

Chief Kwame Asante, Tredehene, for and on behalf of his stool *Appellant*

v.

Chief Kwame Tawia, for and on behalf of the Asafu (other-
wise Akwamu) stool of Kumasi (substituted for Chief Asafu
Boakyi II, Akwamuhene) - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 15TH FEBRUARY, 1954

Present at the Hearing :

LORD COHEN

SIR LIONEL LEACH

MR. L. M. D. DE SILVA

[*Delivered by* LORD COHEN]

This appeal first came before this Board in October and December, 1948. It related to the ownership of a considerable tract of land in Kumasi State or Division of Ashanti which was claimed on the one hand by the appellant, Chief Kwame Asante on behalf of his Stool, and on the other by Chief Kwame Tawia, on behalf of the Asafu or Akwamu Stool of Kumasi. The latter Chief was in the course of the proceedings substituted for his predecessor Chief Asafu Boakyi II, Akwamuhene by whom in the year 1936 they had been commenced.

The dispute, since it related to the ownership of land in the Kumasi State of Ashanti, was properly and solely cognisable by a Native Court, the Asantehene's Divisional Court, a Court of the "B" Grade, which was constituted under the Native Courts (Ashanti) Ordinance, 1935 and will be referred to as "Court B". This Court, in which the Chief Asafu preferred his claim, on the 1st April, 1936 decided in his favour against the appellant. After an unsuccessful appeal to Court "A" (also a Native Court established under the same Ordinance) the appellant appealed to the Chief Commissioner's Court which on the 17th December, 1936 sent back the case to Court B for hearing.

On the 1st July, 1937 after a re-hearing of the case Court B again decided in favour of Chief Asafu. The appellant appealed to Court A, which on the 16th December, 1937 dismissed his appeal; thence to the Chief Commissioner's Court which on the 14th November, 1939 dismissed his appeal, and finally to the West African Court of Appeal, which in turn on the 22nd November, 1940 dismissed his appeal.

When the case reached the West African Court of Appeal it was for the first time suggested and made a ground of appeal that the trial court was not validly constituted for the rehearing of the case in that certain Chiefs had sat as judges in that Court who were not qualified to sit and that the proceedings before that Court must accordingly be regarded as "*coram non iudice*" and its judgment a nullity. The West African Court of Appeal observed that this additional ground of appeal

was filed without the leave of the Court and that it was too late in the proceedings to raise a point of this nature which was not raised in any of the three Courts below or at the beginning of the hearing of the appeal in that Court. They accordingly dismissed the appeal. It was from that Order that the appeal to this Board took place.

Their Lordships were informed that in 1948 the case was argued before this Board by the appellant on the merits as well as on the point of jurisdiction taken for the first time in the West African Court of Appeal.

This Board found it impossible to assent to the view expressed by the West African Court of Appeal that it was too late to raise that point since if it appears to an appellate court that an Order against which an appeal has been brought was made without jurisdiction it could never be too late to admit and give effect to the plea that the Order was a nullity. Their Lordships then dealing with the matter were however not satisfied that they had all the necessary material for a final decision. They therefore advised that the matter be remitted to the West African Court of Appeal in order that they might have the advantage of the considered opinion of the learned judges of that Court upon questions which lie peculiarly within their province and that an opportunity might be given to obtain evidence upon two material points the nature of which appears sufficiently from the answers given by that Court to the questions put to it. Their Lordships expressed no opinion on the merits.

The West African Court of Appeal dealt with the questions thus remitted to them on the 17th March, 1951 and answered the specific questions put to them as follows:—

(a) The answer to the first question is that the only member of Court B who in fact held any of the offices in the Fourth Schedule to Order 5 of 1935 was the Adontenhene. As the minimum quorum under section 5 of the Order is three the Court was not therefore properly constituted.

(b) The answer to the second question is that there was no other Order in existence at the date of the re-hearing which authorised any of the persons (other than the Adontenhene) who in fact sat at the re-hearing, to adjudicate.

They accordingly decided that the West African Asantehene's Divisional Court of the "B" Grade as constituted on the 4th February, 1937 had no jurisdiction to deal with the matter.

That decision having been obtained, the appeal to this Board was restored. Neither party sought to question the conclusion thus arrived at by the West African Court of Appeal. Accordingly their Lordships have no alternative but to declare the judgment of the 1st July, 1937 to be a nullity and to set aside all the subsequent Orders that have been made in the West African Courts in this matter except the Order of the West African Court of Appeal dated the 17th March, 1951 with the unfortunate result that the dispute that commenced as early as 1937 still remains unsettled and will have to be resolved at a further hearing in the appropriate Court.

For these reasons their Lordships will humbly advise Her Majesty (1) to declare that there has been no determination of the issues between the parties by the Asantehene's Divisional Court of the "B" Grade and that the judgment recorded in that Court as having been given on the 1st July, 1937 is a nullity; (2) to set aside the Order of the Asantehene's Divisional Court of the "A" Grade dated the 16th December, 1937, the Order of the Chief Commissioner's Court, Ashanti dated the 14th November, 1939 and the Order of the West African Court of Appeal dated the 22nd November, 1940; (3) to remit the case for hearing to the Asantehene's Divisional Court of the "B" Grade or to such other Court as may now have jurisdiction in the matter. The respondent must repay to the appellant any sums paid by the appellant to him pursuant to the said judgment of the 1st July, 1937, and Orders of the 16th

December, 1937, the 14th November, 1939 and the 22nd November, 1940. The costs of the proceedings in the Asantehene's Divisional Court of the " B " Grade and in the Asantehene's Divisional Court of the " A " Grade and in the Chief Commissioner's Court, Ashanti which led to the said Orders of the 1st July, 1937, the 16th December, 1937 and the 14th November, 1939 are to abide the ultimate result of the re-hearing of the case. Each party shall pay his own costs of the proceedings in the West African Court of Appeal which led to the judgment of the 22nd November, 1940. The respondent must pay to the appellant his costs of the proceedings in the West African Court of Appeal arising out of the Order in Council of the 28th January, 1949 and one-third of his costs of the proceedings before this Board.

In the Privy Council

CHIEF KWAME ASANTE, TREDHEHENE,
FOR AND ON BEHALF OF HIS STOOL

v.

CHIEF KWAME TAWIA, FOR AND ON
BEHALF OF THE ASAFU (OTHERWISE
AKWAMU) STOOL OF KUMASI (SUB-
STITUTED FOR CHIEF ASAFU BOAKYI
II, AKWAMUHEHENE)

DELIVERED BY LORD COHEN