

~~G.H.G.3~~ 37,1961

1.

IN THE PRIVY COUNCIL

No. 31 of 1959

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

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

63507

B E T W E E N

NII AMON KOTEI (Head of the Nii Koi
Olai Family of Accra) substituted
for Nii Amasah Nikoi Olai, Mantse
of Asere Djorshie (for himself and
representing the Stool, and subjects,
of Asere Djorshie) (Plaintiff) since
deceased Substituted Appellant

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- and -

THE ASERE STOOL (Co-Defendant) .. Respondent

CASE FOR THE RESPONDENT

1. This is an Appeal from a Judgment and Order of
the West African Court of Appeal, Gold Coast
Session, (Ghana Court of Appeal), dated the 4th
March, 1955, dismissing with costs, an appeal from
a Judgment and Order of the Supreme Court of the
Gold Coast, Lands Division, (Jackson J.) dated the
22nd November, 1951, whereby, in an action for a
declaration of title to certain land in the
Plaintiff's occupation, damages for trespass and
for a perpetual injunction, it was held that the
Plaintiff was entitled to a declaration that he,
and those whom he represented, as subjects of the
present Respondent, possessed farming rights in
the said land subject however to such farming
rights etc. as might already have been granted by
the present Respondent; that he was not entitled
to any damages for trespass; but that he was
entitled to an appropriate injunction for the
protection of his interests.

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Record
pp.107-112

pp.97-103

The said action was originally instituted
against five persons none of whom is a party to
the present appeal.

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The present Respondent (hereinafter, also, called "the Co-Defendant") was added as a co-defendant at the instance of the Trial Court.

Following the death of the original Appellant, (original Plaintiff), the present Appellant was substituted in his place by an Order of Revivor, made pursuant to Section 16 of the Constitution (Consequential Provisions) Act, 1960, following the issue of a Certificate by the Ghana Court of Appeal, dated the 13th June, 1960, under Section 26 of the Court of Appeal (Appeals to Privy Council) Order in Council, 1957. 10

2. The main question for determination on this appeal is whether or not the concurrent Judgments of the Courts below on questions of fact upon the determination of which the nature and extent of the Plaintiff's title depended were, upon the evidence before them, and in the circumstances of this case, so devoid of judicial merit or otherwise contrary to law as to merit intervention by the Board. 20

3. The facts are as follows:-

p.1

On the 20th April, 1948, the Mantse of Asere Djorshie, hereinafter also called "the Plaintiff" (for himself and representing the Stool, and subjects, of Asere Djorshie) instituted proceedings against one James Adams and five others (all six are hereinafter referred to as "the Defendants" and are to be distinguished from the present Respondent, "the Co-Defendant") in the Native Court "B" of the Ga State, claiming as against the Defendants rights in a piece of land known as Muko or Mukosa situate near Abeka in the Accra District and relief for injury to those rights. 30

p.3

On the 22nd June, 1948, the action was transferred to the Land Court of the Lands Division of the Supreme Court, Eastern Judicial Division, which tribunal, on the 16th August, 1948, ordered that the present Respondent should be joined in the action as a co-defendant.

p.4

p.5, 11.5-11

4. In his Statement of Claim, dated the 15th June, 1949, the Plaintiff, as the occupant of the Nikoi Olai Stool of Asere Djorshie and Head of the Nikoi Olai Family, alleged that: the said Family owned certain land which was described and delineated in a Plan prepared by a Licensed Surveyor; about 1924 40

- the Plaintiff was appointed Head of the said Family "having a few years previously been enstooled on the Nikoi Olai Stool"; for many years the Head and members of the said Family had controlled and occupied the said land and had exercised rights of ownership in respect thereof, principally by granting permission to persons to occupy and farm portions of the land; about 1948 a certain piece of land, South-west of the land in suit, was acquired by the Government for the purposes of a Wireless Station and compensation was paid to the Plaintiff and members of the said Family in respect of the acquisition; and that the (original) Defendants had "purported to sell and convey the area edged green in the Plan as their family property and wrongfully entered upon the said land and purported to give possession thereof to their said grantees, J.A. Quaye and two others."
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5. By their Statement of Defence, dated the 11th August, 1949, the Defendants (who are not now parties to this appeal) denied all material allegations contained in the statement of claim.
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6. By his Statement of Defence, dated the 17th February, 1950, the Co-Defendant (the present Respondent) said:-
- "1. The Co-Defendant is the occupant of the Asere Stool and the owner as such of all the Asere Stool lands.
2. The land herein claimed by the Plaintiff is part of Asere Stool lands of which the Co-Defendant through his licensees and subjects has been in undisturbed possession and occupation from time immemorial."
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- Further, the Co-Defendant denied several of the allegations made by the Plaintiff in support of his title in the Statement of Claim and, of the persons mentioned by the Plaintiff as having occupied the land in dispute, he said that if in fact they had done so they did so "like any other subjects of the Asere Stool, with leave and licence of the Co-Defendant's predecessor in title."
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- The Co-Defendant said also that "on other occasions when the Plaintiff had put a claim to the land part of which is in dispute, he had claimed the land as Asere Stool land and not as Nikoi-Olai

Record
p.5, 11.26-31

p.5, 11.32-40

p.5, 1.41 to
p.6, 1.8

p.6, 11.9-13

p.7

p.8

p.8, 11.12/19

p.8, 11.20/28

p.8, 11.29-33

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p.8, l.40 to
p.9, l.3

Family land" which estopped the Plaintiff from now claiming the land as his Family land.

7. The case came on for trial in the Supreme Court of the Gold Coast (Lands Division) before Jackson, J., who, after due consideration of the evidence in the case, decided as is stated in paragraph 1 hereof.

An analysis and assessment of the relevant evidence led the learned Trial Judge to the following findings which are best stated in his own words:-

- p.101, 11.42/
45 1. "Quite clearly this land in issue was occupied very many years ago by some Members of the Plaintiff's Family and who farmed it to some degree." 10
- p.101, 1.46 to
p.102, 1.8 2. "It is equally clear that whatever villages they occupied then as farming villages they have abandoned for very many years, the last one at Mukose in 1926, and that by the ordinary practice of customary law whatever character of family land it may then have possessed disappeared with its abandonment, and the land was free for any subject of the Asere Stool to farm upon and was equally open to strangers who had received the permission of the Manche or Headman to farm upon payment of an annual toll and so the evidence proves they did farm." 20
- p.102, 11.9-12 3. "The evidence is perfectly clear that the land at the date of the issue of the writ was Asere Stool land" [i.e. the Respondent's land] "and had been Asere Stool land for very many years before the issue of that writ." 30
- p.102, 11.12/
16 8. The learned Trial Judge was clear that the Plaintiff's Family (an Asere Family) could not be dispossessed of their right of farming in the area in question and to that extent, as against the original Defendants' Family, they had some title or interest in the land. He found that the said Defendants' Family had no title or interest in the land and that, therefore, by their conveyance of the same, dated the 4th December, 1947, to one Moustah Captan, they had conveyed "precisely nothing." 40

On the subject of ownership of the land, he said:-

p.102, 11.29-
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"The property in the land, it follows, remains in the Asere Stool, subject to the rights of its

subjects and those strangers who have received possession" (? permission) "to farm thereon."

9. Pursuant to his findings, the learned Trial Judge granted to the Plaintiff:-

(1) "A declaration of title that as subjects of the Asere Stool they possess rights of farming in the area edged in pink, subject only to such rights as may have been granted to strangers for farming by the Asere Manche or one possessed by other subjects of the Asere Stool." p.103, 11.9-15

(2) "An injunction against the Defendants (including the Asere Stool) to restrain them from selling the land other than with their concurrence and with the concurrence of the other parties required by customary law, subject to the proviso that the land can be sold in no event other than to discharge a debt and for which there are available no other assets of the Stool." p.103, 11.16-23

The learned Judge said that the evidence did not justify the finding that the Plaintiff's possessory rights had been damaged by the Defendants and he therefore dismissed the claim in trespass for damages. p.103, 11.24-31

10. Against the said Judgment of the Supreme Court of the Gold Coast (Lands Division) the Plaintiff (who, it would seem, had secured to a substantial extent the relief that he had claimed against the original Defendants) appealed to the West African Court of Appeal, Gold Coast Session, upon the grounds set out in his Notice of Appeal, dated the 18th February, 1952 (printed on pp.104-105 of the Record). He made the added Co-Defendant (the present Respondent) the only respondent to his appeal.

11. By their Judgment, dated the 4th March, 1955, the learned Judges of the West African Court of Appeal, Gold Coast Session (Foster-Sutton P., Coussey and Hearne, J.J.A.) dismissed the appeal with costs. pp.107-112

12. Delivering the main Judgment of the Appellate Court, Coussey, J.A. (with whom Foster-Sutton P. and Hearne J.A. agreed) said:-

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p.109, 11.36-
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"The appeal which is only against the Co-Defendant, the Asere Stool", [present Respondent] "is brought on the contention that this was never Asere Stool land but land owned by the Plaintiff's Family Stool by virtue of first occupation and settlement."

"The onus was upon the Plaintiff to establish this ownership and in my opinion he failed to do so."

p.109, 1.43 to
p.110, 1.3

The learned Judge drew attention to the fact that the Plaintiff's Counsel had been constrained to concede at the trial that

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"the Asere Stool by the Asere Manche had control and management of the land in issue and as to which the payment of tolls to the Asere Stool and the direct placing and recognition of Headmen in the villages on the land is evidence, in my opinion, conclusive against the Plaintiff's contention that they are the allodial owners."

p.110, 11.4-
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13. The learned Appellate Court Judge (Coussey J.A.) referred to, but rejected, the argument advanced on behalf of the plaintiff that as the Co-Defendant (present Respondent) had supported the Defendants' title which was found to be defective he was estopped from denying the Plaintiff's title and asserting his own. He said:-

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p.110, 11.14-
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"I fail to see how a declaration that one family has no title to land automatically establishes the title of another party to the same area of land."

p.110, 11.18-
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"The onus remained on the Plaintiff to establish his title in this suit. No plea of estoppel was raised by the Plaintiff-Appellant in the suit on the joinder of the Co-Defendant now argued in the Court below and I cannot see how the conduct of the Co-Defendant which was ultra vires his authority and trust led the Plaintiff to alter his position as the representation was not made to him. There was no admission of the Plaintiff's title."

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p.110, 11.27 to
p.111, 1.30

14. The learned Appellate Court Judge (Coussey J.A.) referred to, and rejected, also, an argument on the Plaintiff-Appellant's behalf, based on the allegation that the Judgment of the learned Trial Judge was in conflict with a previous decision of the same Judge in an issue between the Plaintiff and the

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Co-Defendant affecting part of the land in suit and that the principles of native customary tenure applied in the previous suit were in material conflict with those applied in the present suit. The learned Appellate Court Judge referred to relevant passages in the Judgment of the learned Trial Judge in the previous suit and said:-

- 10 "I am unable to hold that the learned Trial Judge applied any different principle of native customary tenure in the two cases. Indeed the declaration made conforms with the essential findings in the previous matter." p.111, 11.31-35
15. The learned Appellate Court Judge (Coussey J.A., with whom Foster-Sutton P., and Hearne J.A. agreed) referred, also, to an earlier suit in 1921 (D.P. Hammond (Asere Manche) v. Amoo Wellington and Others) in which the Plaintiff's predecessor had testified that he and one Abaka Kwaiman had collected tolls from lands which were the subject matter of the present suit and paid the tolls to the Asere Manche (i.e. to the present Respondent) - which, of course, would not have occurred had the title in the said lands been in the Plaintiff's predecessor. p.111; 1.48 to p.112, 1.15
- 20 In the opinion of the learned Judge, the declaration of the Court below in the form decreed was a right and proper one. p.112, 11.18-19
16. Against the said Judgment of the West African Court of Appeal, Gold Coast Session, this appeal to Her Majesty in Council is now preferred, Final Leave to Appeal having been granted by an Order of the said Court, dated the 28th October, 1955. p.114
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The Respondent humbly submits that the appeal should be dismissed, with costs throughout, for the following among other

R E A S O N S

1. BECAUSE in order to ascertain the Plaintiff's right to the declaration of title which he had claimed it was necessary to ascertain the rights to the said lands of the Co-Defendant.
- 40 2. BECAUSE the ascertainment of all the said rights was dependent upon the determination of questions of fact which, after an examination of all the relevant evidence, have been concurrently

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and correctly decided by the Judgments of both Courts below.

3. BECAUSE in the determination of the said questions of fact due regard was paid by both Courts below to all relevant customs affecting the tenure and ownership of the said lands.

4. BECAUSE the Plaintiff failed to discharge the onus (which was upon him) of establishing an absolute title to the said lands.

5. BECAUSE the form of the order declaring the Plaintiff's title is, in view of the findings of both Courts below, correct and proper.

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6. BECAUSE, for reasons stated therein, the Judgments of both Courts below are right.

DINGLE FOOT.

E.F.N. GRATIAEN.

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- and -

THE ASERE STOOL (Co-Defendant) ..
Respondent

CASE FOR THE RESPONDENT

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