Appeal No. 31 *of* 1959

Nii Amon Kotei substituted for Nii Amasah Nikoi Olai, Mantse of Asere Djorshie for himself and representing the Stool of and subjects of Asere Djorshie – – – – – – *Appellant*

v.

The Asere Stool – – – – – – – – *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JULY, 1961

Present at the Hearing:

LORD DENNING.

LORD MORRIS OF BORTH-Y-GEST.

MR. L. M. D. DE SILVA.

[*Delivered by* LORD DENNING]

This case is concerned with an area of 900 acres of land four miles north-east of Accra which may be called " the Mukose land ". It is undulating land of little agricultural value and situate on high ground. It is short of water and only inhabited by small groups of persons who till the soil in the immediate vicinity of their huts. But their Lordships were informed that it has potential value for building purposes.

The plaintiff is the head of the Nikoi Olai family and he claims that the land is part of the ancestral property of the Nikoi Olai family of Asere. In 1947 he found that the members of another family called the Abbetsewe family had purported to sell the land to a Lebanese trader named Mousbah Captan. The transaction had been carried out by two deeds. The first deed dated 25th October, 1947, was a conveyance of the land by James Adams and five others who were principal members of the Abbetsewe family to J. A. Quaye and two others for £200: the second deed dated 4th December, 1947, was a conveyance of the land by J. A. Quaye and the two with him to Mousbah Captan for £2500. In order to validate this transaction, as they thought, James Adams and the other members of the Abbetsewe family got the head of the Asere Stool to witness the conveyance and paid him £1000 for giving his consent, this sum being, so it was said, the customary one-third share due to the Asere Stool and people.

Faced with this sale, the head of the Nikoi Olai family on 20th April, 1948, brought an action against James Adams and the other five members of the Abbetsewe family claiming that the 900 acres was the ancestral stool property of the Nikoi Olai family of Asere, Accra, damages for trespass and an injunction. The head of the Nikoi Olai family brought the action in the Ga Native Court " B ". But the Judge of the Land Court ordered it to be transferred into the Land Court and he directed that the Stool of Asere should be joined as a defendant in addition to the six members of the Abbetsewe family. " The Asere Stool " therefore appears as a party, meaning no doubt the Asere Mantse representing the Stool of Asere.

The action was tried before Jackson, J. for ten days between 18th October, 1951, and 1st November, 1951: and he gave judgment on 22nd November, 1951. He rejected decisively any right or title in the Abbetsewe family.

" That family ", he said, " qua family, possessed no title or interest in this land—they possessed no title whatsoever by the deed dated 25th October, 1947, and when less than six weeks later, these three members of that family purported to convey that estate to Mousbah Captan by their deed dated the 4th December, 1947, they conveyed precisely nothing ". This finding has never been challenged or disputed. But Jackson, J. not only condemned the Abbetsewe family for selling land which did not belong to them. He also condemned the head of the Asere Stool for consenting to it and taking £1000 for his consent. The Judge said this about it: " The acts of the defendants and especially that of the Asere Manche do display a wicked and reckless disregard of the trusts imposed upon the occupant of a Stool ". The Judge accordingly found in favour of the plaintiff and granted an injunction against the defendants, including the Asere Stool, to restrain them from selling the land. He ordered the defendants to pay the costs.

Stopping there, it might be thought that the plaintiff, the head of the Nikoi Olai family, had won a considerable victory: and he had, indeed, against the Abbetsewe family whom he had sued. But not so against the Asere Mantse whom the Judge had brought into the case of his own motion. It appears that there has been much dispute about the position of the Asere Stool. The Nikoi Olai family have for a long time claimed that they were entitled to occupy the Asere Stool themselves. But the Judge made it clear in his judgment that he regarded the Nikoi Olai family as subjects of the Asere Stool. He refused to declare that the land was the ancestral property of the Nikoi Olai family as they claimed it was. On the contrary he only declared that " as subjects of the Asere Stool they possess rights of farming in the area, subject only to such rights as may have been granted to strangers for farming by the Asere Manche or are possessed by other subjects of the Asere Stool ". The plaintiff was aggrieved by the limitation thus put upon the rights of the Nikoi Olai family and appealed to the West African Court of Appeal, but on the 4th March, 1955, that Court, consisting of Foster-Sutton, P., Coussey, J. A., and Hearne, J. A., dismissed his appeal with costs. He now appeals to their Lordships' Board.

Their Lordships would first point out that they can have no concern with the dispute about the occupancy of the Asere Stool. That is not within the jurisdiction of the Courts. It was considered by the State Council in 1931 who then ruled that the Agbon and Frempong families were entitled to occupy the Stool alternately to the exclusion of the Nikoi Olai family. But in 1958 the Governor-General appointed a committee to inquire further into the dispute and this committee reported in September, 1959, that the claims of the Nikoi Olai family, and the Agbon and Frempong families were indistinguishable and inseverable. The committee recommended that the Stool should be occupied in rotation in this order: (i) Nikoi Olai, (ii) Frempong, (iii) Nikoi Olai, (iv) Agbon. The committee recommended that the present occupier of the Asere Mantse's Stool (of the Agbon family) should continue to occupy the Stool until his death, deposition or abdication. The Asere Mantse at present is Nii Akrama II of Agbon.

Putting aside the constitutional question, the first point to be considered is whether the Nikoi Olai family are entitled to these 900 acres of land as their ancestral property or whether it is Asere Stool land. Upon this point the Nikoi Olai family relied greatly upon an earlier case decided in 1948 by the same Judge, Jackson, J. It was a case where a piece of land was required for a wireless station. It was part of these Mukose lands. The Government had acquired it. The compensation had been assessed by Korsah, J. But the question was: To whom was the compensation payable? The rival claimants were the Nikoi Olai family and the Asere Mantse. Jackson, J. held that the Nikoi Olai family were the parties in possession of 7/8ths of the area as the owners thereof and, as such, were entitled to receive compensation for 7/8ths of the area of the land: but that in respect of the remaining 1/8th the Asere Mantse was entitled to receive compensation for that portion. The Nikoi Olai family asserted before their Lordships that this amounted to a *res judicata* adjudging that they were the absolute owners of the Mukose lands as their family lands free from any rights of the Asere Stool. Their Lordships

cannot so regard it. Although Jackson, J. found that the Nikoi Olai family were owners in possession of 7/8ths, he also found that their rights were subject to the paramount title of the Asere Stool: and on that account the Nikoi Olai family had no " right to alienate without the consent of the paramount Stool ".

In the present case Jackson, J. came to a similar conclusion. He held that the Mukose lands were Asere Stool lands. He based this finding on evidence that the Asere Stool had placed headmen on the land: that these headmen permitted strangers to farm upon that land and collected tolls from them; and the headmen paid these tolls over to the Asere Mantse. Their Lordships have examined this evidence and are of opinion that it supports the Judge's finding that " the tolls collected were paid by the collector to the Asere Mantse ". It was said by Mr. Davies that, even if this were so, it does not warrant the inference that it was Asere Stool land. The tolls were only paid by strangers and they may have been paid, not for the use of the land itself, but as a recognition of the political jurisdiction of the Asere Mantse. Their Lordships cannot accept this view. It seems clear upon the evidence that these strangers paid the tolls for the use of the land.

The West African Court of Appeal affirmed the decision of Jackson, J. but their Lordships feel bound to notice that they seem to have made two slips in their reasoning. They seem to have been under the impression that the compensation was awarded according to the rights of the parties in the whole land, that is, as to 7/8ths to the Nikoi Olai family for their possessory right to the whole, and as to 1/8th to the Asere Stool for their right to manage and control the land and receive tolls. But Mr. Dingle Foot felt bound to concede that the compensation was not divided on that basis. Nor indeed could it be. The only persons entitled to compensation were " the parties in possession of such lands as being the owners thereof ". It was therefore a necessary finding by Jackson, J. in the wireless case that the Nikoi Olai family were entitled in possession as being the owners of 7/8ths of the land. There was another error made by the West African Court of Appeal. They relied on the evidence of one Djani Kofi in an earlier case, which had been specifically excluded. And Mr. Dingle Foot felt obliged to admit this. In view of these errors made by the West African Court of Appeal, it cannot be said that there are two concurrent findings that these lands were Asere Stool lands.

In these circumstances it is open to their Lordships to reconsider the evidence adduced before Jackson, J. in the present case: and they find there was sufficient evidence on which he was entitled to find, as he did, that the Mukose lands were Asere Stool lands, in this respect, that the Asere Stool had a paramount title. The payment of tolls to the Asere Stool and the recognition of headmen in the villages is sufficient proof of such a paramount title in the Stool. Nevertheless there was a great deal of evidence to show that, subject to the paramount title of the Asere Stool, the Nikoi Olai family had an estate or interest in the Mukose lands. The crucial findings on this point are these:

(i) The Nikoi Olai family were the original founders of the village of Mukose: and the land in issue was occupied very many years ago by members of the Nikoi Olai family. Much of it has been used exclusively by members of that family (hence the 7/8ths area for which they obtained compensation for the wireless station). But some of it has been used by strangers by the permission of the headmen and in respect of land so occupied by strangers tolls have been paid to the Asere Stool (hence the 1/8th area for which the Asere Stool received compensation). It is true that the village of Mukose was abandoned in 1926 but farms have been maintained by the descendants of the old settlers. " I am satisfied ", said Jackson, J. in the wireless case, " that the Nikoi Olai family formerly occupied the major portion of the land . . . and have since their first settlement . . . enjoyed all the rights of owners in possession ".

(ii) The Nikoi Olai family have asserted their estate or interest in the land successfully, not only in the claim for compensation, but also in the proceedings against the Abetsewe family. Furthermore, the head of

the family gave evidence that he inspected the land from time to time and asserted their title against anyone who was there. " I used to go and inspect the land and if I saw anyone there, I asked him how he got there ".

(iii) In the light of this evidence, it cannot be said that the Nikoi Olai family have abandoned their rights. It is true that the village of Mukose was abandoned and fell into ruin but there is nothing to warrant the suggestion that the family ceased to have anything to do with the land such as to warrant the inference of abandonment. Indeed, they have vigilantly upheld their rights.

What was the nature of this estate or interest in the land? There was no evidence on this point. Jackson, J. seems to have thought it was a right of farming with no right to alienate except with the consent of the paramount Stool. Hence his declaration that " as subjects of the Asere Stool they possess rights of farming in the area ". In this he no doubt had in mind the evidence which he had heard earlier in 1951 in cases about the *Kokolemle Lands* (*Golightly v. Ashrifi* Privy Council Appeal No. 31 of 1958). But their Lordships would point out that the findings in the *Kokolemle* case depended entirely on the evidence in those cases: and must not be taken to be determinations of law which are of general application. Their Lordships have been referred to a series of decisions in the Land Court in recent years, affirmed on occasion by the Court of Appeal, from which it appears that the usufructuary right of a subject of the Stool is not a mere right of farming with no right to alienate. Native law or custom in Ghana has progressed so far as to transform the usufructuary right, once it has been reduced into possession, into an estate or interest in the land which the subject can use and deal with as his own, so long as he does not prejudice the right of the paramount Stool to its customary services. He can alienate it to a fellow-subject without obtaining the consent of the paramount Stool: for the fellow-subject will perform the customary services. He can alienate it to a stranger so long as proper provision is made for commuting the customary services. On his death it will descend to his family as family land except in so far as he has disposed of it by will, which in some circumstances he lawfully may do. The law on the subject is developing so rapidly that their Lordships think it wrong to limit the right of the plaintiffs in the way that Jackson, J. did.

Their Lordships will accordingly report to the President of Ghana that in their opinion the declaration made by Jackson, J. and affirmed by the West African Court of Appeal should be varied so as to grant to the plaintiffs a declaration that they possess such rights in the area edged in green, on the plan, Exhibit 1, as are conferred by law on a subject of a Stool who is in possession. But inasmuch as the plaintiffs have not succeeded in their claim to be absolute owners free of the Asere Stool altogether, and thus have in part failed but in part succeeded, their Lordships will report to the President of Ghana that in their opinion no order should be made as to the costs of this appeal and that the order for costs made by the West African Court of Appeal should be set aside, leaving each party in that Court also to pay his own costs.

In the Privy Council

NII AMON KOTEI

v.

THE ASERE STOOL

DELIVERED BY
LORD DENNING

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