

69, 1949

Appeal No. 6 of 1945.

In the Privy Council.

ON APPEAL
 FROM THE WEST AFRICAN COURT OF APPEAL
 (Gold Coast Session).

UNIVERSITY OF LONDON
 W.C.1.
 -8 OCT 1956
 INSTITUTE OF ADVANCED
 LEGAL STUDIES

44358

BETWEEN

ODIKRO DANSO ABIAM II on behalf of himself
 and the subjects of the Tekyimantia Stool
 (Plaintiff)

Appellant

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AND

OHENE BOAKYI TROMU IL (Defendant)

Respondent.

Case for the Respondent.

RECORD

1. This is an appeal from a judgment of the West African Court of Appeal delivered on the 1st March, 1944, dismissing the appeal of the plaintiff-Appellant from a judgment of the Chief Commissioner's Court, Ashanti, dated 30th November, 1943, which dismissed an appeal from a judgment of Asantehene's "A" Court, dated the 28th August, 1943, and which dismissed an appeal from a judgment of the Asantehene's Divisional "B" Court, dated the 2nd February, 1943.

p. 29
 p. 21
 p. 14
 p. 10

20 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 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, and are further subject to the payment of Stool debts.

30 Strangers (that is, subjects of other Stools) have no such right, though frequently suffered or permitted to live and farm upon such land, paying, as a rule, toll or tribute for their user of the land, especially when cocoa or other commercial crop is grown on, or produced from, the land. 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

CASE FOR THE RESPONDENT

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.

p. 1. 3. The Appellant as plaintiff instituted the suit on the 4th August, 1942, in the Asantehene's Divisional " B " Court by a Civil Summons. The claim was as follows :—

p. 2. " The plaintiff claims that he and all the subjects of Tekyimantia stool are not entitled to pay any tribute to the defendant on behalf of his Stool and therefore calls on the defendant to show cause why he is demanding him and his subjects that from henceforth every inhabitant of Tekyimantia Stool should pay a tribute of £2 7s. each whereas there are agreements to the knowledge of the defendant and made between the ancestors of both the plaintiff and the defendant by Messrs. Philbrick & Fell and confirmed by F. C. Fuller, Chief Commissioner, Ashanti, dated 15.10.14, 17th April, 1917 respectively, and L. H. Wheatley, Ag. Commissioner W. P. A. on the 11th February, 1919, purporting that no tribute was to be collected from any residents of Tekyimantia. 10

2. The plaintiff further asks the Court in the meantime to restrain the defendant his servants and/or agents from proceeding to collect any such tribute from plaintiff or any subjects of Tekyimantia Stool till final hearing of the case to a close." 20

p. 3. On the 18th December, 1942, the defendant was restrained from collecting tribute from the plaintiff and his Stool subjects pending the determination of the case.

p. 4. 4. The plaintiff, in his evidence, said that his only witness was an agreement dated the 11th February, 1919, which was admitted in evidence and is the only exhibit. p. 34.

The agreement is in these terms :—

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p. 34. " We the undersigned the Chief and Elders of Nkwanta and the Chief and Elders of Tekyementia agree to and hereby bind ourselves to accept and keep the following conditions with reference to the collection and division of tribute on snails, kola, cocoa, etc., etc.

1. Both parties shall send representatives who shall meet and combine to collect the tribute.

2. The tribute shall be divided into three parts—
1/3rd to be given to the Chief of Tekyementia and
2/3rds to the Chief of Nkwanta.

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3. The tribute to be collected from strangers and not from bona fide residents on Tekyementia land."

p. 4, l. 28. In cross-examination he admitted that the Takyimantia land belonged to the Nkwantahene (Chief of Nkwanta), the defendant; that he was occupying the land prior to the drawing up of the agreement; that he had contributed £300 to the Nkwanta Stool debt since the agreement had been p. 4, l. 30. p. 4, l. 45.

made ; that he was subservient to the Nkwanta Stool about 15 years ago when the British Government made him so ; that his Stool was no longer under the Nkwanta Stool but was under the Etipin Stool ; that on the 25th July, 1942, as a result of the cancellation of the agreement, the Chief of Nkwanta was charged an "aseda" of £9 6s. before the Otumfuo Asantehene ; and that the Otumfuo Asantehene had caused it to be declared that thenceforth the plaintiff and all Takyimantia subjects should pay tribute to the defendant.

10 He further admitted that the Etipinhene, to whom he now owed allegiance, was present on the occasion when the Otumfuo Asantehene sat in Council and decided that the plaintiff should pay tribute to the defendant in respect of the Takyimantia land ; and that a matter settled before the Otumfuo Asantehene in which an Aseda is paid stands valid.

When asked by a member of the Court whether the agreement had been produced before the Otumfuo at the arbitration, plaintiff said " Yes."

The same member asked this question :—

" Did the Otumfuo say the Takyimantia people should go and pay tribute to the Nkwantahene ? "

20 He replied " Yes, the Otumfuo said so but on the strength of the agreement which still holds good, I begged and brought this action to the Court."

5. J. H. Gambrah, defendant's Court Registrar, by power of Attorney, gave evidence for the defendant.

He said that Takyimantia land belonged to the defendant's stool ; that before 1896, the Otumfuo Asantehene brought the Takyimantia people, who are the Etipinhene's subjects, to the Nkwantahene to give them a place to live and hunt for the Otumfuo Asantehene ; that the Nkwantahene gave these people land to occupy free ; that about 40 years ago the British Government came to Ashanti and that Government made these people subservient to the Nkwanta Stool ; that by and by the Takyimantiahene and his Elders made overtures to be allowed to help in the collection of tribute payable to the Nkwantehene ; that after consulting the District Commissioner, Sunyani, the Nkwantehene agreed and executed the agreement in question ; that about 7 years ago the Confederacy was restored and the Takyimantia people reverted to their original clan, Etipin, and ceased to serve the Nkwanta Stool ; that before the Committee of Privileges the Nkwantahene declared that while these people were under his Stool they had the use of his land free ; that the Committee decided that since these people had left from under his Stool they should pay tribute in respect of their cocoa farms to the Nkwanta Stool ; that the Etipinhene and the plaintiff were present at the meeting of the Committee of Privileges ; that 2 years ago when the Nkwantahene incurred a debt as a result of litigation the Takyimantia people refused to contribute towards that Stool debt saying they had an Agreement with the Nkwantahene ; that the Nkwantahene brought the position before the Otumfuo Asantehene who decided that these people should pay tribute to him ; that the plaintiff was found at fault and the Nkwantahene was made to pay an Aseda of £9.6.0 ; that after the Otumfuo's decision was

p. 7, l. 34. made, the defendant got the Otumfuo's messengers to collect tribute from the plaintiff and his people who refused to pay; that the plaintiff was summoned before the Otumfuo when the minutes of the Committee of Privileges were read in which it was recorded that the Takyimantia people should pay tribute; and that when the defendant had made up his mind to collect but had not actually done so, the plaintiff instituted the present proceedings.

p. 7, l. 43. In cross-examination, witness said that plaintiff's predecessor and his head Chief, the Etipinhene, were present when the Committee of Privileges gave their decision. He further stated that it was the plaintiff's predecessor, 10
p. 8, l. 8. Praka, who was present with all his Elders.

p. 8, l. 17. Bafuor Osei Akoto, Linguist to the Otumfuo Asantehene, said that
p. 8, l. 18. the Otumfuo sat at Pat Akrom, when he was present; that the defendant stated that he had once proposed to charge the Takyimantiahene and his people tribute to show that the land is his property and added that the Otumfuo had referred the matter to the Etipinhene to go and see to it and let the Takyimantia people pay "Adwantari" nominal fee but these people refused to do so; that the plaintiff was asked if the statement of the Nkwantahene was true, he said "Yes" and he had an agreement and on that account the Takyimantia people were not to pay tribute; that the 20
p. 8, l. 26. Chief Registrar was asked to fetch and read the section of the minutes of the "Committee of Privileges" dealing with the Takyimantia land question; that it was observed that the Committee had decided that the Takyimantia people lived on Nkwantahene's land and should pay tribute to him; that the plaintiff and his people were asked if they would now pay the tribute and they said "No"; that the Otumfuo decided on the strength of the decision of the "Committee of Privileges" that the defendant should charge the Takyimantia people tribute; and that the
p. 8, l. 30. defendant thanked the Otumfuo and paid an Aseda of £9 6s.
p. 8, l. 33.

The plaintiff asked witness this question :

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"If my predecessor had consented to the cancellation of the Agreement then I have nothing to say?"

Witness replied :

"Yes, that is the case."

p. 9, l. 4. J. W. K. Appiah, Chief Registrar, Asantehene's Court, in his evidence, said that on the 20th June, 1935, the "Committee of Privileges" met with the following members present: Major Jackson, Chief Commissioner, Otumfuo Asantehene, Nana Kofi Adu-Kokofuhene, Nana Essumingahene, Nana Gyasehene-Kumasi; that the defendant laid a claim to Yanfo, Adrobaa, and Susanso, and added that the Takyimantia land belonged to 40
p. 9, l. 9. him from time immemorial but that the people living there served Etipinhene; that he alleged that since the Takyimantia people were placed under his Stool they contributed to his Stool debts and therefore he charged them no tribute but now that they were going back to serve Etipin he would charge them tribute; that with regard to Yanfo, Adrobaa, and Susanso, nobody was litigating with him; that the Committee therefore decided that these three places should remain as they were but that if anybody appeared to litigate with him, he might apply to or bring the case before the Committee of Privileges; that with regard to Takyimantia
p. 9, l. 11.
p. 9, l. 15.
p. 9, l. 16.
p. 9, l. 19.

the Otumfuo said that the Nkwantahene could charge the Takyimantia people tribute and if they refused to pay it, he might bring the matter before him for settlement; and that this is reported at page 40 of the proceedings of the meetings of the Committee of Privileges held at Kumasi, from the 18th June, 1935, to the 3rd January, 1936. p. 9, l. 22.

In reply to the defendant, witness said that the defendant first appeared before the Otumfuo asking the plaintiff to share his Stool debts when he refused; and that after this, the defendant appeared before the Otumfuo about the payment of tribute which the Otumfuo told the plaintiff to pay. p. 9, l. 28.
p. 9, l. 32.

10 6. The Asantehene's Divisional "B" Court, after quoting in full the plaintiff's claim, referring to the Agreement of the 11th February, 1919, and considering the evidence led, gave judgment in these terms:—

20 "In the opinion of this Court, the plaintiff is entirely wrong in instituting this action against the defendant seeing that the plaintiff is bound by the decisions of the 'Committee of Privileges' and of the Otumfuo Asantehene who, in the olden days acquired this Takyimantia land from the Nkwantahene and made the Takyimantia people occupy it to act as his hunters. Still in the opinion of this Court, if the plaintiff produced the said Agreement before the 'Committee of Privileges' the decision as regards the Takyimantia land might have been re-considered. In the absence of this fact the plaintiff is bound by the decision given by the Committee, and therefore, judgment is entered for the defendant and against the plaintiff with costs to be taxed." p. 11, l. 37.

This judgment is dated the 2nd February, 1943.

30 7. There was an appeal to the Asantehene's "A" Court which by judgment dated the 28th August, 1943, affirmed the judgment of the Court below and dismissed the appeal. The "A" Court, before giving judgment, heard the Appellant upon oath. Examined by the Respondent, the Appellant said he served the Asantehene through the Etipinhene. In answer to the Court, Appellant said that he served the Respondent's Stool before the Confederacy and that he did not contribute to his Stool debts; that after the Confederacy he served the Etipinhene and that he was entitled to contribute to Etipin Stool debts; that he lived on Respondent's land but would not contribute to his Stool debts; that with the restoration of the Ashanti Confederacy, he carried out the order of the Confederacy Council to serve the Etipinhene; that assuming it is the ruling of the Committee of Privileges that his Stool subjects should pay tribute to the Respondent's Stool, he and his people would pay; that he agreed that whatever the Otumfuo ordered when sitting in Council as affecting his Stool was valid; and that he did not agree that the Respondent refrained from collecting tribute from his subjects because at that time he was serving the Respondent. p. 15.
p. 12, l. 42.
p. 13, l. 20.
p. 13, l. 24.
p. 13, l. 26.
p. 13, l. 35.
p. 13, l. 42.
p. 13, l. 51.
p. 14, l. 1.

The Respondent, on being sworn by proxy, said he had nothing to add to what had been recorded in the Court below.

In giving judgment, one of the members of the Court said that the judgment of the Court below is a sound one; that the Appellant who had originally served the Respondent now served the Etipin Stool according p. 14, l. 23.

- p. 14, l. 26. to the ruling of the Committee of Privileges ; that he saw no reason why Appellant should refuse to abide by the Committee's further ruling that his Stool should pay tribute to the Respondent ; that in his view the ruling of the Committee of Privileges annuls the agreement ; and that since the Appellant and his subjects do not contribute to the payment of the Respondent's Stool debts it is only equitable that the Appellant should pay tribute to the Respondent's Stool.
- p. 14, l. 31.
- p. 14, l. 33.
- p. 14, l. 38.
- p. 14, l. 40. A second member of the Court concurred. He said that if both the Appellant and the Respondent had been serving one master there would have been a different aspect to the case ; and that it was not in the interest of justice that the Appellant should refuse to pay anything to the Respondent while he lived on his land and collected gains and products thereon with which he served another Chief. 10
- p. 15, l. 1. The third member of the Court concurred. He said he could not find how the Appellant should refuse to pay tribute to the Respondent's Stool when he lived on his land and when he and his people did not serve his Stool and did not contribute towards his Stool debts.
- p. 15, l. 6. The Court held that there was no substance in the appeal which was dismissed with costs.
- p. 20, l. 31. 8. There was an appeal from the judgment of the Asantehene's " A " Court, dated the 28th August, 1943, to the Chief Commissioner's Court, Kumasi, which, by a judgment dated the 30th November, 1943, dismissed the appeal with costs. In giving evidence before that Court, the Appellant said that at the time the agreement was made he was serving Nkwantahene and therefore was not a stranger on the land ; that he now served Etipinhene ; that up to the time the agreement was made he was collecting tribute for Nkwantahene ; and that he based his entire grounds of appeal on the agreement. 20
- p. 20, l. 39. J. H. Gambrah, on behalf of the Respondent, in his evidence said that, when serving the Respondent, the Appellant contributed towards the Stool debts of the defendant and was not then regarded as a stranger ; that tribute was collected from strangers by the Respondent himself at first ; that later the Appellant asked to help in the collection on behalf of the Respondent ; that still later the Appellant asked for a share for his trouble ; that the agreement was entered into whereby the Appellant was to get a third share for that trouble ; that the agreement on being signed was sent to the Commissioner who also signed it ; that on the restoration of the Confederacy, the Appellant made an application to the Committee of Privileges to serve the Etipinhene ; that the Respondent tried to retain the Appellant, but the Committee would not agree as the Appellant had served the Etipinhene in the olden days ; and that after a lengthy discussion the Committee decided that the Appellant should pay tribute to the Respondent. 30
- p. 21, l. 3.
- p. 21, l. 6.
- p. 21, l. 9. 40
- p. 21, l. 26. The Chief Commissioner's Court gave judgment to the effect that at the time the agreement was made the Appellant was serving the Respondent and was therefore not a stranger on the land and could not by native custom be called upon for tribute ; that times have changed and the Appellant is now serving the Etipinhene of Kumasi, not against his own will ; that it
- p. 21, l. 28.
- p. 21, l. 31.

is not denied that the Appellant is on the Respondent's land and therefore he now becomes a stranger liable to pay tribute to the land owner ; that on account of the changed conditions the agreement is no longer valid ; that as conditions now are the agreement violates the custom of land tenure ; and that both Courts below had rightly held that this could not be done. The appeal was accordingly dismissed with costs. p. 21, l. 33.

9. The Appellant appealed from the judgment of the Chief Commissioner's Court dated the 30th November, 1943, to the West African Court of Appeal, which, by a judgment dated the 1st March, 1944, dismissed the appeal with costs. The Appellant filed seven grounds of appeal and eight weeks later he filed six additional grounds of appeal. p. 22.
p. 23.

During the arguments, Counsel for the Respondent made an application to be allowed to raise the question that none of the Courts had jurisdiction since the matter was of a constitutional nature. The Court decided to hear the Appellant's Counsel who submitted that the Appellant was entitled to a declaration as prayed. p. 26, l. 13.
p. 27, l. 10.

In the opinion of the Court, this could not be granted in the form in the writ as it was obviously too general. Thereupon Counsel for the Appellant said that what was being asked was a declaration that " Plaintiff and all his subjects are not liable to pay any tribute to the defendant on behalf of his Stool in respect of their occupation of that portion of Nkwanta land known as Takyimantia land." p. 27, l. 13.

These two applications and the arguments of Counsel are dealt with in the judgment of the Court.

10. The West African Court of Appeal, in its judgment dated the 1st March, 1944, said that the application to amend the Writ of Summons at such a late stage would not be granted without very good reasons, but in this case there were good reasons, namely :— p. 29.
p. 30, l. 15.

" (1) that if the objection to the jurisdiction had been taken in the trial Court there would then have been an opportunity for the Appellant to apply to make this amendment, and p. 30, l. 18.

(2) that, as always, we look not merely to the form of the Writ of Summons in Native Court proceedings, but rather to the substance of the issues actually raised and tried in the suit, and that in the present case the issues raised and tried were those raised by the amendment now proposed. p. 30, l. 21.

We have, therefore, decided to allow the amendment sought ; the Writ of Summons is amended accordingly, and that disposes of the objection to the jurisdiction of the trial Court, the issue being solely a question of whether or not tribute is payable in respect of the occupation of land, no constitutional question being raised." p. 30, l. 26.

The Court stated the main historical facts, about which there is no serious controversy.

(1) Prior to the British occupation the Takyimantia people were subject to the Etipinhene and through him subject to the Asantehene. p. 30, l. 33.

p. 30, l. 35.

(2) Under the re-arrangements made under the auspices of the British Government in 1896 the Takyimantia people were taken away from their allegiance to the Etipinhene and placed under the Nkwantahene.

p. 30, l. 38.

(3) Later, on the re-establishment of the Ashanti Confederacy, the Takyimantia people were taken from the Nkwantahene and put back again under the Etipinhene.

p. 34.

p. 31, l. 6.

After quoting the terms of the Agreement of the 11th February, 1919, the Court went on to state that on the return of the Asantehene some years ago a "Committee of Privileges" was set up by the Government to deal with constitutional questions which might arise in connection with the restoration of the Ashanti Confederacy; and that no report of that Committee dealing with matters now in dispute was formally put in evidence although it appears to have been available in the Asantehene's "A" Court and to have been read in whole or in part to that Court. 10

Although the Court had not seen the Report, it was of opinion that it was not of direct importance to the determination of the claim as now amended, as the Committee was not a judicial tribunal whose decision would constitute *res judicata* on matters of this kind coming before a judicial tribunal. As the Appellant in all the lower Courts expressly, and very definitely, based his case entirely on the Agreement, the Court said that to understand the Agreement, and to define its meaning, it was essential to bear in mind the relationship between the parties at its date; that the most important point is that, at the date of the Agreement, the Takyimantia people were under the Nkwantahene; that the land in question was undoubtedly Nkwantahene's land at the date of the agreement, so that at that date the Takyimantia people, in any questions or agreements, were not "strangers"; that it was by the action of the British Government in putting them under Nkwantahene that they had ceased to be "strangers" in regard to Nkwanta land; that not being "strangers" they were by the terms of the 1919 agreement and at its date, exempted from payment of tribute in respect of their occupation of that portion of Nkwanta land known as Takyimantia land; that the decision of the Committee of Privileges does not itself bind the Appellant as a judgment of a judicial tribunal about rights to land; that all the Committee could decide was the constitutional relations between the parties, but upon these relations the parties themselves by their agreement made exemption from tribute to depend; and that in other words it was the parties by their agreement who made the decision of the Government through the Committee of Privileges as binding for practical purposes as if it had really been *res judicata* as to tribute. 20 30 40

It was clear, in the opinion of the Court, that if and when they should become "strangers" they were *by the terms of the agreement*, on which their whole case in the lower Courts was expressly based, no longer exempted from the payment of tribute.

By the action of the Government in 1896, the Appellant and his people ceased to be "strangers" to the Nkwantahene, but had become "strangers" to the Etipinhene.

When later, by the action of the Government through the Committee of Privileges they were taken from the Nkwantahene and put back under the Etipinhene, they became "strangers" to the Nkwantahene just as they ceased to be "strangers" to the Etipinhene.

Just as in 1919, by the 1896 action of the Government, they were within the express exemption of the agreement, so by the later action of the Government through the Committee of Privileges, they have been taken out of that exemption.

Counsel for the Appellant sought to get behind the agreement and to
10 found on occupation prior to 1896.

The Court, however, held that if this new case had been put forward in the trial Court there would have been ample evidence without doubt to show the circumstances and the terms of the occupation of the Asantehene's hunters prior to 1896, but owing to the absence of such evidence the Court could not draw conclusions from mere guesses.

In these circumstances the Appellant was not entitled to the declaration asked for.

The appeal was accordingly dismissed with costs.

11. Leave to appeal to His Majesty in Council was granted on the
20 21st July, 1944. p. 33.

12. The Respondent respectfully submits that the appeal should be dismissed with costs, for the following, among other

REASONS

- (1) BECAUSE the judgment of the Asantehene's Divisional " B " Court is right.
- (2) BECAUSE the judgment of the Asantahene's " A " Court is right.
- (3) BECAUSE the judgment of the Chief Commissioner's Court is right.
- (4) BECAUSE the judgment of the West African Court of Appeal is right.

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T. B. W. RAMSAY.

Appeal No. 6 of 1945.

In the Privy Council.

ON APPEAL

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

BETWEEN

ABIAM II

Appellant

AND

TROMU II

- - - *Respondent.*

Case for the Respondent

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Solicitors for the Respondent.