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IN THE PRIVY COUNCIL

No. 15 of 1957

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

B E T W E E N:

NANA YAO NKANSAH II, Gyasehene and acting
Ohene of Bukuruwa (substituted for Nana
Osei Twum II, Ohene of Bukuruwa)
Plaintiff-Appellant

- and -

NANA ASANTE YIADOM II, Ohene of Nkwatia
Defendant-Respondent

CASE FOR RESPONDENT

UNIVERSITY OF LONDON
W.C.1.
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INSTITUTE OF ADVANCED
LEGAL STUDIES

50869

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Respondent's Solicitors
and Agents.

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(GOLD COAST SESSION)

BETWEEN:- NANA YAO NKANSAH II, Gyasehene and
 acting Ohene of Bukuruwa (substitued
 for Nana Osei Twum II, Ohene of
 Bukuruwa) Plaintiff-Appellant

- and -

10 NANA ASANTE YIADOM II, Ohene of Nkwatia
Defendant-Respondent

CASE FOR RESPONDENT

Record

1. This is an appeal by leave of that Court from a Judgment of the West African Court of Appeal delivered on the 4th March, 1955, allowing an appeal from a judgment of the Supreme Court of the Gold Coast (Land Court) delivered on the 8th August, 1952. The Land Court had granted to the Plaintiff-Appellant, as representing the Stool of Bukuruwa, a declaration of title to a certain parcel of land delineated by a red line upon the plan forming Exhibit "1" in the said proceedings, and had dismissed a counterclaim on behalf of the Defendant-Respondent, as representing the Stool of Nkwatia, for a declaration of title to a certain parcel of land comprised within the former delineated by a line hatched pink upon the plan forming Exhibit "2" therein. The Court of Appeal set aside the judgment of the Land Court and gave judgment for the Stool of Nkwatia upon the said counterclaim in respect of the major portion of the land claimed on its behalf.
2. The estimated area of the land so claimed by the Stool of Bukuruwa is of an area of about 1100 square miles and that so claimed by the Stool of Nkwatia is of an area of not less than 250 square miles.
- The Land Court found that the Stool of Nkwatia had established title to the greater part of the
- pp.225-6
pp.220-5
pp.182-205
p.205, Ll.3-6
p.204, Ll.30-35
p.182, l.35
p.200, Ll.30-42
p.204, Ll.37-47
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Record

area claimed on its behalf and to a small adjoining area. The part to which the Land Court found that the Stool of Nkwatia had established title was delineated by the Court upon the said Exhibit "2" by a green line and the letters A, B, C, D, E, F, G, H, K and L. The relevant markings from the said Exhibits "1" and "2" have been transferred to an Extract from the Southern Sheet of the Road Map of the Gold Coast which is annexed to this case. For convenience the area claimed by the Appellant is hereinafter called "the red land", that claimed by the Respondents "the pink land", and that awarded to the Respondents "the green land".

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The titles of both the Stool of Nkwatia and the Stool of Bukuruwa are admittedly subject to the rights of the Paramount Stool of Kwahu as the Paramount Stool of both and these paramount rights are not in question in the present suit.

p.204, Ll.29-35

3. Notwithstanding this finding of fact in favour of the Stool of Nkwatia, the Land Court held that the Stool of Nkwatia was estopped by the judgment in a previous action (hereinafter called "the 1940 Action") commenced by Bukuruwa Stool on the 13th March, 1940 against third parties wherein the Bukuruwa Stool and the Paramount Stool of Kwahu had obtained a declaration of title to the land delineated by the red line against third parties, in which action the Stool of Nkwatia had intervened in manner hereinafter stated. The only question in the present appeal is whether the alleged estoppel exists. The Court of Appeal found that it did not and accordingly directed that judgment should be entered for the Stool of Nkwatia upon the counterclaim to the extent already noted, namely in respect of the green land.

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p.225, Ll.4-8

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4. Nkwatia and Bukuruwa are part of the Oman (State) of Kwahu and their respective Chiefs are immediately subordinate to the Paramount Chief of Kwahu. This State and its constituent parts have a known history extending back to about the year 1700, or earlier, when their predecessors first established themselves in a cluster of villages, on their man territory, which lies west of the green land, the villages of Nkwatia and Bukuruwa being distant therefrom 35 miles. The Kwahus are of the Akan race.

p.186, Ll.4-9

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5. The red land is bounded on the east by part

of the River Volta, the largest river in the Gold Coast. The land contains forest, in which until recently elephants were hunted, farm land, rivers and a number of small villages, mainly on the bank of the Volta, but a few sparsely scattered more inland. It contained no roads whatever, being sparsely traversed by paths and hunters' trails only. The far side of the Volta is here inhabited by Ewe people, who are divided into various Native States with their respective subdivisions. The adjoining Ewe States on the east of the Volta are the Akpini State and the Peki State and the subdivisions of these States bounding the Volta and going from north to south, are Aveme, Wusuta, Botoku (all parts of the Akpini State) and Tonkaw (part of Peki State). The Ewe race is distinct from the Akan race, speaking a different language and having materially different customs.

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6. The Kwahus arrived in these parts after the Ewes, but for some considerable time before the 1940 action, the red land, or the greater part of it, was claimed both by the Ewes and the Kwahus.

p.310, Ll.1-2

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7. Inspection of Exhibit "1" shows that the only part of the land which was at all closely inhabited at the time when that Exhibit was made in or about the year 1943 was a comparatively small area of high ground covered (according to the Government map which is the basis of Exhibit "1" and Exhibit "2") with forest, lying south of the largish village of Atipradaa (on Exhibits "1" and "2" named Atikplale) and west of the very small village of Asabi, both villages being on the bank of the Volta. Atikplale was an Ewe village, the Chief of which was a subchief of the Chief of Wusuta, whose main territory was on the opposite side of the Volta. Asabi, however, was a Kwahu village, with close historical connection with Bukuruwa, the physical Stool of Bukuruwa having at some time been kept there, and its Chief was a subchief of the Chief of Bukuruwa.

p.189, l.28

The only place names in this highland area appearing in the Government map, the basis of Exhibits "1" and "2", are (1) the small twin village, south west of Asabi of Kwae Kese; (the words Kwae Kese are Akan words, Kwae meaning forest, Kese - big, tall, so indicating this was an Akan Settlement) and (2) the small village of Domiabra, on the edge of the high land south of the more inland Kwae Kese, Domiabra also being an Akan name.

Record

- p.185, 1.31 to
p.186, 1.3
- p.229, 1.20
p.3
- p.229, 1.22
p.230, 1.31
- pp.231-234
p.246, Ll.12-14
- p.237
- p.237, Ll.20-26
- p.321, Ll.25-34
cf. p.184, 1.11
8. There has also been a long standing dispute between the Nkwatia Stool and the Bukuruwa Stool as to the ownership of the land edged red; both claiming it by right of conquest dating from the year 1700 or thereabouts.
- But in more recent times Nkwatia Stool has been content to claim only the middle portion of this area, and when it was proposed in 1927 by the Paramount Chief and his Tribunal that there should be a division of this middle portion between the Bukuruwa Stool and the Nkwatia Stool, neither Stool would consent.
- A subsequent attempt in the year 1929 to settle the dispute between Bukuruwa and Nkwatia also proved abortive.
- THE 1940 ACTION.
9. In these circumstances the 1940 action was begun in the Tribunal of the Paramount Chief of Kwahu, between Bukuruwa Stool as Plaintiff and the Chief of Atipradaa (otherwise Atikplale) and one of his subjects as Defendants, by Summons issued on the 13th March, 1940 claiming "for a declaration of title to All that piece or parcel of land situate at Kwaekesiem in Kwahu and bounded on the north by the River Faa, on the South by the River Afram, on the East by the River Volta and on the West by the Plaintiff's Stool land" and ancillary relief.
10. The area intended to be so claimed is uncertain. Subsequently the Court of Appeal, in accordance with the evidence of the Surveyor who, under the Order of the Supreme Court, made the plan Exhibit "1", took it to be about 20 square miles in extent, having as its eastern boundary the River Volta. This description in conjunction with the name Kwaekesiem fits the area referred to in paragraph 7 of this Case and its immediate neighbourhood, the name "Kwaekesiem", meaning "Kwaekese area", "siem" being an Akan suffix indicating locality. The area bounded by the Rivers Faa, Afram and Volta is a very much larger area, whatever the undefined position on the west of "the Plaintiff's Stool land".

Having regard to the original Defendants to the 1940 action, it seems that the area intended

to be claimed was that which the Atipradaa Chief was also claiming, which does not appear to have extended northwards as far as the River Faa and certainly did not extend to the south beyond that part of the high Kwaa Kese area which Exhibit "1" shows was in Ewe occupation, i.e. to the Kwabena Stream.

- 10 11. (i) On the 21st March, 1942, on the application of the Bukuruwa Stool, the suit was transferred to the Supreme Court of the Gold Coast. p.239, Ll.10-17
- (ii) On the 8th July, 1942, on the application of the Bukuruwa Stool, the Chief of Wusuta was added as a Defendant on the ground that the original Defendants were his subjects and claimed that they occupied the land in dispute (not further defined) under his authority. p.243, l.29
p.242, Ll.29-34
- 20 12. In this same year (1942) the then Paramount Chief of Kwahu made a further attempt to settle the dispute between the Nkwatia Stool and Bukuruwa Stool by laying down a boundary so that each Stool's villages were to be within that Stool's own boundary. This attempt again proved abortive. pp.103,104
p.193, l.35 to
p.196, l.42
p.250
13. (i) On the 20th November, 1942, the Supreme Court ordered pleadings but deferred consideration of the making of a plan until the pleadings had been closed.
- (ii) The Statement of Claim dated 19th December, 1942, repeated verbatim the description of the area in the Summons and alleged that Bukuruwa Stool was the owner; that the original Defendants were the subjects of the Chief of Wusuta, that the predecessor of the 1st Defendant has been permitted by the Bukuruwa Stool to reside, hunt and make farms on payment of tolls but now the original Defendants refused to pay tribute and, together with the Chief of Wusuta, claimed the land as part of the Stool property of the Wusuta Stool. The claims for relief in the Summons were repeated verbatim. p.251-2
- 30 (iii) By their Defence dated 5th February, 1943, Akuamo, the 2nd Defendant and the Chief of Wusuta (inter alia) denied the alleged ownership of the land by the Bukuruwa Stool and alleged that the major portion thereof belonged to the three Defendants for their subjects and people from time
- 40 pp.255-7

Record

immemorial and had from time immemorial been occupied by their subjects and people and the remainder belonged to other neighbouring chiefs (unnamed, but evidently referring to other Ewe Chiefs). The alleged permission to occupy and payment of tolls was denied.

pp.258-9

(iv) By his Defence dated 13th April, 1943, the Chief of Antipradaa set up, in somewhat different words, the same Defence as Akuamoaa and the Chief of Wusuta had done.

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p.294, Ll.10-15

(v) Though no Order of Survey appears in the Record of Proceedings, it is evident therefrom that at some time during the year 1943 such an order was made, presumably so as to define exactly the area in dispute in accordance with the usual practice of the Court in land cases, which is to direct the parties to point out their claims to the surveyor for insertion in the plan, the result of this procedure being that an overlap of the claims appears, which defines the disputed area.

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The Surveyor and the then parties inspected in May 1943 for the purposes of the plan.

p.308, Ll.14-16

(vi) The completed plan (which forms Exhibit "1" in the present suit) is dated by the Surveyor the 8th February 1944. It does not follow the usual pattern of such plans in that it does not in any way indicate the area claimed by the Defendants, either by the original and principal Defendant, the Chief of Atipradaa, or by the added Defendant, the Chief of Wusuta. The usual overlap does not appear and the precise area of conflict is not apparent, the position being left at least as indefinite as in the Summons and, indeed, being made more indefinite in that an entirely fresh Northern boundary (the River Obosum, instead of the River Faa) is shown thereon. The confusion was further increased in that the area was described in the Summons as being bounded on the west by Bukuruwa Stool lands, where admittedly no part of the western boundary of the red land was so bounded.

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p.297, Ll.20-23
p.236 Ll.1-7

It seems, therefore, that the reference in the Summons and Statement of Claim to the area claimed being bounded on the West by Bukuruwa Stool land must have been to some line to the east of the westernmost red line on Exhibit "1", towards Kwaekesiem, the position of which line was never defined.

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14. (i) On the 31st January, 1944, the Chief of Nkwatia intervened by making an application to be joined as Defendant, supported by an affidavit that the land claimed in the action was part of Nkwatia Stool lands and that he had become aware of the action in consequence of letters from the Chief of Wusuta and the Chief of Bukuruwa in October and November, 1943, informing him of it and requesting him to send elders to point out boundaries to the Surveyor surveying under an order of the Court and that, on doing so, it was discovered that practically the whole land in dispute was Nkwatia Stool land and had upon it about 27 Nkwatia villages. The land in dispute however had not been ascertained, nor was the location of any of the 27 "villages" stated.
- Record
p.260
pp.261-2
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- (ii) On the 11th February, 1944, this application, though opposed, was granted, the Chief of Nkwatia being directed to be served with prior proceedings, to deliver a Defence within 21 days, with provision for Reply, and to point out his land to the Surveyor in order that the same might be demarcated upon the plan which was being made. It was not shown or alleged by the present Appellant, either in the 1940 action or the present suit, that the Chief of Nkwatia was ever served with the prior proceedings, (which service it is submitted was a condition precedent to his delivery of a defence still less that he was served with the amended Summons and Statement of Claim hereinafter mentioned) nor was any defence on his behalf ever delivered, nor did he take any step whatever in the proceedings in the Supreme Court in the 1940 action nor is the intervention of the Stool of Nkwatia, or anything at all as to such Stool, mentioned in the judgment in that suit, alleged to constitute an estoppel, which treats the action purely as a contest between the Kwahus as a whole and the Ewes, particularly the Wusuta division of the Akpini State.
- p.267, L1.9-17
L1.20-22
- 20
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- p.184, L1.38-43
- pp.307-313
p.185, L1.7-10
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- (iii) On the 22nd November, 1944 an appeal against the order for joinder was dismissed by the Court of Appeal and the name of the Chief of Nkwatia thereafter appears in the title of the action as co-defendant in proceedings therein filed by other parties.
- p.269
15. (i) On the 25th August, 1945, upon the ex parte application by the Bukuruwa Stool (made by Mr. Sawyerr as Counsel for that Stool), the then
- pp.273-4

- Record
p.271, Ll.20-27. Paramount Chief of Kwahu was joined as co-plaintiff on the ground that he had interest in all Kwahu lands and that his subchiefs "look after their respective portions of the said lands on his behalf" and that the lands in dispute were a portion of the lands under him.
- pp.274-5 (ii) Thereafter, on the 7th September, 1945, Mr. Sawyerr, as Solicitor for the Bukuruwa Stool and the Paramount Chief, signed and filed a Statement of Claim on behalf of the Paramount Chief. 10
- p.185, 1.14 (iii) Thereafter the Stool of Nkwatia took no part whatsoever in the proceedings. It is their case that they "faded out" (in the words of the Trial judge in the present action) because the Paramount Chief told the Nkwatia Chief that, if he were a co-defendant, it would be taken that he was on the side of the defendant Ewes. This arrangement to withdraw as co-defendant was made with the Paramount Chief without the Bukuruwa Chief, before the Paramount Chief became a co-plaintiff, and, 20
- p.127, Ll.21-31
p.27, 1.35
p.127, 1.30
so stated
p.224, 1.26
p.289 (iv) Nearly a year later, on the 6th August, 1946, Mr. Sawyerr, on behalf of the Plaintiffs, applied to the Court for a hearing date (the Court notes recording that the Nkwatia Chief was absent) and stated that he understood that the Nkwatia Chief did not intend to defend. The hearing date was then fixed for the 12th September, 1946. 30
- p.291, 1.31 (v) Thereafter, in the same month, an application was made by Counsel that the Ewe Chief of Tongor (otherwise Tonkaw, mentioned in paragraph 5 of this Case) should be joined as co-defendant, on the ground, set out in an affidavit sworn 15th August, 1946, that, at the survey, the Plaintiffs had claimed and caused to be demarcated a substantial portion of his Stool land.
- pp.293-5 The then representative of the Bukuruwa Stool (being the same person as the present Appellant) swore an affidavit in opposition on the 11th September, 1946, which contained the following paragraphs 2 and 3 :- 40
- "2. The above suit is with reference to the
"ownership of a piece of land situate near

"the River Volta, and the dispute is as
 "between the Kwahus under the 2nd Plaintiff
 "Akwamoa Achiampong Omonhene of Kwahu on the
 "one side and the Owusutas under the Paramount
 "Chief of Akpini State in the British Mandated
 "Territory of Togoland on the other side.

Record

10 "3. The Applicant Asuo Kwasi IV Ohene of Tongor
 "is not connected in any way with either party
 "in the said case but is in the Peki State under
 "Kwadjo Dei Paramount Chief of the Peki State
 "in the Gold Coast."

(vi) It is submitted that these paragraphs are a clear recognition by the Bukuruwa Stool of the actual state of affairs, - namely that the lis was solely between the Kwahus as a whole to assert their rights against the defendant Wusutas and in no way concerned with the internal dispute between the Bukuruwa Stool and Nkwatia Stool.

20 (vii) This application for joinder was refused p.296
 on the 12th September, 1946, (the date previously fixed for the trial) having regard to the stage at which the action was, particularly because such joinder would delay the hearing. The hearing then begun before Mr. Justice McCarthy.

30 16. (i) The position still was that, by the Summons and Statement of Claim, the Kwahu Plaintiffs were claiming some undefined area on the west bank of the Volta lying somewhere between its tributaries, the Faa on the north and the Afram on the south, and extending from the Volta westwards to some undefined line, beyond which line were Bukuruwa Stool lands. The Wusutas were also claiming an area not delineated on the plan and not defined in the pleadings. The Surveyor stated p.309, Ll.27-29
 40 that the area in dispute (i.e. between the Kwahus and the Wusutas), was an area of about 20 square miles, and in the end the West African Court of Appeal, rightly or wrongly, took it that it was the title to an area of about 20 square miles which was p.321, Ll.28-29
 decided in that action between the Kwahus and the Wusuta Chief, though what the Court of Appeal thought that area to have been is not clear. They refer to the village of Fasu, which is north of p.325, l.19
 the mouth of the River Faa, as on the land in dispute.

(ii) By the 24th September, 1946, it became p.309, Ll.9-11

Record

p.309, Ll.11-14 evident that Aveme, Botoku and Tongor (Tonkaw) Stools, claimed to be interested in distinct parts of the land edged red, apart from such part as the Wusuta Stool claimed. On that date, therefore, it was ordered that these Stools should be joined as co-defendants, but when the Court next sat for the hearing on 24th February, 1947, this Order was rescinded.

17. The only references during the hearing of the 1940 action to the dispute between the Stools of Nkwatia and Bukuruwa were :- 10

(a) In the evidence of one Emmanuel Otukwa, a Bukuruwa man and a principal witness for the Plaintiffs, who deposed during cross-examination :-

p.300, Ll.20-23 "At one time Nkwatia claimed the middle part of the land from us. As the result of the intervention of the Omanhene the claim was settled".

On being re-examined, this witness deposed :- 20

p.300, Ll.25-27 "The Omanhene held an arbitration on the dispute and demarcated the boundary between Nkwatia and Bukuruwa. This is shown on the map (Exhibit "A"). We then brought this action. For some reason or other the Nkwatias got joined as co-defendants, but on the Omanhene becoming Co-plaintiff they withdrew."

Ex."1" in present appeal
p.201, Ll.43-45 This witness's statement that, as the result of the intervention of the Omanhene, the claim of Nkwatia was settled was set up in the present action and rejected by the Supreme Court. 30

p.305, Ll.26-27
p.306, Ll.5-6 (b) In the evidence of one Johnson, the State Secretary of Kwahu, who had been in the Omanhene's Office since 1920 (except for a period in 1926 and 1927, when he was attached to the Nkwatia Chief's Office). Giving evidence for the Plaintiffs, he deposed as follows :-

p.306, Ll.15-19 "The Nkwatia's claim that they own land between Asabi and Nkami lands. They do not claim any other parts of the land in dispute. However, this is an internal dispute between Nkwatia and Bukuruwa, which has nearly been settled by the Omanhene". 40

Johnson had been called by the Plaintiffs in order to rebut evidence given by the representative of the Chief of Fasu in support of the Ewe claim to land in that area. For this purpose he produced letters from the Chief of Fasu to the Chief of Nkwatia which were admissions of the title of the Nkwatia Chief and which were admitted in evidence as proof of the general Kwahu title, through the Nkwatia Stool.

Record
p.304, Ll.29-32
p.305, l.5

pp.314-320

cf. p.224;
Ll.34-39

10 18. Johnson, so called in rebuttal, was the last witness. Plaintiffs' Counsel then applied to amend the description of the land claimed in the Summons and leave was given to amend the Summons and Statement of Claim by substituting the description :-

p.306, Ll.35-42

20 "All that piece or parcel of land, situate in
"Kwahu, and bounded on the north by the River
"Obosom, on the South by the River Afram, on
"the east by the River Volta and on the West
"by Abetifi, Nkwatia, Pitiku and Kwahu Tafo
"Stool lands".

p.236, Ll.1-7

30 for the original description in the Summons and
Statement of Claim, which is set out in paragraph
9 of this Case. This new description is in fact
a description of the red land (that is to say, an
area of approximately 1,100 square miles) and is a
description of all the land claimed by all the
Kwahus against all the Ewes and not of the limited
area in dispute between the Kwahus on the one side
and Wusuta and Atipradaa on the other. No attempt
appears to have been made to serve the amended
Summons and Statement of Claim on the Stool of
Nkwatia.

p.237, Ll.20-26

40 19. (i) Mr. Justice M'Carthy delivered judgment
on the 2nd May, 1947, finding in favour of the
Plaintiffs and making the declaration claimed.
His judgment does not mention Nkwatia or any dis-
pute between Bukuruwa Stool and Nkwatia Stool nor
does the name of the Nkwatia Chief or Stool appear
in the title of the judgment.

pp.307-313

(ii) It is submitted that it is clear that
the learned Judge dealt with the suit solely as one
between the Kwahus as a whole and the Wusutas, for
he expressly says, referring to the last-minute
enlargement of the claim and to an objection that
the Plaintiffs could not obtain a declaration in
respect of all the land included in such enlarge-
ment, that such a judgment would only be binding

p.309, Ll.17-29

Record

on the Wusuta Stool and those claiming under it, remarking also that the land claimed by Wusuta was not delineated on the plan Exhibit "A" (i.e. Exhibit "1" in the present appeal).

(iii) No formal judgment or decree was drawn up consequent upon the judgment of the learned Judge, it being the usual practice under the Rules of Court then current not to draw up any formal judgment or decree.

pp.321-330

20. (i) The judgment of Mr. Justice M'Carthy was upheld by the West African Court of Appeal by a judgment of the 1st March 1948, being the judgment before referred to in paragraph 10 of this case.

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(ii) This judgment begins :-

"This is an appeal by the Defendants against a judgment of the Lands Division of the Supreme Court (M'Carthy, Acting C.J.) in a suit in which the Plaintiffs obtained a declaration of title to a large area of land, about 20 square miles in extent, having as its eastern boundary the River Volta, the principal river in the Gold Coast Colony ... "

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p.325, 1.24

(iii) This Court, it is submitted, clearly treats the dispute as one between Kwahu and Wusuta only. The judgment contains no reference to any dispute between Nkwatia Stool and Bukuruwa Stool, though it does refer to the use of the letters mentioned in paragraph 17(b) of this Case as containing admissions "as they were said to do of the co-plaintiff's title through his sub-chief of Nkwatia, who had withdrawn from the suit as a Co-Defendant". This is the only mention of Nkwatia therein nor does the name of the Nkwatia Chief or Stool appear in the title of this judgment, which repeats the names in the title of the judgment of the Land Court.

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p.321

THE PRESENT ACTION AND APPEAL.

p.1

21. (i) On the 14th June, 1950 the Bukuruwa Chief issued a Summons in the Grade A Native Court of Okwawu (i.e. Kwahu) against the Chief of Nkwatia. In this he alleged himself (scilicet, on behalf of Bukuruwa Stool) to be the owner of land situate in Kwahu State by the same description as the amended

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description in the 1940 Action, except that the land was now stated to be bounded on the west by Abetifi, Nkwatia, Pitiku and Begoro Stool lands instead of by Abctifi, Nkwatia, Pitiku and Kwahu Tafo Stool lands. But it later became evident that the same area of land was intended as that in respect of which the Plaintiff Bukuruwa Stool had obtained a declaration of title in the former suit, i.e. the red land. The Plaintiff also alleged that the Defendant's subjects, servants and labourers had by his authority wrongfully occupied portions of the land. He therefore claimed damages for trespass and recovery of possession.

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(ii) By his Counterclaim dated the 22nd June, 1950 the Nkwatia Chief, on behalf of his Stool, claimed against the Bukuruwa Chief, as representing his Stool, a declaration of title to the pink land. There were also counterclaimed, damages for trespass by the Bukuruwa Chief in sending his subjects and people to occupy portions of this land without permission of the Nkwatia Chief, recovery of possession of the portions so wrongly occupied and an injunction against further trespass.

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22. (i) On the 2nd December, 1950 the suit was transferred to the Land Division of the Supreme Court of the Gold Coast, which directed pleadings and delivery by Plaintiff to Defendant of a plan (which plan was Exhibit "1"). Upon this plan the Defendant indicated the portion counterclaimed, being the pink land.

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(ii) The Bukuruwa Chief accordingly delivered a Statement of Claim dated 21st February, 1951. This alleged that the red land was the property of the Bukuruwa Stool, having been acquired by conquest about 200 years before and thereafter possessed. It further alleged in paragraph 5 that Nkwatia Stool was estopped from claiming ownership to the pink land and from denying the title of Bukuruwa Stool :-

- 40 (a) by reason of having intervened in the 1940 Action and of the judgment therein p.11, Ll.18-42
- (b) by reason of a customary Arbitration in or about 1942, being the proceedings referred to in paragraph 12 of this Case. p.11; 1.43 to p.12, 1.5

And the Plaintiff claimed relief as in the Summons.

Record
pp.13-14

(iii) In his Defence dated 20th March, 1951, the Nkwatia Chief (inter alia) denied the alleged historical title of the Bukuruwa Stool to the pink land, and set up his own historical title thereto by conquest about 280 years before and subsequent possession, admitting the alleged occupation by his subjects and people of this area but as a right-ful occupation. He denied the alleged estoppel and he counterclaimed for a declaration of the title of Nkwatia Stool to the pink land.

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p.19; 1:44 to
p.20, 1.8

23. (i) On the 27th October, 1951 the Court decided as a matter of urgency to determine as a preliminary issue whether the Defendant was estopped from denying the Plaintiff's title.

pp.20-22

(ii) On the 12th November, 1951 the Court proceeded to determine that issue, Plaintiff's Counsel describing the issue to be decided as "res judicata" raised by way of estoppel in paragraph 5 of the Statement of Claim. He then put in the said Judgment of the Land Court of the 2nd May, 1947 as being a judgment, obtained against a number of Defendants, including a predecessor in title of the then Defendant, deciding that the ownership of the red land was in the Bukuruwa Stool, and put in plan Exhibit "1", to show its position and extent. He went on to narrate the proceedings in the former action as to the joinder of the Nkwatia Stool down to the Order for joinder referred to in paragraph 14 of this Case.

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p.21

p.22

At this point the Court enquired if the papers had been served as directed and referred to "Order 3, r.5", when Plaintiff's Counsel asked for an adjournment to ascertain this.

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p.22, Ll.22-29

(iii) On resuming he stated that he could find no record of any service of the papers and stated that he could not "press for this particular plea", whereupon Counsel for the Defendant requested a decision against such plea, and the Court ruled against it, the Judge stating that he would give on the 19th November, 1951 his reason why the plea on estoppel must fail.

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p.23

(iv) The record of proceedings on the 19th November, 1951 does not however record the giving of such reason, but shows that an interim injunction was granted to restrain both sides from making fresh farms on the disputed area and an order that

the surveyor should inspect and record the existing farms. The result of this inspection and record is Exhibit "2".

Record

The date for the trial was also fixed for the 11th February, 1952.

10 (v) The learned Judge did not state whether his reference to Order 3 rule 5 was to the Order and Rule 50 numbered in the Second Schedule of the Courts Ordinance (Laws of the Gold Coast, 1936
 20 Revision, Chapter 4) or to the Order and Rule 50 numbered in the Third Schedule to the Ordinance, both of which deal with service, but it is presumed that the reference intended was to the Third Schedule, where the rule provides for the joinder of persons "who may be entitled to, or who claim some share or interest in the subject matter of the suit, or who may be likely to be affected by the result", for their being made plaintiffs or defendants and for the service of a notice to them upon such persons joined. The rule proceeds:- "On
 30 proof of due service of such notice, the person so served, whether he shall have appeared or not, shall be bound by all proceedings in the cause".

Nothing further as to the notice or any service appears upon the Record.

24. (i) The trial was not commenced until the 3rd June, 1952. Evidence was heard on that and thirteen subsequent days up to the 21st June, 1952. p.25
 p.170

30 (ii) On the first day of the hearing, Exhibit No. "2" was filed and the boundary shown on it as the Nkwatia boundary was subsequently by amendment of the Defence substituted for that previously shown on Exhibit 1. The present Appellant gave evidence, first referring to the 1940 action, when the parts of the Record in that action which related to the joinder of the Chief of Nkwatia and the Paramount Chief were put in. When asked in chief whether the Nkwatia chief took any further part in the proceedings he alleged that he came to the Court at the beginning, but later stopped coming and did not give evidence. He also alleged erroneously that Nkwatia was represented by Counsel at the trial, the Counsel named being in fact Counsel for the Ewe Chiefs of Atipradaa and Wusuta. p.65, 1.22
 p.25, 1.38 to p.26, 1.37
 p.26, 1.26-28

But next day, still in chief, he stated truly p.31, 1.28

Record

that the Chief of Nkwatia was joined as Defendant but took no further part in the proceedings.

p.33, 1.26 to
p.34, 1.9

Under cross-examination he admitted that in that 1940 action it was part of their case that the Chief of Faso was under the Chief of Nkwatia.

p.35, Ll.3-14

But he refused to admit that he knew that the Chief of Nkwatia had retired because the Paramount Chief was identifying himself with the interests of Nkwatia (i.e. as a Kwahu interest).

This witness also gave evidence as to the traditional title of Bukuruwa Stool to the red land, and as to the long standing dispute with Nkwatia Stool and as to occupation of the land.

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p.72, 1.35 to
p.73, 1.9

(iii) On the 10th June, 1952, one Kwesi Amoa, who had been linguist to the Paramount Chief, was giving evidence for the Plaintiff and in cross-examination stated that when the Paramount Chief became a party to the 1940 action he had asked the Nkwatia Chief to withdraw from the action on the ground that the Ewes were trying to claim the land and that the Nkwatia Chief must fight the case with him, though he would not admit to knowing why the Nkwatia Chief so did withdraw.

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p.102, 1.20

(iv) On the 13th June, 1952 Otukwa, the Chief of Asabi and Mankrado of Bukuruwa for 20 years, admitted, in reply to the Court, that the letters before referred to, from the Chief of Faso to the Chief of Nkwatia, were tendered in the 1940 action, to show that the Ewes served a Kwahu Chief and not Nkami.

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p.103

(v) On the said 13th June, 1952 the Paramount Chief of Kwahu himself gave evidence. He referred to the previous disputes between Bukuruwa and Nkwatia Stools and indicated his view (conveyed in a letter to the District Commissioner) that it was not right that he should support either of these Stools against the other; that after he became a co-plaintiff in the 1940 action it was financed from the Stool Treasury (i.e. the State of Kwahu's Treasury) and that he knew that Nkwatia and Bukuruwa each had a part of the land.

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p.104, Ll.38-41

p.105, Ll.25-35

p.106, 1.4

p.115

(vi) The Chief of Nkwatia, the present Respondent, gave his evidence (in Twi) on the 16th and 17th June. In chief he said nothing as to his intervention in the 1940 action.

In cross-examination he gave the evidence which was interpreted and recorded as follows :-

Record
p.127, L1.13-33

"Q. It was quite clear to you or it was to everyone, that the Ewes were claiming what you now say is your land?

"A. Whenever they take anything from the land they give me a part.

"Q. Do you mean to suggest that you did not know the Ewes were claiming the land as their own?

10 "A. I did not know that.

"Q. Why did Nkwatiahene come and join as a defendant, why did he not join as a co-plaintiff with the Bukuruwahene?

"A. The Omanhene said that if I joined the defendants it would be taken that I was on the side of the Ewes.

"Q. Did you come to any arrangement with the Bukuruwahene in this respect? A. No. (Sic)

20 "Q. Was this arrangement before or after the Omanhene had been joined as plaintiff?

"A. It was before.

"Q. How long before was this?

"A. I cannot say."

It is submitted that this is confirmed by the evidence of the Plaintiff's witness, cited in paragraph 24(iii) of this Case.

The cross-examination continued as follows :-

30 "Q. You do know that when Omanhene was joined his Statement of Claim was served on your predecessor? A. I don't know that.

p.127, L1.33 to
p.128, 1.5

"Q. In the Omanhene's Statement of Claim he said that Nkwatia was not entitled to any part of that land?

"A. If he had claimed the land we would have sued him. Yes Dwamena Ayirepe is in Accra now."

Record

It is submitted that the suggested interpretation of the Paramount Chief's Statement of Claim is contrary to the evidence and actions of the Paramount Chief himself and for this and other reasons ought not to be accepted.

(vii) No other evidence than that detailed in paragraph 14 and the present paragraph of this Case was given as to the circumstances in which the Nkwatia Stool became a party to the 1940 action but subsequently "faded out". The rest of the evidence of the 16 witnesses for the Plaintiff and the 18 witnesses for the Defendant (including himself) was almost wholly devoted to history, tradition, occupation and the disputes between the Stools of Bukuruwa and Nkwatia, except for that part of the evidence of the surveyors for the Plaintiff and Defendant respectively, which related to the making of Exhibits "1" and "2". Such evidence as to the joinder and "fading out" appears incidental to the main bulk of the evidence. 20

p.172, L1.1-8

25. In the closing addresses Defendant's Counsel very shortly referred to the plea of estoppel by "res judicata" and submitted that there was no estoppel by record and that no estoppel by conduct had been pleaded.

p.176; 1.16 to
p.178; 1.20
p.176, 1.21

Plaintiff's Counsel, following, dealt with estoppel at considerable length. He submitted that paragraph 5 of the Statement of Claim, in relation to the 1940 action, was a plea of estoppel by conduct and also a plea of "res judicata". He also relied upon the alleged arbitration and award in 1942. 30

p.178, 1.18

p.22

Neither Counsel referred to the Plaintiff having on the 15th November, 1951 abandoned the plea of estoppel or to the ruling of the Court on that day that such plea must fail.

p.182-205

26. Mr. Justice Jackson delivered his judgment on the 8th August, 1952. He identified by reference to Exhibits "1" and "2" the red land as the area of approximately 1,100 square miles, the ownership of which was claimed by Bukuruwa Stool, and the area referred to in this Case as the pink land as the part of the red land of which the ownership was claimed by Nkwatia Stool. 40

27. The learned Judge then proceeded as follows:-

Record

"The land described in the Writ issued on 13th
 "March, 1940, shows that the land then in issue
 "was precisely the same as the land in issue
 "before me now, having an area of approximately
 "1,100 square miles, but which is delineated by
 "M'Carthy, J. as being an area of some 20 square
 "miles. In any event Counsel agree, and I am
 "satisfied, that the subject matter of the
 "earlier case and of this case is identical."

p.184, Ll.6-14

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28. It is submitted that the learned Judge was here manifestly in error. The land described in the original Writ in the 1940 Action, was, as shown in paragraph 10 of this Case, a much smaller area than the red land (though comprised within it) and of uncertain boundaries. It may well have been of an area of 20 square miles, though this was never so stated by Mr. Justice M'Carthy. It was only when the Writ in the 1940 Action was amended at the close of the trial that the whole of the red land was claimed by the Plaintiffs in that action. Even so, the subject matters of the two actions remained throughout distinct. In the present action the subject of the dispute was the pink land; and in the 1940 Action the effective dispute was as to land claimed by the Stool of Wusuta, whatever that was. Moreover, there is nothing in the record to show that Counsel ever agreed with the propositions put forward by the learned Judge, beyond the statement in the judgment.

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It is submitted that the error of the learned Judge, in considering that the area in dispute in the 1940 action and the area in dispute in the present suit were identical, vitiated his consideration of the issue of res judicata.

29. The learned Judge then detailed the part played by the Stool of Nkwatia in the 1940 Action and noticed its failure after the joinder of the Paramount Chief to play any part therein though there appeared to have been no formal discharge of Nkwatia from the Suit or leave to his Counsel to retire but simply a "fade out". He mentioned the reference in the judgment of the West African Court of Appeal of the 1st March 1948 to the Nkwatia Chief having withdrawn from the case as a co-defendant and stated that the submission before him by Counsel for Nkwatia was that this was the result of an agreement made by Nkwatia with the Bukuruwa

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p.184, l.15 to
 p.185, l.30

Record

Stool and the Paramount Chief so as not to embarrass the conduct of the case of the Bukuruwa Stool against a common enemy and that by their conduct they could not now set up an estoppel.

p.172, Ll.1-18

The Record does not record this Submission by Counsel but undoubtedly that was the case for Nkwatia on this point, except that Nkwatia did not allege any express agreement with Bukuruwa Stool but rather a submission by Nkwatia to the will of the Paramount Chief as the superior of both Nkwatia and Bukuruwa and a consequent agreement with the Paramount Chief to withdraw and make common cause with Bukuruwa against the Ewes, a position which Bukuruwa in concert with the Paramount Chief tacitly accepted and acted upon by taking advantage of evidence of Nkwatia's title. 10

p.185, 1.31
to
p.201, 1.7

30. The learned Judge did not at that point give a decision as to res judicata and estoppel but proceeded to deal at length with the evidence as to history, tradition, occupation and the disputes between the Stools of Bukuruwa and Nkwatia. As to history his view was that the trend of history rather supported the Bukuruwa claim to have been at some time in the past the land-owning community in respect of the red land and not Nkwatia, but that this was not a conclusion upon which he could act and would have to consider the question of possession; which he proceeded to do and as a result he found as follows :- 20

p.190, 1.42
to
p.191, 1.2

pp.191-200

p.200, Ll.30-42

"In my judgment the Nkwatias have established certain rights within a large part of the area claimed by them which possess all the features of ownership by customary law subject to the over-riding rights of allegiance to the Kwahu State and that to deny to them these rights would be an attempt to set back the clock to some period prior to 1866, with results which would amount to a denial of justice to many occupants of the land, who have occupied it in good faith or without being challenged as to their possession and which occupation, apart from hunting, could be termed original settlement in virgin forest land." 30 40

p.201, 1.8
to
p.204, 1.5

31. (i) Before defining those rights which he so held that the Nkwatia Stool had established, the learned Judge again addressed himself to the plea of estoppel raised in paragraph 5 of the Statement

of Claim. He first held that the long standing dispute between Nkwatia Stool and Bukuruwa Stool had not been settled by an award as Bukuruwa alleged.

Record
p.201, L1.43-45

(ii) He then purported to set out the evidence given in the suit before him as to the withdrawal of the Nkwatia Chief from the 1940 action referring to

p.202, 1.1 to
p.203, 1.21

- 10 (a) the evidence of the present Appellant (which is set out in paragraph 24 (ii) of this Case;
- (b) the evidence of the Paramount Chief as not having referred to the withdrawal, (which evidence is set out in paragraph 24 (v) of this Case);
- (c) the evidence of the present Respondent (set out in paragraph 24 (vi) of this Case);

20 But he did not refer to the evidence of the Linguist to the Paramount Chief (which is set out in paragraph 24 (iii) of this Case).

On this evidence, he held that no agreement between the parties to the 1940 action (referring to the Kwahu parties and presumably to the Bukuruwa Stool and Nkwatia Stool) had been established.

p.203, L1.22-36

30 He held, therefore, that the Nkwatia Stool, having applied to be and having been joined in the 1940 action, and not having been discharged by the Court from the action, was deemed to have acquiesced in what had been done and that consequently the judgment in that action for the Bukuruwa Stool was binding upon all the parties joined, including the Nkwatia Stool.

p.203, 1.37 to
p.204, 1.16

40 32. The learned Judge further held that that judgment was an effective declaration of title to the whole of the red land (1,100 square miles) and the Nkwatia Stool was estopped from denying that that was the effect of the judgment nor was it in the power of himself (Mr. Justice Jackson) to reserve to the Nkwatia Stool such lesser title as might have been reserved to Nkwatia Stool "by way

p.204, L1.17-35

Record

of title to possession derived from long and uninterrupted occupation".

p.204, Ll.36-49

But if he were wrong, then in respect of the green land, he was of opinion that, upon the counterclaim, the Nkwatia Stool was entitled to a declaration that the Nkwatia Chief, his Stool subjects and strangers occupying by his permission, were entitled to exclusive rights of occupation.

p.205, Ll.1-11

33. In the event the learned Judge granted the Bukuruwa Stool a declaration that they were the owners of the red land, £25 damages for trespass and an order for recovery of that part of this land of which they had been dispossessed.

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34. The Appellant does not contest in this appeal, if the plea of estoppel by reason of the judgment in the 1940 action is not upheld, the said findings that the Nkwatia Stool have established ownership of the green land or the declaration of the title of Nkwatia Stool to that area upon the counterclaim.

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pp.206-208

35. (i) The Stool of Nkwatia duly appealed to the West African Court of Appeal from the said decision of Mr. Justice Jackson in the Land Court in upholding the plea of estoppel by reason of the judgment in the 1940 action, alleging error in the judgment of the 8th August, 1952 on the grounds :-

- (a) that the Nkwatia Stool was not in fact or law a party when the 1940 action was tried and judgment given;
- (b) that the Nkwatia Stool had withdrawn from the 1940 action before the trial; and the judgment in that suit expressly or impliedly recognised that the Nkwatia Stool was no longer a party;
- (c) that Mr. Justice Jackson was wrong in holding that the Nkwatia Stool must prove a formal agreement to withdraw, that in any case the evidence established an agreement to withdraw, and that it had been implemented by the Nkwatia Stool providing evidence for the Plaintiffs in the 1940 suit;
- (d) that the judgment itself showed it was only against the Wusuta Defendants and not against any Kwahu subjects;

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(c) that for estoppel the party to be estopped must be a party to the judgment or a privy of a party.

Record

10 But the Notice of appeal did not give as a ground of appeal that the Plaintiff had before the trial abandoned in open Court his plea of estoppel and that the learned trial Judge had adjudicated upon and held it failed, and so had no jurisdiction to adjudicate upon it again or to reverse his previous decision.

20 36. At the hearing of the appeal, in addition to arguing the grounds of appeal stated above, Counsel for Nkwatia Stool made objection that the trial Judge, having decided previously that the plea of estoppel failed, had no jurisdiction to adjudicate upon it at the trial, and pointed out that he had not cross-examined the Paramount Chief in order to prove the agreement for the Nkwatia Stool to withdraw, for to have done so would have been to treat the plea of estoppel by the judgment in the 1940 action as still open to the Bukuruwa Stool, but that his action, in so failing to cross-examine, had materially induced the trial Judge to find that there had been no agreement.

p.216

p.216, l.31
p.219, l1.3-8

The Court of Appeal accepted, during the argument, that the action went to trial on the footing of no estoppel but Counsel for Bukuruwa submitted that it had not been included in the filed grounds of appeal.

p.218, l.40

p.219, l1.1-2

30 37. By their judgment of the 4th March, 1955 the Court of Appeal (Foster-Sutton, President, and Coursey and Hearne, Judges of Appeal) allowed the appeal of the Nkwatia Stool. The Court of Appeal did not decide whether the Trial Judge acted without jurisdiction in adjudicating a second time on the plea of estoppel but they found that there had been no estoppel, upholding the contention of the Nkwatia Stool that there was an understanding that the Nkwatia Chief should drop out of the action when the Paramount Chief had been joined as a co-plaintiff and thereafter the battle was between the Kwahu (as a whole) and the Wusuta.

p.220

p.225, l1.4-8

40 38. The Judgment of the President (in which the other members of the Court concurred) relied upon the following considerations :-

p.224, l.7 to
p.225, l.3

Record

Firstly, there was no other apparent reason for the Nkwatia Chief dropping out - and here the Court referred to the evidence of the Plaintiffs' witnesses in the 1940 action, Otukwa and Johnson, (set out in paragraph 17 of this Case):

Secondly, that in the 1940 action the particular title of Nkwatia had been used in support of the general Kwahu title:

Thirdly, the express declaration by Mr. Justice M'Carthy in his judgment in the 1940 action that the judgment would only be binding upon the Wusuta Stool and those claiming under it: 10

Fourthly, that the name of the Nkwatia Chief ceased to appear in the title of the action and no judgment was asked for, or given against him at the conclusion of the trial of the 1940 action.

p.225, 1.9

39. The appeal was accordingly allowed with costs, the judgment of the Court below set aside and judgment directed to be entered for Nkwatia Stool upon the Counterclaim, for a declaration of title to the green land. 20

pp.225-226

40. From the said judgment of the West African Court of Appeal, pronounced upon the 4th March 1955, the present Appellant duly obtained upon the 22nd August, 1955 final leave to appeal to Her Majesty in Council.

41. The Respondent humbly submits that the Appeal ought to be dismissed for the following, among other,

R E A S O N S :-

1. BECAUSE the Judgment of the Court of Appeal was correct in holding that the Stool of Nkwatia was not estopped from counterclaiming for a declaration of title to the pink land by reason of the judgment in the 1940 action: 30
2. BECAUSE the reasons given by the said Judgment of the Court of Appeal for so holding were each of them a good and sufficient reason negating the alleged estoppel:
3. BECAUSE the title of the Nkwatia Stool to the pink land was not in issue at the trial 40

of the 1940 action but the title to land, the position of which was never defined, and which was not shown in this action to comprise the green land or any part of it and in respect of which undefined area only the title of the Atipradaa Stool or the Wusuta Stool or of both of such Stools against the Kwahu State as a whole irrespective of its Divisions was in issue, and the title of the Kwahu State as a whole was established:

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4. BECAUSE the Judgment of the Supreme Court in the 1940 action was not directed to and did not deal with the rights of the Stool of Nkwatia to the land then in dispute:
5. BECAUSE there was no evidence that Nkwatia Stool was served with process as was directed by the Court in the 1940 action and as was required by the Rules of Court:
6. BECAUSE as the Appellant well knew the Nkwatia Stool had retired from the 1940 action long before the trial and was not a party to it at the time of the judgment therein and the lis was then only between the Appellant and the Wusutas:
7. BECAUSE in the 1940 Action the Appellant relied upon the particular title of the Nkwatia Stool in support of his own case:
8. BECAUSE neither in fact nor in law was the Stool of Nkwatia a party to the 1940 Action at the date when Judgment was delivered therein as is conclusively shown by the omission of all reference to the Chief of Nkwatia in the then title of the 1940 Action:
9. BECAUSE (in default of proof of service of the amended Writ and Statement of Claim upon the Chief of Nkwatia) the only estoppel which could have arisen as against the Stool of Nkwatia in relation to the 1940 Action would have been in relation to the land as originally claimed in the unamended Writ, which land was never precisely defined.
10. BECAUSE the trial judge ruled against the plea of estoppel on the 12th November, 1951 and consequently had no jurisdiction at the subsequent trial to adjudicate upon it or to reverse his previous decision.

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IN THE PRIVY COUNCIL

No. 15 of 1957

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL

(GOLD COAST SESSION)

B E T W E E N:

NANA YAO NKANSAH II, Gyasehene and acting
Ohene of Bukuruwa (substituted for Nana
Osei Twum II, Ohene of Bukuruwa)
Plaintiff-Appellant

- and -

NANA ASANTE YIADOM II, Ohene of Nkwatia
Defendant-Respondent

CASE FOR RESPONDENT

A.L. BRYDEN & WILLIAMS,
53, Victoria Street,
London, S.W.1.

Respondent's Solicitors
and Agents.