HUTCHINSON, C.J. & TYSER, J. 1902

March 24 & *April* 30

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

W. COLLET AND SADIK EFFENDI, THE REPRESENTATIVES OF THE EVQAF OF CYPRUS,

v.

KYRILLOS, METROPOLITAN OF KITION, AS METROPOLITAN OF THE SEE.

VAQF LANDS—RENT PAYABLE BY TENANT.

Rent was paid by the tenant of vaqf lands to the Delegates of Evqaf from 1874 *to* 1895, *inclusive, at the rate of a kile of barley and a kile of wheat per donum. After* 1895 *the tenant continued to hold the land but refused to pay the same rent claiming that the rent was prior to* 1874 *and still ought to be estimated by the kafiz and not the kile, and that the kafiz was a smaller measure than the kile. Defendant did not prove on what terms he became tenant of the land, nor did he prove any contract to pay by the kafiz.*

HELD: *that Defendant, while he continued as tenant without any fresh agreement, must continue to pay the rent at the rate of a kile per donum unless he could prove that he was entitled to hold as tenant at a different rent.*

HELD *further: that the mere fact that a tenant of vaqf property has once paid a rent lower than that which he has subsequently paid is not proof that he is entitled to hold the property at the lower rent.*

This was an appeal by the Defendant from a judgment of the District Court of Larnaca. The facts sufficiently appear from the judgments.

Rossos appeared for the Appellant.

Sevasli for the Respondent.

Judgment: THE CHIEF JUSTICE: The Plaintiffs sued for 5 years arrears of rent of certain vaqf lands at Tersephano occupied by the Defendant from 1896 to 1900, inclusive; the rent claimed being the value of so many kilos of wheat and barley.

The Plaintiffs claimed that the rent due was one-eighth of a kile of wheat and one-eighth of a kile of barley per annum for each donum of land. The Defendant at first denied that the lands are vaqf lands and denied that the rent was at the rate alleged by the Plaintiffs; and the issues settled for trial were, (1) is the land vaqf? (2) how many donums are there? and (3) at what rate is rent payable if at all? But finally the only question at issue became the rate of rent, the Plaintiffs claiming one-eighth of a *kile* of wheat and barley per donum, while the Defendant contended that it should be one-eighth of a *kafiz*.

The evidence showed that this land has been occupied by the Defendant as Bishop of Kition since he became Bishop in 1893. Before that, in 1892, it was occupied by the Archimandrite during the vacancy of the See; and before that again by the previous Bishop. For many years before 1896 the Evqaf Administration used to let out the rents of this and of their other lands in the neighbourhood; but since 1896 they have

collected the rents themselves. For some time before 1873 the rent of this land and of other lands near it, which the parties and the District Court have assumed to be vaqf and to be held on the same terms as the land in respect of which this action is brought, was calculated by reference to a measure called the kafiz; but since about 1873 the measure has been the kile.

The majority of the District Court found that payment by the kile "has been a customary payment for over 24 years," and "that this "method of payment had a legal origin in the agreement of the parties"; and they gave judgment for the Plaintiffs accordingly. Mr. Cramby dissented, thinking that the measure ought to be the kafiz, "which used "to be paid *ab antiquo*;" and he held, without any proof, that 8 kafiz were equal to 6 kiles.

The case is brought before us in a very unsatisfactory state. In the first place there is no evidence as to the nature of the vaqf. An order was obtained after the settlement of issues that an affidavit of documents should be filed by the Plaintiffs; but the order does not appear to have been drawn up or any affidavit filed. One witness said that a vaqf-name exists at Constantinople; but nothing more was said about this document.

Secondly, since the Defendant alleged and the Plaintiffs did not deny that the rental paid since 1873 has not been the same as it was before that date, it seems material, in the absence of documentary evidence, to know whether the vaqf is of such a nature that it was lawful for the delegates of Evqaf and the tenants to change the rental by agreement.

The majority of the District Court decided that such an agreement was lawful; and they apparently assumed that the vaqf is Ijaretein, without saying anything on the question whether the rent of an Ijaretein vaqf can be altered by agreement. But there is no evidence as to whether it is an Ijaretein vaqf or not, and the attention of the parties and of the District Court was never called to this question.

In the third place, the evidence tends to show that since about 1873, the measure in which the rent was paid for other adjoining lands of this vaqf has been the kile; and that the rent for this land was paid in the same measure since about the same date until 1893, when the Defendant became the tenant; and that since 1895 no rent has been paid for this land; and that the measure in which payment was made before 1873, was the kafiz. But there is no evidence as to how long the kafiz was the measure: Mr. Cramby says that it was "*ab antiquo*;" but there is no evidence to support that statement. And there is no evidence as to what the kafiz was, beyond a vague statement that it "was smaller than

HUTCHINSON, C.J. & TYSER, J.

W. COLLET AND ANOTHER v. KYRILLOS, METROPOLITAN OF KITION

"a kile;" and no evidence why or by what authority the kafiz was superseded by the kile.

At first I thought that we ought to call for further evidence; but I have come to the conclusion that it is best to dispose of the appeal on the materials which we have, without deciding the question, which has not been considered, whether this is a Vahide or an Ijaretein vaqf. We find then that the only measure which has been used in payment of rent for the lands of this vaqf for the last 20 years and upwards has been the kile. This raises a presumption that the kile is the measure in which the Defendant ought to pay; and in my opinion that presumption is not rebutted merely by showing that for some period before 1873, the kafiz was the measure used. It is not shown for how long the kafiz was in use, or what it was, or under what circumstances it was given up; and there is no more reason for supposing that the kile is wrong than there is for supposing that the kafiz was wrong. As the kafiz has been abandoned and the kile used in calculating these rents for the last 20 years and more, I think we ought to assume that the change, whatever it was, was lawfully made.

I therefore agree with the decision of the majority of the District Court, though I do not altogether agree with their reasons.

The title of the formal judgment of the District Court requires to be amended by describing the Defendant "as Metropolitan of the See." In other respects the judgment should be affirmed; and the Defendant must pay the costs of the appeal.

TYSER, J.: The Plaintiffs sue as Delegates of Evqaf and seek to recover rent from the Defendant as tenant of certain vaqf lands.

The facts appear to be as follows:—

1. The land in respect of which the rent is claimed is vaqf.
2. For a long time, it does not appear how long, the Defendant and preceding representatives of the See of Kition have been in possession of these lands.
3. Since 1874 until the last three or four years the representatives of the See have paid as rent for the lands one-eighth of a kile of wheat and one-eighth of a kile of barley for each donum of the land.
4. The Defendant refuses to continue payment of rent at this rate, alleging that prior to 1874 the See only paid one-eighth of a kafiz of barley and one-eighth of a kafiz of wheat; that the kafiz is less than the kile, and that the Plaintiffs are not entitled to payment at the larger rate now claimed.
5. By the Law of 20 Jemazi-ul-Akhir, 1286, Destour, Vol. i., p. 744, new measures were introduced, which became compulsory in

1874, and from the tables for converting the old measures into new (Appendix to Destour, Vol. ii., p. 202) it seems clear that before that date a kile was in use which was considerably less in quantity than the kile then introduced.

It is probable that prior to 1874 the See paid rent calculated by the old kile, which may be the kafiz referred to.

The evidence is not very clear on the point, but I will assume for the purposes of this judgment that prior to 1874 the rent was paid in kafiz and that a kafiz was less than the kile now used.

The question to be decided is whether this is sufficient ground for the present refusal to pay the rent demanded.

As the rent demanded was paid by the See from 1874 until 1896, and the See continued on as tenant of the land without any new agreement, and with knowledge that the Plaintiffs claimed rent at the same rate as the See had paid up to 1896, the Defendant must pay rent at that rate, unless he can show that he is entitled to hold as tenant at a lower rate of rent.

The burden of proof is on the Defendant to prove that he is entitled to hold the land at a lower rate.

The suggestion on behalf of the Defendant would appear to be that the See holds the land on some sort of perpetual tenure, under which the rent was fixed unalterably at the beginning of the tenure, and that therefore the Defendant is only liable to pay rent at the rate at which it was paid prior to 1874.

This defence was not however put forward at the settlement of issue, nor does it appear ever to have been properly raised.

Neither is there anything in the evidence which would support such a contention or from which an inference could be drawn that the See holds the land otherwise than as an ordinary tenant.

The District Court appears to have assumed that the Defendant held as tenant under an Ijaretein tenure, and the contention for the Defendant would appear to be that his liability was limited to the amount of the Ijare muejel fixed when the supposed tenancy in Ijaretein commenced, and that the rent paid prior to 1874 was the amount of that rent.

In the first place I can see no reason to assume that the land was Ijareteinlu.

There is no evidence from which I should infer that the Defendant held in Ijaretein. The only evidence supposed to bear on the question

HUTCHINSON, C.J. & TYSER, J.

W. COLLET AND ANOTHER v. KYRILLOS, METROPOLITAN OF KITION

was that of persons who held other lands belonging to the same vaqf, to the effect that they had bought their lands or inherited them. This evidence is quite consistent with a transfer of an ordinary tenancy from father to son or to a stranger with the consent of the Evqaf Board. A transfer even of an Ijaretein tenancy would require the consent of the Mutevelli or of the Delegates of Evqaf in cases where they manage the property.

Moreover there is no evidence of any of the alleged transactions being registered, as by Law they are required to be, if the property is Ijaretein.

Further in considering the evidence as to whether or no the land is held under an Ijaretein tenancy, the nature of the land and the category of the vaqf must be borne in mind.

The land appears to be arable land, which would not be of the mulk category unless specially made so.

It appears, from the book of accounts produced, that the Delegates of Evqaf receive not only a rent but also the tithes.

These facts point to the vaqf being one of the Takhsisat Category mentioned in Sec. 4 of the Land Code.

It is not very likely that such land would be held on an Ijaretein tenure.

Secondly, assuming that the land is Ijareteinlu, there is nothing to show what was the original Muejel. The mere fact that the See paid in kafiz for some time prior to 1874 does not show that the rent then paid was the original Muejel.

Thirdly, if the land were Ijareteinlu and the original Muejel was the amount which the Defendant alleges, a question might arise as to whether that rent might not be raised by agreement between the Evqaf and the tenant in Ijaretein.

If such an agreement could be made, there would be ample evidence to support it.

The Defendant has failed to prove that he is entitled to hold as Ijaretein tenant at a lower rent than that claimed.

I will only add that the Defendant has not adduced any evidence to shew that he holds under any tenure other than Ijaretein, by which his liability is limited to a fixed rent.

The Vaqfie was not produced: so it is impossible to say what rights, if any, the Defendant takes by virtue of the Vaqfie.

In the absence of the Vaqfie the Court is bound to consider what has been the ancient custom in dealing with matters relating to the vaqf.

The Defendant's evidence is to the effect that on one occasion the rent was raised and does not shew that the rent was fixed for any ascertained period other than the period since 1874.

Therefore there is no evidence of custom to treat the rent as unalterable. If there is any ancient custom it would seem rather to be a custom under which the Plaintiffs have a power to raise the rent. The fact that the rent has been the same since 1874 would hardly be sufficient to prove an ancient custom.

The Defendant has failed to prove that the See is entitled to hold the land at any fixed rate of rent.

The Defendant continued to hold the property after 1896, and in the absence of any fresh agreement he must be taken to hold it at the same rent as he paid before 1896.

For these reasons I am of opinion that the appeal must be dismissed and the judgment affirmed.

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

HAJI SALIH MIHTAT, *Plaintiff,*

v.

DIAMANTOU LOIZA, *Defendant.*

MULK LAND—DOUBLE REGISTRATION—RIGHTS OF REGISTERED OWNERS.

A prior registration is not necessarily superseded by a registration of later date.

Where two persons are registered as owners of the same land, if the prior registration is properly made, and the later registration is made on a ground which is proved to have been untrue, the prior registration is not superseded by the later registration.

This was an appeal of the Defendant from a judgment of the District Court of Limassol.

The Plaintiff sued as Muteveli of the Kilani Mosque and his claim was for an order to restrain the Defendant from interfering with a phrakte at Kilani.

The Defendant claimed that the phrakte washers, and relied on a kochan which shewed that she was registered on the 12th May, 1903 (*i.e.*, A.D. 1877), as owner of a house with boundaries which certainly included the phrakte.

The District Court directed that the registration of the Defendant should be set aside, and granted the injunction claimed.

It appeared from the evidence that about 1877, the Defendant's husband verbally agreed with Molla Rejeb, the then owner of the phrakte, to buy it for 800 piastres:

HUTCHINSON, C.J. & TYSER, J.

HJ. SALIH MIHTAT v. DIAMANTOU LOIZA

That the Defendant or her husband paid 108 piastres on account, and that the balance had never been paid: and

That at the Yoqlama in 1877, after the agreement for purchase, the Defendant was registered as stated above.

There was evidence that shortly afterwards Molla Rejeb purported to dedicate verbally the phrakte to the Kilani Mosque.

Nothing was done to carry out the dedication legally or to cancel the Defendant's registration.

Ever since that time, that is, since about 1878 or 1880, there had been constant disputes about the ownership of the phrakte, and neither party proved any continuous occupation or possession of it.

In May, 1891, the Plaintiff's registration was effected, on the ground (as stated in the kochan) of length of possession.

Laniti for the Appellant.

Pascal and *Frangoudi* for the Respondent.

The Court, after setting out the facts, gave judgment as follows:

June 3

Judgment: The events which we have thus narrated, do not, in our opinion, give the Plaintiff any right to have the Defendant's registration set aside.

It is true that the balance of the purchase money agreed to be paid 25 years ago is still unpaid. But there is nothing to show that the Defendant's registration in 1877, was wrongfully made, or that it was made without the knowledge of Molla Rejeb: and we must assume, unless the contrary is shown, that the registration was properly made. It was not therefore superseded by the registration of the Plaintiff in 1891, which purports to be made on the ground of length of possession by the Plaintiff: whereas it is plain that the Plaintiff could not then have had 15 years' uninterrupted possession.

In our judgment therefore the Defendant's registration is still in force and the Plaintiff has not shown that he is entitled to have it set aside, and the appeal should be allowed and the action dismissed with costs.

The case of *Rex v. Rebeka Theori and Dimitri Solomou* reported in pages 14–16 of the original edition is no longer of any importance.