Privy Council Appeal No. 5 of 1951

The Stool of Abinabina - - - - - - - - *Appellants*

v.

Chief Kojo Enyimadu (on behalf of the Stool of Nkasawura - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JANUARY, 1953

Present at the Hearing:

LORD NORMAND
LORD REID
LORD COHEN

[*Delivered by* LORD COHEN]

The appellants claim a declaration of their title to a piece of land edged in pink on the plan, exhibit 1 in these proceedings and also damages for alleged trespass. The respondents allege that they are entitled to the piece or parcel of land known as Nkasawura Lands and edged in green on the same plan, which includes part of the land claimed by the appellants. It is admitted that the respondents had been in possession of the Nkasawura Lands for many years but the appellants say that tribute was paid to them for a number of years in respect of the said lands and that whether or not tribute was proved to have been paid, the appellants were entitled to the disputed lands and the respondents are only in occupation of it by their leave and licence. Before turning to the record of the proceedings their Lordships think it advisable to observe that the expression "title" appears to be used throughout in the sense of the usufructuary right defined by Lord Haldane in *Amodu Tijani* v. *The Secretary, Southern Nigeria* (1921) 2 A.C. 399 at p. 402.

The proceedings were commenced by writ dated the 21st November, 1941, the immediate cause of the dispute being that a Mr. R. T. Briscoe had felled trees on the disputed lands pursuant to a licence granted, as the appellants allege unlawfully, by the respondents. The proceedings were commenced in the Native Tribunal but on the 27th April, 1942, were transferred to the Divisional Court, Cape Coast. There were various interlocutory proceedings and finally the case came before Mr. Justice Jackson in the year 1946. He heard the evidence out in full in May, but on the 5th September, 1946, decided that in view of a then recent decision of the West African Court of Appeal he should have heard the evidence with an assessor and accordingly he determined to rehear the whole of the evidence in the presence of an assessor. The rehearing was commenced on that date and evidence was called on both sides. It was partly traditional—that is to say evidence as to rights alleged to have existed beyond time of living memory and proved by linguists or other members of the various tribes concerned—and partly factual as to actual events occurring within living memory. In the course of the proceedings after the appellants' evidence had been concluded and in the middle of the respondents' evidence the learned judge of his own motion directed that a sketch plan in the handwriting of the judge who had presided at the trial of a land dispute between the appellants' stool and another tribe (hereinafter referred to as the 1902 action) should be put in evidence in order to explain the judgment of Branford Griffith, C.J. in that case. At the conclusion of the evidence and arguments of counsel after taking the opinion of the assessor the learned judge reserved judgment.

He delivered his judgment on the 16th October, 1946. He referred in the course of it not only to the record in the 1902 action to which their Lordships have already referred, but also to the proceedings in a case in 1879 *Ahin Doman* v. *Acquassie Essaimin.* Basing himself on what had occurred in those two actions as well as in part on what had taken place at the abortive hearing before him in May, 1946, in the present proceedings, he came to the conclusion that the plaintiffs (by which he must have meant Chief Kwesi Kuma II, then Chief of the appellants, and his witnesses) 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. He then considered the factual evidence as to tribute and said it was of a most unsatisfactory nature and as to credibility he preferred the denials of the defendants to the averments of plaintiffs in this connection. He did not dwell upon the traditional evidence advanced on behalf of the respondents other than to say that he was inclined to a conclusion in favour of the respondents. He summed up his conclusion in the following words:—

> " 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."

The appellants appealed to the West African Court of Appeal who dismissed the appeal. Their judgment was short and so far as material was in these terms:—

> " 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.
>
> " The learned trial Judge found that the Appellant had failed signally to prove his claim and we are in agreement with him in so finding."

They did not make any observations as to the nature of the evidence required to establish title, but as the Court of Appeal affirmed without qualification the decision of Jackson J., their Lordships consider that the Court of Appeal must be taken to have agreed with his views on that point.

From this decision the appellants appealed to Her Majesty in Council. Mr. Dingle Foot on their behalf attacked the judgments in the West African Courts on two grounds:

> (1) that the trial judge was wrong in holding that sufficient and frequent positive and numerous acts within living memory were necessary to establish title and, inferentially, that such title could not be supported by traditional evidence alone; and
>
> (2) that the trial judge was not justified in finding that the plaintiff was lying on the ground of discrepancies between his evidence at the trial in September, 1946, and evidence given (*a*) by him at the abortive trial in May, 1946, and (*b*) by his predecessor in title in the 1902 action.

Neither of these points was taken in the West African Courts. They could not of course have been taken before Jackson J. since they only emerged from his judgment. They could have been taken before the West African Court of Appeal but their Lordships consider that as they involve substantial points of law, substantive or procedural, and it is plain that no further evidence could have been adduced which would affect the decision of them, the appellants should be allowed to raise them before this Board.

The respondents submitted that they were entitled to judgment since there were concurrent findings of fact in the West African Courts which, applying the principles laid down in *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy* (L.R. 73 I.A. 246) ought not to be disturbed.

But the rule as to concurrent findings is subject to certain exceptions one of which is clearly stated by Lord Thankerton at page 259 of the case cited as follows:—

> "In order to obviate the practice there must be some miscarriage of justice or violation of some principle of law or procedure."

After defining miscarriage of justice, Lord Thankerton continues:

> "The violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect."

Their Lordships considered that if Mr. Foot could make good his attack on both points, he would have satisfied the conditions which bring this exception into operation. They therefore proceed to consider whether he has done so.

Their Lordships are satisfied by reference to authorities that the opinion of Jackson J. that frequent and positive numerous acts within living memory are essential to justify the inference of exclusive ownership is not well founded. It will be sufficient to refer to two cases. In *Nchirahene Kojo Ado* v. *Buoyemhene Kwadwo Wusu* (4 W.A.C.A. 96) the actual decision in the Court of Appeal was on a point of equity but it is clear from the judgment of the court that apart from that point the court would have accepted the plaintiff's title solely on the basis of traditional evidence. The opinion thus expressed was not merely a dictum since the court ultimately on the facts decided the point of equity in favour of the plaintiff and gave judgment in his favour (see 6 W.A.C.A. p. 24).

That traditional evidence may be very relevant is also apparent from the decision of this Board in *Kwamina Kuma* v. *Kofi Kuma* (5 W.A.C.A. 4). This case is also of importance because Sir Lancelot Sanderson delivering the judgment of the Board pointed out at page 7 that "even assuming that the defendant and his predecessors have been to some extent in occupation of parts of the land in question without paying tribute to the plaintiff or his predecessors, such possession . . . is not conclusive evidence of the defendant's title".

Their Lordships are also of opinion that Mr. Foot was right in his criticism of the use made by the trial judge of the evidence given by the plaintiff's predecessor in title in the 1902 action without giving the plaintiff an opportunity of explaining the supposed discrepancy between his evidence and that of his predecessor. The use for a similar purpose of the plaintiff's own evidence in the abortive trial in May is perhaps more excusable since plaintiff's counsel may have had a note of that evidence and could thus have dealt with the discrepancy. Even so their Lordships think it would have been better had this discrepancy also been put to the witness before it was used against him. Their Lordships are however of opinion that the use of the evidence in the 1902 proceedings in the way indicated above is sufficient in itself to vitiate the finding of the trial judge that the plaintiffs were lying in the evidence they gave before him as to tradition. Their Lordships would add that even if the discrepancy remained unexplained it would hardly justify a finding of deliberate untruth.

Their Lordships therefore are of opinion that Mr. Foot has made good his two propositions and that the order of the Courts in West Africa must be discharged. It is however plainly a case where their Lordships cannot themselves reach a conclusion on the evidence and there must be a new trial.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and the orders of the West African Court of Appeal and of the Divisional Court at Cape Coast be set aside and that the case be remitted to the said Divisional Court for a new trial. Each party must pay their own costs of the appeals to the West African Court of Appeal and to this Board. The costs of the original trial before the Divisional Court are to abide the result of the new trial.

(17846) Wt. 8096—1 100 1/53 D.L./PI/3

In the Privy Council

THE STOOL OF ABINABINA

v.

CHIEF KOJO ENYIMADU
(on behalf of the Stool of NKASAWURA)

DELIVERED BY LORD COHEN

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1953