Privy Council Appeal No. 12 *of* 1941

Chief Yaw Nimo - - - - - - - - *Appellant*

v.

Chief Kwaku Wuo - - - - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY, 1943.

Present at the Hearing:

LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD PORTER
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* LORD RUSSELL OF KILLOWEN]

The question for determination in this appeal is the ownership of an area of land in Kumasi Division (Kumasi State) of the Crown Colony of Ashanti. The land stretches about two miles from North to South with a width of from a mile to a mile and a half from East to West, and is shown on the map Exhibit " L " as bounded on the West by a river or stream called Ahiresu, its other boundary lines being shown by a yellow border. This land is hereafter referred to as " the land now in question."

The appellant is the Chief of Donyina and claims that the land is attached to the Stool upon which he sits. The respondent in the Chief of Nyamiani and claims that the land is attached to the Stool upon which he sits. They will be alluded to as the appellant and respondent.

The land now in question is part of a large area known as Kyim Kwayem which many years ago had been acquired by conquest from a chief named Dapoa in a war between him and the Chiefs of Ejisu, Donyina, Nyamiani and Kwarso. The land was portioned out among the conquerors, but, as might be anticipated, disputes have not infrequently arisen as to boundaries. In or about 1907 such a dispute arose between Ejisu on the one hand and Donyina and Nyamiani on the other, owing to alleged trespasses by Ejisu which extended beyond the Eastern portion of Kyim Kwayem which had been allotted to Ejisu and far beyond it into those portions which had been allotted to Donyina and Nyamiani respectively.

This dispute was settled by an executive decision (dated 19th February, 1907) made by Captain Hobart, the District Commissioner, and confirmed or approved by Captain Armitage, the Acting Chief Commissioner of Ashanti on the 20th August, 1907. This decision, which is officially recorded in a Boundary Book, determined that the Donyina-Ejisu boundary was the road (stated to be practically only a hunters' track) from Esienipon (i.e. Asiempong) through Dumasi (i.e. Odumasi) to Aku. This decision purports to establish that Ejisu had no land on the Western side of the boundary, and that on that side Donyina was the adjoining neighbour of Ejisu. It would follow from that, that Nyamiani's land in Kyim Kwayem did not at any point adjoin Ejisu land, but lay to the West of the Donyina land.

It subsequently appeared that on the line described in the Hobart decision between Odumasi and Boadja Nkwanta there existed in fact two tracks, which diverged at Odumasi and met again at Boadja Nkwanta. This led to a suit between Donyina and Ejisu, which resulted in a judgment in the Chief Commissioner's Court dividing the land between the two tracks equally between Donyina and Ejisu. The effect of this is shown by the blue line on map " L." It does not seem directly to affect the question of the title to the land now in question.

The proceedings in the present litigation which have led to this appeal to His Majesty in Council, have been numerous and prolonged, and must be mentioned in some detail. They were commenced in Asantehene's Divisional Native Court " B " in October, 1935, the appellant occupying the position of plaintiff and swearing the Great Oath that he was the owner of the land to which the defendant Chief Kwabena Dumfeh (who was then Chief of Nyamiani) responded to the effect that he and the plaintiff owned the land. This would seem to be an allegation of joint ownership, but he ultimately claimed that he and not the plaintiff was the owner.

The evidence given before the " B " Court was vague, and after hearing it the Court deputed five individuals (not members of the Court) " to view the disputed land and submit a written report before judgment is delivered ". At this point two matters should be noted. (1) The land then in dispute included the land shown on the map " L " within the border-line coloured pink; but the appellant's claim in these proceedings is now confined to the land indicated above. (2) The map " L " was not in existence at this time, but was prepared as will hereinafter appear at a much later date.

The five viewers made their report on the 30th March, 1936, in which after narrating the procedure adopted by them, the statements made by the parties, and the events which happened in the course of their expedition, they set out their " findings ", which were in favour of the defendant. The Court apparently adopted the report and decided that the land was the property of the defendant.

On appeal to the " A " Court (the Native Court of Appeal) that Court, having reheard the case on the record of the Court " B ", and on additional evidence, found in favour of the appellant. Part of the land originally claimed by him was excluded from the judgment, viz., the land mentioned above which is enclosed within the border-line coloured pink on map " L ". The reason for this exclusion was the fact that (as stated in the report of the viewers and as proved before Court " A ") it had been claimed by the Odikro of Aku as having been sold to his ancestors by the respondent's ancestors over 90 years ago. In view of this adverse claim of ownership by a stranger to the suit, the appellant could not, nor does he any longer seek to establish any title to that land in these proceedings. As to the land now in question, the Court held that it was the property of the appellant. Among the witnesses who gave evidence was a representative of the Ejisuhene who denied that any boundary existed between the Ejisus and the Nyamianis.

The defendant then appealed to the Chief Commissioner's Court, which dismissed the appeal in view of the Hobart executive decision. The Commissioner refused to review his judgment. He said: " I consider I am bound by the record in the Boundary Book and it is not in my power to make any enquiry into the circumstances under which the executive decision was made ".

The defendant appealed to the West African Court of Appeal. The learned Chief Justices who heard the appeal sent the case back to the Chief Commissioner's Court to be tried on the merits, notwithstanding the Boundary, Land, Tribute, Fishery Disputes (Executive Decisions Validation) Ordinance (dated the 30th April, 1929), which enacts (section 3) that " any executive decision in a dispute or matter relating to ownership or boundaries of any land . . . in Ashanti given confirmed or approved by the Chief Commissioner prior to the commencement of this Ordinance and officially recorded in a Boundary Book is hereby validated and invested

with full and definite legal force and effect for all purposes whatsoever as against all persons whomsoever the rights of the Crown alone being reserved ". They were of opinion that the decision recorded in the Boundary Book was ambiguous in that it was doubtful whether the boundary was meant to be a boundary between Ejisu on the one hand and Donyina on the other, or merely a boundary between Ejisu on the one hand and Kumase on the other. They were further of opinion that this alleged ambiguity was resolved in the latter sense by the production of a document, Exhibit B (not recorded in any Boundary Book), which appears to be a version of the same decision but which contains a statement that it was " upheld " by Chief Commissioner Fuller and the words " Boundary Dispute between Kumase and Ejisu ", in the place of the words which appear in the recorded decision, viz., " Land Dispute between Kumase and Ejisu Donyina—Ejisu Boundary ".

The case was then reheard in the Chief Commissioner's Court, when witnesses were called and the evidence fully gone into. The decision was in favour of the appellant.

The defendant appealed to the West African Court of Appeal. That Court was of opinion that the matter could not be properly determined without a proper plan drawn to scale having been prepared. They accordingly sent the case back to the Chief Commissioner's Court with a direction to that Court " to cause to be made by a Licensed Surveyor . . . a proper plan of the land in dispute and the surrounding areas showing all places mentioned in the proceedings, and then to amend its judgment by reference to the new plan." The map " L " was accordingly prepared by Mr. Andrews and proved by him in the Chief Commissioner's Court. In the meantime the Chief of Nyamiani had died, and the respondent was added as a party in his place.

The Acting Chief Commissioner then delivered his amended judgment on the 14th August, 1939. He examined all the evidence in the case and on that evidence held that the land belonged to the appellant, and confirmed the judgment of Court " A ".

The appeal to the West African Court of Appeal was then heard, and on the 24th February, 1940, the judgment of that Court was delivered allowing the appeal, and restoring the judgment of Court " B ".

The results of these numerous stages in this unfortunately prolonged litigation, and the reasons for the views of the four different tribunals as they appear from the judgments may now be summarized.

Court " B " seems merely to have adopted the " findings " of the viewers, and to have relied on statements in the report that two people had sworn the Great Oath " that the land in dispute does not belong to the plaintiff, but that they have boundaries with the defendant, but the plaintiff did not respond to the Oath." This would appear to be a misapprehension so far as concerns the land now in question. Neither of the persons referred to swore the Great Oath in reference to any of that land.

Court " A " upon a consideration of the evidence adduced before Court " B " and having heard further evidence (including that of the representative of Ejisu) were satisfied that the land now in question was the property of the appellant.

The Assistant Chief Commissioner at the first hearing before him based his decision in favour of the appellant upon the Hobart decision and the before mentioned Ordinance. At the second hearing before him after hearing further evidence (including the evidence of another representative of Ejisu) and with the assistance of Map " L " came to the conclusion after considering all the evidence that the land now in question belonged to the appellant. The representative of Ejisu confirmed the evidence of the former representative that Ejisu had no boundary with Nyamiani after the division of the land. He also stated in reference to the division of the land after the war with Dapoa " Donyinahene . . . was given the middle of the land . . . Nyaminahene also was given a land on the right of Ahiresu to Boni and Donyina was in the middle."

The West African Court of Appeal reversed this decision.

Before considering the reasons which led the Court of Appeal to reverse the second judgment of the Chief Commissioner's Court their Lordships think it right to state that the first decision of that Court ought to have been affirmed. The Ordinance invested the recorded executive decision with full legal force and effect for all purposes whatsoever as against all persons whomsoever. It was therefore binding on and conclusive against Nyamiani. In their Lordships' opinion there is no ambiguity in the recorded decision, nor, had there been any ambiguity in the record would it be right to resolve it by reference to Exhibit B. If any inference could properly be drawn from a comparison of the record with Exhibit B, the only proper inference to draw would be that the purpose of the alteration in the record was to achieve some result which without the alteration would not have been achieved. But the recorded decision states plainly that it is fixing a boundary, and that the boundary which it is fixing is the boundary between the land of Donyina and the land of Ejisu. This being the true interpretation of the recorded executive decision, the appeal from the judgment of the 1st December, 1936, should have failed.

Their Lordships, however, are also of opinion that the appeal from the judgment of the Chief Commissioner's Court of the 16th August, 1937, should have been dismissed. The grounds upon which the Court of Appeal reversed that judgment now require consideration. After stating the history of the litigation and mentioning four previous land disputes to which they attached no importance (although one suit between Ejisu and Donyina was actually concerned with trespass on the land now in question), the Court proceeded to consider a plan " C " which had been produced by the appellant. To that plan the greatest importance was attached; indeed it is the foundation of the Court decision, because it is their reading of that plan that brought them into agreement with the viewers' report and the adoption of it by Court " B."

In their Lordships' opinion the viewers and the Court of Appeal placed upon Plan " C " a reading or construction which it cannot bear; and that if it be read as it should be read it strongly supports the claim of the appellant. To make this clear a description of plan C, and the words thereon, is necessary. The plan C shows the land on each side of the Jackson line. The land on the Ejisu side of it is marked Ejisu's Land, the word " Ejisu's " being written in large letters followed at some distance by the word " Land " in smaller letters. As to the land on the other side of the Jackson line, plan C shows by a green edging the easterly boundary of the land now in question, from Boadja Nkwanta to the Wonwa stream; the green edging then continues up to Odumasi. Above the Wonwa stream and on the side of the green edging farthest from the Jackson line is written in large letters the word " Doyin " and below the Wonwa along the easterly boundary of the land now in question is written in much smaller letters the word " Stool property ". The viewers in their report took the words " Stool property " to be isolated words which merely indicated that the land was " Stool property " without identifying any particular Stool (a somewhat useless fact to record on a plan); and this view apparently commended itself to the Court of Appeal. With this view their Lordships cannot agree. In their opinion the words " Stool property " are not isolated words but must be linked up with the word " Doyin ", just as the word " Ejisu's " on the other side of the plan must be linked up with the word " Land." So read Plan C shows a large part of the land now in question to belong to the appellant. The decisions adverse to the appellant have their Lordships think been based upon a mis-reading of Plan " C ", and with this vital flaw in their foundation they cannot stand.

Moreover in their Lordships' opinion proper effect has not been given to the evidence of the appellant's ownership which was given in the Native Court " A " and in the Court of the Chief Commissioner which influenced the decisions of those tribunals. Their Lordships refer in particular to the following facts which were proved:—It was proved that in 1929 when Nyamiani and another chief had a land dispute Mr. Wood, a licensed surveyor, in the presence of the two disputants and of Donyani fixed in

the ground a stone pillar to mark the point at which the lands of the three adjoined. This pillar is marked A.10/29/2 on Map " L ". It is on the westerly boundary of the land now in question. The Court of Appeal say truly that this pillar is difficult to reconcile with the respondent's claim; and they suggest an explanation which does not even purport to be other than guesswork. Further, the fact that at no point have the Ejisu any bounday with Nyamiani and that on the division of Kyim Kwayem after the war " Nyaminahene was given a land on the right of Ahiresu to Boni, and Donyina was in the middle ", is strong in support of the claim that the land now in question (which is bounded on the west by the left bank of the Ahirisu) is Donyina land. Finally, the land now in question has been under the control and in the possession of the appellant and not of Nyamiani. This is made clear not only by the appellant's evidence but also by the evidence given by the original defendant in the Native Court " A ".

For the reasons indicated their Lordships will humbly advise His Majesty that this appeal should succeed, that the orders of the West African Court of Appeal dated the 24th April, 1937, and the 24th February, 1940, should be set aside and the orders of the Chief Commissioner's Court dated the 1st December, 1936, the 16th August, 1937, and the 14th August, 1939, and the judgment of Asantehene's Native Court " A " should be restored. The respondent must pay the appellant's costs as provided by the restored orders and judgment, and also his costs of all the proceedings in the West African Court of Appeal (including the whole cost of making the map Exhibit " L ") and the costs of the appeal to His Majesty in Council.

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In the Privy Council

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v.

CHIEF KWAKU WUO

DELIVERED BY
LORD RUSSELL OF KILLOWEN

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