

Dajani and others - - - - - Appellants

v.

Mustafa El Khaldi *since deceased* and another - - Respondents

FROM

THE SUPREME COURT OF PALESTINE AT JERUSALEM

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 14TH MAY, 1946

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*Present at the Hearing:*

LORD PORTER

LORD DU PARCQ

SIR JOHN BEAUMONT

[*Delivered by* LORD PORTER]

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This is an appeal from a decree and order dated the 22nd December, 1943, of the Supreme Court of Palestine sitting as a Court of Appeal whereby a judgment dated the 8th July, 1943, of the Land Court of Jerusalem was reversed, and whereby it was adjudged that those who then represented the respondents to this appeal be registered in the Land Registry of Jerusalem as owners of the lands in question in the appeal, and that the costs of the appeal to the Supreme Court be paid out of the estates. The question at issue is whether these lands were validly dedicated by their owner as a waqf so that on her death they passed to the mutwallis appointed by her as representatives of the waqf or whether there was no valid dedication and the lands passed to the heirs of the owner.

The lands in question are situated in Palestine and the disposition of land in that country is governed by The Land Transfer Ordinance (Cap. 81) the long title of which is "An ordinance to provide for the registration of dispositions and transmissions of land."

Its material terms are as follows:—

"Section 2: 'Director' means the Director of Lands. 'Disposition' means a sale, mortgage, gift, dedication of waqf of every description and any other disposition of immovable property, except a devise by will or a lease for a term not exceeding three years, and includes a transfer of mortgage and a lease containing an option by virtue of which the term may exceed three years.

Section 3: This Ordinance shall apply to all immovable property, the subject of the Ottoman Land Code dated 7 Ramadan 1274 as well as to mulk land, all forms of waqf land and every other form of immovable property.

Section 4: (1) No disposition of immovable property shall be valid until the provisions of this Ordinance have been complied with.

(2) Any persons wishing to make a disposition of immovable property shall first obtain the written consent required by the next succeeding sub-section.

(3) In order to obtain the consent referred to in sub-section (2), a petition shall be presented through the Land Registry Office in which the land is situated to the Director setting out the terms of the disposition intended to be made and applying for his consent to the disposition.

(4) The petition shall be accompanied by proof of the title of the transferor and shall contain an application for registration of a Deed to be executed for the purpose of carrying into effect the terms of the disposition.

(5) The petition may also include a Clause fixing the damages to be paid by either party who refuses to complete the disposition if it is approved.

*Section 7:* After the title has been examined and the consent required by Section 4 has been obtained, a Deed shall be executed in the form prescribed and shall be registered in the Land Registry:

Provided that where a registered mortgage contains a covenant by the mortgagor not to lease the mortgaged property without the consent of the mortgagee, the Director shall refuse to register any lease by the mortgagor of the mortgaged property unless the written consent of the mortgagee is first lodged with the Director of Lands.

*Section 11:* (1) Every disposition to which the consent required by Section 4 has not been obtained shall be null and void:

Provided that any person who has paid money in respect of a disposition which is null and void may recover such money by action in the Courts.

*Section 13:* (1) 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.

(2) The registration shall be made upon the certificate of a competent court stating that the person or persons requiring registration are entitled as legatees or heirs or upon a certificate signed by the Mukhtar or imam and two notables."

It was said by the respondents that the requirements of these sections had not been complied with, that the dedication of this land as waqf was not valid, but was null and void or at any rate, as the transfer had not been effected at the date of the death of the transferor, the suggested transmission to the mutwallis was ineffective to pass the property.

The property in dispute belonged before her death to Sitt Amineh Khaldi. The ownership of ten or eleven pieces of land is in issue and of these she was registered as part owner of three whereas of the others she had inherited a share from her relatives Sheikh Khalil and Nafiseh and was entitled to obtain registration.

The lady died on the 9th November, 1942. She was anxious before her death to make a settlement of her lands as a waqf and accordingly, having, it seems, approached the Kadi of the Shariah or religious court in Jerusalem she made in his presence on the 4th April of the same year a dedication of the lands in question as waqf. The respondents however maintain that such a dedication, though binding on the lady, does not constitute or take effect as a "disposition" of lands unless the provisions of the Land Transfer Ordinance are complied with and they contend that those provisions have not been fulfilled.

The facts relevant for a consideration of the point at issue are as follows:—

(1) On the 1st of April, 1942, Sitt Amineh sent an extract from the Register containing a list of the properties she wished to dedicate to the Kadi of Jerusalem accompanied by a letter of which the material terms were:—

“ To His Honour, the Qadi, Shariah Court, Jerusalem.

“ Applicant: Amineh daughter of the late Bader Effendi el Khaldi, of Jerusalem.

“ Application: I own personally and by way of inheritance from my late brother Sheikh Khalil Effendi el Khaldi and my late sister Nafiseh el Khaldi the properties situated in Jerusalem as specified in a list registered in the Tabu Department of Jerusalem. I desire to dedicate as waqf what I am entitled to; in the said properties under conditions which I shall prescribe before Your Honour. Will you please do me the favour to come to my house situated near the Shariah Court for registration of this waqf as I am a veiled Moslem Woman.”

This letter was forwarded by the Kadi on the same day to the Registrar of Lands: he says:—

“ I beg to forward to you a schedule which was submitted to me by Amineh Bint Bader Eff el Khaldi requesting registration as waqf of the property registered in her name and her share in the properties inherited by her from her brother Esh Sheikh Khalil Eff. and her sister Sitt Nafiseh, by virtue of two certificates of succession issued by this Court. Please say whether there is any objection for registration of the waqf or not.”

Again on the same day the Registrar of Lands replied to the Kadi saying:—

“ On searching the Registers it appears that the Raqaba (ownership) of the properties shown in the Tabu extract attached to your letter is mulk property ” (i.e. freehold) “ and there is no objection to its being made a waqf, accordingly.”

On receiving this reply the Kadi proceeded on the 4th April to the house of Sitt Amineh and there held a Shariah meeting at which the lady dedicated the properties in question to the waqf in the terms which are to be found in a wakfieh or deed of dedication of that date.

From that document it appears that not only had an extract from the Land Register been sent to the Registrar on the 1st of April but that a copy of the title deeds had also been furnished at the same time. Under the terms of the wakfieh the present appellants were appointed mutwallis and the proceedings of the Shariah meeting terminated with the usual fictitious lawsuit by which dedication is effected and the transfer made irrevocable so far as the Shariah Court is concerned.

On the 15th of April the Kadi wrote again to the Registrar of Lands stating that a judgment had been given in the Shariah Court for the validity of the waqf, enclosing the wakfieh, and stating that the lady was taking all the necessary legal and official measures for the registration of the waqf in the Land Registry.

The necessary Petition fees were paid by the appellant Mamduh Eff Khaldi, one of the mutwallis, on the 16th April and on the 22nd April he wrote to the Registrar of Lands pointing out that the wakfieh which had been sent by the Kadi had been registered in the Shariah Court, was accompanied by a schedule of properties and by two certificates of succession (viz.: those proving Sitt Amineh's succession from her brother and sister) and requesting that the properties might be registered as waqf.

Two days later the Mutwalli having discovered that two of the properties dedicated had been mortgaged sent a further letter setting out this fact but asking that as the rights of the mortgagees had been reserved by the wakfieh, the mortgaged properties might be registered as waqf in the Land Registry. On the 27th April the Registrar of Lands sent on the file to the Director of Land Registration and enquired whether the transaction of the constitution of the waqf might be proceeded with in accordance with the wakfieh as requested by the applicant Sitt Amineh.

The Director replied to the Registrar on the 4th June authorizing the constitution of the waqf in respect of the properties not mortgaged, but requiring with regard to the mortgaged properties that no action be taken until the existing mortgage should be discharged.

Apparently some time after this note was despatched the applicant or someone on her behalf either saw or wrote to the Director with the result that he wrote to the Registrar on the 16th September stating that the applicant was insisting on the registration of the wakfieh on the properties which were mortgaged. The letter proceeds—"He desires therefore to register the Wakfieh, subject to the aforesaid mortgage. I have reconsidered the case and will have no objection to the registration of the waqf on the mortgaged properties provided a note is inserted against those entries that this waqf will take effect only subsequent to the mortgage being released as stated in the Wakfieh."

The steps necessary for registration had proceeded no further when the lady died but before that time the land had been officially valued in order that the fees payable might be ascertained. The mutwallis had always been prepared to make the requisite payment but since no information as to the amount of the valuation had been given to them until December, 1942, they were unable to tender the fees before that date. The Registrar kept those fees in deposit when they were tendered but did not accept them as payment of the sum due.

Immediately after the lady's death those then representing the respondents claimed the property as her heirs, applied to be registered in the Land Registry as owners, brought this action in the Land Court claiming that the land should be registered in their names and applied for an injunction to restrain the respondents from taking any step to register the lands in the name of a waqf. Meanwhile the appellants had entered into possession of the property, had received the rents and profits, paid the interest on the mortgages and, it seems, sold some of the lands.

In these circumstances an interim injunction was granted until the trial of the action but on the hearing the action was dismissed and the injunction discharged.

An appeal however to the Supreme Court was allowed, the judgment of the Land Court reversed and the properties in dispute ordered to be registered in equal shares in the names of the respondents. It is from that judgment that this appeal to His Majesty in Council is preferred.

The first argument put forward before their Lordships on behalf of the appellants was that the matter was solely one for decision in the Shariah Court, had there been finally decided and was not within the jurisdiction of the Land Court.

The contention was put in this way: The Palestine Mandate, it was said, provided that "Respect for the personal status of the various peoples and communities and for their religious interests shall be fully guaranteed. In particular the control and administration of waqfs shall be exercised in accordance with religious law and the dispositions of the founders."

The Palestine Order in Council of 1922 was promulgated to carry out the mandate and provided:—

"17. (1) (c) No Ordinance shall be promulgated which shall be in any way repugnant to or inconsistent with the provisions of the Mandate, and no Ordinance which concerns matters dealt with specifically by the Provisions of the Mandate shall be promulgated until a draft thereof has been communicated to a Secretary of State and approved by him, with or without amendment.

42. The High Commissioner may by order establish Land Courts as may be required from time to time for the hearing of such questions concerning the title to immovable property as may be prescribed.

46. The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman Laws as have been or may be declared

to be in force by Public Notice, and such Orders-in-Council, Ordinances, and regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure, and practice may have been or may hereafter be modified, amended, or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary.

51. Subject to the provisions of Articles 64 to 67 inclusive, jurisdiction in matters of personal status shall be exercised in accordance with the provisions of this Part by the Courts of the religious communities established and exercising jurisdiction at the date of this Order. For the purpose of these provisions matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons.

52. Moslem Religious Courts shall have exclusive jurisdiction in matters of personal status of Moslems in accordance with the provisions of the Law of Procedure of the Moslem Religious Courts of the 25th October, 1333, A.H., as amended by any Ordinance or Rules. They shall also have, subject to the provisions of any Ordinance or of the Order of the 20th December, 1921, establishing a Supreme Council for Moslem Religious Affairs, or of any Orders amending the same, exclusive jurisdiction in cases of the constitution or internal administration of a waqf constituted for the benefit of Moslems before a Moslem Religious Court.

There shall be an appeal from the Court of the Qadi to the Moslem Religious Court of Appeal whose decision shall be final."

Relying upon these provisions the appellants say that the rights of the parties to the ownership of the disputed properties is a matter of succession, succession is personal status and Moslem Religious Courts are given exclusive jurisdiction in such matters.

They support their argument by referring to sections 2, 3 (1), 6 (1) and 25 (1) of the Succession Ordinance which are in the following terms:—

" 2. In this Ordinance, unless the context otherwise requires—

' civil court ' means a court established by, and sitting under the authority of, the Government of Palestine, but does not include a religious court;

3. (1) The civil courts shall have exclusive jurisdiction in all matters relating to the succession to, and the confirmation of wills of, every Palestinian citizen and any other person, not being a foreigner:

Provided that such citizen or other person was not at the date of his death either a Moslem or a member of one of the religious communities.

6. (1) The Moslem religious courts shall have exclusive jurisdiction as to all matters relating to succession upon death to the estate of a Moslem, whether under a will or otherwise.

25. (1) Any person claiming to be entitled to any share in immovable property forming part of a succession may apply to the Director of Lands to enter his name upon the register in respect of his interest, and such entry shall be made accordingly upon payment of the prescribed fees and upon production to the Director—

(i) where the deceased was a Moslem, of an *ilam sharia* from the competent religious court;

(ii) in any other case—

(a) of an order of the president of the competent district court in any case in which there has been registered at the land registry a memorandum of an order under section 9 (2), or the probate of a will;

(b) of an order of the president of the competent district court in any case in which the deceased was a foreigner as to whose succession no order to refer has been made in pursuance of section 5, and in any case in which the deceased was not, at the time of his death, a member of one of the religious communities;

(c) of an order of the competent court of the community of which the deceased was a member at the date of his death in any case not falling within paragraphs (a) or (b)."

Though this question was fully argued before the Board, it is doubtful if it was persisted in before the Supreme Court.

But however this may be, in their Lordships' view it must fail. In their opinion no question arises here of succession. Admittedly the respondents are Sitt Amineh's successors. Indeed they have been so declared by a certificate of the Shariah Court dated the 23rd November, 1942. It is true that that certificate limits the succession to those lands which were not dedicated as waqf, but the ownership of the dedicated lands is not a question of succession. It depends upon a transfer by way of waqf purported to be made by the lady in her lifetime and is no more a succession than would be a dispute between the mutwallis of a waqf who claim that their title prevails over that of a purchaser from a former owner. The lady's death is but an incident, not the foundation of the mutwallis' title. Their title is the dedication, not the death.

But even if the matter were not otherwise plain it is to be observed that Section 52 of the Order in Council makes the jurisdiction of the Moslem religious courts subject to the provisions of any Ordinance and section 5 of the Civil and Religious Courts (Jurisdiction) Ordinance (cap. 18) declares that "Every action or other proceeding concerning the ownership or possession of immovable property, shall be decided by a Civil Court, notwithstanding any claim by any party or person that the land is waqf." Their Lordships entertain no doubt that the civil courts had jurisdiction to hear and determine the matter.

Secondly, however, it was said that the land had been solemnly dedicated, that the lady had taken, or had had taken on her behalf, all steps that were possible to perfect the transfer and that the delay in registration, which was not her fault, was not a bar to the appellant's claim. In answer, the respondents relied upon the Land Transfer Ordinance, alleged that its terms had not been complied with and said that the gift of the land had never been perfected.

It is not disputed that the Ordinance applies to any case where the Land Court has jurisdiction nor that the dedication of a waqf is a disposition.

Accordingly it is argued that the provisions of the Ordinance have not been complied with in that (1) the written consent of the Director of Lands was never obtained and in any case was not obtained *first*, i.e., before the disposition was made.

(2) that no petition was presented and in particular no petition setting out the terms of the disposition;

(3) that no proof of title was sent;

(4) that the disposition was therefore invalid under section 4 (1), and null and void under section 11.

Their Lordships are not prepared to accede to these arguments. They do not consider that the letter of the 1st April amounts to a petition

within the terms of the Ordinance or that the answer of the Registrar of Lands amounts to a consent. They are, however, of opinion that the three letters of the 1st, 15th and 22nd April are a sufficient compliance. Having regard to the tenor of the correspondence they can have no doubt that the application was made on behalf of the lady. No particular form of petition is required, the Wakfieh deed was sent and contained all the terms of the disposition, the land had been identified and apparently two certificates of succession were sent dealing with the property which had passed to Sitt Amineh from her brother and sister. It is true that one of the certificates printed in the Record is of later date than this letter, but no denial of the receipt of both appears in the correspondence and no point of their absence is to be found in the arguments or judgments in the Courts below. It is also true that the Land Registrar who alone gave evidence at the trial in the Land Court stated that proofs of title included a Mukhtar's Certificate as well as a Certificate of Succession, but no complaint of the absence of these documents is to be found in the letters emanating from or passing within the precincts of the Land Registry and no point as to their absence appears to have been taken in the Courts in Palestine.

It is said, however, that the absence of consent by the Director of Lands is a fatal flaw, that even if he indicated his consent with regard to the unmortgaged properties on the 4th June and of the mortgaged properties also by the letter of the 16th September, that consent was not given before the disposition and in any case was not given to the applicant but was merely a departmental communication.

These letters are indeed dated after the dedication and Wakfieh. In their Lordships' view however the word "first" in section 4 (2) is not to be taken as meaning "before the dedication," but as conveying that the consent must be given before the disposition becomes effective. This view is borne out by the terms of section 4 (1) where it is said that the disposition shall not be valid until the provisions have been complied, not as is the case with a failure to obtain the Director's consent at all, that the disposition is null and void under section 11 (1).

Moreover, in their Lordships' opinion, the necessity of obtaining the written consent of the Director does not require that the consent should be communicated to the petitioner.

In fact from the terms of the Director's letter of the 16th September, their Lordships would draw the inference that at any rate the Director's consent to registration of the unmortgaged property had been communicated to the applicant, but provided the Director had assented in writing they do not think that his consent must reach the applicant. It is required by the Registrar of Lands as his authority for the transfer, not by the transferee as part of his title.

Their Lordships are therefore of opinion that the provisions of the Land Transfer Ordinance have been sufficiently complied with.

There remains, however, the question whether a disposition of immovable property by way of gift can take effect before registration. The Chief Justice of Palestine thought not and Edwards J., though with some reluctance, concurred. This view is expressed in the words "A dedication of land as waqf does not become a disposition until such dedication has been registered under and in accordance with the provisions of the Land Transfer Ordinance."

In truth, however, under the definition contained in section 2 of the Land Transfer Ordinance "disposition" means (inter alia) "dedication of a waqf of every description" and is no less a disposition though it has not yet been registered.

The question now under consideration, as their Lordships see it, is not whether there has been a disposition but whether the voluntary transfer had been completed or sufficiently completed before the lady's death or whether it must be regarded as an incomplete transfer, which the law would not perfect after the decease of the dedicator.

In this connection their Lordships were referred to a number of cases tried in the Courts of Palestine in which conflicting decisions have been given.

In the first of these, *Lababidi v. Ma'mour Awqaj* (1942) 9 P.L.R. 608 there does not appear to have been either petition, consent or registration.

The dedicator was mutawalli, remained in possession, and sold part of his property. He had done nothing towards perfecting his gift and his transfer might well be held to be ineffective.

The *Turk* case (1943) 10 P.L.R. 159) was decided in favour of the validity of the disposition.

In that case consent was held to have been obtained and it does not seem to have been suggested that any of the other formal steps had been omitted, save only that the transfer had not been registered. In these circumstances the Supreme Court, sitting as a Court of Appeal, held that the dedication was not null and void under section 11 and ordered that transfer in the Registry into the names of the heirs of the dedicators should be annulled.

In a third case also on appeal, *Abdul Jaber v. Qadi of the Shari'a Court, Jenin* (1943) 10 P.L.R. 552), the facts appear to have been somewhat similar to those in *Lababidi's* case and the same result followed. The Court seems to have laid some stress on the fact that a consent which had perhaps been obtained seven years after the execution of the wakfieh was obtained too late and it may well be that after that lapse of time a consent would be ineffective.

Of these three cases the first and last would appear to depend on facts differing from those in the present case, which indeed presents features more favourable to the efficacy of the dedication than even the second since in that case no attempt at registration seems to have been made, whereas here the lady or her advisers seem to have taken every requisite step but only to have failed to obtain the necessary registration owing to the delay (no doubt unavoidable) in the Registry itself. In these circumstances their Lordships do not think that the dedication fails because the transfer had not been registered before the lady's death.

She had done all the acts required to be done by her, even to putting the mutwallis into possession. Nothing remained to be done which she could do or which would require an order of the Court to compel her to do in order to complete the disposition. Indeed so far as she was concerned, the dedication having been completed in the Shariah Court was irrevocable.

No doubt, as was held in the *Turk* case, purchasers for value or mortgagees would take precedence of volunteers whose title though earlier in date was unregistered, at any rate if they were without notice of that disposition, but heirs do not give consideration for the land they inherit: they are successors not purchasers and are in no better position than volunteers and as their Lordships have already pointed out the disposition is not null and void except where the necessary consent has not been given. In other cases it is merely invalid and even then only until the prescribed provisions have been complied with.

In the present case no further order of the Court is required on behalf of the appellants to enable the appellants' title to be completed. The Registrar unless prevented by injunction was and no doubt is prepared to register the appellants as owners of the property.

In these circumstances in their Lordships' opinion the fact that Sitt Amineh died before registration could take place did not prevent the disposition being a valid one, capable of being registered after her death.

They will therefore humbly advise His Majesty that the appeal should be allowed, the order of the Supreme Court discharged, and the order of the judge of the Land Court restored.

The respondents must pay the costs of the hearing before their Lordships' Board: the costs in the Courts in Palestine to be payable out of the estate.





THE GREAT CHURCH

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