

In the Privy Council.

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

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

BETWEEN

THE STOOL OF ABINABINA (Plaintiff) *Appellant*

AND

10 CHIEF KOJO ENYIMADU on behalf of the STOOL OF
NKASAWURA (Defendant) *Respondent.*

CASE FOR THE RESPONDENT

RECORD.

1. This is an appeal from a Judgment of the West African Court of Appeal, dated the 4th June, 1947, which affirmed a Judgment of the Supreme Court, Divisional Court, Cape Coast, Gold Coast, delivered by Mr. Justice Jackson on the 16th October, 1946.

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2. On the 21st November, 1941, the Plaintiff, Chief Kwesi Kuma II, Chief of Abinabina, took out a Civil Summons in the Native Tribunal of Akropong against Kofi Amoah of Nkasawura, the predecessor of Chief Kojo Enyimadu of Nkasawura, who was substituted by Order of the Court on the 14th August, 1943. The Plaintiff claimed £100 damages from the Defendant whose predecessor was alleged to have unlawfully granted to one R. T. Briscoe Mahogany trees and other timber-like trees without the knowledge and consent of the Plaintiff.

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3. Leave to amend the Writ of Summons was granted, and the amended Writ of Summons in addition to the said claim for Damages included a claim to establish title to the Nkasawura lands with boundaries as stated. It was alleged that the Defendant and his ancestors as tenants of the Abinabina Stool has been paying tribute to the Plaintiff's Stool until about five years ago when an adverse title had been set up.

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4. On the 27th April, 1942, the Provincial Commissioner's Court ordered the process and proceedings in cause with attested copies of all entries in the books of the Native Tribunal to be transmitted to the Divisional Court at Cape Coast and for the case to be heard before the said Court.

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The ground for the transfer was in these words :—

“ It is obvious that neither the Akropong Tribunal nor the Ayanfuri Tribunal would give an unbiassed Judgment as the Chiefs

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of these two towns are intimately connected with the dispute, and the same may be said of the Tribunal of the Paramount Chief Denkera.”

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5. On the 26th May, 1942, the said Divisional Court ordered Pleadings.

The Statement of Claim was delivered on the 9th July, 1942. In the Statement of Claim the following paragraphs are material :—

“(2) Attached to the Plaintiff’s said Stool are the lands in dispute herein.

(3) The Predecessors of the Defendant settled on the lands in dispute herein by the leave and licence of the Plaintiff’s predecessors who arranged with the Defendant’s said predecessors that tribute should be paid to the Plaintiff’s Stool. 10

(4) The Defendant’s predecessors faithfully and loyally observed the said arrangement by the payment of tribute to the Plaintiff’s Stool from time to time until Defendant’s predecessor, Chief Kofi Bissa of Nkasawura, repudiated the arrangement by refusing to pay tribute and claimed ownership of the land in dispute herein.

(5) The predecessor of the present Defendant, that is, Chief Kofi Bissa, without the consent, authority and/or permission of the Plaintiff, sold timber and timber-like trees on the area in dispute to a Mr. R. T. Briscoe of Dunkwa, who felled from the said lands Mahogany and other trees. 20

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(7) The Plaintiff’s claim against the Defendant is to establish the title of the Stool of Abinabina Division to all that piece or parcel of land known as Nkasawura Lands the property of the Plaintiff situate at Abinabina in Wassaw Amenfi State and bounded on the East by Offin River, on the North by Denkyira Obuasi and by River Ahumfra, on the North-East by River Offin, and on the South by Ayanfure lands. 30

The Defendant and his ancestors as tenants of the Abinabina Stool have been paying tribute and tolls to the Plaintiff’s Stool until about five (5) years ago set up an adverse title to the said Nkasawura Lands against the Abinabina Stool.

The Plaintiff also claims £100 Damages from the Defendant and his agents for wrongfully cutting timber trees on the said land without Plaintiff’s permission.”

Under paragraph 9 the Plaintiff claimed a Declaration of title and damages as stated in the said paragraph 7.

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6. In the Statement of Defence delivered on the 28th July 1942, the Defendant denied that the Plaintiff is the owner of the land in question, and said that from time immemorial the land had been attached to the Stool of Nkasawura in the Denkera State. He denied that his predecessors settled on the Nkasawura Stool land by leave and licence of the Plaintiff’s predecessors with an arrangement to pay tribute to them. He denied 40

that his predecessors or any of them had in the history of his Stool paid tribute or any sum of money by way of tribute. He admitted that trees had been felled by Mr. R. T. Briscoe, but this had been done by the permission of his predecessor as owner of the land in question.

7. The Plaintiff sent to the Registrar of the Court his Particulars for Survey on the 19th August, 1943, while on the following day the Defendant sent in his Particulars for Survey.

8. On the 2nd March, 1944, there was a Motion of Notice by the Defendant praying the Court to make an Order for the payment of £519 5s. by the Chief Commissioner, Dunkwa, Cape Coast, in respect of Nkasawura land. In an affidavit, dated the 3rd March, 1944, in support of the Application, the Defendant stated that in March, 1938, the Stool of Denkera and Nkasawura granted a Concession to a certain Company in Sekondi in respect of a portion of Nkasawura land near the Offin River, which Concession was opposed by the Chief of Abinabina, the Plaintiff herein, which was the subject of the Concession Enquiry No. 2293 (Cape Coast) held before this Court, and which Ruling was delivered in his favour on the 19th August, 1939; that in October, 1942, the Plaintiff herein filed a Motion supported by an Affidavit for interim injunction restraining the Defendant, his agents, servants and privies from entering on the land in dispute which application was rejected by this Court; that after the motion for interim junction was rejected by this Court the Government under Regulation 43 of the Defence Regulations 1939, in April, 1943, had taken a strip of land which is a portion of the said Nkasawura land measuring 200 feet wide which is approximately 15 miles long, for the construction of a railway line and offered him (the Defendant) £200 compensation for the gravel at mile 11½ and £319 5s. for 884 timber trees felled and used for the laying upon the railway lines on which the train runs; that the Defendant applied to the District Commissioner, Dunkwa, for payment to him of the amounts deposited in Treasury, but the Commissioner refused to do so unless ordered by this Court.

On the 25th March, 1944, one Kweku Sunn, on behalf of the Stool of Abinabina, swore an affidavit in opposition to the application for payment out. He said, *inter alia*, that it would be unjust and unfair to both parties for the money to be paid out pending the litigation and until the same has been determined.

The Court appears to have agreed with this view as on the 28th March, 1944, the following order was made :—

“ Not sufficient grounds to grant motion. Motion rejected.
No order as to costs.”

9. On the 5th September, 1946, Mr. Justice Jackson decided to re-hear the case in these words :—

“ 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 one. Accordingly with consent of both parties, I shall re-hear the whole evidence to enable the Assessor, now appointed, to hear it.

Pleadings as filed.

Assessor : Chief I. O. Dansu.”

p. 20 to p. 28.
p. 29 to p. 34.

10. Evidence in the case was accordingly given on the 5th and 6th September, 1946, by the Plaintiff with five witnesses in support of his case, and by the Defendant with four witnesses in support of his case. 10

pp. 72, 63, 61, 50,
54.
pp. 67, 57, 60, 64.

Plan No. 1 of the disputed area, a separate document, was admitted by consent. The land claimed by the Plaintiff is edged in pink on the plan while the land claimed by the Defendant is edged in green. Certain exhibits were put in evidence by the Plaintiff and by the Defendant in support of the respective claims.

p. 21, l. 35.

The Plaintiff in his evidence said that there had been litigation with Ayanfuri people about Bokitsi when his predecessor Kwesi Kuma I was on the Stool. This referred to Concession Inquiry No. 38, Cape Coast, The Bokitsi Concession, which is reported at page 148 of Sarbah's Fanti Law Report, as a Judgment of Sir W. Brandford Griffith, C.J., dated 20 19th July, 1902.

The learned Chief Justice in that case dealt with the claims of the Ayanfuri (or Iamfuri) people on the one hand and of the opposers the Abinabina people on the other at considerable length and with meticulous care. In so doing he considered the judgment in *Arkin Doman v. Chief A. Esseamin*, dated the 3rd December, 1879, which is an exhibit put in by the Plaintiff in the present case. Towards the end of his judgment, the learned Chief Justice said he had essayed a reduction of the plan which a Mr. Campbell had made.

p. 33, l. 19.

In the record of the present case the following paragraph appears :— 30

“ On Court's own Motion—

Sketch plan in handwriting of presiding Judge and dated 4.7.1902 at page 163 of volume III Concession Record Book 1902 put in evidence in explanation of Judgment of Bradford Griffith, Chief Justice. (Sarbah's Reports page 148.) ”

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This sketch plan is appended to the Judgment of the Trial Judge in the present case.

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11. Counsel for the parties addressed the Court on the 7th September 1946. On the same date the Assessor gave his opinion.

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12. Judgment was delivered by Mr. Justice Jackson on the 40 16th October, 1946.

The learned Trial Judge dealt with the Plaintiff's Claim, the alleged repudiation of the agreement to pay tribute at the time when the Gold Coast Selection Trust Limited sought a Concession which was granted to them by the then Omanhene of Denkera and Chief Kofi Bissa of Nkasawura of an area described on Plan No. 1, Nkasawura Concession C.V. 615, the evidence upon which the Plaintiff's case was founded, including cases heard in the Supreme Court—(1) *Ahin Doman v. Essaimin* (1879) (Exhibit 3) and (2) Concession Enquiry No. 38 Cape Coast (Reported at pages 148–159, Sarbah's Fanti Law Reports). The learned Trial Judge said that the Plaintiff had sought to establish that the identity of the land in issue in these actions named Owiosu was situated at the place described on Plan No. 1 as being Wioso (RNs). This led the learned Trial Judge to test the evidence as given before him on behalf of the Plaintiff by comparing it with the evidence as adduced by the Abinabina Stool in the Bokitsi case, 1902. The learned Trial Judge considered a sketch Plan in the writing of Sir W. Brandford Griffith, Chief Justice, who delivered the famous Bokitsi Judgment and which is found at page 163 of the Concession Record Book, volume III for 1902, a copy of which is attached to the judgment in the present case. He used these words :—

“ It is clear upon the evidence given in 1902 that the Plaintiffs have been lying in the evidence they gave before me both as to their evidence of tradition and as to their former settlement at Wiosu.”

The only evidence given by witnesses for the Plaintiff which impressed the learned Trial Judge at all favourably was that given by Kojo Uamoah (or Yamoah).

The learned Trial Judge concluded with these words :—

“ The evidence of the payment of tribute in recent years was of the most unsatisfactory nature and as to credibility I preferred the denials of the Defendants to the averments of the Plaintiffs in this connection.”

I need not dwell upon the traditional evidence advanced by the Denkyiras other than to say I am inclined to believe that from the earliest days that tribe occupied land to some extent on either side of the River Offin and that at no time, within the area claimed, was that occupation made either with the leave or licence of the Plaintiffs, or anyone else and that for generations long before the limits of human memory the people of Denkyira State have effectively occupied that area on the Plan shown by them as being edged in green. That line, however, in my Judgment, does mark the limits of that full ownership by original occupation. Beyond that the evidence shows they occupy with leave of the Abinabina.

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.

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.

Let the costs be taxed."

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13. The West African Court of Appeal by a Judgment, dated the 4th June, 1947, affirmed the said Judgment of Mr. Justice Jackson, sitting in the Supreme Court, Divisional Court, Cape Coast.

The Court held that the learned Trial Judge was right when he found that the Appellant had failed signally to prove his claim.

With regard to the objection taken by the Appellant to the use by the learned Trial Judge of a Sketch Plan taken from the Judgment Book of Sir W. Brandford Griffith, Chief Justice, in a Concession Case of 1902, the Court held that the learned Trial Judge had used the Sketch for the purpose of seeing how far the said Judgment could be read as relating to places shown on the Surveyor's Plan in the present case in evidence before the Land Court and that there was no reason to object to his so doing.

The Court accordingly dismissed the appeal with costs.

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14. On the 25th April, 1950, there was an Order in Council granting Special Leave to Appeal to His Majesty in Council.

15. The Respondent respectfully submits that the Judgment of the West African Court of Appeal which affirmed the Judgment of the Supreme Court, Divisional Court, Cape Coast, is correct, and that this appeal should be dismissed with costs throughout, for the following, among other,

REASONS

- (1) BECAUSE the concurrent findings of fact as to the Plaintiff's evidence of tradition, of the former settlement by the Plaintiff's ancestors at Wiosu, and of the payment of tribute by the Defendant, are correct and ought not to be disturbed. 30
- (2) BECAUSE the Judgment of the West African Court of Appeal is correct.
- (3) BECAUSE the Judgment of the Supreme Court, Divisional Court, Cape Coast, is correct.

S. P. KHAMBATTA.

T. B. W. RAMSAY.

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CASE FOR THE RESPONDENT.

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