26,1957

IN THE PRIVY COUNCIL No. 4 of 1954

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL

(GOLD COAST SESSION)

B E T W E E N :

TWIMAHENE ADJEIBI KOJO II, substituted for Chief Kwame Antwi Adjei, Twimahene (Plaintiff) Appellant

- and -

1. Opanin Kwadjo Bonsie
2. Odikro Kwaku Manu, both of Nerebehi (Defendants) Respondents

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CASE FOR THE APPELLANT

1. This is an appeal from a Judgment of the West African
p.110 Court of Appeal dated the 9th January, 1953 dismissing with costs an appeal by the Appellant from a Judgment of
p.101 the Supreme Court of the Gold Coast, Ashanti, dated the 15th November, 1951 allowing with costs an appeal by the
p. 80 Respondents from a Majority Judgment of the Asantehene's "A" Court dated the 9th December, 1950 allowing with costs an appeal by the Appellant from a Judgment of the
p. 55 Asantehene's "B" Court dated the 4th August, 1950 dismissing with costs the claim of the Appellant which was for a declaration of title to and subsidiary relief in respect of certain Stool land.

2. The principal questions to be determined on this Appeal are -

(a) whether the inferences drawn from the evidence and the reasons given for their decision by the Majority

there were conflicting decisions of two Native Courts the Supreme Court and the West African Court of Appeal were right in applying the rule that the judgment of the Court of first instance should be accepted.

3. THE PRESENT SUIT

p.1 p.3 was instituted by a Civil Summons dated the 21st October, 1948 claiming a declaration of title to all that piece or parcel of land situate at Bonkwaso in the Kumasi District of Ashanti, and bounded on one side by Hiahene's land, on one side by Bisiesihene's land, on one side by Abongpehene's land and on the other side by Kwabena Annani's land, and for an injunction and further relief.

4. The Summons joined the First Respondent as sole Defendant and on the 7th December, 1948 the Second p.2 Respondent applied, on the ground that the land in dispute belonged to his Stool and that the First Respondent was only his caretaker, to be joined as Co- p.3 Defendant, and he was so joined. On the 4th February, 1950 the name of the Appellant was substituted for the p.5. original Plaintiff, who had died and been succeeded by the Appellant.

5. The trial of the suit in the Asantehene's Native Judgments of the Asantehene's "A" Court were right and should be preferred to those of the Asantehene's "B" Court.

(b) whether in the circumstances of this case where

Court "B" took place during nine days between February and July 1950, judgment being delivered on the 4th April, 1950.

pp.6-11 6. The Appellant's case was that his predecessor had pledged the disputed land to the First Respondent's predecessor some 80 years earlier and that when shortly before this suit was instituted he had offered to redeem the pledge the First Respondent had (as was not disputed) refused to accept the money. As to title the Appellant claimed that the disputed land had been given by the Asantehene to an earlier predecessor as a reward for capturing it in the Abrimoro War. He said that his predecessor had been deputed with other chiefs to pursue Abrimoro after his raid on Kumasi and that after the defeat of Abrimoro each of these chiefs was granted the land which he had occupied in his advance.

7. The evidence of the Appellant was corroborated by

pp.11, 17,20. that of his neighbouring chiefs, the Hiahene, the Akwaboahene and the Besiasihene. The Hiahene also

p.13,l.13 corroborated that his land had boundaries with the Appellant's land and the Besiasihene testified that his

p.20,l.32 land had had boundaries with the Appellant's land before the latter came into the possession of the Respondents.

pp.24, 30 Kwabena Akyeampong, the Safohene to the Hiahene, and Kwabena Anane, whose ancestors had been allowed to settle on part of the land granted to the Appellant's predecessor after the Abrimoro War, also supported the Appellant's

p.27 case. Kojo Aboagye, a very old witness, described by the Court as "very shaky in his body and statement", deposed that he had been sent by the Appellant's predecessor to pledge the disputed land to Kwabèna Tenteng.

p.34 8. The Respondents' case was conducted by the Second Respondent. His case was that his predecessor had been sent to assist the other chiefs who were engaged in the Abrimoro War and that the disputed land had been given to him for his services. He said that he had been in undisputed enjoyment of it for many years. (This was not contradicted by the Appellant who under the pledge agreement had transferred both the possession and the profits). He said that he owned the land but served the Bantamahene with it. He denied that the Appellant had been deputed to take part in the Abrimoro War. The First Respondent was a grand nephew of Kwabena Tenteng and was the Second Respondent's caretaker. The evidence of the Second Respondent was supported by that of the Bantamahene, and also by the Akwamuhene and the Akroponghene, who had not taken part in the war but obtained grants of land after it. The only other witness for the Respondents was the First Respondent who denied all knowledge of the pledge and stated that his ancestors had served the Second Respondent since the time of Kwabena Tenteng's uncle.

pp.41, 46, 49

p.52

9. The Judgment of the trial Court gave four reasons for finding for the Respondents. These reasons are summarised as follows:-

pp.56-7

(1) The Appellant alleged that his predecessor had been appointed by the predecessor of the Bantamahene to take part in the Abrimoro War, but the Bantamahene gave evidence that his predecessor had not appointed the Appellant.

(2) The Appellant admitted that on the death of Kwabena Tenteng and his successors his predecess-

ors had not reported to each such successor the existence of the debt and pledge, which by native custom they ought to have done.

(3) The Appellant represented a prosperous Stool and it was surprising that he could have pledged so valuable a piece of land for over 80 years for a meagre sum of £6.

(4) The record of a case in the Chief Commissioner's Court (Exhibit "C") between the Second Respondent and a third party shewed that a previous Hiahene gave evidence of his boundary with the Second Respondent, which shewed that the disputed land belonged to the Second Respondent. It was also evident that part of the disputed land had been leased or given away by the Second Respondent to the knowledge of the Appellant.

10. This Judgment was reversed by the Asantahene's

p.80 "A" Court by a majority decision of two to one. The

p.81 leading opinion was delivered by the Akyempimhene, who based his views on the fact that both parties claimed to have acquired title to the disputed land as a reward for their exploits in the Abrimoro War and that accordingly a finding upon the part actually played in the War by the parties was fundamental to the issue. The following passage is quoted from this opinion:-

p.82, l.5 "History is clear on the facts that the Abirimoro war was fought during the reign of Asantehene Nana Poku Ware (Katakyie) of blessed memory and that the land in dispute formed part of the enemy's lands which were over-run and occupied by the army of Ashanti.

History is also clear on the fact that after the Abirimoro Campaign the extent of territory covered by each warrior-chief was given to him for occupation by the Asantehene in trust for the Golden Stool. And the contention of both parties is based on these historical facts.

Now in my opinion the major issues of this case evidently are (A) Whether or not the ancestors of Appellant and 2nd Respondent took part in the Abirimoro Campaign and (B) Whether the ancestors of Appellant covered the land in dispute in the war or

the ancestors of 2nd Respondent did so.

As regards the first point there is overwhelming evidence on record by the first four independent witnesses for Appellant (i.e. Hiahene and Akwaboahene, and Besiasehene and Kunsu Dikro) who are the present occupants of the Stools of the important Chiefs who took part in the Abirimoro Campaign. These witnesses deposed that the ancestor of Appellant took part in the war and that on fighting up to the land in dispute his forces were attacked by an epidemic of small-pox but the disease being highly contagious orders were issued by the Commander of the Army (Hiahene) to halt there. On the other hand 2nd Respondent and his witnesses clearly deposed that 2nd Respondent's ancestor did not take part in the actual campaign but that when the forces had stayed long in the campaign the Asantehene detailed the Krontihene (Bantamahene) to follow up and look out for what had happened to them. That while the Krontihene (Bantamahene) tarried in Kumasi mustering his forces he detailed 2nd Respondent's ancestor who was sub-chief in the Gyase group of the Krontihene to go ahead, and on doing about four days journey 2nd Respondent's ancestor met the forces of the Ashanti Army on the river Supon returning home after having conquered Abrimoro's Army.

Now it has been admitted by 2nd Respondent in cross-examination that his principal witness Krontihene (Bantamahene) did not actually leave Kumasi to follow up the campaigners as alleged to have been ordered by the Asantehene and this witness also confirmed the fact in his evidence that he tarried in Kumasi after the alleged orders to follow up by the Asantehene until after about a week 2nd Respondent's ancestor returned to inform him (Bantamahene) that the forward body of the campaigners had been met returning home. But all Chiefs in Ashanti have taken the Oath of Allegiance to the Asantehene that whenever they are ordered to go to war they should proceed at once. If therefore it was a fact that the ancestor of the Krontihene (Bantamahene) was ordered to follow up the chasers of Abirimoro as maintained by him in his evidence and in his capacity as a Head Clan Chief he did tarry in Kumasi for about a week after receiving the orders of the Asantehene to move it was conclusive that the ancestor of the Krontihene should have committed a breach of his Oath of Allegiance by his action which should have landed him in impeachment as custom demanded. The absence therefore of any punitive action against the ancestor of the Krontihene (Bantamahene) for this serious breach of customary obligation is a sure indication of that never at any time did it happen that the Asantehene

ordered ancestor of the Krontihene (Bantamahene) to follow up the pursuers of Abirimoro as alleged by 2nd Respondent and his witnesses much more as to give occasion to the ancestor of the Krontihene (Bantamahene) in turn giving charge to his Gyase group (Respondent's ancestors) to go ahead. From the Admission of facts by both Respondent and his witnesses I am fully satisfied that Respondent's ancestors did not take part in the Abirimoro Campaign and with the historical facts already set out it is preposterous to think how the Court below arrived at the decision that 2nd Respondent's ancestors could have benefited from the sharing of the booty of a campaign in which they did not take part.

But it is incredible to note that the Court below in summing up its decision attached importance to the evidence of the Krontihene (Bantmahene) who although admitted his ancestor did not take part in the Abirimoro Campaign his mere deposition that Appellant's ancestor was not detailed to take part in the campaign gravely misguided the Court to arrive at an erroneous decision. Apart from the fact that the preponderance of evidence supported the case for Appellant the Court below should have clearly discovered that the evidence of the Krontihene (Bantamahene) was that of an interested party. That this witness is an interested party is clearly indicated by his admission in answer to cross-examination by Appellant that 2nd Respondent served him (witness) with the land in dispute and that all valuable derived from it were sent to him (witness) and this is supported by witness' conduct in signing Exhibit "A" as a grantor in a Deed of Concession in which the land in dispute is included.

Furthermore not only did the 2nd and 3rd witnesses for Respondents make a candid confession that their ancestors did not take part in the Abrimoro Campaign but it will also be noted that 2nd witness for Respondents has been presented with a portion of the land in dispute and his evidence therefore amounts to that of an interested party."

The Akyempimhene made the following observations on the second, third and fourth reasons given by the trial Court and summarised above:-

p.84, l.15 "But that the land in dispute was pledged by Appellant's ancestor to 1st Respondent's ancestor for a loan of £6 ("Asuasa") as maintained by Appellant has been supported by the evidence of accredited witnesses and I am consequently satisfied that being a native pledge where the property pledged has been in the continuous possession of the pledgee for the enjoyment of the usufruct thereof the pledger has the customary right to claim recovery of the

pledged-property on repayment of the pledge-money and that the long continued possession of the land in dispute by 1st Respondent and the lapse of time cannot be accepted to constitute a barrier to redemption of the pledged property by Appellant.

I should also refer to the second point stressed in the decision of the Court in which the exposition of the theory of native customary procedure in the case of the death of a pledgee or creditor to be followed by a pledgor or debtor is rather the converse.

The accepted customary procedure is that on the death of a pledgor or debtor the pledgee or creditor discloses the transaction between him and the deceased and when proved to be genuine the deceased's relatives accept it as family liability. This point therefore has no effect whatsoever on the issues of the case. The third point in the summing up of the Court below I opine is mere expression of sentiment and therefore holds no legal weight.

It is also very important that I should touch on the fourth point raised by the Court below in its judgment. Although Exhibit "C" clearly indicates that the predecessor of 2nd Respondent entered into litigation over a trespass committed by the Odikro of Domiabra on 2nd Respondent's Stool land it is also quite clear that neither was Appellant nor 1st Respondent and/or any of their predecessors connected with the claim as Co-Defendants. Furthermore in nowhere in Exhibit "C" is any reference made to the land in dispute (i.e. "Bonkwaso" Land) as the subject matter of the claim for damages.

In view of the fact that 2nd Respondent has his own land I entertain no doubt that his predecessor made the claim in Exhibit "C" in respect of his Stool lands and not in respect of the land in dispute which had been pledged to 1st Respondent's predecessor but not 2nd Respondent's predecessor. I am therefore satisfied that the contents of Exhibit "C" cannot be construed to be binding on Appellant and to constitute an estoppel to Appellant's claim."

11. The gist of the minority opinion of the Nkwantahene is contained in the following passage:-

p.85,l.16 "I need not over emphasize the fact that the members of the Court of first instance had the opportunity of hearing the evidence of the witnesses for both parties and watching their demeanour and they (Court members) were in a better position to believe or disbelieve the respective evidences. Being satisfied with the truth in the statements of Defendants - Respondents and their witnesses (they) did arrive at a conclusion on finding of facts by disallowing the claim of Plaintiff-Appellant. Judgment therefore having been given

on points of facts by the Court below I am of the opinion that this Appellate Court should not interfere with it".

12. This passage from the minority opinion delivered in the Asantehene's "A" Court was reproduced in the Judgments both of the Supreme Court and of the West African Court of Appeal. It appears that both these Courts based their decisions on the principle thus set out.

p.101, l.24
p.110, l.35

13. It is submitted that in the circumstances of this case this principle provides no conclusive criterion. The decision at first instance turned upon the accuracy of the traditional history put forward in evidence by the parties and the trial Court did not purport to reach their decision upon the demeanour or personal credibility of the witnesses but upon the reasons given in their Judgment. It is submitted that these reasons cannot be said to outweigh the effect of the Appellant's evidence which was described in the Judgment of the Supreme Court as "very cogent". As to these reasons, it is submitted that (1) affords no ground for accepting the evidence of the Bantamahene and rejecting that of the Hiahene, Akwaboahene and Besiasihene, particularly as -

p.103, l.27

(a) the point was not apparently put to the Appellant;

p.43, l.26.

(b) the Bantamahene himself said that he would believe the Akwaboahene's report of the war;

p.44, l.37.

(c) the Bantamahene was an interested party in that he admittedly received tribute from the Second Respondent for the disputed land.

As to reason (2) it is submitted that there was no sufficient evidence of the alleged custom, which was the opposite of the custom alleged by the Appellant and was not accepted by the Akyempimhene. Further, even if

p. 9, l.26.
p.84, l.30.

the custom existed, the fact that the Appellant, who was unaware of its existence, did not observe it was not any reliable evidence that he did not grant the pledge, still less that he was not the original owner of the land. As to reason (3) it is submitted that this is no more than the expression of an opinion that the Appellant had improvidently neglected to take advantage of his opportunities.

As to reason (4) it is submitted that the record of evidence in a case between different parties, even if admissible and clear in its effect, went only to the credit of the Hiahene and should not have been used as direct evidence upon which to found the decision in this case. The remaining matters relied upon were amply explained by the Appellant who stated that under the terms of the pledge the First Respondent enjoyed the full possession and fruits of the land and that he (the Appellant) had not gone on to it.

p.6, l.30

p.9, l.36

14. It is submitted that the Majority Judgment of the Asantahene's "A" Court was correct and founded upon the considerations which should have guided the trial Court. Since both parties claimed title from an award based upon their active participation in the Abrimoro War, the trial Court should have treated this issue as fundamental to its decision. There was abundant evidence of the part played in the War by the Appellant, but the trial Court contented itself with

p.81

accepting the evidence of the Bantamahene that his predecessor had not appointed the Appellant's predecessor. If (as is submitted) the Appellant's evidence established his original title to the disputed land, it is further submitted that none of the subsequent happenings could have deprived him of that title.

15. The Appellant respectfully submits that this Appeal should be allowed and that the Judgments of the West African Court of Appeal and the Supreme Court of the Gold Coast, Ashanti, should be set aside and that the Judgment of the Asantehene's "A" Court should be restored and that the Appellant should be granted the costs of these proceedings throughout, for the following, amongst other

pp.110, 101

p.80

REASONS

1. Because the decision of the Asantehene's "B" Court was based upon reasons which do not support the decision and was contrary to the weight of the evidence.

2. Because the decision of the Asantehene's "A" Court was right and ought to be restored.

3. Because the Supreme Court of the Gold Coast and the West African Court of Appeal were wrong in applying the principle that as between the decisions of the two native Courts in this case the decision of the Court of first instance should be preferred.

JOSEPH DEAN

No. 4 of 1954

IN THE PRIVY COUNCIL

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL

(GOLD COAST SESSION)

B E T W E E N :

TWIMAHENE ADJEIBI KOJO II, substituted for Chief Kwame Antwi Adjei, Twimahene (Plaintiff) Appellant

-and-

1. OPANIN KWADJO BONSIE
2. ODIKRO KWAKU MANU both of Nerebehi (Defendants) Respondents

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CASE FOR THE APPELLANT

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