Privy Council Appeal No. 31 *of* 1958

H. E. Golightly and another – – – – – – *Appellants*

v.

E. J. Ashrifi and others – – – – – – – *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH DECEMBER, 1960

Present at the Hearing :

LORD COHEN

LORD KEITH OF AVONHOLM

LORD DENNING

[*Delivered by* LORD DENNING]

This case concerns a tract of land lying to the north of Accra known as "the Kokomlemle lands". These lands are some two square miles in extent. Some years ago it was open country with a few mud huts on it. It is now being developed as a residential suburb. There has been much dispute as to the ownership of it. The principal contestants for years have been, on the one hand, the *Atukpai family* (which was represented before their Lordships by Nii Tettey Gbeke II); and on the other hand, the *Korle family* (which was represented before their Lordships by Numo Ayitey Cobblah, the Korle Priest). The trial Judge, Jackson, J., on 31st May, 1951, held that the *Atukpai family* had no right to the land at all: but that the *Korle family* had a right to it, not by itself alone, but only in conjunction with two other stools the *Ga* Stool and the *Gbese* Stool. The West African Court of Appeal, Stafford Foster-Sutton, P., Smith, C.J., and Henley-Coussey, J.A., on 4th March, 1955, affirmed his decision on both these points. The Atukpai family now appeal to their Lordships' Board. They do not seek to dispute the finding that the Atukpai family had no right to the land. They realise that there are two concurrent findings of fact against them on that point. But they do dispute the finding that the Korle family had any right or interest in the land, save as caretakers of it. Mr. Khambatta for the Atukpai family said that the sole question for determination in the appeal is: What is the position of the Korle priest?

According to tradition the Korle people were hunters who discovered the Korle lagoon which runs into the sea just west of James Town. They found there two large pots containing some beads named "Korle" which they took home to their hunting camp. There a woman named Dede became inspired by the spirit of the lagoon—the Korle fetish—and the lands all around were placed under the protection of the priestess of that spirit—the Korle Wulomo. In consequence in those ancient days the Korle family was regarded as the owner of these lands with the Korle fetish as its spiritual protector. They included the Kokomlemle lands now in dispute. But in course of time the Korle family ceased to be regarded as the absolute owners of the land. They were only a section of a larger people called the *Gbese* and these in turn were only a section of a much larger people called the *Gas*. These peoples combined together into a system under which the paramount chief was the head of all *Ga* people, the *Ga Manche*. Under him were subordinate chiefs including the chief of the *Gbese* people, the *Gbese Manche*. Under him

were five families one of whom was the *Korle* family with the *Korle* priest at its head. Under this system, the overlords, seeing that they were under a duty to protect the lands of the Korle family, acquired rights and exercised control over the lands. The *Ga* stool had the reversion and ultimate control. The *Gbese* stool and all its subjects acquired a usufructuary right. The *Korle* family administered the lands and were described as "caretakers".

Such is the tradition which is regarded as binding on the *Gbese* stool and on the *Ga* stool in its relation to the *Gbese* stool: though it might be denied by other sections of the *Ga* tribe. But so long as the Kokomlemle lands were agricultural lands of little value, there does not seem to have arisen much controversy about it.

The trouble seems to have arisen in 1938 or thereabouts when the Kokomlemle lands were seen to have potentialities as building lands. Both the *Korle* family and the *Atukpai* family claimed it as their own. The *Korle* family claimed to be, not only caretakers, but absolute owners of the land and they said they had a right to alienate it without the consent of the paramount stools at all. The *Atukpai* family also claimed to be absolute owners. They were one of five families in the *Gbese* quarter and they claimed that they were granted the land absolutely in 1827. They had in that year saved the Gas from danger of invasion and had been rewarded by the grant of the land. The land was Ga Stool land and the grant was made, they said, by the senior Ga chiefs and the priests.

In pursuance of these rival claims the two families began to sell off plots of land to purchasers who started to build on them; and as soon as they started to build, the rival family or their purchasers brought actions against them. Hence all this prolonged litigation over the last 20 years. But not only these two families: other families also made claims and actions followed. All of these actions were started in the Tribunal of the Paramount Chief of the Ga State and all were in due course transferred to the Supreme Court of the Gold Coast. Some of them need particular mention.

The first action to come on for hearing was an action commenced on 24th March, 1942, by Dr. Nanka-Bruce against the Atukpai family and a purchaser from them. Dr. Nanka-Bruce claimed that the *Korle* priest had granted the land to his ancestor many years ago. He complained that the purchaser had begun building on the land. The plaintiff claimed a declaration of title and an injunction. On 1st December, 1942, Lane, J. non-suited the plaintiff because he failed to prove title. The learned Judge was far from being impressed by the title set up by the Atukpai family, but he rightly observed that the plaintiff must succeed on the strength of his own title and not on the weakness of that of the defendants. His decision was affirmed by the West African Court of Appeal on 7th March, 1944, and by their Lordships' Board on 11th July, 1950.

The second action to come on for hearing was Suit No. 12 of 1943. This was an action commenced on 29th April, 1943, by the Korle Priest against the Atukpai family and many purchasers from them. The Korle Priest claimed that he was entitled to a large tract of the Kokomlemle lands and sought a declaration of title and damages for trespass. On 31st May, 1947, McCarthy, J. non-suited the plaintiff and on 13th December, 1947, his decision was affirmed by the West African Court of Appeal. It is important to notice that in this action the Korle priest claimed that the land belonged to or was the property of the Korle family in the fullest legal sense of that expression, excluding altogether any rights of the Ga Mantse, the Gbese Mantse or anybody else. McCarthy, J. said that "as the plaintiff has totally failed to establish his right to bring this action in the capacity of absolute owner, he will be non-suited". The West African Court of Appeal said that: "If the plaintiffs are in fact the caretakers, no matter what definition is placed upon that word, they certainly cannot claim to hold the land

in what would amount to a fee simple . . . the learned trial Judge was perfectly correct to non-suit the plaintiffs rather than dismiss the case thus giving them the opportunity of clarifying their position if possible". Their Lordships look upon this case as a clear rejection of the claim of the Korle family to be absolute owners but as leaving it open to them to claim to have some interest in the land short of absolute ownership. True it is that a non-suit is by Order 40 Rule 3 equivalent to a judgment for the defendant: and that it is not open to the plaintiff to bring an action for the same matter unless the Court otherwise orders. But here the Court did in effect otherwise order.

Finally, there came for trial the actions now under appeal to their Lordships. These formed part of a group of 25 consolidated actions, the first of which was commenced early in 1940 and the last on 27th July, 1950. They were tried before Jackson, J. for 15 weeks in the beginning of 1951 and he gave a judgment on 31st May, 1951, which runs to 142 pages of the Record of the proceedings before their Lordships. In 16 out of the 25 actions appeals were taken to the West African Court of Appeal who on 4th March, 1955, affirmed the decision of Jackson, J. on all the issues in the 16 cases save one issue in one of the cases. That issue does not now concern their Lordships. In eight of the 16 actions appeals are now brought before their Lordships' Board.

Now in four of these actions the Atukpai family succeeded, namely, in Suits No. 11 of 1943, 7 of 1944, 5 of 1949, and 39 of 1950. The Atukpai family were defendants in those actions: and the actions were dismissed against them because the plaintiffs in each had not proved the case against them. Their Lordships do not see how the Atukpai family can appeal against these four decisions in which the claims against them were dismissed. Their Lordships need, therefore, say no more about those actions.

In two of the actions, namely, Suit No. 2 of 1944 and Suit No. 46 of 1950, the Atukpai family were plaintiffs claiming to be entitled to the land by reason of a grant made in 1826 to them. The Judge held there was no such grant and that the Atukpai family have no title to these lands. He was very outspoken about their conduct. He said their claim was bogus. The West African Court of Appeal affirmed his decision on that point. It was conceded before their Lordships that these two concurrent findings cannot be challenged. Their Lordships need, therefore, say no more about those two actions.

There remain only two more actions under appeal. In both of them the Atukpai family were defendants and in both of them judgment was given against them. There is something, therefore, against which they can appeal. So their Lordships will consider them in more detail.

Suit No. 7 *of* 1951. In 1937 Mr. Ashrifi and Mr. Narh bought a piece of land from Mr. Allotey and entered into possession. In 1939, however, the Atukpai family claimed the land and on 20th January, 1940, they conveyed it to Mr. Golightly, who thereupon entered on to the land. Mr. Ashrifi and Mr. Narh brought an action against Mr. Golightly for £25 damages for trespass and an injunction. In order to support their action, Mr. Ashrifi and Mr. Narh relied on a claim of title from the *Korle* priest, and in particular on a Deed of Conveyance in 1918 whereby the Korle priest and his elders (without the consent of the Ga or Gbese Stools) conveyed the land to their predecessor in title. In order to resist the claim, Mr. Golightly relied on the title of the Atukpai family who had sold the land to him: and they claimed it by the supposed grant of 1826.

The learned Judge held that the plaintiff's title was defective. He said: "Quite clearly the Korle priest could not convey the absolute ownership in land in which he only possessed a joint interest with the Ga and Gbese Manches." He held also that the Atukpai family had no title at all. But inasmuch as the plaintiffs had possession, he decided in their

favour. He said, as their Lordships think quite rightly, that " it is quite clear that a person deriving a title (however defective), coupled with possession from the Korle priest, has a better title than the one derived from Golightly, who derived it from the Atukpai family who had no title at all and no possessory interest." He therefore awarded the plaintiffs £25 damages and granted them an injunction.

Their Lordships think this decision was clearly right on the settled principle that as against a wrongdoer, possession is sufficient to maintain an action. In the circumstances, this case cannot constitute a binding authority on what is the title of the Korle priest. So it does not enable the essential issue in this appeal to be resolved.

Suit No. 15 *of* 1943. A family named Okaikor Churu had been in possession of land at Kokomlemle ever since 1875. They had been given the right to farm it by the Gbese Stool. Distinguished members of the Gbese Stool were buried on the land. When the trial Judge visited it he found a tomb with a headstone showing that in 1932 a priest was buried there. In 1942, however, the Atukpai family claimed to be the owners of the land. They sold it to purchasers who put up buildings on it. In 1943 the head of the Okaikor Churu family brought an action against the Atukpai family claiming a declaration of title, £100 damages for trespass and an injunction. Later on the Korle priest was apparently joined as plaintiff. At the trial in 1951 the learned Judge decided in favour of the plaintiffs and made a declaration which does decide the essential issues in this appeal. His order was as follows :—

> " The plaintiff, Afiyie, is granted a declaration that she and the other members of the Okaikor Churu Family are possessory owners of that portion of land (here it is described) which they are entitled to use for purposes of farming and residence by the members of their family, *subject to the rights of the Ga and Gbese and Korle Stools who are recognized by customary law as being the allodial owners of that land.*
>
> In respect of the trespass by authorising this building of a house (described) the nature of the trespass was one which has destroyed the character of the land as farming land and was perpetrated without any *bone fide* claim of right, and was persisted in despite protest . . . I assess the general damages at £100.
>
> The plaintiff is granted the injunction prayed for (that is to say, a perpetual injunction restraining the Atukpai people from entering upon the land or dealing with it in any manner whatsoever)."

Their Lordships are clearly of opinion that this Declaration and Injunction does decide the rights of these families in a manner which is binding on them. Their Lordships read the word " allodial " as meaning that the three stools are owners free of external control. They do not hold of anyone else. The declaration in that suit, therefore, is similar to the declaration in Suit No. 33 of 1950 (which is not subject to appeal to their Lordships) where the Judge granted to the Korle Priest " a declaration that he is the ' caretaker ' of Stool Lands on behalf of the Ga, Gbese and Korle Stools and of which lands described in the writ they are the owners ". It appears to their Lordships that, by appealing in Suit No. 15 of 1943 against the declaration, the Atukpai people are entitled to have resolved the question they desire: What is the position of the Korle Priest?

Mr. Khambatta for the *Atukpai* family argued that the question was concluded by the action (Suit No. 12 of 1943) decided by McCarthy, J., in 1947 which was affirmed by the West African Court of Appeal, to which their Lordships have already referred. He said that in that action the Korle priest claimed to be the owner of the Kokomlemle lands, and having failed in his claim, he must abide by that failure and could not claim any interest in the Kokomlemle lands now. The question was, he said, *res judicata.*

Mr. Dingle Foot took a preliminary objection. He said that it was not open to Mr. Khambatta to take this point of *res judicata*. Their Lordships ruled in favour of Mr. Foot's submission. True it is that the point had been pleaded in one of the consolidated actions (Suit No. 33 of 1950) but the trial Judge decided against it. And it had not been raised in the West African Court of Appeal. The appellants at that time apparently acquiesced in the view that there was no *res judicata*. In these circumstances their Lordships held that they would not allow it to be raised before them. Only in the most exceptional circumstances would their Lordships allow a point to be taken before them which had not been taken in the Court of Appeal. And there were no such exceptional circumstances here.

Now that their Lordships have heard all the case, they would like to say that there is no foundation whatever for the suggestion that the question was *res judicata*. In the previous action, No. 12 of 1943, the Korle Priest claimed to be absolute owner of the land free of any control by the Ga or Gbese Stools. The Ga Stool and the Gbese Stools had applied to come in as parties and had been refused. Whereas in the 25 consolidated suits the Korle priest no longer claimed to be the absolute owner. He sued and was sued as the "Korle priest for and on behalf of the Korle Stool, Gbese Stool and Ga Mantse Stool". The trial Judge especially amended the proceedings in the consolidated suits so as to enable him to be so described. At the trial the three stools were represented by counsel. Mr. Hutton-Mills appeared for the Ga Manche Stool, and Mr. Lamptey for the Korle and Gbese Stools: and at the hearing before their Lordships Mr. Dingle Foot expressly stated that he appeared for all three stools. It is quite apparent therefore that the Korle Priest sued in different capacities in the two proceedings. In the previous proceeding he claimed on behalf of the Korle family or stool solely as absolute owners of the land. In the present proceedings he claimed on behalf of the three stools as owners together. Both McCarthy, J., and the West African Court of Appeal made it quite clear that the decision in the previous proceedings was not to prejudice such a claim as that made in the present proceedings.

Mr. Khambatta, defeated on his plea of *res judicata*, then sought to say that the decision of the Judge was wrong in so far as he held that the three stools were the owners of the Kokomlemle lands. Mr. Khambatta argued that the Korle Stool was a mere caretaker, that is to say, a person who takes care of the property on behalf of another but has no right or interest in the lands himself. Their Lordships cannot accept this view There are some cases where under customary law a caretaker may correspond to a caretaker in English law, see *Yawah* v. *Maslieno* (1930) 1 W.A. C.A. 87. But there are many others where he may be a person who not only takes care of the land but also has a right or interest in it himself. In the present case the learned trial Judge said of the *Korle* family: "Today they are described as being the 'caretakers' of these lands for the Ga, Gbese and Korle Stools. But it must be clearly understood that the word 'caretaker' does not mean simply one who looks after land for another, but connotes one who has an interest in the land". Their Lordships accept this view which they think is clearly correct.

What then is the position of the Korle priest? This is a question of native customary law which "has to be proved in the first instance by calling witnesses acquainted with it until the particular customs have by frequent proof in the Courts become so notorious that the Courts take judicial notice of them", see *Kobina Angu* v. *Cudjoe Attah* Privy Council Judgments, 1874–1928 at p. 43. In the present case it was found by the West African Court of Appeal on a careful consideration of all the evidence:

> (1) that the Korle priest as the caretaker of the lands may make grants of lands to members of the stool for specific purposes, that is, to farm or to build for the purposes of residence or trade: but this right can only be exercised over land which is deemed to be unappropriated:

(2) that an outright alienation or sale of the lands can only be effected with the prior consent of the three stools, the Ga, Gbese and Korle Stools and that publicity is necessary in such transactions, the publicity being a safeguard provided by native customary usage against the clandestine disposal of land without the knowledge of the necessary parties:

(3) that the three stools cannot however alienate stool land without obtaining the consent and concurrence of individuals or families who are lawfully in occupation of the land, such as subjects of the Gbese stool who are in occupation, or strangers who have been properly granted some interest, be it a farming or occupation interest, in the land.

In making these findings the West African Court of Appeal was affirming the findings of the trial Judge save in one respect. He had held that the land could not be sold outright except to satisfy a stool debt. The West African Court of Appeal, as their Lordships think rightly, disagreed with him in this: but in all other respects affirmed his findings. There are therefore two concurrent findings on the points their Lordships have mentioned and they think they should be accepted.

Their Lordships will therefore report to the President of Ghana as their opinion that the appeals should be dismissed and that the appellants should pay the costs.

(39372) Wt. 8109—53 100 1/61 D.L.

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DELIVERED BY LORD DENNING

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