

Kwesi Enimil and others - - - - - *Appellants*

v.

Kwesi Tuakyi and another - - - - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 15TH JULY, 1952**

Present at the Hearing :

LORD PORTER
LORD TUCKER
LORD COHEN

[Delivered by LORD COHEN]

The lands which are the subject matter of this appeal from a decision of the West African Court of Appeal dated the 3rd February, 1950 are known as Bortogina lands and are situate in the Chama District of the Gold Coast Colony. They have been the subject matter of much litigation.

According to a certificate of purchase issued to one Jobson on the 22nd October, 1903, Jobson became the purchaser of the right title and interest of a number of persons in the Bortogina lands and other lands which right title and interest had been sold by order of the Supreme Court of the Gold Coast Colony dated the 10th August, 1900. Prior to the issue of this certificate Jobson commenced proceedings to establish his title to the Bortogina lands against Cudjoe Aryarpah and eleven others but on the 26th August, 1903 his action was dismissed on the ground that the endorsement on the writ of summons disclosed no cause of action against the defendants to that action and that the certificate of purchase by which Jobson sought to establish his title was not then in existence. Jobson was ordered to pay the defendant costs amounting to £260 7s. 4d.

On the 6th November, 1903 Jobson commenced proceedings against Kwesi Pon and others claiming to eject the defendants from the Bortogina lands and other lands and claiming damages for mesne profits. Kwesi Pon was the head man or Odikro of Bortogina village and was therefore predecessor in title of the defendant Kwesi Enimil, the first defendant in the suit which is now before this Board.

The plaintiff Jobson was non-suited on the 25th November, 1903. The effect of the judgment is, in their Lordships' opinion, correctly stated by the learned Trial Judge in the present case where he said that the Court came to the conclusion in the 1903 case that the plaintiff did not know the exact situation, or area, or boundaries, of the lands to which he sought to establish his title and accordingly declined to give the plaintiff possession of the land concerned of which he could give no reliable information.

On the 10th April, 1904 Jobson mortgaged various pieces of land including Bortogina, to one Ogden as security for £100. The deed provided that the loan should be repayable on the 9th April, 1905, and contained the usual power of sale, either by auction, or otherwise, in the event of failure to pay the loan on the due date. The Bortogina land was in due course sold by public auction by the orders of the mortgagee and there is in the notes in the present suit a receipt dated the 26th October, 1906 for £144 expressed to be paid by one Kojo Attah for lands bought and sold under the said mortgage deed. In the ejectment action the defendants had recovered payment for £260 7s. 0d. against Jobson for costs, and they sought to levy execution on the Bortogina lands to satisfy that judgment. Kojo Attah claimed the same lands as purchaser from Ogden with the result that interpleader proceedings were directed. Judgment in those proceedings was given on the 17th May, 1909 by Gough J. He gave judgment for Kojo Attah with costs.

On the 4th November, 1909 Kojo Attah commenced proceedings against Kwesi Pon and others claiming possession of the Bortogina lands and £150 rent or damages for use and occupation thereof. On the 15th May, 1911, Gough J. gave judgment in favour of Kojo Attah for possession. He based his judgment on the rights acquired by Kojo Attah as a result of his purchase of the rights of Jobson in the sale by the mortgagee under the deed of 1904. But he refused to decide as to the extent of those rights saying "As to what those rights are I have not sufficient data to give a decision". His judgment was affirmed by the Full Court on the 30th November, 1911.

On the 29th October, 1912 a motion by Kojo Attah for a writ of possession for the Bortogina lands came before Waison J. Chief Kobina Angu, the second defendant in all the actions consolidated in the proceedings now before this Board, applied for leave and was granted permission to oppose that motion. He did so, but an order was made for the issue of the writ of possession. On the next day Chief Kobina Angu issued a writ against Kojo Attah to establish his title to tribute as against Kojo Attah in respect of the Bortogina lands. On the 30th April, 1913 Hawtayne J. gave judgment in favour of Chief Kobina Angu. His decision was reversed by the Court of Appeal but was restored by order of this Board dated the 23rd June, 1916. It is their Lordships think clear from the judgment in that case that this Board held that the Bortogina lands formed part of the property of the Stool of Manso of which Chief Kobina Angu is the present chief, but that Kojo Attah had rights over the whole Bortogina lands which rendered him liable to tribute in respect thereof.

What happened subsequently to the Privy Council decision is not altogether clear. Kojo Attah died soon after the decision was given and the present respondents are his successors in title according to native law. It seems that they remained in possession of part of the Bortogina lands, but that other parts were occupied (a) by the head man of the village and the villagers of that village, and (b) by strangers let into possession by the Odikro acting on behalf of Chief of the Stool of Manso.

On the 21st November, 1946, the present respondents issued three writs:—

(1) against Kwesi Enimil, headman of the Bortogina village, for himself and as representing the people of that village in which the respondents, as successors in title according to native customary law, claimed possession from the defendant of Bortogina lands at present occupied by the defendant and his people, and £300 for the use and occupation of the said lands ;

(2) against Kwodwo Mankradu claiming £200 by way of mesne profits for the use and occupation of portions of the Bortogina lands ;

(3) against Busumafi claiming £150 by way of mesne profits for the use and occupation of other portions of Bortogina lands.

According to the evidence given in the proceedings Mankradu and Busumafi had been let into possession by Enimil or his predecessor, as Odikro, and paid tribute to the Odikro for the time being, as representing the Chief of the Manso Stool.

On the 31st January, 1947, the second defendant, Chief Kobina Angu, applied to be added as party to the first suit and was so added on the 12th February, 1947. On the 2nd April, 1947 he made similar applications in the other two suits and those applications were granted on the 9th April, 1947.

On the 6th March, 1947, the respondents delivered their statement of claim, in all three suits. They alleged that they were the successors in title of Kojo Attah, and that his title had been upheld in the interpleader proceedings and by the Full Court in the ejectment action in which the judgment of Gough J. in favour of the plaintiff was affirmed by the Full Court on the 30th November, 1911. They also relied on the order for the issue of writ of possession dated 29th October, 1912. The statements of claim in the action against Enimil further contained the following paragraphs:—

“ 2. Plaintiffs' predecessor Kojo Attah was the *owner* of Bortogina lands, the same having been purchased by him at a public auction.

5. The defendant and his people are occupying parts of Bortogina lands, and have cultivated farms thereon and are otherwise using the said Bortogina lands without paying *tribute* to the plaintiffs wherefore plaintiffs claim as per their writ of summons issued herein.”

Similar paragraphs are to be found in the statements of claim delivered against Mankradu and Busumafi. Defences to all three actions were put in on the 13th and 15th April, 1947. In substance each of the defences denied the allegations of the plaintiff, and the last paragraph of each reads as follows:—

“ The said Chief Kobina Angu pleads that the plaintiffs if successors of Kojo Attah are estopped by the Judgment of Mr. Justice Hawtayne delivered on the 30th April, 1913, in the Divisional Court, Sekondi, between the said Chief Kobina Angu and the said Kojo Attah relating to a claim by the said Plaintiff Angu to tribute in respect of the said Bortogina land and affirmed by the Judicial Committee of the Privy Council on the 23rd June, 1916. The Divisional Court, Sekondi, was the Court of competent jurisdiction over the said action and the parties thereto ”.

All three cases came on for hearing before Hooper J. on the 23rd February, 1948. By consent of the parties he consolidated the three actions. Mr. Blay, who appeared for the respondents, after reading the statements of defence, said that he agreed that the concluding paragraph of each of the defences, to which their Lordships have already referred, correctly represented the true position and that his clients were prepared to pay the tribute in question to the defendant, Chief Kobina Angu.

The evidence called by the plaintiffs was mainly documentary, but dealt with the position since the conclusion of the above mentioned proceedings before this Board. Kwesi Arhin Akwa, who was called on their behalf, deposed that the defendant Enimil's people were still on the land, that they had farms on the land, and so had the respondents.

All the defendants were called and after hearing their evidence the learned Judge gave judgment on the 24th April, 1948.

He summarised the evidence and the effect of the earlier judgments to which their Lordships have already referred. He came to the conclusion with which their Lordships respectfully agree that there was nothing in the judgments of the 26th August, 1903 and 25th November,

1903 which precluded the Court from coming to the conclusion, as it did in 1911, that Jobson had acquired some right title and interest in the Bortogina lands, that he had mortgaged that right or interest to Ogden and that Attah purchased it from him in due course. Their Lordships would however emphasise that the Court in 1911 did not decide the nature of the right or interest. On the contrary Gough J. was careful to say that he had not sufficient data to give a decision on that point. Gough J. must, however, have been satisfied that it entitled Attah to possession of the land for he gave judgment for the plaintiff whose claim was for possession.

Returning to the present suit, the learned Judge accepted the submissions of Mr. Blay, counsel for the plaintiff, that it was immaterial whether or not the writ of possession had actually been issued pursuant to the order of 29th October, 1912, that Attah was *bona fide* purchaser of the rights of Jobson and that he thereby acquired an interest which was transmissible to his heirs, the present respondents. He rejected a claim based on the Statutes of Limitation for reasons into which their Lordships need not enter as Mr. Ramsay does not now rely on the Statutes of Limitation, and brushed aside an argument based on the references to tribute in the pleadings, treating that point as disposed of by Mr. Blay's admission of the defendant Angu's right to the tribute.

From that decision the present appellants appealed to the West African Court of Appeal. Their grounds of appeal were five, two only of which in view of the attitude very properly adopted by Mr. Ramsay before their Lordships are now material. They are as follows:—

“ 3. Because the setting up of an adverse title to Bortogina lands by the plaintiffs-respondents against the defendant-appellant Chief Kobina Angu and his subjects and agents was according to native custom a ground for ousting the plaintiffs-respondents and their predecessor Kojo Attah from possession or from entering upon Bortogina lands.

“ 5. Because on the judgment of the Privy Council in this case dated the 23rd June, 1916 in *Kobina Angu v. Cudjoe Attah*, the plaintiffs-respondents are estopped from claiming title to and possession of Bortogina lands.”

When the matter came before the West African Court of Appeal, the main point argued was the question of limitation of action. This has ceased to be material. The Court of Appeal affirmed the decision of the Land Court. The material portions in the judgment of Smith J. who delivered the leading judgment are as follows:—

“ 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.

“ As I indicated the final conclusion of the judgment of the learned Judge is correct. One final point, the co-defendant claims that he is now entitled to possession of the land because the plaintiffs denied his overlordship. It seems to me that the co-defendant cannot have it both ways. By claiming tribute in the suit of 1912 he has inferentially recognised that Kojo Attah had rights in the land from which the liability to pay tribute arises. The only occasion upon which the plaintiffs' predecessor in title denied co-defendant's right to tribute was when he contested the co-defendant's claim in the 1912 case. This alone cannot be a good ground for forfeiture, otherwise no person could ever risk contesting any claim of this nature and

holders of land would be left entirely at the mercy of their overlords. I hold that there has been no forfeiture and that the plaintiffs' title is still unimpaired. I would dismiss this appeal with costs."

From this decision the appellants appealed to this Board. Mr. Ramsay who appeared for the appellants did not dispute that the respondents had rights of occupancy as successors to Kojo Attah, but he submitted that the respondents' claim must fail (a) because they had forfeited those rights either (1) by non-payment of tribute to the appellant, Chief Kobina Angu; or (2) by setting up in the present proceedings title to tribute adverse to that of the said appellant; (b) because the boundaries of the Bortogina lands are not defined; (c) because the respondents were seeking to convert a right of occupancy into ownership; (d) because upon the true construction of their claim they were claiming tribute; (e) because the judgments of Gough J. and of the Full Court are no longer available in view of the decision of the Privy Council in 1916.

Their Lordships can dispose shortly of the last point. The decisions of Gough J. and of the Full Court did not deal with the question of ownership or the right to tribute. The claim in those proceedings was for possession and rent or in the alternative damages for use and occupation. In giving judgment Gough J. made it clear, as their Lordships have already observed, that he was not determining the exact nature of the rights by virtue of which Kojo Attah was entitled to an order for possession. In the Privy Council case Chief Kobina Angu was claiming tribute and the decision in his favour far from being inconsistent with the decisions of Gough J. and the Full Court proceeded on the basis that Kojo Attah was entitled to be in occupation of the Bortogina lands. Sir Arthur Channell who delivered the judgment of the Board said:—

"There is nothing in the notes of the evidence of the plaintiff's witnesses as to the defendant being in possession of any of the lands of Bortogina, but this must have been admitted, as the defendant in support of his plea of *res judicata* relied on judgments to the effect that he was entitled to the possession."

Their Lordships are also satisfied that the argument as to the boundaries being ill-defined has no substance. It is sufficient to point out that the decisions of Gough J. and the Full Court as well as the decision of Hawtayne J. which was affirmed by this Board in 1916 all proceeded on the basis of the boundaries being ascertainable. If there is any dispute between the parties of the present suit as to those boundaries when the time comes to enforce the judgment of Hooper J. it will be for the appropriate Court in the Gold Coast to determine the dispute.

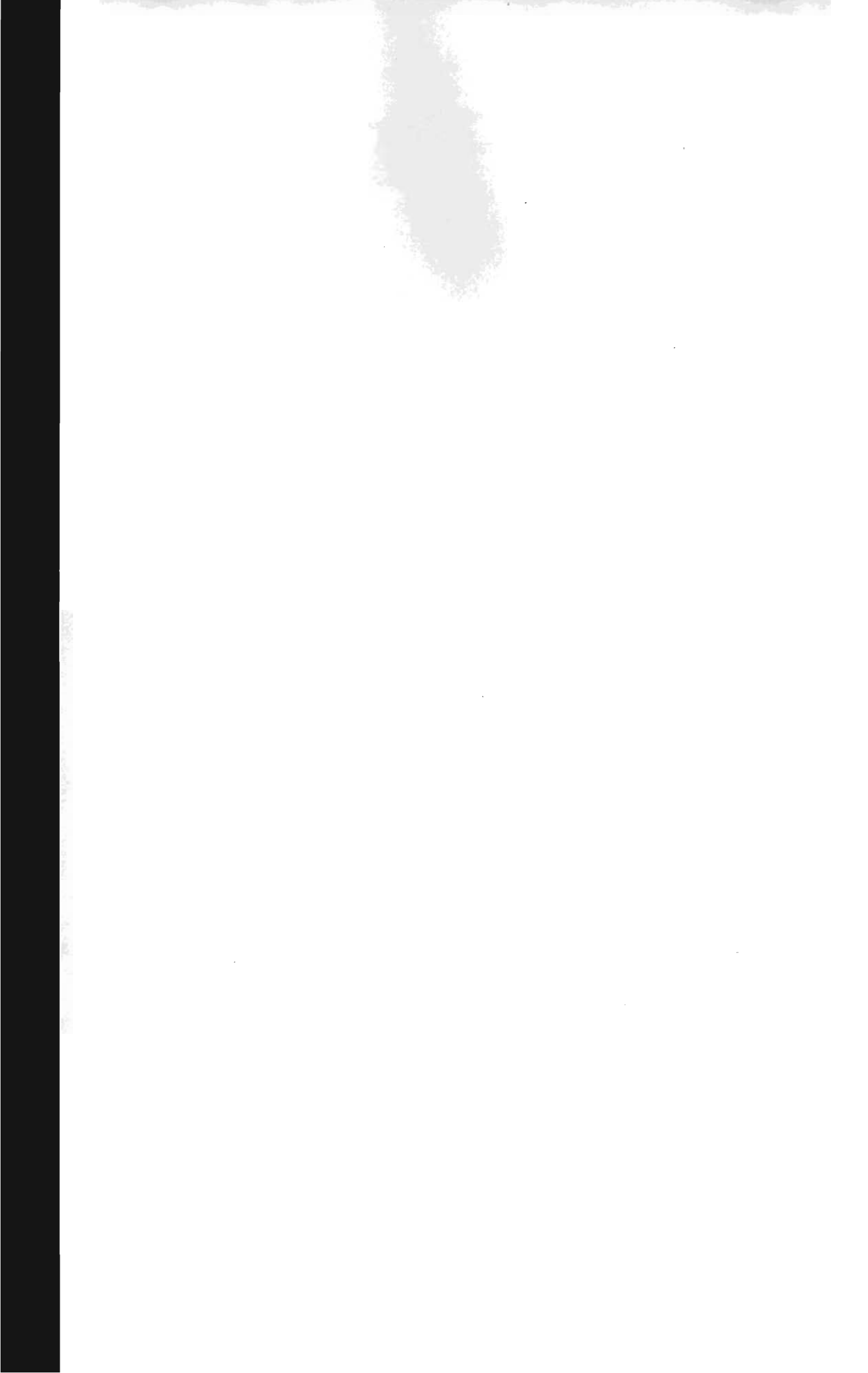
The remaining points really raise the same issue and may be thus stated. Did the respondents by their statements of claim set up a title to tribute adverse to the claim of the Chief Angu? If so, is that a ground on which their rights of occupancy are forfeited?

Mr. Ramsay contended that the respondents by paras. 2 and 5 of their statement of claim had set up a title adverse to that of Chief Angu. The use of the word owner in paragraph 2 and the reference to tribute in paragraph 5 undoubtedly lend colour to this argument. But it seems clear from authorities, to which their Lordships' attention was called in the course of the argument, that the term owner is loosely used in West Africa. Sometimes it denotes what is in effect absolute ownership: at other times it is used in a context which indicates that the reference is only to rights of occupancy such as the respondents undoubtedly possessed. Again it appears that the terms rent and tribute are on occasions treated as interchangeable. This looseness of language is, their Lordships think, due very largely to the confused state of the land law in the Gold Coast as it now stands. As appears from the report made in 1898 of Rayner C.J. on Land Tenure in West Africa which

was cited by Viscount Haldane delivering the judgment of this Board in *Amodu Tijani v. Secretary, Southern Nigeria* ([1921] 2 A.C. 399 at p. 404) there has been introduced into the native customary law, to which the notion of individual ownership was quite foreign, conceptions and terminology derived from English law. In these circumstances it is not surprising that it is difficult to be sure what is meant in any particular case by the use of the expression owner. Having regard to the fact that by their writs in the present case the respondents claimed only possession and mesne profits, their Lordships feel some doubt whether by the use of the term owner and the reference to tribute in their statements of claim the respondents were intending to set up anything more than the rights of occupancy which had been recognised by the decision of this Board in 1916. But their Lordships will assume for the purpose of this judgment that it was the intention of the respondents to set up a claim adverse to the right to tribute of the Chief Kobina Angu. If that was their intention it was made abundantly clear by Mr. Blay on their behalf at the commencement of the hearing before the Trial Judge that this claim was abandoned, and it is, their Lordships think, plain from the reports of the proceedings before the Trial Judge and before the Court of Appeal that the argument now relied upon by Mr. Ramsay was never raised in either court in West Africa. In those circumstances their Lordships have not the assistance of the Judges in West Africa on the point and they do not think it would be right to allow Mr. Ramsay to rely on it. Their Lordships therefore do not find it necessary to decide whether, if the pleadings ought to be construed in the sense in which Mr. Ramsay construes them, the allegations in the statement of claim would afford a ground on which the respondents' rights of occupancy were forfeited. It might be that the reasoning which induced the Court of Appeal to reject a similar argument based on the resistance offered by Kojo Attah to the claim of Chief Kobina Angu to tribute in 1912 would apply equally to the argument which Mr. Ramsay sought to advance before this Board.

In the result their Lordships are of opinion that the decision of Hooper J. affirmed by the West African Court of Appeal was correct. As their Lordships read that decision, it decided only that the respondents were entitled to possession of the Bortogina lands and £50 damages; it left untouched the right of Chief Kobina Angu to tribute from the respondents.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of the appeal.



In the Privy Council

KWESI ENIMIL AND OTHERS

v.

KWESI TUAKYI AND ANOTHER

DELIVERED BY LORD COHEN

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