

62, 1948

Appeal No. 50 of 1944.

In the Privy Council.

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| UNIVERSITY OF LONDON W.C.1. |
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| INSTITUTE OF ADVANCED LEGAL STUDIES |

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL (GOLD COAST SESSION.)

BETWEEN

NKWANTAHENE NANA KWAME BOAKYE
 TROMU II, substituted for NANA ADU KOFI III
 (on behalf of the Stool of Nkwanta) (Plaintiff) *Appellant*

AND

BECHEMHENE NANA FOSU GYEABUOR II
 (on behalf of the Stool of Bechem) (Defendant) *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal concerning land in the Colony of Ashanti and is from a judgment of the West African Court of Appeal delivered on the 3rd June, 1941, allowing the appeal of the Defendant-Respondent from a judgment of the Chief Commissioner's Court of Ashanti, dated the 5th October, 1940, which dismissed the appeal of the said Defendant-Respondent from a judgment of the Asantehene's "A" Court, dated the 19th August, 1940, which had allowed the appeal of the Plaintiff-Appellant from a judgment of the Asantehene's "B" Court, dated the 28th November, 1938.

p. 40.
 p. 33.
 p. 26.
 p. 14.

2. Land in Ashanti, as is universal in the Akan States of the Gold Coast, is attached, unless alienated, to the ancestral Stools of the respective Chiefs and is in the disposition of the Chief occupying the Stool for the time being and the Elders and Councillors. The question in this case is whether the land in dispute is attached to the Stool of Nkwanta or to the Stool of Bechem. Nkwanta and Bechem are the respective headquarters of Chiefs, Nkwantahene and Bechemhene, who occupy Stools of which the attached lands abut the one upon the other.

No land, though unoccupied, is without an owner, but boundaries are frequently in dispute, as in the present case. No question of alienation arises in this case.

CASE FOR THE APPELLANT

The subjects of a Stool to which land is attached are entitled, subject to the control of the Chief and Elders, to farm upon portions of the Stool land which have not been duly appropriated to others for that purpose, but strangers (that is subjects of other Stools) have no such right, though frequently suffered or permitted to live and farm upon such land, often, but not necessarily, paying toll or tribute for their user of the land, especially when cocoa or other commercial crop is grown or produced from the land. Infiltration of strangers constantly takes place, especially where boundaries are not clearly known or recognised by the subjects of each Stool.

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But mere occupation, however long, does not oust the title of the original owner, though it may be that the stranger cannot be ousted from his enjoyment of the usufruct of the land he has been permitted to occupy, so long as he behaves himself and in particular does not challenge the title of the original owner and pays such tribute or lawful dues or makes such acknowledgment as may be customary and meet.

3. On the 19th August, 1937, the Plaintiff, Nkwantahene Adu Kofi III by a civil summons in the said " B " Court sitting at Kumasi called upon the Defendant, Bechemhene Fosu Gyeabuor II, to show cause (1) why he has started farming on Plaintiff Nkwanta-Kwasu land, without his permission, and (2) why he prohibits Plaintiff's tenants (from Gyakye) from farming thereat.

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p. 2.
p. 45.
p. 44.

4. Evidence was adduced before this Court from the 1st to the 13th October, 1938. During the hearing the Plaintiff tendered in evidence a Boundary Agreement dated 17th April 1913 between the Chiefs and Elders of Nkwanta and Bechem respectively with annexure (District Commissioner Fell's notes of parties' statements). This was admitted and marked exhibit " A " and the substance of it is set out in paragraphs 6 and 7 of this Case.

On the 13th October, 1938, the Court made the following Order :—

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" Let the parcel of the land in dispute before this Court be viewed by messengers to be deputed by this Court with a view to finding out as to whether the Defendant has encroached on the Plaintiff's portion of the land. Deputation to file its written report before judgment in the case is delivered."

The Order then named the messengers appointed.

pp. 46 to
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5. The viewer's report, with proceedings during the view, and with findings, is dated the 15th November, 1938. Their finding is in the following terms :—

p. 50.

" In view of the facts embodied in this our report our unanimous opinion is that the Plaintiff's claim is not correct. For the simple reason is that the farms and villages on the right bank of Kwaso as far as two miles from Kwaso at right angle belong to Bechemhene and Nkwantahene was unable to deny that they were not for Bechemhene.

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Bomahene also bore witness to Bechemhene that he is having boundary with Bechem and not Nkwanta.

Nkwantahene did not show to us any farm or village that belonged to him in that area, and he had no one to bear witness to support his claim."

This report with proceedings and finding was submitted to Court " B " on the 28th November, 1938, and marked as exhibit " B ".

p. 13.

6. In his notes of the 17th April, 1913, District Commissioner Fell states the claims of the contending parties. The Chief of Nkwanta stated that the Obukrukrua river flows into the Adinkra river, then into the Boa river, and then into the Kosu river, and that the land on the right bank of the said river as so joined had been given to him by the Chief Commissioner in 1906. The river Kosu itself was his ancestral boundary, having been his boundary in the olden days of the Kings of Coomasie.

There are three camps on the land called Adesua, Yao Kokwa Esuboi, and Anwiafutu. He was willing to allow the Bechem people to remain on his land in so far as they acknowledged the land as his.

The Chief of Bechem stated that the Chief Commissioner made the Obuokrukruwa river his boundary ; that he had a boundary with the Chief of Boma at a stream named Grunyah which runs into the Kosu river near Bosankro ; that the Chief of Nkwanta has also a part there ; that his grandfather, a hunter, had built a camp at Acheremosu for which no tribute was paid ; and that Nkwanta was claiming it.

7. The Boundary Agreement, to which the foregoing notes form an annexure, and which is dated the 22nd May, 1913, was made before Captain A. W. Norris, an Acting District Commissioner and reads as follows :—

" 1. The Boundary between Bechem and Nkwanta to be the thalweg of the Obukruwa-su to where it joins the Adinkra-su thence to the Boa-su following the thalweg of the Boa to the point where the Kosu joins it. Bechem people to have full use of all farms and hunting huts at present used by them on Nkwanta land without tribute from any rubber or cocoa grown or manufactured on that land.

2. The only claim Nkwanta reserves is—if any gold or other mineral is found thereon, or a concession of any sort granted."

The word " su " in paragraph 1 means river or stream.

8. Judgment of the " B " Court of the Asantehene was delivered on the 28th November, 1938.

p. 14.

After quoting paragraph 1 of the said agreement, the Court said :—

" According to the evidence adduced by the parties and their respective witnesses, as also the report of the messengers of this Court who were deputed to view this area and report, the area in dispute is outside the confines of the said boundary demarcated by the Commissioner aforesaid : otherwise the present case would be one of the nature of res judicata."

p. 15. After giving the contentions of the parties the Court said that the five messengers had been sent to view, and report on the land in dispute "in order to clarify the doubts surrounding the case." The Court said that the messengers disclosed that the portion in dispute has had "a long lease of occupation by various Bechem people who have villages all over the land, of the age of about eight or ten years minus paying tribute to anybody."

This occupation would be after the date of the agreement and being only a few years would have no evidential value of long occupation. By allowing Bechem people to flock on the area in dispute and raising no objection the Nkwantahene, according to the Court, made it appear that "silence means consent." 10

p. 15.
p. 46. The Court concluded by saying that "as far as the evidence adduced before this Court goes, and on the strength of exhibit "B" (the Viewer's report) this Court is entirely satisfied that if the parcel of the land in question belonged to the Plaintiff as he alleged, his predecessor, or even the elders attached to his Stool, would have prevented the Bechem people from farming it or made a case against the Bechemhene long before this time."

The Court, accordingly, gave judgment in favour of the Defendant with costs.

p. 16. 9. The Nkwantahene appealed from the said judgment to Court "A" 20 of the Asantehene.

p. 17. In his grounds of appeal he submitted *inter alia* that the "B" Court was grossly wrong in its interpretation of the Agreement of the 22nd May, 1913; that if Captain Norris, who demarcated the boundary had the inference drawn by the Court below in view he would have used the word "end" or "stop"; that his contention all along had been that his lands were on the right bank of the Kosu and those of Bechem on the left bank of the said river; that the Notes of Commissioner Fell bear out that contention; that Adesua, Yao Kokwa Esuboi and Awiafutu were among the villages on Nkwanta land which the Bechems were allowed to continue to farm without tribute; that these villages were beyond the junction of the Boa and the Kosu, and on the right bank of the Kosu; that Awiafutu was about $7\frac{1}{2}$ miles away from the junction of the said river; that the judgment was wrong both in law and custom; that the messenger's report and findings cannot hold in law and equity; and that, instead of visiting the locus and reporting to the Court, the messengers held a Court in the bush, examined the parties and their witnesses, permitted the parties to examine each other, and gave a finding upon which Court "B" gave its judgment. 30

p. 19. 10. Court "A" of the Asantehene heard evidence from the Plaintiff 40 and Defendant on the 1st and 4th May, 1939, and then adjourned for the locus to be inspected by messengers to be appointed by the Court.

pp. 51 to 77. The messengers appointed visited the locus and, instead of reporting in the usual customary way, made a report on the 13th June, 1939, with proceedings during the view and findings, just as the other messengers had done.

This report was put in evidence on the 31st July, 1939, and marked exhibit "A1". The Court, however, said— p. 23.

"as the messengers are not unanimous in their findings—2 for the Appellant and 3 for the Respondent—the Court sets aside their report and decides to send a Licensed Surveyor to survey the land and make a Plan thereof."

The Surveyor, Mr. Ernest S. S. Wood, made a survey of the land and a plan which was tendered, accepted and marked as exhibit "B1" on the 5th August, 1940. Copies of the plan were given to the parties who were allowed to examine the surveyor about the places mentioned thereon. p. 24.

On the 19th August, 1940, the Asantehene "A" Court delivered judgment. p. 26.

The Court noted that the three villages of Adesua, Yaw Kokwa Esuboi and Awiafutu referred to by Nkwanta in supplement (1) to exhibit "A", as also Acheremosu referred to in supplement (2) by Bechem during the dispute before Mr. Fell, are all in the disputed area. The Court then quoted the words of exhibit "A" and said— p. 27. p. 45. p. 44.

"This Court holds that if the disputed area belonged to Bechem Stool, the Commissioner would certainly not have embodied in exhibit 'A' that Bechem people should have full use of all farms and hunting huts at present used by them on Nkwanta land. p. 27.

Naturally, Bechem would have raised a protest to this clause in exhibit 'A'. Though Bechemhene (Respondent) contends that the names of the villages referred to in the supplement (1) are not correct names, the Court finds itself unable to accept this contention, seeing that it cannot safely be accommodated to the names of the villages in supplements (1) and (2) to the exhibit 'A'."

"In view of the foregoing the Court has no alternative but to allow the appeal and to set aside the judgment of the 'B' Court." p. 27.

11. The present Respondent then appealed to the Court of the Chief Commissioner which, by judgment delivered on the 5th October, 1940, dismissed his appeal with costs. p. 33.

The Commissioner, who has very great practical experience in native land cases, said that he had formed the opinion from the study of exhibit "A" that the parties were also then disputing about both portions of the land, although the claim in that case reads "Claims lands from where Obuokrukruwa crosses the Kumasi road till it joins the Kosu river" and he emphasized what the then Chief of Nkwanta said about the Kosu being his ancestral boundary in the olden days of the Kings of Kumasi:— p. 44.

"It is inconceivable to me that if the parties did not intend that the Kwaso should from its junction with the Bua be the boundary between them that the agreement should have been omitted to say what was the boundary from that point. The Kwaso is a natural feature of the land, whereas the boundary which Bechem claims from Boa Kwaso junction has no physical features to mark it.

The Bechemhene has told the Court that he followed farm boundaries in making this boundary.

Furthermore, the then Bechemhene stated that his boundary with Boma is a stream called Grunyah which runs into the Kwaso river near Bosankro and said that the Chief of Nkwanta also has a part there and that we have no settled boundary with Nkwanta in the bush. Grunyah river is the same as Awiafutu stream and Acheremosu has been identified as Achemwasu. These are on the western boundary of the land in dispute."

p. 9. The Commissioner went on to say that the Bechemhene now claims 10
p. 9. a boundary with Boma at Donkotor though this was not mentioned in
p. 10. 1913; that Kofi Fosu Krontihene (Commander-in-Chief) of Boma, Defendant's witness, while confirming a boundary with Bechem states that he has a boundary with Nkwanta at Donkotor; and that the three (Boma, Bechem and Nkwanta) have no common boundary.

p. 12. Defendant's third witness, Yaw Asubonten of Esukesi, deposes that the Plaintiff has a boundary with Esukesi at Donkotor and that Esukesi has a boundary with Bechem at Awiafutu and with Brosankro at Atwetwebosu (Achochobuosu on exhibit " B ").

" From the evidence of these witnesses it is obvious that the 20
claim of Bechem to land up to Donkotor cannot be maintained. Furthermore, the evidence given by the witnesses as to the Boma Bechem boundary at Awiafutu (Grunyah) supports the contention that the Commissioner, when making the agreement in 1913, had the whole of this area on the North part of Kosu and Boa in mind, more especially as the then Chief of Bechem said that the Chief of Nkwanta had a part there and there was no settled boundary."

After saying that the various inspectors who went on the land were at variance in their opinions and that both parties have been making use of the land, he said— 30

p. 34. " I am of the opinion that the agreement, exhibit ' A ', was
p. 44. intended by the parties at the time to apply not only to that area immediately North of the Bua river but also that area now in dispute and that the Defendant is bound by it."

He accordingly dismissed with costs, the appeal of the present Respondent.

p. 40. 12. The present Respondent appealed from the said judgment of the
p. 40. Court of the Chief Commissioner to the West African Court of Appeal, which, by a judgment, dated the 3rd June, 1941, allowed the appeal. The Court said that the two points which arise for decision in the case 40
are—

p. 44. (1) The effect of exhibit " A " upon the rights of the parties ;
and
(2) What are the respective rights upon the evidence given ?

After quoting the terms of exhibit "A", the Court said—

p. 44.

"On the face of it, therefore, it is evident that the agreement which ended the dispute in 1913 related only to the boundary North-east of the point where the Boa and Kosu rivers meet and did not extend to the boundary South-west of the point."

p. 41.

The Court said that the "B" Court found—

"the demarcation by the Commissioner twenty-five years ago stopped at where the Boa and Kwasu rivers join and did not go beyond and so the question arose, who owned the area beyond the junction of these two rivers."

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The Court then quoted from the judgment of the "A" Court the answer to this finding as mentioned at the end of paragraph 10 hereof, and also the answer of the Court of the Chief Commissioner as mentioned at the end of paragraph 11 hereof.

p. 27.

p. 34.

The Court expressed disagreement with the opinion of the Chief Commissioner's Court and with the reasoning of the "A" Court, and upheld the view of the "B" Court.

p. 42.

Although the "B" Court did not have a plan before them, they sent messengers who were unanimously of opinion that "the Plaintiff's case is not correct."

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p. 42.

The Appeal Court said that three out of the five messengers sent by Court "A" to view the land were in favour of Bechem, and concluded by saying "the judgments of both the Asantehene's Court 'A' and of the Chief Commissioner of Ashanti's Court are based, not on the relevant evidence given in this case, but on misconceptions of the effect of exhibit 'A'. There was ample evidence before the 'B' Court to justify its finding, and that finding must be restored." The appeal Court accordingly allowed the appeal with costs in the two immediate lower Courts, and restored the judgment of the "B" Court, with this addendum that it is declared that the land in dispute is that shown in exhibit "B1" in the Asantehene's "A" Court.

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13. On the 26th November, 1942, Nkwantahene Nana Kwame Boakye Tromu II was substituted as Appellant for Nana Adu Kofi III and on the same date final leave to appeal to the Privy Council was granted.

p. 43.

p. 44.

14. The present appeal has been preferred against the aforesaid judgment of the West African Court of Appeal, dated the 3rd June, 1941, which reversed the judgment of the Chief Commissioner's Court of Ashanti, dated the 5th October, 1940.

The Appellant humbly submits that the said judgment of the West African Court of Appeal is wrong and should be reversed and that the judgment of the Chief Commissioner's Court of Ashanti should be restored for the following, among other

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REASONS

- (1) BECAUSE the messengers who were sent to view the locus instead of merely giving a report showing who farmed the land, who put them there, who collected tolls or tribute and other relevant facts, acted as a Court and gave their "findings".
- (2) BECAUSE it is the duty of the Court itself to arrive at its own findings on the facts presented by the messengers.
- (3) BECAUSE the messengers by giving findings acted 10 contrary to customary law.
- (4) BECAUSE the "B" Court wrongly accepted the "findings" of its messengers and the "A" Court, rightly rejected "findings".
- (5) BECAUSE the "A" Court rightly appointed an experienced surveyor to make a plan in order to appreciate the evidence.
- (6) BECAUSE the judgment of the "B" Court is wrong.
- (7) BECAUSE the judgment of the "A" Court is right.
- (8) BECAUSE the judgment of the Chief Commissioner's 20 Court of Ashanti is right.
- (9) BECAUSE the judgment of the West African Court of Appeal is wrong.

T. B. W. RAMSAY.

Appeal No. 50 of 1944.

In the Privy Council.

ON APPEAL

*From the West African Court of Appeal
(Gold Coast Session).*

BETWEEN

**NKWANTAHENE NANA KWAME
BOAKYE TROMU II, substituted
for Nana Adu Kofi III (on behalf of
the Stool of Nkwanta) (Plaintiff) - Appellant**

AND

**BECHEMHENE NANA FOSU
GYEABUOR II (on behalf of the
Stool of Bechem (Defendant) - Respondent.**

Case for the Appellant.

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