

*Privy Council Appeal No. 76 of 1931.*

Omanhene Kobina Foli - - - - - *Appellant*

*v.*

Chief Obeng Akesse - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 26TH FEBRUARY, 1934.

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*Present at the Hearing :*

LORD THANKERTON.  
SIR LANCELOT SANDERSON.  
SIR SIDNEY ROWLATT.

[*Delivered by* LORD THANKERTON.]

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This is an appeal from a judgment and order of the West African Court of Appeal, dated the 12th May 1930, dismissing a motion by the present appellant to set aside an award dated the 31st January 1930, delivered by a Judge of the Supreme Court of the Gold Coast Colony, as arbitrator on a reference ordered by the Full Court of the Supreme Court, sitting as the Appeal Court from the Chief Commissioner's Court of Ashanti, on an appeal from a judgment of the Circuit Judge of Ashanti, dated the 9th May 1923, in an action in which the present appellant was plaintiff and the respondent and Odikro Asante, since deceased, were defendants.

The appellant not only challenges the award on certain grounds, but also challenges the validity of the order of reference by the Full Court of the Supreme Court, and it is therefore necessary to refer to the proceedings in the action prior to the order of reference.

On the 11th August 1922, the appellant, who is Omanhene of Adansi in Ashanti, on behalf of his Stool, issued a writ of

summons in the Chief Commissioner's Court of Ashanti against Asanti, the Odikro of Edubiase, now deceased, and the respondent, Obeng Akesse, the Chief of Okyereso, who were both under the Omanhene of Akim-Abuakwa, in the Eastern Province of the Gold Coast Colony. The appellant claimed £500 damages against both defendants jointly and severally for certain alleged acts of trespass and he also asked for a declaration as to the boundary between Adansi and Akim.

At the material portion of its course the River Prah forms the political and territorial frontier between Ashanti and the Gold Coast Colony and has a southerly course. The learned Trial Judge describes the questions in issue before him as follows : "The plaintiff alleged that the first defendant sold a stretch of the river Prah between Ahudwi and Sumuoso, collected tribute at Ahudwi and Nyamibekyere on the right bank of the Prah, and destroyed a fishing weir erected by Akaakupeh, plaintiff's vassal, in the Prah at Sumuoso, and that the second defendant aided and abetted the first defendant in these acts. The plaintiff further alleged that these acts constituted a trespass on the territory of Adansi, and claimed £500 damages against both the defendants jointly and severally. He also asked the Court to declare that the left bank of the Prah, from the Anum to the Offin, was the boundary between Adansi and Akim, and that the river and its right bank belonged to Adansi. The first defendant explained that he did not sell, but only mortgaged the river. Subject to this correction, both the defendants admitted the acts complained of, but said that the river Prah between the Numea (or thereabouts) and Ahudwi, together with a semi-circular tract of land on the right bank, were under Akim-Abuakwa, that the erection of the fishing weir constituted a trespass, and that the acts complained of were lawful and justified. Both the defendants, therefore, pleaded that they were not guilty of trespass, and not liable in damages."

After trial, the learned Circuit Judge issued a judgment, dated the 9th May 1923, in which he found that, under a grant from the King of Ashanti, the plaintiff's title extended to the Prah and negatived the claim of the defendants to a title to any land on the right or west bank of the Prah ; he further stated that he was not satisfied that the ownership of the river was vested in the plaintiff, so as to exclude, if he chose, the defendants from fishing in it, and he therefore found that neither party had proved its claim to the entire water rights ; he rejected the claim for damages on account of the sale or mortgage of the river, but he held that the collection of tribute within the plaintiff's territory and the destruction of the weir were tortious acts and awarded the plaintiff nominal damages of £50. Finally, the learned Judge stated, "I make no declaration that the left bank of the Prah is the boundary of Adansi, and I have not

sufficient information—nor, in view of my other findings, do I think it necessary—to make any declaration as to the extent of land owned by plaintiff (apart from the land in dispute).”

On the 12th November 1927, the defendants obtained leave to appeal to the Supreme Court of the Gold Coast Colony in terms of section 18 of the Ashanti Administration Ordinance (No. I of 1902, in the 1920 Revision). The defendant Odikro Asante had died, but it was agreed that the action should proceed against the other defendant. The appeal came on before a Full Court at Accra on the 14th March 1929, and the Court was of opinion that the true issue between the parties, viz., whether the river Prah was the boundary between the parties or not, could not be satisfactorily determined on the evidence and findings before them, and that a survey was necessary to show exactly the area in dispute. Accordingly, by consent of counsel for both parties, a consent order was made on the 18th March 1929, (a) setting aside the judgment appealed from, (b) ordering a survey of the disputed area to be made by an officer in the Survey Department, and (c) providing, on completion of the survey, for a further order by a Full Court under Order 52, Schedule 2, Supreme Court Ordinance, referring to Hall J. the matters in difference between the parties.

The survey having been completed and a plan—No. C. 18—having been made in accordance therewith, a Full Court, on the 3rd December 1929, on the joint motion of parties, made the following order:—

“ It is hereby ordered that His Honour Mr. Justice Roger Evans Hall, Judge of the Supreme Court of the Colony aforesaid, be appointed as Arbitrator herein and that the matters in difference between the parties herein, namely, whether the semi-circular tract of land edged red having as its base the river Prah edged green on the plan No. C. 18, signed by W. F. Mindham, Officer in Charge Cadastral Branch, dated 15th of August 1929, is the property of aforesaid Kobina Foli, Omanhene of Adansi, or Obeng Akese, Ohene of Okyereso, be referred to the final decision of the said Arbitrator.

“ It is hereby ordered that the said Arbitrator shall deliver his award within three months from date and shall have and exercise all powers given to Arbitrators under 52, Schedule 2, of the Supreme Court Ordinance.”

The learned Arbitrator proceeded with the reference, and, after hearing evidence at Accra for some thirteen days and spending a week on inspection of the disputed area and taking evidence there, made his award on the 31st January 1930, under which he awarded and adjudged that as regards the area in dispute, namely, the semi-circular tract of land edged red having as its base the river Prah, the land to the west of a purple line he had caused to be drawn on the survey plan across the area in dispute was the property of the plaintiff, and the land to the east of the aforesaid purple line was the property of the defendant. The location of the purple line resulted in the plaintiff being awarded about one-fourth of the disputed area,

the remaining three-fourths being awarded to the defendant, and the Arbitrator made an award of costs in corresponding proportions.

On the 10th February 1930, the plaintiff filed an application to the Full Court to set aside the award on a number of grounds. On the coming into force on the 1st March 1930, of the West African Court of Appeal Order in Council 1928, the proceedings fell to be continued before the West African Court of Appeal, and on the 12th May 1930, that Court refused to set aside the award and dismissed the motion. The plaintiff now appeals against that decision.

In the first place the appellant maintains that the order of the Full Court of the Supreme Court dated the 3rd December 1929, which referred the matter to arbitration, was incompetent and invalid, in respect that the power to order a reference conferred by Order 52, Schedule 2, of the Supreme Court Ordinance, was not available in the case of an appeal from the Chief Commissioner's Court of Ashanti. Their Lordships have no difficulty in rejecting this contention as untenable, as Rule 6, Schedule 3, of the Supreme Court Ordinance provides with regard to appeals from the Chief Commissioner's Court of Ashanti—such as in the present case—"the Appeal Court shall hear, determine and deal with in the same way as if it was an appeal from a judgment of the Supreme Court." This makes available the very wide powers conferred by Rule 26, Order 53, Schedule 2. These provisions clearly warranted the Supreme Court's exercise of the power to order a reference under Order 52. It is hardly surprising that this contention was abandoned by the appellant's counsel in the Court below.

Rule 13 of Order 52 provides that no award shall be liable to be set aside except on the ground of "perverseness or misconduct" of the arbitrator. The appellant's grounds for setting aside the award fell under two heads, namely, (a) excess of jurisdiction appearing on the face of the award, and (b) error in law appearing on the face of the award, and amounting to misconduct or perverseness.

As regards excess of jurisdiction, the appellant maintained, in the first place, that, in view of the terms of the reference, it was only open to the Arbitrator to award one or other of two boundaries, viz., either the boundary line edged red or that edged green. Their Lordships agree with the learned Judges of the Court below in rejecting this contention, on the grounds stated by them. These two coloured lines set out the extreme claims of the parties, but the matter in difference between them was as to the exact line of the boundary. In their Lordships' opinion it was open to the Arbitrator, if he found, as matter of title, that the existing boundary lay between these extremes, to make his award in accordance with such boundary.

In the second place, the appellant maintained that it appeared on the face of the award that the Arbitrator had laid down a new boundary line, not as matter of existing title, but as a fair demarcation of boundary as between the parties. If this criticism can be justified, there can be no doubt that the award was beyond the scope of the reference, for the duty of the Arbitrator was to ascertain a boundary existing as matter of title, and not to lay down a new boundary, however fair that might appear to be in light of the circumstances disclosed in the evidence. It is therefore necessary to consider carefully the award, in which the learned Arbitrator has fully set out his views on the evidence and his reasons for his award.

In the first place, it appears from the award that the Arbitrator did not regard any of the traditional or historical evidence as of assistance to him, and that he based his award on the evidence as to occupation and possession inside the area in question, as he also rejected the evidence given by defendant's witnesses from other tribes as to their boundary with the defendant.

The evidence as to occupation and possession within the area related to 36 so-called villages or hamlets or alleged ruins thereof, roads, tolls, and a fetish hill, Onuem Beppo, which is the most distinctive natural feature in the area. The evidence is referred to in considerable detail in the award. As regards 19 out of the 36 places the Arbitrator states that the evidence rendered him no assistance and required no comment. That leaves only 17 of these evidently small places in an area of something like 100 square miles, and 7 out of these 17 places are either on or close to the Prah on the eastern edge of the area in dispute or on the western boundary of the area. Of the remaining 10 places, 3 of them—Adeamra, Asempaneyeye and Mpasem—are within the area awarded to the respondent, although the only evidence referred to in the award was in favour of the appellant.

In questions of disputed ownership of land, occupation and possession of portions of the disputed area is not relevant evidence of title to the whole area unless it can be reasonably attributed to a right to the whole area. The portions so occupied may be so numerous and so closely adjoining that they practically cover the whole area. No such conditions exist in the present case. Alternatively, the occupation of a portion may be reasonably attributable to a right of ownership in a larger area, as, for instance, occupation of a portion of a field may be attributed to a right extending over the whole field. But the larger area must be defined; in other words, it must be attributable to an existing boundary. There is no trace in the award of any such evidence or of any such question being considered by the learned Arbitrator. As regards the fetish on Onuem Beppo, it clearly affords no evidence of an existing boundary on the line laid down by the Arbitrator. On the other hand, it is used by the Arbitrator

as the main turning point for the demarcation of a new boundary. It may be added that the evidence as to roads and tolls was found by the Arbitrator to be of no assistance.

Their Lordships are therefore of opinion that the learned Arbitrator has misconceived his duty under the reference, in respect that by his award he has laid down a new boundary line, based on consideration of what would be a fair division of the disputed area between the parties. It follows that the award should be set aside on the ground that the Arbitrator has acted *ultra fines compromissi*. It is unnecessary to consider the remaining contentions for the appellant or to express any opinion on them.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgment of the West African Court of Appeal of the 12th May, 1930, should be reversed, that the award of the 31st January, 1930, should be set aside, and that the case should be remitted to the West African Court of Appeal. The appellant will have the costs of this appeal and his costs in the Court below on his motion to set aside the award.

Howard Crosby

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In the Privy Council.

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OMANHENE KOBINA FOLI

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CHIEF OBENG AKESSE.

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DELIVERED BY LORD THANKERTON.

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