

22, 1952

# In the Privy Council.

No. 49 of 1950.

ON APPEAL FROM THE WEST AFRICAN 31391

## COURT OF APPEAL

(GOLD COAST SESSION.)

UNIVERSITY OF LONDON W.C.1.
9 - NOV 1958
INSTITUTE OF ADVANCED LEGAL STUDIES

BETWEEN

KWESI ENIMIL for himself and as representing the people of Bortogina village and CHIEF KOBINAA ANGU, Chief of Manso ... (*Defendants-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 ATTACH, deceased ... (*Plaintiff-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 ATTACH, deceased ... (*Plaintiffs-Respondents*)

RESPONDENTS.

## CASE FOR THE RESPONDENTS

1.—These are consolidated Appeals from a Judgment of the West African Court of Appeal dated the 3rd February, 1950, dismissing an Appeal by the present Appellants from a judgment of the Land Court, Sekondi, dated the 24th April, 1948, whereby the learned trial judge decided in favour of the Respondents' claim for possession of certain lands known as Bortogina lands.

RECORD

CASE FOR THE RESPONDENTS

p. 46

2.—On the 22nd October, 1903, the Supreme Court of the Gold Coast Colony, Western Province, issued a Certificate of Purchase of Lands certifying that one Jobson had been declared the Purchaser of the right, title and interest of six persons therein named in divers pieces and parcels of land including Bortogina and that the messuages lands and tenements in question had been sold in execution of a decree in the suit of *J. E. Jobson v. Kobina Baidoo and Ors.*, dated the 10th day of August, 1950.

p. 49

3.—By a Writ of Summons dated the 6th November, 1903, the said Jobson instituted proceedings in the Supreme Court of the Gold Coast Colony against Kwesi Pon and five other Defendants claiming to eject the said Defendants from all those pieces and parcels of land known as Ekoomasoi, Bortogina and Buama together with the buildings thereon. On the 25th November, 1903, Purcell, J., non suited the Plaintiff on the following ground :—

“ On all the evidence before me I have come to the conclusion that the Plaintiff has no knowledge whatsoever of either (1) the exact situation, (2) the area, and (3) the boundaries of the land or lands which he seeks to establish his title to in this action. And I further come to the conclusion that the land known as Bortogina is in truth and in fact land attached to the Stool of Kweku Pon, Chief of Mansue, and on which the Defendants were properly located as holding from that Chief (Kweku Pon). It is quite clear under the circumstances that it will be impossible for this Court apart from all other considerations to put the Plaintiff in possession of lands concerning which, as I have already remarked, he appears startlingly ignorant.”

pp. 51-3

4.—By an indenture dated 10th April, 1904, the said Jobson in consideration of a loan of £100 mortgaged to one Ogden, certain pieces of ~~and~~ parcels of land including Bortogina. The said indenture provided that the loan should be repayable on the 9th April, 1905, and contained a power of sale either by auction or private contract in the event of default of payment of the said loan or the interest thereon.

p. 56, l. 34

5.—On the 26th October, 1906, one Kojo Attah, the Respondent's predecessor in title, purchased the said lands referred to in the said indenture for the sum of £144, for which sums he received a receipt from one Davis acting as auctioneers for the said Ogden.

p. 56

p. 56, l. 30

6.—In 1908 Kwesi Pon and others caused to be issued a Writ of Fi Fa, and certain lands including Bortogina were seized by the Deputy Sheriff acting on the aforesaid writ. Kojo Attah and two others then commenced interpleader proceedings alleging that Kojo Attah had purchased the said lands from the said Davis as aforesaid and that they had since been in undisputed possession and had cultivated it and planted crops thereon.

7.—On the 17th May, 1909, Gough, J. gave Judgment for Kojo Attah with costs in the said interpleader proceedings. pp. 77-8

8.—By a Writ of Summons dated the 4th November, 1909, Kojo Attah instituted proceedings in the Supreme Court of the Gold Coast Colony against Kwesi Pon and others claiming (1) possession of the land known as Bortogina, together with farms, houses and buildings thereon, and (2) £150 rent due for the use and occupation of the said land, farms, houses and buildings by the Defendants, their servants or agents, or alternatively £150 damages for the use and occupation thereof. The Judgment in these proceedings was delivered by Gough, J. on the 13th May, 1911, and included the following passage :— p. 78

“ The land at present in dispute was included in my Judgment which was based on the documentary evidence laid before me, particularly a Mortgage between Jobson and Ogden, in which Bortogina land was mentioned. The present action was tried without pleadings, but as is usual in such actions I called on the Defendant’s Counsel to plead verbally, and the pleas substantially meant that the Plaintiff was not entitled to the possession of the land in dispute. My Judgment in 1909 meant that the Plaintiff was so entitled, whether I was right or wrong. The persons who were aggrieved by my decision could have appealed to the Full Court ; they did not appeal. I have no power now to reverse my own decision, and to give Judgment in favour of the Defendants would mean to reverse my decision given in 1909. 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. But on the 1st paragraph of his claim, set forth above, I give Judgment for the Plaintiff : on the 2nd and 3rd paragraphs which are the same thing I give no decision, in other words the Plaintiff is non suited : on the main issue the Plaintiff has succeeded, and I give him costs.” p. 86, l. 25

The Defendants appealed from the said Judgment to Full Court of the Supreme Court of the Gold Coast Colony whose Judgment dated the 30th November, 1911, included the following passage :—

“ The Court is quite satisfied on a review of the evidence in both this and the previous case that the question of ownership and possession of the land known as Bortogina was decided by Mr. Justice Gough in the Interpleader case *Jobson v. Pon and Others*, Kojo Attah, the present Plaintiff, being claimant. pp. 90-1

RECORD

“ As there was no appeal from that Judgment dated 17th May, 1909, the question cannot be again raised between the same parties.

“ This Court finds, confirming the Judgment of the Court below, that the issue of this case is *res judicata*, and on that ground dismisses the appeal with costs.”

p. 91

9.—On the 29th October, 1912, Watson, J. sitting in Divisional Court held at Sekondi, ordered that a Writ of Possession should issue to Kojo Attah. The motion for the said writ was opposed by the Appellant Kobina Angu.

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p. 91, l. 30

p. 95

10.—By a Writ of Summons dated the 30th October, 1912, the Appellant Kobina Angu commenced proceedings in the Supreme Court of the Gold Coast Colony claiming to establish his title to tribute as against Kojo Attah in respect of all that piece or parcel of land situate at Bortogina and known as Bortogina in Choma District. By his Judgment dated the 30th April, 1913, Hawtayne, J. held that the defence of *res judicata* failed because both of the earlier cases (i.e. Kojo Attah's claim against Kwesi Pon and others decided by the Full Court on appeal from Gough, J., and the decision of Watson, J. to order a Writ of Possession) were for possession whereas this case was for tribute. He therefore gave Judgment for the Plaintiff with costs. The Defendant (Kojo Attah) appealed to the Full Court who on the 28th February, 1914, allowed the appeal. The Plaintiff (i.e. the present Respondent Kobina Angu) appealed to His Majesty in Council on the following among other grounds :

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p. 100, l. 4

“(3) Because the case relied on by the Respondent related to the right to the possession of the Borogina Land, and the Appellant does not claim the possession thereof but the right to receive tribute from the tenant or occupant in respect of such land. The Appellant was not a party or privy to these proceedings, and therefore cannot be prejudiced or affected thereby, the cause of action moreover being different from that which is the basis of his claim in the present proceedings.

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100, l. 22

“(5) Because the Respondent derives title from the Judge's Certificate of Purchase dated the 22nd October, 1903, and marked D in the Record, by which one J. E. Jobson was declared the Purchaser at sale by auction under a Writ of Fi Fa in the action of 'J. E. Jobson v. Kobina Baidoo and Others' of certain lands, including the Bortogina land. Under the said Certificate, the said J. E. Jobson obtained only the 'right, title and interest of the Judgment Debtor in the property sold,' according to Order XLV, Rule 34. Schedule 2, Supreme Court Ordinance, 1876. Such an incident of tenure or charge on the land as that claimed

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“ by the Appellant remains unaffected by such a sale, and attaches  
 “ to the land in the possession of any subsequent purchaser,  
 “ tenant or occupant.”

RECORD

His Majesty in Council set aside the judgment of the Full Court and restored the judgment of Hawtayne, J.

11.—By three Writs of Summons dated the 21st November, 1946, the Respondents commenced

### THE PRESENT SUIT

claiming as against the Appellant Kwesi Enimi possession of Bortogina p. 2  
 10 lands occupied by the Appellant and his people and the sum of £300 for use  
 and occupation of the said lands ; as against the Appellant Kojo Mankradu  
 £200 mesne profits for the use and occupation of portions of the said lands ; p. 3  
 and as against the Appellant Busumafi £150 mesne profits for the use and  
 occupation of portions of the said lands. By orders dated the 12th February, pp. 8 and 15  
 1947, and the 9th April, 1947, the Appellant Kobina Angu was joined as  
 Co-Defendant in these three suits.

12.—By their three Statements of Claim dated the 6th March, 1947, p. 10, l. 12  
 the Respondents pleaded (*inter alia*) that they were successors in title of  
 Kojo Attah ; that Kojo Attah's title to the said land had been upheld by a  
 20 judgment of the Divisional Court dated the 17th May, 1909, and by a  
 judgment of the Full Court dated the 30th November, 1911 ; that by a  
 Writ of Possession dated the 29th October, 1912, Kojo Attah was placed in  
 possession of the Bortogina lands ; and that the Appellants and their people  
 had entered upon the said lands and cultivated cocoa farms thereon and  
 failed to pay tribute to the Respondents. By their Statements of Defence  
 dated the 13th April, 1947, the Appellants pleaded (*inter alia*) that the  
 Respondents were estopped by the aforesaid judgments of Purcell, J., dated p. 16, l. 34  
 the 26th August, 1903, and the 25th November, 1903, in the two suits  
 brought by the aforesaid Jobson against Kwesi Pon and others, and by the  
 30 judgment of Hawtayne, J., dated the 30th April, 1913, which was affirmed  
 by the Judicial Committee of the Privy Council. He further pleaded that  
 the Respondents' claim or right of action, if any, was bound by the Real  
 Property Limitation Acts, 1833 and 1834, and the Civil Procedure Act,  
 1833.

13.—On the 23rd February, 1948, the Court ordered that the three p. 22, l. 2  
 cases should be consolidated.

14.—In the course of the hearing the Appellant Kobina Angu deposed p. 25, l. 32  
*inter alia* that he had given permission to certain people to farm on his land  
 at Bortogina including the Appellant Busumafi ; that Kwesi Opon (sic) p. 26, l. 6

## RECORD

p. 26, l. 9

p. 26, l. 30

was succeeded as Odikro of Bortogina by Kojo Sakyini who, on his death was succeeded by the Appellant Kwesi Ennil; and that the Bortogina lands were in possession of Kwesi Opon as ~~co~~ taker for him. In cross-examination he stated that his action ~~ag~~ against Attah was for the payment of tribute by him and not in respect to his possession.

15.—The aforesaid judgment of the trial judge (Hooper, J.) included the following passage :

p. 35, l. 40

“ The two Judgments of the 26th August and 25th November, 1903, seem to me to prove little more than that the evidence placed before the Court when those cases were heard was not sufficiently strong or cogently put to justify the Court in accepting the case for the Plaintiff. There is nothing in these Judgments to preclude the Court subsequently from coming to the conclusion as it did, that it was clear that Jobson owned the land, mortgaged it to Ogden and that Attah purchased it in due course from him. 10

“ As regards the Writ of Possession, Mr. Williams has pointed out that the Privy Council Record (Exhibit ‘ A ’) does not contain the actual writ. On the other hand, there can be no doubt that the writ was granted to Kojo Attah when the Motion was made on the 29th October, 1912, some thirty-five years ago, and it seems unreasonable to conclude, merely because the actual writ is not contained in Exhibit ‘ A ’ and cannot be produced today, that Kojo Attah was not put in possession. It seems to me unreasonable to conclude that a man would go to the trouble to obtain a Writ of Possession and fail to make use of it afterwards. In any case, I agree with Mr. Blay’s submission that even if the Writ of Possession was not executed, this does not affect the legal position created by the grant of the writ to Attah. With regard to the effect of these Judgments I accept Mr. Blay’s submission that Kojo Attah is a *bona fide* purchaser. This being so it seems to me that he has clearly more than a life interest in the land which he can transfer to his heirs.” 20 30

p. 36, l. 20

The learned judge further held that the Statutes of Limitation relied on by the Appellants applied where even one of the parties to a case was a native but did not apply where both parties to the transaction were natives. He therefore came to the conclusion that this case was not governed by the Statutes of Limitation.

The principal judgment in the West African Court of Appeal was delivered by Smith, J., and included the following passage :

41, l. 39

“ The learned Judge in his Judgment seems to have thought that the fact that both parties were natives would in itself give rise to the conclusion that Native Law and not English Law would govern their relationship. With respect to the learned Judge that is not correct. The question is whether the parties 40

“ have bound themselves in terms of English Law or Native Law.  
 “ For instance if one native gives another a promissory note under  
 “ English Law, it has been held that the English Law governs their  
 “ relationship. Similarly, as in the case of *Nelson v. Renner*, if a  
 “ native gives another a Mortgage under English Law the relation-  
 “ ship between the Mortgagor and the Mortgagee in regard to the  
 “ Mortgage is governed by English Law.

10 “ But in this case the land was undoubtedly native tenure  
 “ originally. The interest of the former owner of the land was  
 “ seized and sold by the execution of the process of the Court.  
 “ The right, title and interest which the Judgment Debtor was  
 “ entitled to under Native Law was brought by one Jobson who  
 “ later mortgaged it. The Mortgagee later exercised the power of  
 “ sale in the Mortgage and sold to the predecessor of the present  
 “ Plaintiffs. What the Plaintiffs’ predecessor bought was the  
 “ right title and interest under Native Law of the original Judgment  
 “ Debtor. That that is so is shown by the Privy Council case  
 “ referred to by Appellants’ Counsel in which the Co-Defendant  
 20 “ claimed tribute under Native Law from the predecessor of the  
 “ present Plaintiffs. I am in no doubt at all that the Plaintiffs’  
 “ tenure is governed by Native Law. It is quite clear that he has  
 “ bought an interest in the property which carries with it the right  
 “ of possession. Thirty years ago he brought an action for  
 “ possession and in pursuance of it entered into part of the land.  
 “ In his evidence in this case he said that the Plaintiffs are in  
 “ possession of parts while the Defendants are in possession of other  
 “ parts. The Plaintiffs are entitled to possession of the whole.”

The learned judge further held that there had been no forfeiture and that  
 the Respondents’ title was still unimpaired. He would therefore dismiss the  
 30 appeal without costs. Blackall, P., agreed that the appeal should be  
 dismissed. Lewey, J. A., agreed. p. 42, l. 28  
p. 42, l. 40  
p. 42, l. 41

Final leave to appeal to His Majesty in Council was granted on the p. 43  
 22nd June, 1950.

The Respondents humbly submit that these appeals should be dismissed  
 with costs and the judgment of the West African Court of Appeal affirmed  
 for the following amongst other

### REASONS

40 1. BECAUSE the West African Court of Appeal were right in  
 holding that the Respondents’ tenure was governed by Native  
 Law and that therefore the Statutes of Limitation did not  
 apply to these proceedings.

2. BECAUSE alternatively the trial judge was right in holding that the Statutes of Limitation did not apply to a case in which both the parties were natives.
3. BECAUSE the West African Court of Appeal were right in holding that there had been no forfeitures and that the Respondents' title to the lands in dispute was still unimpaired and there had been no forfeiture.
4. BECAUSE (if it be material to this appeal) Kojo Attah's title to the lands in dispute had been upheld by a judgment of the Divisional Court dated the 17th May, 1909, and by a judgment 10 of the Full Court dated the 30th November, 1911, and the said Kojo Attah had been placed in possession of the said lands by a Writ of Possession dated the 29th day of October, 1912, and the issue was therefore *res judicata*.
5. BECAUSE (if it be material to these appeals) the trial judge was right in holding that there was nothing in the judgment in *Jobson v. Pon* dated the 26th August, 1903, and in the judgment in *Jobson v. Kwesi Pon* dated the 25th November, 1903, which precluded the Court subsequently from declaring Kojo Attah to be the purchaser of the rights in the said land 20 formerly owned by Jobson.
6. BECAUSE the judgments in the Courts below were right and should be upheld.

DINGLE FOOT.

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# In the Privy Council.

No. 49 of 1950.

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

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BETWEEN

KWESI ENIMIL ... .. APPELLANT

AND

KWESI TUAKYI and KOFI ESSON  
RESPONDENTS

AND BETWEEN

KOJO MANKRADU and CHIEF KOBINA  
ANGU ... .. APPELLANTS

AND

KWESI TUAKYI and KOFI ESSON  
RESPONDENTS

AND BETWEEN

BUSUMAFI and CHIEF KOBINA  
ANGU ... .. APPELLANTS

AND

KWESI TUAKYI and KOFI ESSON  
RESPONDENTS

(CONSOLIDATED)

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CASE FOR THE RESPONDENTS

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