SUPREME COURT OF LOUISIANA

No. 96-C-0732
consolidated with
No. 96-C-0741

HELENA BABIN KENNEDY

versus

JAMES KENNEDY

****
ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL, SECOND CIRCUIT,
PARISH OF CLAIBORNE
****

Jeannette Theriot Knoll
ASSOCIATE JUSTICE

ON REHEARING

Victory, J., not on panel. Rule IV, Part 2, Sec.3.

We granted rehearing in this case to revisit the issue of a usufructuary's right to harvest timber from a previously unmanaged tract of land. The facts of this case are laid out in detail in the original opinion. Helena Kennedy, the 91 year old usufructuary of a 143 acre tract of mature loblolly pine trees, sought a declaratory judgment authorizing a clear-cut on the tract. James Kennedy, the 70 year old naked owner, opposed the clear-cut.

USUFRUCT OF TIMBERLAND

Ordinarily, the right of the usufructuary extends only to the fruits of the thing subject to the usufruct. La.Civ. Code art. 550. On account of their slow growth and high value, trees are usually considered to be capital assets rather than fruits. In the case of an ordinary tract of land, the usufructuary may cut trees only for his personal use or for the improvement or cultivation of the land. La.Civ. Code art. 560. The revision comments to Articles 551 and 560 suggest that the continuous production of a "tree farm" or "regularly exploited forest" may be regarded as fruits, and thus belong to the usufructuary.

However, we find that the designation of the timber as "fruits" or "products" is irrelevant in the instant case, since the right of a usufuctuary to harvest trees from timberland is governed by a *specific* article, La.Civ. Code art. 562, which states:

> When the usufruct includes timberlands, the usufructuary is bound to manage them as a prudent administrator. The proceeds of timber operations that are derived from proper management of timberlands belong to the usufructuary.

La.Civ. Code art. 13 provides that where two statutes deal with the same subject matter, they should be harmonized if possible. However, if there is a conflict, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character. *State ex rel. Bickman v. Dees*, 367 So.2d 283, 291 (La.1978). Article 562 is a new provision, added in the revision of the Civil Code

articles on usufruct in 1976. It provides for a different disposition of the proceeds of timber operations on timberland than from cutting trees on ordinary land. Since Article 562 is specifically directed to timberland, it must be treated as an exception to the general rules of usufruct.

Two factual issues are raised under Article 562, namely, whether the tract is "timberland" and what constitutes "proper management" of that particular tract.

TIMBERLAND

Put simply, the central issue in the case *sub judice* is whether land containing valuable timber which has never been exploited or the subject of forestry management constitutes "timberland" for the purposes of the application of Article 562. Restated, does La.Civ. Code art. 562 require prior timber operations on the property for the land to be construed as "timberland" ?

As noted by Justice Kimball in her dissent in our original opinion, this exact issue was considered by the drafters of the 1976 revision of the law of usufruct. The original draft of Article 562, prepared by the Louisiana State Law Institute, stated:

> If the usufruct includes lands that were *regularly exploited for timber* at the time of the creation of the usufruct, and if there is no provision concerning the use and enjoyment of the landowner's rights in timber, the usufructuary is entitled to *continue the operations* of the owner; but he has *no right to commence* timber operations without the consent of the naked owner. (Emphasis added).

This original version of the article was intended to adapt the "open mines" policy for the usufruct of minerals to the usufruct of timberlands. Nevertheless, upon a motion by Prof. Joseph Dainow, this draft of the article was rejected in favor of the more flexible "prudent management" standard found in Article 562 today. The language requiring regular exploitation or continuing timber operations was removed.

La.Civ. Code art. 11 provides that the words of a law must be given their

generally prevailing meaning, and that words of art and technical terms must be given their technical meaning when a law involves a technical matter. "Timber" is defined by La.Civ. Code art. 562, Comment (c) as trees which, if cut, would produce lumber for building or manufacturing purposes. The term "timberland" is defined in Webster's Third New International Dictionary as "land covered with forest and especially with marketable timber."

The expert witnesses also supplied definitions of "timberland" as applicable to forestry operations. Mr. Lewis Peters, Mrs. Kennedy's forestry expert, defined "timberland" as "land that's capable of producing commercial forest products," while Mrs. Kennedy's other expert, Mr. Richard Freshwater defined "timberland" as "land with or without timber capable of growing timber in commercial quantities." Mr. Gary Wade agreed that "timberland" is "any land that has some type of timber growth on it, be it merchantable or not merchantable."

"Timberland" is distinguishable from land which has been regularly managed and exploited for timber, which is best defined by the term "tree farm." The defining characteristic of a "tree farm" as stated by this court is "the land's ability, through proper management techniques such as selective thinnings and plantings, to provide sustained yields." *Succession of Doll v. Doll*, 593 So.2d 1239, 1249 (La.1992). Mr. Peters noted that the term "tree farm" was "sort of like a trademark" and that "it's a designation that's given to landowners that apply and meet the requirements of the American Forestry Association whose . . . under whose umbrella the tree farm system was created." The 143 acre tract is not a "tree farm," as it has never been managed, and is unable to produce a sustained yield of timber in its present state.

Under both the general definition and under the technical definition supplied by the foresters, the 143 acre tract is "timberland." For this tract not to be classified as

"timberland," this court would have to create an alternative legal definition or term of art, requiring that the tract be regularly managed or exploited for timber prior to the initiation of the usufruct, making "timberland" synonymous with "tree farm." We decline to do so, especially since this would substantively reenact the original version of La.Civ. Code art. 562, which had been rejected by the Louisiana State Law Institute.

PROPER MANAGEMENT

The second issue before us is whether Mrs. Kennedy's plan to clear-cut the tract constitutes proper management or prudent administration of the tract. This is clearly an issue to be decided by the trier of fact. After a two day trial in which each party called two forestry expert witnesses, the trial court adopted the expert opinion of Mrs. Kennedy's forester, Mr. Lewis C. Peters, on the proper management of the tract.

Mr. Peters noted that the tract consisted of an even aged stand of mature and over mature loblolly pine, whose age was between sixty and seventy-five years. He testified that the life span of loblolly pine trees was between eighty and one hundred years. Mr. Peters stated that thirty acres in the southwest corner of the tract contained trees younger than those found on the remainder of the tract. Mr. Peters noted that undesirable hardwood species were beginning to succeed the pines on the tract, and he opined that because the tract had not been previously managed it would be difficult to rehabilitate.

Mr. Peters testified that the most prudent approach would be to harvest the merchantable timber on the majority of the tract, including the hardwoods, and replant the site with genetically superior seedlings. He stated that it would not be prudent to simply cut the larger pines since the smaller trees were the same age. He opined that the smaller trees were so old and suppressed that they would not respond to the removal of the larger trees. Mr. Peters outlined the risks associated with allowing the

older pine trees to remain on the tract, noting that the trees were rapidly approaching the end of their life span, that they were vulnerable to insect attack, and that they could attract endangered species, thus preventing their harvest. Mr. Peters recommended that some hardwoods be left along watersheds and streams to prevent erosion and encourage wildlife. With respect to the thirty acre portion of the tract containing the younger trees, Mr. Peters recommended a selective cut of only the larger trees.

Obviously, what constitutes "proper management" of timberland will vary depending on the species, condition, size, location, age, and density of the timber on the tract. The trial court was presented with several expert opinions on the prudent administration of this particular tract, and was well informed about the several available alternatives. The trial court's acceptance of Mr. Peters' recommendations as the most prudent course of management of the property was reasonable, and we find no manifest error in its decision to accept Mr. Peters' expert opinion.

It is apparent from the findings of the trial court that prior to the initiation of the usufruct, the 143 acre tract had not been properly managed to provide sustained yields, and that selective thinnings and plantings on the tract would do little to rehabilitate the tract. Because the tract had been neglected for so long from a forestry standpoint, leaving some of the trees standing placed the entire stand of timber at risk of infection, infestation, destruction by the elements, and succession by less desirable species. These risks greatly outweighed any benefits that could accrue by leaving the smaller trees. The trial court reasonably concluded that the most prudent management of the tract called for a clear-cut of the majority of the tract, followed by replanting with genetically improved seedlings.

Had this tract been a properly managed "tree farm" prior to the initiation of Mrs. Kennedy's usufruct, it is unlikely that her plan to clear-cut the tract would be

considered prudent. However, we recognize that under certain circumstances, such as those found in the present case, a clear-cut may be warranted. The prudent administrator/proper management standard is a flexible one, and we are unwilling to hold that as a matter of law clear-cutting will never constitute the proper management of timberland.

Accordingly, under Article 562, Mrs. Kennedy is entitled to the proceeds of the prudent management plan proposed by her foresters and approved by the trial court. The judgment of the court of appeal, limiting Mrs. Kennedy's timber activities to a selective cutting from the thirty acre stand of younger trees is reversed, and the judgment of the trial court is reinstated.

REVERSED.