19, 1957

No. 1 of 1952.

In the Privy Council

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL

(GOLD COAST SESSION)

CONSOLIDATED SUITS AND APPEALS

1. Transferred Suit No. 32/1947 (from the Ga Native Court " B ").

BETWEEN JOSIAH KORKWEI QUARMINA ARYEH, DANIEL SACKEY QUARCOOPOME, J. AMOS LAMPTEY, CHARLES AMOO ANKRAH, claiming as Head and Representative of Mantse Ankrah Family, J. R. ANKRAH, A. DINNAH ANKRAH and AFLAH QUARCOOPOME (Defendants) ... ... *Appellants*

AND

NAA QUARDUAH ANKRAH and ROBERT ADJABENG ANKRAH (otherwise known and called Arday Ankrah substituted for Mark David Adjabeng Ankrah otherwise Kwaku Nyame Ankrah) claiming for and on behalf of Mantse Ankrah Family and ~~JOSEPH COMMEY ANKRAH~~ (Plaintiffs) ... ... *Respondents.*

2. Suit 112/1947.

BETWEEN CHARLES AMOO ANKRAH claiming as Head and Representative of Mantse Ankrah Family (Defendant) ... ... *Appellant*

AND

ROBERT ADJABENG ANKRAH (substituted for Mark David Adjabeng Ankrah other-

wise Kwaku Nyame Ankrah) claiming for and on behalf of Mantse Ankrah Family and ~~JOSEPH COMMEY ANKRAH~~ (Plaintiffs) ... *Respondents.*

RECORD.

Case for the Respondent

(ROBERT ADJABENG ANKRAH)

1. This is an appeal from a judgment of the West African Court of Appeal dated the 22nd February 1951 whereby that Court by a majority dismissed the Defendants' appeal from the judgment of the Supreme Court of the Gold Coast (Land Court) given on the 15th October, 1948, in the consolidated suits No. 32/1947 and No. 112/1947.

2. Suit No. 32/1947 was a suit transferred from the Ga Native Court " B " to the Land Court, Accra, being a division of the Supreme Court of the Gold Coast. In the suit the Plaintiffs, Naa Quarduah Ankrah (a Respondent to this appeal) and M. D. A. Ankrah (since deceased, in whose place the Respondent Robert Adjabeng Ankrah has been by order of the West African Court of Appeal substituted) claimed from the Defendants, Appellants in this appeal, damages for trespass to land, an injunction restraining such trespass, and a declaration of title.

3. In suit No. 112/1947, which was initiated in the Land Court of Accra, the said M. D. A. Ankrah, with his Co-Plaintiff and present Respondent J. C. Ankrah (joined as Plaintiff by order of Court dated 22nd June, 1948) claimed from the Defendants, who are Appellants in this appeal, and M. Captan, who has not appealed, damages for trespass to land and an injunction restraining such trespass.

p. 15. l.1. **4.** By order of the Supreme Court made on the 4th December, 1947 the two suits aforesaid were consolidated.

5. By his Statement of Claim filed on the 22nd September, 1947 the Plaintiff pleaded that the property in dispute was a stool property belonging to Mantse Ankrah Family and known as Royal Stool of Nii
p. 6. l.19. Otu Ahiakwa founder of Otublohum Quarter of Dadebanna Accra comprising nine Chiefs who had sat on the said Royal Stool; that he
p. 6. l.36. himself was the customary Acting Head and Lawful representative of

the Family and caretaker of the Stool and lands ; and claiming against the Defendants that it was improper and illegal for any person or any member of the Mantse Ankrah Family to arrogate unto themselves the power to commit trespass by entering upon and leasing or selling or breaking or fixing a pillar or pillars on Awudome land without first consulting the Plaintiff in accordance with Native Custom, or in accordance with the universal law of Justice. The Plaintiff claimed a declaration that they (his Family) were in possession as owners of the land in dispute, £200 damages for trespass and an injunction restraining the Defendants, their servants or agents from entering upon or interfering with the said land. By his Defence filed on 9th October, 1947 the 1st Defendant (M. Captan) pleaded that he was not in a position to deny or admit the allegations contained in the Statement of Claim, but that he bought the land in question from the Co-Defendant (Charles Amoo Ankrah) and the principal members of the Mantse Ankrah Family by a Deed of Conveyance. p. 8.

6. By his Defence filed on the 9th October, 1947 the Co-Defendant admitted that the property in dispute belonged to the Mantse Ankrah Family but said that the Mantse had a family stool of his own, distinct from the Otublohum Stool, of which he was the founder. He further pleaded that the Plaintiff had never been appointed Acting Head of the Mantse Ankrah by those entitled by Native Custom to appoint such a head, but said that he the Co-Defendant was Head of the Family and was so appointed in November, 1945, in accordance with all customary rites, and that his appointment had been published to the Ga Mantsemei by the Otublohum Mantse in accordance with customary practice. He also pleaded that he was the right person to alienate any property of the Family and that the property in dispute was sold to the Defendants by him with the consent and concurrence of the principal members of the Family. He admitted that the Plaintiff was in possession of the Mantse Ankrah Family Stool and some of its paraphernalia, but he said that the Plaintiff's possession was wrongful and pleaded that there was an action (instituted by oath) by the Family against the Plaintiff pending for the recovery of the said Stool and its paraphernalia. p. 9. l.1. p. 9. l.15.

7. By a Statement of Claim filed on 3rd December, 1947, in Suit No. 32/47 the Plaintiffs, Naa Quarduah Ankrah and M. D. A. Ankrah as lawfully appointed Attorney and Representative of the Manche Ankrah Family, pleaded that the 2nd Plaintiff (M. D. A. Ankrah) had been given charge, control and management of all the properties of the said family ; that with the concurrence and consent of the principal elders and members of the Family he had allotted to the 1st Plaintiff, one of the elderly female members of the Family, a portion of the Family land for building purposes, the title of which land, however, remained p. 13. l.1.

in the Family. They next pleaded that the 2nd Plaintiff's appointment as such Representative and his authority and right to deal with the said
p. 14. l. 3. lands was the subject matter of Suit No. 3/1943, *J. K. Q. Aryeh and Ors.* v. *Mallam Sawuda and M. D. A. Ankrah*, in which his appointment and authority had been upheld by the Divisional Court, Accra, in a judgment given on the 13th November, 1943, and subsequently confirmed on Appeal by the West African Court of Appeal on the 13th May, 1944. They pleaded that the Plaintiffs in that Suit were the Defendants in the present Suit and were claiming in the same right as against the 2nd Plaintiff in this Suit and that they were estopped and precluded by the aforesaid judgment by denying the 2nd Plaintiff's appointment and authority as aforesaid. They averred that the Defendants had broken the pillars of the 1st Plaintiff and they claimed a declaration of title and £50 damages.

p. 15. l. 20. **8.** By their Defence filed on the 11th February, 1948 in Suit No. 32/47 the Defendants pleaded that the alleged appointment of the 2nd Plaintiff as Representative had been annulled by the principal members of the Family and the Defendant was appointed Head of the Family in November, 1945, as aforesaid. They further said that the 1st Plaintiff was estopped from claiming any individual proprietary interest in the land in dispute by reason of the judgment of the Ga Native Court dated the 28th July, 1947 in a Suit entitled *Naa Quarduah Ankrah* (the 1st Plaintiff) v. *J. K. Q. Aryeh & Ors.* (the Defendants herein). They denied that they were estopped by reason of the aforesaid judgment of the Supreme Court of the West African Court of Appeal since they averred that the said judgment did not pronounce the 2nd Plaintiff as Head of the Family or preclude the members of the Family from electing a proper Head of the Family which they did in November 1945.

p. 19. **9.** By an Order dated the 22nd June, 1948 Joseph Commey Ankrah was joined as Co-Plaintiff in both Suits. On the 20th July, 1948 he filed
p. 20. l. 10. a Statement of Claim in which he pleaded *inter alia* that both the Defendant J. K. Q. Aryeh and others knew that he had been granted land by the Plaintiff M. D. A. Ankrah with the knowledge and consent of the
p. 22. l. 20. Mantse Ankrah family and that he had built thereon. By their Defence dated the 9th August, 1948, to the aforesaid Statement of Claim the Defendants pleaded that they had at all material times admitted the Co-Plaintiff's title to the land described in his Statement of Claim and they said that the said land was to the knowledge of the Co-Plaintiff excluded from the area sold to the Defendant Captan.

p. 27. l. 15 **10.** The Plaintiff M. D. A. Ankrah deposed as to his appointment in 1936 to act as Head of the Family. He produced a copy of the proceedings in *Aryeh & Ors.* v. *Sawuda & Ors.* and said that after that case

his position as Acting Head was not challenged except when this present litigation started. He said that members of the family could not convene a meeting unless they came and told him first. The Defendants had sent and told him that they were going to convene a meeting to elect a Head of Family. This witness said " No, that is not the custom ". The meeting was held and he and his faction did not attend other than the Defendant C. A. Ankrah. Later he heard that they had sold the land to Captan. p. 28. l.12. p. 28. l.20. p. 28. l.24.

11. Commey Tetteh, the Linguist to the Ga State, deposed that he knew Ga custom. If a man had land and died intestate the land went to the family, i.e., to the brother and to the children. The brother— if he had a good head—would look after it for the children and all the family. Where a man had two brothers by the same mother and died leaving land and the brother had died but the children survived the land would go to the grandchildren of all three brothers and the one in the family who had sense would be appointed by them to look after the land. If a man occupied a stool and acquired property it belonged to the stool. The Head of the Family was appointed by elders who met in the house of the late Head of the Family. One branch of such a Family could not nominate the Head. They must all join and do it together. He himself was a member of the State Council and was present when the Plaintiff M. D. A. Ankrah was introduced to the State Council as the man who would represent the Atifi and Dadebanna branches of his family. The Defendant C. A. Ankrah had not been brought to the State Council. Once he had come there with Mr. Lamptey saying that Otublohum Manche had sent him to represent him. The State Council had said that they did not know him and told him to go. p. 39. l.38. p. 40. l.2. p. 40. l.6. p. 40. l.10. p. 40. l.27. p. 41. l.37.

In cross-examination this witness deposed that if a brother died leaving a brother and sister and both died the children of the sister were given preference. The general rule in Accra was that inheritance was through the mother's side ; that it was only when a man died without any female relatives that a male might inherit ; and that if there were three children and no sister and one of the brothers died the children of the man who died would inherit ; that if a man died leaving x children of his own and a uterine brother the uterine brother would inherit and that on the death of such brother the property would go back to the children of the owner, i.e., the first brother who died. p. 43. l.7. p. 43. l.17. p. 43. l.27. p. 43. l.35.

In re-examination this witness said that if the uterine brother who succeeded the deceased's brother had children himself at the time of his death the land would be divided equally among the children. The Assessor stated that he did not agree with that answer and that the property would go back to the children of the owner. He also said that p. 45. l.30. p. 45. l.20. p. 45. l.34.

if there were three brothers and they left children under Ga custom the property belonged to all the children of the uterine brothers.

p. 46. l. 36. p. 46. l. 39. **12.** Tawiah Ankrah deposed that when the 1st Plaintiff was made Acting Head he took part. He had never been invited to any meeting at which the Defendant C. A. Ankrah was made Head.

p. 60. l. 21. p. 61. l. 2. **13.** Nii Akwaa Mensah the Second, a Nai priest, deposed that his predecessors were the founders of Accra. He knew the tradition of the founding of the Quarter known as Otublohum. His ancestors gave it to Otu Ahiakwa. In cross-examination he stated that Otublohum succeeded through the female line, but in his Quarter they succeeded through the male line.

p. 61. l. 27. p. 61. l. 30. p. 62. l. 15. **14.** Robert James Ankrah, one of the elders, deposed that if there was to be a meeting to appoint a head of the Manche Ankrah line only he as representative of his father should be invited to that meeting. He had not been invited to any meeting to make a head. He was one of those who appointed Plaintiff as caretaker.

p. 66. l. 16. **15.** Amponsah Ankrah a member of the family deposed that he took part in the appointment of the Plaintiff as Acting Head; neither he nor any of his father's children took part in the alleged election of C. A. Ankrah; and that the Awudome land belonged not to his line alone but to all three lines.

p. 72. l. 14. **16.** The Defendant C. A. Ankrah deposed that he was Head of Manche Ankrah Family. He had not been present at the meeting when he was elected. As a matter of etiquette the person to be elected did not attend. In reply to the Court he stated that he was among persons who appointed the Plaintiff as caretaker of the properties. He held the view that the descendants of Nii Ayi and Nii Okanta did not have a share in Awudome land because his branch of the family had no share in theirs.

p. 84. l. 5. p. 88. l. 1. **17.** The Defendant J. K. Q. Aryeh deposed that he knew the history of Awudome land and that this had been given to Manche Ankrah as a personal gift. He had been present at the meeting which elected C. A. Ankrah. Attendance was not confined to direct descendants of Manche Ankrah. Some came from Okanta and Ayi's line.

The cross-examination of this witness included the following questions and answers :—

"*Q.* In the last case you spoke for all your colleagues ?—*A.* Yes.

Q. When you spoke were you not then representative and leader ?—*A.* It does not mean I am the leader.

Q. Do you say that your case in 1943 was in any way different to your case to-day ?—*A.* It is the same. But there were some plans in the first case. It was non-suited. I do not agree with the judgment.

Q. You filed motion for leave to go to Privy Council and then abandoned it ?—*A.* Yes—there were reasons."

18. Nii Amu Nakwa who deposed that he was related to all the parties except Captan said that he had never had any doubts that the land was given to Manche Ankrah personally. He further deposed that C. A. Ankrah was elected Head of Nii Ankrah's Family and that that meant that he was made Head for Okanta line too. He was never head of Ayi line as well. p. 95. l.10. p. 95. l.36.

19. Nii Ayikai the Second was called by the Court as to custom. He deposed that if he had land and died his brothers would inherit it. If he had three brothers of the same mother the elder would get a larger share. This witness further gave evidence as to the law of inheritance in Accra. p. 106. l.10.

20. T. B. F. F. Ribeiro called by the Court produced the original proceedings in Suit No. 68/41 *J. K. Q. Aryeh and Ors.* v. *Mallam Sawuda and M. D. A. Ankrah.* p. 112. l.21.

21. In his judgment dated the 15th October, 1948, the learned trial judge, after summarizing the pleadings, dealt first with the issue of estoppel based on the judgments in *J. K. Q. Aryeh and Ors.* v. *Mallam Sawuda and M. D. A. Ankrah.* He referred to the passage in the judgment of the West African Court of Appeal in that Suit in which the Court said :— pp. 122-139. p. 128. l.29.

> " The main claim is that the direct descendants of Manche Ankrah are entitled to exclusive ownership of the land in question, the descendants of Manche Ankrah's uterine brothers having no rights in the land."

And said that that was clearly the main issue before him in the present cases. He pointed out, however, that in the former case the trial judge had narrowed the issues in the following terms :—

> " The parties agreed that the issues to be tried by the Court were whether or not the Defendant, Ankrah, is a member of the Ankrah family and whether or not he has any right to represent the Ankrah family in this action." p. 125. l.40.

After referring to further passages in the judgments of the trial judge and of the West African Court of Appeal the learned judge said :—

p. 126. l.26. " Now when the Court of Appeal held that the ordinary rule of native customary law as to descent of property through the female line applied, I understand that to mean that the ordinary Akan law subject to its modification as regards the interests of children in land being recognised by the Ga customary law, as opposed to the law of devolution of property advanced by the Defendants, and that this issue of law was a necessary and material finding of fact before the learned trial Judge could find affirmatively on the other facts as he did.

" If I am right in this assumption, then the effect of a non-suit is of as great force in this Colony as is a decision on the merits (Order 39, Rule 3) and the plea of estoppel raised by the Plaintiffs in paragraphs 7 and 8 of their Statement of Claim operates to stop the Defendants from litigating again that issue of customary law.

" But in view of the somewhat uncertain issues that were decided by the learned trial Judge in that former action, learned Counsel for the Plaintiffs, Mr. Bossman, felt it safer to lead evidence, and for my own part I felt it safer that it should be heard, and that it was safer to view the statement as to customary law made by the West African Court of Appeal as *obiter dicta*."

p. 127. l.17. **22.** The learned judge next considered what, according to Ga customary law, were the rights to inheritance to the land called Awudome. After reviewing the evidence and referring to the chapter on succession in Sarbah's " Fanti Customary Laws," 2nd Edition, the learned judge p. 136. l.20. arrived at the conclusion that by native customary law the persons who were entitled to make a valid grant of Ankrah family land to a member of that family was the Head of the Family and the principal Elders of each of the three sections of that family and that the same rule applied p. 136. l.26. as to its alienation to strangers. In the absence of a Head of Family he found that his duties devolved by custom upon the person appointed to be the Caretaker and Acting Head and that such an appointment could only be made by the principal Elders of each of the three sections p. 136. l.42. of the family. The decision in the earlier case established that the land known as Awudome was part of the Stool lands of the family and that M. D. A. Ankrah was the accredited caretaker for the family of these p. 136. l.45. lands. Those facts the Defendants were estopped from denying. The sole issue, therefore, which he had to decide was whether " the family " meant the three branches known as Manche Ankrah, Ayi and Okanta, or whether it meant the Manche Ankrah line alone.

The learned judge further held that upon the Defendants' own pleadings the family consisted not only of Mantse Ankrah Family but also of persons other than the direct descendants of Mantse Ankrah. He was satisfied that M. D. A. Ankrah was appointed to the position of Caretaker by members of all three branches of the family and that by customary law the person so appointed could only be removed from that office by those persons who appointed him and in this respect he accepted the evidence given by the witness called by the Court, namely, Nii Ayikai II. p. 137. l.10. p. 137. l.16.

As regards the meeting called to elect C. A. Ankrah the learned judge said :—

> " I am satisfied upon the evidence that the object of that meeting was to elect a Head from the direct descendants of Manche Ankrah alone. Whether that meeting was held in accordance with customary law I cannot say, but it is quite clear upon the evidence that for the purpose of electing a Head for the whole family it did not accord with customary law since many elders of the Ayi-Okanta branches who were entitled to attend the meeting neither attended nor were given the opportunity to attend. I would say that in the peculiar circumstances attending the fact of this personal hostility evidenced as existing between the Manche of the Otublohum Quarter and M. D. A. Ankrah, a meeting presided over by this Manche to decide the status of Ankrah, by itself, would fly in the face both of public opinion and of custom. p. 138. l.18.
>
> " I am not satisfied that M. D. A. Ankrah has been removed from his position as Caretaker and Acting Head of the Manche Ankrah Family by the persons who so appointed him and I find that at the date of the issue of the writs in the two actions he was the person entitled to deal with Awudome land subject to the restrictions imposed upon him by customary law as to its alienation, namely, that before doing so he must first obtain the consent of the principal members of the three branches of the family or a majority of such members."

The learned judge dismissed the claim in respect of trespass. He granted the declaration, an injunction as prayed against both Defendants and assessed the general damages against the Defendant C. A. Ankrah at £50. p. 139. l.3.

23. Both Defendants appealed to the West African Court of Appeal which by a majority (Korsah J. dissentient) affirmed the judgment of the learned trial judge. Coussey J. was of the opinion that the judgment in the earlier proceedings established that Awudome land was part of pp. 142-144. p. 157. l.1.

the stool land of the Mantse Ankrah family, that it had been so declared in earlier proceedings in 1931 and that M. D. A. Ankrah had been appointed to represent the stool family in all matters connected with
p. 157. l.6. the stool and the stool lands. In the present action the Defendants-Appellants had rightly been held to be estopped from re-opening those issues and the only issue remaining for determination was whether the three branches of the family had interests in the land or only the Mantse Ankrah branch, i.e., the direct descendants of Mantse Ankrah. The learned President continued as follows :—

p. 157. l.11 " That was a question involving issues of fact and Ga native customary law. It is not necessary nor possible within the compass of this judgment to state the evidence in detail. I will merely observe that upon a closely reasoned review of all the evidence and the decisions relevant to the issue the learned judge arrived at the following conclusion in these words :—

> " ' The preponderance of evidence before me given by witnesses who could properly be described as expert in native customary law was that not only would the consent of all three lines of the family be necessary before a valid grant or sale of the land could take effect, but that every member of the three lines had an interest in the land to the extent that if they wished to farm upon it they could do so or give up all tribute upon seeking and obtaining the consent of the caretaker of the land.' "

p. 158. l.5. The learned President also dealt with the contention that as the land was the self-acquired property of Mantse Ankrah who died leaving two brothers but no sister or other maternal relative, on the death of the last brother, who had admittedly succeeded to the property, according to Ga customary law the land reverted to the children of Mantse Ankrah and was inherited by their descendants to the exclusion of the descendants of Ayi and Okantah. The learned judge then continued as follows :—

p. 158. l.10. " I have given very careful consideration to these authorities but I am unable to hold that they go so far as to establish such a rule or that they are strictly applicable to the facts of this case. The argument involves the proposition that land of a family stool, undivided at the death of Okantah the brother and successor of Mantse Ankrah, could then revert to the direct descendants of the grantee as their heritage thereby losing its character of stool family property. I am unable to agree with that. All the cases upon which the Appellants rely in the argument before this Court were considered and dealt with fully by the trial judge and upon an examination of them I

am unable to find in any of them clearly and affirmatively the doctrine contended for with reference to property after it has once been regarded as stool family property. In cases of this kind each must depend upon its own particular circumstances and in this case, having regard to my view of the authorities and the strong evidence for the Respondents at the trial I concur with the decision of the Court below and I think it right to dismiss the appeal."

Lewey, J.A. agreed with the judgment of Coussey J. Korsah J. p. 158. l.27.
10 delivered a dissenting judgment. p. 159. l.23.

24. This Respondent humbly submits that the judgment of the West African Court of Appeal is correct and should be affirmed and that this Appeal should be dismissed with costs throughout for the following amongst other

REASONS

(A) Because the Appellants are estopped *per rem judicatam* from denying the authority of the plaintiff M. D. A. Ankrah to dispose of the lands of the Manche Ankrah family with the concurrence of the principal elders
20 of the family.

(B) Because the Appellants are estopped *per rem judicatam* from alleging that the Awudome land belongs exclusively to the direct descendants of Mantse Ankrah.

(C) Because there are concurrent findings of the trial judge and the West African Court of Appeal as regards the customary law applicable to the present case.

(D) Because there was abundant evidence to support the findings on customary law of both the Courts below.

(E) Because the findings of both the Courts below as to the
30 relevant customary law should be supported unless they can be shown to be perverse or wholly unsupported by authority or evidence and because this cannot be shown in the circumstances of the present case.

(F) Because the judgment of the trial judge and the majority judgments of the West African Court of Appeal were right and should be upheld.

DINGLE FOOT.

L. G. SCARMAN.

In the Privy Council.

On Appeal from
The West African Court of Appeal
(GOLD COAST SESSION)

Consolidated Suits and Appeals

1. Transferred Suit No. 32/1947.

BETWEEN :

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2. Suit 112/1947.

BETWEEN :

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AND

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Case for the Respondent

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