23, 1956

No. 24 of 1953.

In the Privy Council.

ON APPEAL

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

BETWEEN

NANA OWUDU ASEKU BREMPONG III Ohene of Amanfupong (substituted for NANA OWUDU ASEKU BREMPONG II alias ALBERT ROBERTSON MICAH KORSAH (since deceased) and NANA OTSIBU ABABIO II, Ohene of Aperade (substituted for NANA AGYEIKU AFARI, Ohene of Aperade (abdicated) for themselves and on behalf of their respective Stools (Plaintiffs) . . . *Appellants*

AND

NANA DARKU FREMPONG II, Ohene of Tarkwa Achiase in the Akim Abuakwa State for himself and on behalf of the Stool of TARKWA ACHIASE AND PEOPLE (Defendant) . . . . *Respondent.*

Case for the Respondent.

RECORD.

1. This is an Appeal from a judgment of the West African Court of Appeal pronounced on the 11th January 1952 allowing an appeal by the present Defendant-Respondent and setting aside with costs a judgment of the Supreme Court of the Gold Coast pronounced upon the 11th August 1951, which granted to the Plaintiffs with costs the declaration of title which they claimed to an area of land in the Gold Coast Colony together with the nominal sum of £5 as mesne profits. p. 50. p. 42.

2. The suit was instituted on the 26th March 1949 by Civil Summons in the Native Court " B " of Asikuma by the above-named Nana Owudu Aseku Brempong II and the above-named Nana Agyeiku Afari for themselves and on behalf of their respective Stools against Ohene Kobina Amoo, then Ohene of Tarkwa Achiasi, for himself and on behalf of the Stool of Tarkwa Achiasi and people but was transferred on or about the 29th June 1949 into the Supreme Court of the Gold Coast to the Land Court for the Central Judicial Division of the Gold Coast Colony. p. 1. p. 2.

On the 21st March 1950 the Respondent was substituted as Defendant for the said Ohene Kobina Amoo. p. 4.

pp. 23 & 25.

3. The area in respect of which a declaration of title was claimed in the suit is delineated upon a plan (Exhibit " B ") put in by the Plaintiffs during the hearing but objected to by the Defendant. This plan shows the area as an irregular square quadrilateral having a mean length from north to south of about 11 miles and a mean width from east to west between boundaries delineated of about 9 miles but the eastern boundary is for more than half its length not delineated, so that the precise area claimed cannot be ascertained. The northern position of such eastern boundary, which is the defined portion, is shown as bisecting the Defendant's town of Achiasi. Aperade, the town of the second Plaintiff-Appellant, is near the middle of the area claimed, but whether the town of Amanfupong, the town of the first Plaintiff-Appellant, is within it or not is uncertain, owing to the said undefined boundary.

p. 4.

4. The case for the Plaintiffs pleaded in the statement of claim was that the land was attached to their respective Stools as joint owners, they claiming to belong to the Akim section of the Akan race, and that before 1700 they were the only people known as Akims being upon that land; (2) that between 1700 and 1731 the King of Denkera, one Ntem Gyakari, destroyed their towns Nyawam and Eno but new townships were founded on the sites and named Amanfupong and Aperade respectively after the cessation of hostilities; (3) that long after these wars the Achiase people, under their Chief Tandoh Frimpong, migrated from Dwaso in Ashanti (i.e., from the north) and were granted permission by the then Chief of Aperade, upon the request of the then Chief of Eduasa, to live upon part of the Plaintiffs' land near their boundary with the land of the Surasi people (i.e., the eastern boundary delineated in Exhibit " B ") subject to their making a customary acknowledgment from time to time of the Plaintiffs' title; (4) this acknowledgment had been annually made until about 1879 when a son of a Chief of Achiase unsuccessfully instituted a suit to establish ownership over part of the land near Achiase Village; (5) that in 1948 the first Plaintiff discovered that the Defendant had cut down a cedar tree and made boards from this under a claim of right as owner of the land at a spot near Dawumarkur within the area claimed, which brought on the present litigation; (6) that " the identical land " had been adjudged to have been the property of the Plaintiffs by a Judgment of the Supreme Court of the Gold Coast dated the 19th December 1926 in a suit between the Ohimba (Queen Mother) of Aperade on behalf of the Aperade people and one R. M. Korsah (Plaintiffs) and one Odikro Kojo Dufoh (Defendant) and Dufoh was alleged to have been a sub-chief of the Defendant and Achiasi people were alleged to have given evidence in this suit; and (7) that the Defendant was estopped by conduct and by the acts of his predecessors from disputing the Plaintiffs' title but what was the conduct and what were the acts of his predecessors were not stated.

The Plaintiffs did not originally plead possession either by their subjects or tenants.

pp. 6–10.

5. The Defendant put in a defence but did not counter-claim. Such defence stated in considerable detail the traditional and recent history of the parties. Such tradition agreed with the Plaintiffs that the Achiasi Stool and people originally came from Dwaso (Juaso) now in the Colony of Ashanti (which was constituted in 1900) but then in the Kingdom of

Denkyira, which then comprised a considerable part of the present Colony, but alleged that this migration had occurred long before the time ascribed to it by the Plaintiffs, at a time when the land was vacant and long before the arrival of the ancestors of the present Aperade and Amanfupong people in the district. Those names were then unknown but villages were established upon their present sites with names Eno and Nyanwan. Thereafter the King of Denkyira (whose commanders were Ananse and others) invaded and conquered the peoples around Achiase incorporating their territories into the Denkyira Kingdom and driving the ancestors of the Aperade and Amanfupong people away, making the then Chief of Achiase the overlord under Denkyira of the district including the conquered territories from which the ancestors of the Aperade and Amanfupong people had been expelled. This conquest had happened in the sixteenth century (not the seventeenth). Subsequently ancestors of the Aperade people came to the Chief of Achiase, submitted to his authority and were given, as a place to stay in, the site of the present village of Aperade. Its Chief was subsequently made by the Chief of Achiase the Captain of his Household (Gyasehene), the lands of Aperade being under the Chief of Achiase as members of his Chiefdom. The defence further traced the history of Achiase and denied in detail the historical and other allegations in the statement of claim where in conflict with the allegations in the defence. In conclusion the Defendant's defence was summarised in paragraphs 29 to 32 inclusive :—

(A) That until the 1926 case, the name Korsah was unknown as owner or Ohene of Amanfupong and in fact the Plaintiff was the Tufuhene (Senior Sub-chief) of a Fanti State (Nkusunkum) and not a Paramount Chief or sub-chief in any State in the Achiase area ; p. 11, l. 27.

(B) That people who had been conquered and driven away and their lands given by the conqueror to another Chief (i.e., the Chief of Achiase) could not two or three hundred years later claim their former possessions ; p. 11, l. 35.

(C) The Defendant owned the land by original settlement and/or conquest, not by grant from the Plaintiffs nor had the Defendant ever paid any tribute to either Plaintiff ; p. 12, l. 1.

(D) The Defendant was in possession and had exercised rights of ownership from time immemorial and the only rights of the Plaintiffs were the rights of occupation granted to them as aforesaid by Achiase after the Denkyira conquest.

6. The suit was heard by the Trial Judge (Dennison, J.) with an African assessor upon seven days in June and July 1951. pp. 13–42.

During the hearing the Plaintiffs by leave amended their Statement of Claim by alleging that both before and since the judgment in *Egyir* v. *Dufoh* they had granted lands in the area upon the abusa (tribute) system to tenants who were in possession and paying tribute. p. 20.

In reply the Defendant denied such allegation and alleged that though, after the case of *Egyir* v. *Dufoh*, the Plaintiff attempted to levy tribute from certain members of Dufoh's family who had farms on the p. 24.

land, no tribute had been paid, that for 300 years the Defendant's people had farmed extensively without question by the Plaintiffs and that the Defendants also had tenants who had paid tribute for several years without such question.

p. 41, l. 39. p. 43, ll. 20–43.

7. At the conclusion of the hearing the African Assessor asked for and was granted time to express his opinion. Thereafter he gave a considered opinion which is set out in the judgment of the learned Judge, to the effect that the case was intricate, that the 1926 judgment had no bearing on the present suit, that he accepted the Defendant's tradition of acquisition by original occupation and subsequent conquest supported as it was in material respects by the Plaintiffs' tradition and by the evidence of a Chief of the Denkyira State, the successor of the aforesaid Ananse that by the customary law conquest gives title if the conquered people are dispossessed and that in his opinion the Plaintiffs had no claim whatever against the Defendants.

p. 42. p. 45, l. 40. p. 44, l. 6 *et seq.* p. 43, l. 3.

8. By his judgment pronounced upon the 11th August 1951 the learned Judge granted the Plaintiffs the declaration claimed together with the nominal sum of £5 as mesne profits and the costs of the action. First he ruled that the judgment in *Egyir* v. *Dufoh* did not in itself operate as an estoppel against the Defendants. He found that upon the evidence both parties were in actual possession of parts of the area in dispute, this being admitted as to the Defendants by the Plaintiffs, and also that the Defendants had made in good faith grants of land to third parties without opposition (except in one case) by the Plaintiffs, that it was admitted by the Plaintiffs that the Defendants (as they alleged) had been cutting timber on the land for a number of years, which evidence standing alone, he considered, would tend to support the Defendants' case, but he nevertheless considered that the suit should be decided upon another ground, namely, whether the parties had slept upon their rights. For this approach he said that he relied upon decisions of the West African Court of Appeal that a person with a right or interest in land must act timeously. He referred expressly to the decision in *Nchirahene Kojo Addo* v. *Buoyemhene Kwadwo Wusu* (4 W.A.C.A. 96) and the decision in *Kodwo Nkoom* v. *Kwamin Etsiaku* (1922) Gold Coast Full Court Reports 5, referred to in *Addo* v. *Wusu*.

p. 45, l. 11.

p. 45, l. 20.

He considered that both parties had slept on their rights but that he had to consider who was the worse offender and that, as in 1926 the Plaintiffs had taken action against Dufoh and then again, after a long gap, had taken the present action, by reason of these two cases and as the Defendants had never sought a declaration of their title, the Plaintiffs could be said to have acted timeously and were therefore entitled to the declaration sought.

p. 44, l. 42. p. 45, ll. 31–36.

Though he would not himself have cared to decide a case on traditional evidence, he accepted the views of the assessor on the evidence of traditional history and the rights of the conquerers but disregarded the assessor on the ground that he could not have been aware of the decisions of the West African Court of Appeal as to acting timeously upon which he himself was deciding the suit.

9. The Defendant duly appealed to the West African Court of Appeal who, on the 11th January 1952, allowed the appeal and set aside the judgment of the Supreme Court with costs. The Court of Appeal held that the trial judge has been in error in relying upon the decision of *Addo* v. *Wusu* but should have applied the principles enunciated in *Kodolinye* v. *Odu* (2 W.A.C.A. 336) the relevant portion of which on pages 337 and 338 they set out as follows :— pp. 50–52.

> " The onus lies on the Plaintiff to satisfy the Court that he " is entitled on the evidence brought by him to a declaration of " title. The Plaintiff in this case must rely on the strength of his " own case and not on the weakness of the Defendant's case. If this " onus is not discharged, the weakness of the Defendant's case " will not help him and the proper judgment is for the Defendant. " Such a judgment decrees no title to the Defendant, he not having " sought the declaration. So if the whole evidence in the case be " conflicting and somewhat confused, and there is little to choose " between the rival traditional stories the Plaintiff fails in the " decree he seeks, and judgment must be entered for the Defendant."

The Court of Appeal was of opinion that the Plaintiffs had signally failed to discharge the onus upon them.

10. On the 26th June 1952 the Court of Appeal granted to the Plaintiffs final leave to appeal to Her Majesty in Council. By Order of Her Majesty in Council dated the 1st February 1955 the present first Appellant was substituted for the first Plaintiff who had died and the present second Appellant was substituted for the second Plaintiff who had abdicated. p. 52. p. 53.

11. The Respondent humbly submits that this Appeal should be dismissed for the following, among other

REASONS

(1) BECAUSE the Plaintiffs did not discharge the onus of proof that they were entitled to the declaration of title which they claimed or to mesne profits.

(2) BECAUSE the Defendant disproved the claim of the Plaintiffs.

(3) BECAUSE the Defendant proved that he on behalf of his Stool was in possession of the area claimed by the Plaintiffs by himself, his subjects and tenants of his Stool.

(4) BECAUSE the Defendant proved that the lands claimed by the Plaintiffs were attached to the Stool of Achiase subject to the customary right of occupation granted by his predecessor to the Stool of the second Plaintiff over part of the lands.

(5) BECAUSE the judgment of the West African Court of Appeal pronounced on the 11th January 1952 was right.

T. B. W. RAMSAY.

No. 24 of 1953.

In the Privy Council.

ON APPEAL

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

BETWEEN

NANA OWUDU ASEKU BREMPONG III and Another
(Plaintiffs) . . . *Appellants*

AND

NANA DARKU FREMPONG II
(Defendant) . . . *Respondent.*

Case for the Respondent.

A. L. BRYDEN & WILLIAMS,
53 Victoria Street,
London, S.W.1,
Solicitors for the Respondent.

The Solicitors' Law Stationery Society, Limited, Law and Company Printers,
Abbey House S.W.1. WL5524-14861