of purchase.

(7) Admissions made by many of the claimants before the Notary Public that they had no rights whatsoever in or over this land which was the property of the Respondents.

(8) The agreement dated the 29th April, 1927, referred to in paragraph 8 above.

(9) Sale of portions of the land with the consent of the Government.

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On behalf of the Appellants it was contended that the case was governed by the judgment of the Land Court, Nablus, of the 14th April, 1924, that had been confirmed by the Court of Appeal on the 20th January, 1925, they alleging that Khor al Wasa' was part of the lands known as Raml Zeita and that as they were once Musha owners of certain shares in Raml Zeita, they *ipso facto* were owners of shares in Khor al Wasa'. They admitted that they had not paid Werko or Rural Property Tax, and that they had not been in possession of the land, but as to the latter admission they submitted that they were prevented from taking possession by the judgment of the Land Court, Haifa, which judgment, so they argued, had been

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obtained by fraud and was contradictory to that of the Land Court Nablus.

13. On the 30th March, 1943, the Settlement Officer gave his decision in favour of the Appellants against these Respondents, save as regards one parcel in respect of which he held that Respondents 4 and 5 had a good title as possessors for more than the prescribed period. As to the other Respondents he found in their favour either on the ground that they had bought in good faith without notice of any defect in the title of their vendor or on the ground that they  
10 had been in possession for more than the prescriptive period.

The Settlement Officer's reason for finding against these Respondents may be summarised as follows. He held:—

1. That the judgment of the Land Court, Nablus, covered the land in question.

2. That the judgment of the Land Court, Haifa, which admittedly covered the land in question, had been obtained by fraud.

3. That being faced with two conflicting judgments he was entitled to direct that the registration ordered by the Land Court, Haifa, should be set aside, and the judgment of the Land Court, Nablus, confirmed.  
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14. The Respondents submit:—

1. That the Settlement Officer had no power to set aside the judgment of the Land Court, Haifa.

2. That there was no evidence entitling the Settlement Officer to find fraud.

3. That the question of the alleged false plan had already been dealt with by the appropriate Courts and could not be re-opened.

4. That it was too late in any event to attempt to set aside the judgment of the Land Court, Haifa, on the ground that it had been obtained by fraud.  
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5. That the judgment of the Land Court, Nablus, was a judgment, *inter partes*, that its effect was a mere change of registration and that it was prescribed.

6. That these Respondents were *bona fide* purchasers who had been in possession for more than ten years.

15. These Respondents appealed to the Supreme Court from the decision of the Settlement Officer. There was no cross-appeal

p. 164.  
p. 171.

by the Appellants from the decision of the Settlement Officer in favour of the other Respondents.

p. 180, l. 32.

16. The Supreme Court (the Chief Justice and Copland J.) on the 21st July, 1943, allowed the appeal, set aside the decision of the Settlement Officer and held that the title of these Respondents (based on the registration) ordered by the judgment of the Land Court, Haifa, in 1925, should remain "unless and until . . . set aside "by a Competent Court." The Supreme Court held that the Settlement Officer had acted without jurisdiction in setting aside the Haifa judgment. Both judges further held that on the facts that 10 were before the Settlement Officer there was no evidence of any fraud.

17. These Respondents submit that the judgment of the Supreme Court, sitting as a Court of Appeal, Jerusalem, dated the 21st July, 1943, is right and should be affirmed for the following among other

#### REASONS

1. BECAUSE these Respondents' predecessors in title were properly on the Land Register pursuant to the judgment of the Land Court, Haifa, a Court of Competent 20 jurisdiction.
2. BECAUSE the Land Settlement Officer was not faced with two conflicting judgments between which he had to choose, but with only one, namely the judgment of the Land Court, Haifa, which it was his duty to follow.
3. BECAUSE the Land Settlement Officer acted without jurisdiction in ignoring or "setting aside" the judgment of the Land Court, Haifa, and the registrations made pursuant thereto.
4. BECAUSE the Respondents were the registered owners 30 of the land in question for a period exceeding the period of prescription.
5. BECAUSE the allegations made by the Appellants against the conduct of these Respondents' predecessors in title were either without foundation or *res judicata*, and in any event so belated that the Appellants ought not to be allowed to raise them.
6. BECAUSE the judgment of the Settlement Officer was wrong.
7. BECAUSE the judgment under appeal having regard to 40 facts and to the law applicable is right and ought to be affirmed.

MAURICE FITZGERALD  
PHINEAS QUASS.



In the Privy Council.

**ON APPEAL**

FROM THE SUPREME COURT SITTING AS A  
COURT OF APPEAL JERUSALEM.

**KHALIL RAJIH KHALIL and Others**

*Appellants*

— AND —

**TOVA RUTMAN OF HUDERA and Others**

*Respondents.*

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**CASE FOR RESPONDENTS 1 to 5.**

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STONEHAM & SONS,  
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London, E.C.4.