

22, 1952

In the Privy Council.

No. 49 of 1950.

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

31392

UNIVERSITY OF LONDON
W.C.1.

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INSTITUTE OF ADVANCED
LEGAL STUDIES

CASE FOR THE APPELLANTS

BETWEEN

KWESI ENIMIL for himself and as representing the people of Bortogina village and CHIEF KOBINA ANGU, Chief of Manso ... (Defendants-Appellants) Appellants

AND

KWESI TUAKYI and KOFI ESSON, Successors according to Native Customary Law of KOJO ATTAH, deceased (Plaintiffs-Respondents) Respondents

— AND BETWEEN —

KOJO MANKRADU and CHIEF KOBINA ANGU, Chief of Manso ... (Defendants-Appellants) Appellants

AND

KWESI TUAKYI and KOFI ESSON, Successors according to Native Customary Law of KOJO ATTAH, deceased (Plaintiffs-Respondents) Respondents

— AND BETWEEN —

BUSUMAFI and CHIEF KOBINA ANGU, Chief of Manso (Defendants-Appellants) Appellants

AND

KWESI TUAKYI and KOFI ESSON, Successors according to Native Customary Law of KOJO ATTAH, deceased (Plaintiffs-Respondents) Respondents.

(CONSOLIDATED)

CASE FOR THE APPELLANTS

RECORD

p. 41

p. 31

1.—This is an Appeal from a Judgment of the West African Court of Appeal, sitting at Accra, dated the 3rd February, 1950, affirming a Judgment of the Land Court, Sekondi, pronounced by Mr. Justice Hooper, on the 24th April, 1948.

RECORD

p. 2

2.—The Respondents, as successors according to Native Customary Law of one Kojo Attah deceased, claimed from the Appellant, Kwesi Enimil, Headman of Bortogina Village, for himself and as representing the people of Bortogina Village (1) possession of Bortogina lands ; (2) the sum of £300 for the use and occupation of the said lands.

p. 17, 1. 18

The Appellant Enimil and his predecessors have been in continuous occupation under the Chief of Manso for over 100 years, and have always repudiated the claims of the Respondents.

pp. 3, 4

The Respondents also brought two other suits against the Appellants Kojo Mankradu and Busumafi, both of Inchaban, in which they claimed 10 from them £200 and £150 respectively, for the use and occupation of portions of the said lands.

pp. 7, 15, 21

Mankradu and Busumafi are strangers and tributaries of the Appellant, Kobina Angu, Chief of Manso Division, who applied to be and was joined as a co-Defendant in each suit ; and, by consent, the three suits were consolidated.

pp. 8, 9, 10
pp. 16, 18, 20

3.—Statements of Claim were filed in all the suits on the 6th March, 1947, while Statements of Defence were filed on the 13th and 15th April, 1947.

pp. 5, 12

4.—Bortogina Village and lands lie within the Manso Division and are 20 administered by the Headman on behalf of the Chief. The description is vague. The farmers have the usual rights of occupancy according to native custom, and the Chief, as owner in trust for his people, is entitled to tribute, at least from strangers.

The Appellants refer to the exposition of Customary Law by the Privy Council in connection with this very land, in *Kobina Angu v. Cudjoe Attah* in Judgments of the Privy Council, 1874–1928, at page 44.

5.—In 1899, one T. E. Jobson acquired some interest in certain lands, of which Bortogina may have been one. This transaction is described in the Judgment of the Privy Council, in *Kobina Angu v. Cudjoe Attah*, 30 dated 23rd June, 1916, Judgments of the Privy Council 1874–1928, page 48, line 43, in these words, “ Jobson had bought under a Sheriff’s “ sale, made in an action in which he was plaintiff, and there is a copy “ of the certificate of this purchase at page 29 of the record (page 48 of this “ record) which is dated the 22nd October, 1903, and which is the root of “ the Respondent’s (Kojo Attah’s) title. Kobina Baidoo the predecessor “ of the present appellant (Angu) was a defendant in that action with “ others, but the proceedings and judgment in that action were not put in “ and there is no proof, and, in the absence of this record, there could be “ no proof of what that action was about. Under the execution on the 40 “ judgment the Sheriff sold, but the certificate states that the sale was of “ the ‘ right, title and interest ’ of six named defendants in the action, “ not including Kobina Baidoo. The certificate, therefore, fails to prove “ the only fact now important, viz.. the acquirement of Baidoo’s interest,

“and, indeed, it negatives that interest having passed by the Sheriff’s
“sale.”

RECORD

Their Lordships then proceeded to consider whether Baidoo ever mortgaged his interest in the land to Jobson, and came to the conclusion that this point failed entirely of proof. The effect of this Judgment was that Jobson had never acquired the right of the Chief (ownership), but only the rights of certain occupiers in Bortogina and certain other lands. It will be noted that out of eight occupiers in fourteen lands the certificate transferred the rights of only six, whose rights of occupancy, and in which
10 lands, or in what parts of them, it is impossible to say, and, in particular, whether, Kojo Attah was one of them, and the certificate *per se*, might be described in the words of Mr. Justice Porter, in *Ovoi Abinah & Anor. v. Mrs. Kennedy & Anor.*, Full Court, 7th March, 1921, as “so vaguely
“worded as to be in my mind valueless.”

Although Jobson had acquired only rights of occupancy, he claimed a freehold and illegally demanded tribute from some of the occupiers. p. 72, l. 36
p. 70, ll. 8-10

6.—On the 28th October, 1902, Jobson brought an action against one Cudjoe Aryarpah and 11 others, including Kwesi Pon the Appellant Enimil’s predecessor in the headmanship of Bortogina, to establish his
20 title to Bortogina, but the action was dismissed on the 26th August, 1903, by Mr. Justice Purcell with £260 7s. 4d. costs. pp. 45, 46, 47

7.—On the 25th November, 1903, Jobson was non-suited by Mr. Justice Purcell, in an action to eject the said Kwesi Pon without liberty to bring a fresh action. The learned Judge found that Jobson was acting in concert with the said Kobina Baidoo (Jobson’s cousin); that Jobson had no knowledge whatsoever of the exact situation, area, and boundaries of the land or lands which he sought to establish his title to; and that the land known as Bortogina was in truth and in fact land attached to the Stool of Kweku Pon, Chief of Manso (a predecessor of appellant Angu) and on
30 which the Defendants were properly located as holding from that Chief (Kweku Pon). p. 50
p. 70, ll. 35-36

8.—On the 10th April, 1904, Jobson mortgaged *inter alia* his interest in Bortogina, to one Samuel Ogden, a European, and in 1906 Ogden foreclosed and the said Kojo Attah, who was Jobson’s brother-in-law and also related to Kobina Baidoo, became the purchaser of the land rights sold under the mortgage. Apparently Kojo Attah had no farm of his own in Bortogina and what he purchased is not clear, but as far as Bortogina was concerned, it could only have been a right of occupancy which had
been transmitted through Jobson to Ogden. p. 51
pp. 63, 70
pp. 61, 63
p. 56

9.—On the 1st July, 1908, the Decree of the 26th August, 1903, was renewed, and on the 21st September, 1908, a Writ of Fi Fa was issued at the suit of Kwesi Pon and others for the recovery of £270 1s. 8d. being the sum in the Decree plus extra costs. Possibly, Aryarpah and the next
40 p. 71, ll. 44-46
p. 73, ll. 10-11
pp. 47, 57

RECORD

p. 77

Defendant were by this time dead, leaving Kwesi Pon as first Defendant. To defend his right of occupancy Kojo Attah inter-pleaded. He claimed as owner, and, on the 17th May, 1909, Mr. Justice Gough gave Judgment in his favour. The learned Judge commented on the vagueness of the description of the lands originally acquired by Jobson. It will be noted that the Privy Council subsequently decided that the Appellant Kobina Angu was the owner.

p. 78

10.—Kojo Attah brought another action against Kwesi Pon and others in which he claimed possession of Bortogina and £150 as rent for use and occupation or alternatively, as damages. 10

p. 88

This suit also came before Mr. Justice Gough who, on the 15th day of May, 1911, gave Judgment in favour of the Plaintiff for possession, but non-suited him on his claim for rent or damages.

p. 90

The learned Judge held that he was bound by his previous Judgment but he added that "whatever rights over those in occupation of the land "the present Plaintiff acquired by successfully claiming the property "attached in the case of *Jobson v. Pon and others* are no greater and no "less than those belonging to Ogden as mortgagee in the Indenture of "Mortgage from Jobson to Ogden. As to what these rights are I have "not sufficient data to give a decision." This Judgment was upheld by 20 the Full Court on Appeal, on the 30th November, 1911, but the dictum of the Full Court that the question of ownership and possession of Bortogina was decided by Mr. Justice Gough is not in accordance with the Judgment of the Privy Council, dated the 23rd June, 1916, which is referred to in paragraph 12 of this case.

Judgments of the
Privy Council
1874-1928, p. 43

p. 91

11.—On the 29th October, 1912, Kojo Attah obtained from Mr. Justice Watson an Order for a Writ of Possession, in spite of the opposition of the Appellant, Kobina Angu, but there is no evidence that the Writ was executed or ever issued or that Kojo Attah was ever in occupation.

p. 23, ll. 1-4
p. 85, ll. 1-2

p. 91

12.—Although Kojo Attah had only bought a right of occupancy he 30 claimed ownership and illegally demanded tribute from the Appellant Kwesi Enimil's predecessor, Kwesi Pon.

This forced the Appellant Kobina Angu to bring an action to defend his rights.

p. 95

On the 30th April, 1913, the Appellant Kobina Angu obtained Judgment from Mr. Justice Hawtayne on his claim to establish his title to tribute as against Kojo Attah, in respect of the land situate and known as Bortogina. This Judgment was reversed by the Full Court on the 28th February, 1914, but restored by the Privy Council on the 23rd June, 1916. The Appellants admit that these proceedings imply 40 that Kojo Attah had acquired some rights of occupancy but not of the occupier-appellant's farms. Kojo Attah is now dead, and after the lapse of thirty years, during which no tribute has been paid by Kojo Attah or them, the Respondents have brought the present actions, claiming to be his successors.

Judgments of the
Privy Council
1874-1928, p. 43

p. 25
pp. 22, 23, 42

13.—The Respondents produced two witnesses at the trial. The first witness, Kwesi Arhin Akwa, in cross-examination, said that land belonging to the Konfuaku Stool cannot be sold without the consent of the Chief and Elders of the Stool, and that if anyone allowed to farm on the land sets up an adverse title, he may be turned off the land. This is the general Native Customary Law. RECORD
p. 23, l. 34
p. 23, l. 36

The second witness, Ebenezer Tackie Otoo, who tendered exhibits in evidence said that there was no Writ of Possession in the Record. p. 24, l. 31

The four Appellants gave evidence in accordance with their contentions throughout, and as set forth in preceding paragraphs in this Case on their behalf. pp. 25-28

14.—In his Judgment, dated the 24th April, 1948, the learned Trial Judge put the onus upon the Defence. On page 34, line 41, “30th November 1909” is a misprint for “30th November, 1911,” while at lines 42-43 of the same page “17th May, 1909,” should be “15th May, 1911.” p. 31
p. 35, l. 32
p. 90
p. 88

The learned Judge held that the non-suit of 25th November, 1903, was not an estoppel. He held that it was unreasonable to conclude that the Writ of Possession was not executed. He held that Jobson owned the land and that Kojo Attah acquired the interest of a *bona fide* purchaser. He did not distinguish what Jobson or Kojo Attah acquired. p. 50

The West African Court of Appeal, in its Judgment dated the 3rd February, 1950, said that “thirty years ago he (meaning Kojo Attah) brought an action for possession and in pursuance of it entered into “part of this land.” Actually, the action was brought 41 years before and there is no evidence of entering. The West African Court of Appeal held that the Plaintiffs-Respondents had a right of occupancy under Native Customary Law, of the whole of Bortogina. The Court also held that the refusal to pay tribute for 30 years did not constitute adverse possession. p. 41

15.—Leave to appeal to the Privy Council was granted on the 22nd June, 1950. p. 43

16.—The Appellants humbly submit that the said Judgment of the West African Court of Appeal, dated the 3rd February, 1950, which affirmed the Judgment of the Land Court, Sekondi, dated the 24th April, 1948, is erroneous and should be reversed and this appeal be allowed with costs throughout, for the following, among other

REASONS

- 40 1. BECAUSE the Respondents are estopped by the Judgment of Mr. Justice Purcell, dated the 25th November, 1903, in a suit between privies.

2. BECAUSE the ownership of Bortogina Village lands is vested in the Appellant Kobina Angu, as Chief, and the rights of occupancy are vested in the other Appellants and any other tenants of the Chief.
3. BECAUSE the Respondents' predecessors, T. E. Jobson and Kojo Attah, acquired only a right to occupy certain land attached to the Stool of the Appellant Kobina Angu, during the pleasure of the Stool-holder, and therefore the Respondents as their successors, have no title to sue.
4. BECAUSE Respondents' only interest is a right of occupancy 10 derived through and from the Stool of Manso and which has been forfeited by non-payment of tribute.
5. BECAUSE the Respondents have slept on their rights and have never been in occupation.
6. BECAUSE the Respondents have no title to the whole of Bortogina, and no title to the parts occupied by the Appellants.
7. BECAUSE the Courts below did not distinguish between the Land of Bortogina and the Respondents' right of occupancy (if any) of a part of it. 20
8. BECAUSE the suits are an attempt to convert a right of occupancy under Native Customary Law into an estate of Fee Simple according to the Law of England, contrary to the Judgments both of the West African Court of Appeal and of the Privy Council.
9. BECAUSE the Respondents have no claim whatever against the Appellants Kojo Mankradu and Busumafi.
10. BECAUSE the action is really a claim to receive tribute, contrary to the decision of the Privy Council in 1916.
11. BECAUSE the West African Court of Appeal accepted the 30 evidence of the Respondents that they were in possession of parts of the land without weighing the evidence of the Appellant, Chief Kobina Angu, that he had been in possession ever since the Judgment of the Privy Council in 1916, and had given permission to certain people to farm on the land.
12. BECAUSE the Judgments of Mr. Justice Gough, dated 17th May, 1909, and 15th May, 1911, and the Judgment of the Full Court, dated 30th November, 1911, were all in effect overruled by the Judgment of the Privy Council, dated 23rd June, 1916. 40

T. B. W. RAMSAY.

E. GARDINER SMITH.

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(CONSOLIDATED APPEALS)

CASE FOR THE APPELLANTS

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