

3, 1953

P.C. Appeal No. 5 of 1951.

In the Privy Council.

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL 33474
(GOLD COAST SESSION)

APPELLANTS CASE

UNIVERSITY OF LONDON
W.C.1.
Appellant NOV 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

THE STOOL OF ABINABINA (Plaintiff) . . .

AND

CHIEF KOJO ENYIMADU, on behalf of the STOOL OF
10 NKASAWURA (Defendant)

Respondent.

Case for the Appellant.

RECORD.

1. This is an appeal by special leave from a judgment of the West African Court of Appeal dated the 4th June, 1947, dismissing with costs an appeal by Chief Kwesi Kuma II on behalf of the Appellant Stool from a Judgment of Jackson, J., in the Divisional Court at Cape Coast of the Supreme Court of the Gold Coast, dated the 16th October, 1946, whereby the learned judge dismissed a claim by the said Chief Kwesi Kuma II for a declaration of title to certain lands known as Nkasawura lands and for damages for the wrongful cutting of timber trees on the said lands. p. 46, l. 20. pp. 38-41.

2. The case for the said Chief Kwesi Kuma II (who is hereinafter referred to as the Plaintiff) was that the lands in dispute were attached to his Stool and that the predecessor of the Respondent (who is hereinafter referred to as the Defendant) settled on the said lands by the leave and licence of the Plaintiff's predecessor and that an arrangement was then made for the payment of tribute to the Plaintiff's Stool but that such arrangement was later repudiated by the Defendant's predecessor, who refused to pay tribute and claimed ownership of the said lands. The case for the Defendant was that he and his predecessors upon the Stool had from time immemorial been the allodial owners of the said land as attached to his Stool and had ever been and still was in possession and that his predecessors had never settled there by leave and licence of the Plaintiff's predecessors or arranged to pay tribute to the Plaintiff's Stool and that no such tribute had ever been paid. p. 7, l. 3. p. 8, l. 12.

3. The principal issue for determination in this appeal is whether the learned trial judge was right in holding that in such an action the

Plaintiff " must evidence such positive and numerous acts within living memory " as to justify the inference that he is the exclusive owner or whether, as the appellant contends, no such evidence is essential.

p. 1.

4. On the 21st November, 1951, the Plaintiff issued a summons in the Tribunal of the Paramount Chief of the Wasaw Amenfi State in the Gold Coast Colony against one Chief Kofi Amoah, the Defendant's predecessor, claiming £100 damages from the said Chief Kofi Amoah for having unlawfully granted to one R.T. Briscoe Mahogany trees and other Timber-like trees without the knowledge and consent of the Plaintiff.

p. 3.

Leave to amend the said summons having been obtained, the Plaintiff, on the 9th March, 1942, issued an amended summons whereby he instituted 10

THE PRESENT SUIT

claiming to establish the title of the Stool of Abenabena Division " to all that piece or parcel of land known as Nkasawura Lands the property of the Plaintiff situate at Abenabena in the Wasaw Amenfi State and bounded on the East by Offin River, on the North by Denkyira Obuasie and by River Ahunfra, on the North-East by Offin River and on the South by Ayanfuri Lands."

He pleaded that this Defendant and his ancestors as tenants of the Abenabena Stool had been paying tribute and tolls to his (the Plaintiff's) Stool until the said Defendant about five years before had set up an adverse title to the said lands against the Abenabena Stool. 20

pp. 4-5.

5. By an order of the Provincial Commissioners' Court dated the 27th April, 1942, the suit was transferred to the Divisional Court, Cape Coast, of the said Supreme Court. On the 26th May, 1942, the said Divisional Court ordered pleadings. By the Statement of Claim dated the 9th July, 1942, and the Statement of Defence dated the 28th July, 1942, the parties pleaded as set out in paragraph 2 hereof.

p. 6.

p. 8.

pp. 9 and 10.

6. Both parties filed Particulars for Survey. The Plaintiff's Particulars named (*inter alia*) the following towns and villages :— 30

" Abinabina, Wioso (ruins) Kyinso Kyiaboso, Nkasawura (ruins) Fubinsu, Oda, Perwuako, Breman Nkortinso, Nkasawura (new), Edjumamu, Brofuyedu, Dominasi, Old Besiase, Abura, Anwayem, Nkokoabom or Obuyaa-Krom."

7. The learned trial judge first sat at Dunkwa where he heard the whole of the evidence which each side desired to call. On the 5th September, 1946, however, he made the following order :—

p. 19, l. 12.

" In view of a recent decision of the West African Court of Appeal, I feel there is some doubt as to whether questions involving native customary law may arise in determining this action and I had heard the whole evidence at Dunkwa without an Assessor— but am of the opinion that it would have been safer to have sat with me. Accordingly with consent of both parties, I shall re-hear the whole evidence to enable the Assessor, now appointed, to hear it." 40

Thereafter the learned judge sat with an assessor, Chief I. O. Dansu, p. 19, l. 32. and the case was re-heard.

8. The Plaintiff's own evidence included the following passages :—

“ Kojo Tsibu came from Ashanti—my ancestor Kodwo Kodu p. 20, ll. 14-34. at a village named Adaboi (Northern end of Plan). Kojo Tsibu asked for a place to settle. Kojo Tsibu asked my ancestor to send a messenger to tell his master who lived at Ekruopong (in the Wassa Amenfi State). Omanhin was informed and Kodwo was told to give him a place to settle.

10 Adaboi given to him, at which to settle. Ashantis were also following. Kojo Tsibu said it was too close to Ashanti and that he should have another place to settle. He was then settled at Awiem (near Bremang).

Kodia a Sub-Chief of Denkyira asked for a place to settle and was given a place at Dehia now called Bokitsi. All Asafuhenfu (Sub-Chiefs) of Denkyira 'applied' for sites on which to settle.

Defendant's ancestors also asked for a place to settle and was given one at Nkasawura near Offin River. Place was swampy. He said he liked it. Pointed out place to Surveyor.

20 Fobenso Ohene was also a Sub-Chief of Denkyira. He applied for and was given a place to settle at Fobenso.

Land was not given to them as their own property. All this happened a long time ago when Denkyiras came from Ashanti. This Fobenso is still in existence. I showed it to Surveyor.

If animal was killed a leg was sent to the owner of the land ; if gold was dug up one-third had to be given to the landowner.”

* * * * *

“ Defendant now claims Fobenso. Amakun is present Chief of Fobenso. He has been on Stool for about 20 years.

30 This Fobenso Chief is a Denkyira man—he is one of the Gyasi.

There are cocoa farms at Fobenso. I collect tolls from the people farming there. In case of any trouble there concerning the land I have to look into it.”

The Plaintiff produced the record of proceedings in the Supreme Court in December, 1879, between Chief Atkin Doman and Chief Acquassie wherein it was decided that Oweawosu belonged to the Defendant who was a predecessor of the Plaintiff. His contention was that Oweawosu was the same as Wiosu which was part of the land now in dispute. p. 21, ll. 3-10. pp. 50-55.

40 KOBINA TENG, a Denkyira man living at Fobenso, deposed that Fobenso belonged to the Plaintiff ; that the Denkyiras came from Ashanti and met the Plaintiff's ancestors ; that in ancient days no tolls were paid but if an animal was killed a leg was given to the Plaintiff ; that one-third of any gold found went to the landowner ; that those with cocoa farms paid the Plaintiff ; that the whole village paid tolls to him ; that Dompouse was occupied by Denkyiras and was on the Plaintiff's land. p. 23.

p. 24.

KOJO YAMOA deposed that over twenty years ago he had bought some trees from Defendant's ancestor to saw timber and had been told by Kofi Amoaku that the money paid for these was being taken to the Plaintiff to share. His evidence also included the following passage:—

p. 25, l. 7.

“ My own ancestors came from Ashanti. When we crossed Offin—I was told that they met Kodwo Kodu, Chief of Abinabina, and settled first at Adaboi. While there Ashantis came and my ancestors were taken away as prisoners without a fight. One of my ancestors by name Amoaku Kwesi remained behind; he was living at *Adaboi* but had come down to Nkasawura to dig gold; he reported to Elders that he heard his people had been caught. Kodwo Kodu interned him and gave him a place to settle. Amoaku was given a place at Nkyiniso (not far from Dominasi). My ancestors settled there. If any treasure is found, finder gets 2/3rd and landowner 1/3rd. I live at Dominasi—I visit Nkyiniso and on these visits stay sometimes for one year. 10

I know Bremang. People living there are all people of my grandfather—the one who got the land from Abinabina.

It was Anhil my ancestor who brought these people from Nkyiniso to Bremang with permission of Yensanti—the predecessor of Defendant. I did not fell trees at Dominasi. I felled them at Bremang. When animals were killed at Nkyiniso they sent a leg to Abinabina.” 20

p. 26, l. 20.

NTIAKUN, a former Omanhin (Paramount Chief) of Amemfi Wassa, gave evidence of the tradition as to the arrival of the Denkyira from Ashanti and receiving a place to live from the Plaintiff's predecessor.

p. 27, l. 10.

JOHN TAYLOR SAMPSON deposed that he had been a clerk to a mining company which had acquired areas in Dunkwa district, one of which was at Nkasawura close to the Offin River. He together with the Manager, the Chief of Nkasawura and some of his elders went to Abinabina in about 1934. The Plaintiff then claimed a portion of the area in question. 30

p. 28, l. 1.

KOBINA AMAKUN, a Denkyira man who lived at Fobenso, deposed that he was not now on the Stool at Fobenso; that Fobenso was on Abinabina's land; that he himself had a cocoa farm there; that he had been on the Stool for about 10 years and had paid tolls to the Abinabina Ohene.

p. 29.

9. The evidence for the Defendant was as follows:—

The Defendant himself deposed that his tribe were Ashantis at first; that his ancestors were at Nkasawura in ancient days and went to Bansu to pay allegiance to the Denkyeras on the other side of the Offin River; that the Denkyeras joined with his own tribe to drive away the Aowins and the Denkyera people settled on the land before Denkyera Ohene left Bansu and migrated to Jukwa; that at no time had he paid contributions or tribute to the Plaintiff or his people and that if a man killed an animal on this land a leg would be sent to the occupant of his (the Defendant's) Stool. He denied that Kobina Amakun was the Ohene of Fobenso and stated that the Stool was at present in the hands of Gyabin. 40

KOFI ASAMUA, a farmer living at Dominasi deposed that he was a linguist to the Ohene of Dominasi and Safuhene as well. Dominasi was on the Defendant's land and no money had been paid to the Plaintiff on account of the land. p. 31.

KOJO GYABIN, that he had been the Ohene's linguist at Fobenso ; that the last Ohene had died five or six years ago ; that the Stool thus passed into his (the witness's) possession as " caretaker " ; that he had never acknowledged the Plaintiff as overlord of Fobenso ; that the Defendant was the owner of the land on which the village stood and that Kobina Amakun was not Ohene. In answer to the Court this witness deposed as follows :— p. 32.

" Denkyeras do live on Wassa land. At Oda there are Denkyera people on Wassa land. That Wioso is at present deserted. The place was occupied by Ashanti people—and they left—the Denkyera people who were there moved to Dominasi." p. 33, l. 12.

At this stage the Court of its own motion put in evidence a sketch plan in the handwriting of the presiding judge in the Bokitsi Concession Inquiry in 1902. None of the witnesses were invited to comment on this document. p. 33, l. 20.

ABABIO AMPIA deposed that in peace time the Omanhene took the head of the State. In war time the Tufuhene took the head. When Denkyerahene was living at Jukwa the Tufuhene was living at Awiem near Jukwa. p. 33, l. 25.

KWAMIN KWANIE deposed that he was Twafuhene of Denkyera State ; that he had a boundary with the Defendant at Bisiasi and with the Plaintiff at Subin River ; that his ancestors had lived and served Kojo Tsibu when he was living in Ashanti ; and that Adaboi was not on his land but belonged to Kudu Apia of Bremang, who served the Denkyerahene. p. 34, l. 30.

10. The judgment of the trial judge included the following passage :—

30 " Before me the Plaintiffs were unable to give any account of their original migration, i.e. how they came to settle as they told me at *Adaboi* where I was told that to this day the annual custom is performed. p. 39, l. 27.

In the former Enquiry referred to before learned Chief Justice, their origin was equally vague but there was one factor which is of considerable significance when viewing the credibility of the evidence given to me that their ancestors' original settlement was at *Adaboi* and to which place I was told the Plaintiffs still make a pilgrimage each year to perform their annual custom.

40 Now *Adaboi* is situate some eleven (11) miles North West of the village of *Ayanfuri*. The enquiry of 1902 related to land at *Bokitsi* some miles South of *Ayanfuri*. At page 151 of the Judgment in the *Bokitsi Concession Enquiry* it is shown that the opposers (*Abinabina*) claimed—

' (3) that at any rate, the deserted village of *Danyuan*, which is practically the same as *Bokitsi* belongs to the *Abinabina*

Stool, inasmuch as it is the place where their ancestors were buried, and where up to six years ago they made their annual custom.'

This is a patent contradiction of the evidence given by the Plaintiffs before me at Dunkwa on the 21st May last as to the original ancestral home and that given by them to Griffiths, C.J., forty-four years ago."

p. 40, l. 20.

p. 40, l. 14.

p. 40, l. 26.

As to the identity of the site at Wioso the learned judge referred to a finding by Griffiths, C.J., in the Enquiry referred to above, Concession Enquiry No. 38 Cape Coast, that there was a village named Owiso near Princisu and that this village must be some seven to eight miles south of the place now claimed by the Plaintiffs as Wiosu. The learned judge therefore came to the conclusion that it was clear upon the evidence given in 1902 that the Plaintiffs (*sic*) had been lying in the evidence they gave before him both as to their evidence of tradition and as to their former settlement at Wiosu. 10

p. 41, l. 4.

As regards the Denkyiras the learned judge was inclined to believe that from the earliest days they had occupied land to some extent on either side of the River Offin and that at no time was that occupation made with the leave and licence of the Plaintiffs and that for generations long before the limits of human memory the people of the Denkyira State had effectively occupied that area on the plan shown by them as being edged in green. 20

The learned judge concluded his judgment as follows :—

"In claims for declaration of title the onus lies upon the Plaintiff to establish his cause upon the strength of his own case and not upon the weakness of his opponents. In such action he must evidence such positive and numerous acts within living memory sufficiently frequent and positive to justify the inference that he is the exclusive owner. 30

This test the Plaintiff has failed signally to satisfy and I do dismiss the claim of the Plaintiff both in respect of the declaration sought for and in respect of that for damages for trespass."

p. 45, l. 14.

11. The Plaintiff's grounds of appeal to the West African Court of Appeal included the following :—

1. "Because the Court having based its decision on the Judgment of Griffiths, C.J., in Concession Enquiry 38 Cape Coast, was wrong in holding in effect that Fobenso and other places belonged to the Defendant as claimed by him.

2. Because the Court was wrong in holding that Plaintiff's evidence as to tradition conflicted with that given in Concession Enquiry 38 Cape Coast as an original settlement at Adaboi is not inconsistent with a subsequent settlement at Danyuan. 40

p. 45, l. 25.

3. Because the Court was wrong in relying entirely upon the sketch plan made by the learned Chief Justice in the Concession

Enquiry of 1902 for the purpose of discrediting the evidence of the Plaintiff as to the Wiosu referred to in the said Enquiry not being identical with the Wiosu shown in the Plan Exhibit 1.”

12. The learned judges of the West African Court of Appeal made no attempt in their judgment to review the evidence or to consider in any detail the findings of the trial judge. They contented themselves with stating that it should by this time be more or less universally known that in a claim of this sort the burden of proof rests heavily on the Claimant and that they are in agreement with the learned trial judge in his finding that the Appellant had signally failed to prove his claim. The only specific issue to which they referred was the use by the learned judge of a sketch plan taken from the judgment book of Griffith, C.J.

13. The Plaintiff being dissatisfied with the said judgment applied to the West African Court of Appeal for leave to appeal to His Majesty in Council. Conditional leave was granted on the 8th December, 1947. Final leave was, however, refused on the 20th April on the ground that although the Plaintiff had deposited the sum of £500 required as a condition of such leave the Court had no power to extend the term beyond the period of three months from the granting of conditional leave.

14. Special leave to appeal to His Majesty in Council was granted by an Order in Council dated the 25th April, 1950.

15. The Appellant respectfully submits that this Appeal should be allowed and that the judgment of the Courts below should be set aside and his claim allowed or that this suit should be sent back for a new trial and that in that event he should be granted his costs of these proceedings throughout for the following, amongst other,

REASONS

- (1) BECAUSE the trial judge was wrong in holding that in such an action the Plaintiff must produce evidence of positive and numerous acts within living memory sufficiently frequent and positive to justify the inference that he is the exclusive owner.
- (2) BECAUSE it is always open to a Plaintiff in such an action to establish his title to land by evidence of history and tradition even though the occupants have never paid tribute to him or acknowledged such title.
- (3) BECAUSE both Courts below failed to have regard to the evidence of history and tradition.
- (4) BECAUSE the evidence of history and tradition alone was sufficient, if accepted, to establish the Plaintiff's title.
- (5) BECAUSE the trial judge held that the Plaintiff in such an action must produce evidence sufficient to justify the inference that he is the exclusive owner

whereas the conception of exclusive ownership is entirely unknown to native law and custom and the Plaintiff was not claiming exclusive ownership.

- (6) BECAUSE the trial judge was wrong in arriving at a conclusion adverse to the Plaintiff based upon evidence given at the abortive hearing when the Court had sat without an assessor.
- (7) BECAUSE before arriving at such a conclusion the trial judge should have afforded the Plaintiff an opportunity of explaining his evidence at the abortive hearing. 10
- (8) BECAUSE before arriving at the conclusion that the Plaintiff was lying since his evidence did not appear to be consistent with the evidence given by or on behalf of his predecessor in title in 1902 or with the sketch plan made by the judge in those proceedings he should have afforded the Plaintiff an opportunity to explain the discrepancy.

DINGLE FOOT.

In the Privy Council.

ON APPEAL
from the West African Court of Appeal
(Gold Coast Session).

BETWEEN

THE STOOL OF ABINABINA

(Plaintiff) - - - *Appellant*

AND

CHIEF KOJO ENYIMADU on

behalf of the Stool of Nkasawura

(Defendant) - - - *Respondent.*

Case for the Appellant

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