

Christian Yao Kisiedu and others - - - - *Appellants*

v.

Djorbuah Dompkeh and others - - - - *Respondents*

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 22ND JUNE, 1937.

Present at the Hearing :

LORD RUSSELL OF KILLOWEN.

LORD ROCHE.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

This is an appeal from a judgment of the West African Court of Appeal (Gold Coast Session) which allowed an appeal from a judgment of the Supreme Court of the Gold Coast Colony (Eastern Province) pronounced in two consolidated actions. Each of these actions was instituted in the tribunal of the Omanhene of the State of Akyem Abuakwa. The first in point of time (the writ being dated the 29th March, 1933) was an action in which one Christian Yao Kisiedu was plaintiff and one Kwao Dompkeh was defendant, and in which the plaintiff claimed damages for trespass on the plaintiff's land and an injunction to restrain further trespass. In the second action (in which the writ is dated the 28th April, 1933) the said Dompkeh as plaintiff claimed against the said Kisiedu as defendant damages for trespass on his land and an injunction. The two actions were consolidated and by an order of the Supreme Court dated the 22nd June, 1933 were transferred for hearing and determination to the Divisional Court, Accra.

The dispute between Kisiedu and Dompkeh was not a dispute as to boundaries between two grantees claiming under the same grantor. Each claimed his land under a different grantor. Kisiedu derived title to his parcel of land by purchase in 1907 from the Stool of Tafo and its subordinate Stool of Adjapoma. Dompkeh derived title to his land, which was a portion of the larger parcel claimed by Kisiedu, by purchase in 1918 from the Stool of Asafo. Obviously the litigation involved bigger questions, than the mere questions of damages for trespass between individuals. It involved questions of title as between different Stools. For this reason orders were made joining as parties to the two

actions representatives of the Stools concerned. By an order of the said Divisional Court of the 13th March, 1934 it was ordered that a representative of the Stool of Asafo be joined as a co-defendant in the first action and as a co-plaintiff in the second action, and that the necessary amendments in the proceedings be made. By an order of the same Court of the same date it was ordered that representatives of the Stools of Tafo and Adjapoma respectively be joined as co-plaintiffs in the first action and as co-defendants in the second action and that the necessary amendments in the proceedings be made. In consequence of the death of Kwao Dompseh an order was made on the 29th June, 1934 entering the name of his legal representative (Djorbua Dompseh) in the place of Kwao Dompseh as a defendant in the first action and as a plaintiff in the second action.

The consolidated actions were heard by Deane C.J. (Gold Coast Colony), the trial lasting some seven days. He decided in favour of Kisiedu awarding him £100 damages for trespass and granting an injunction against the defendants in the first action. In the second action he gave judgment for the defendants with costs. In other words the learned Chief Justice held upon the evidence adduced, that the title to the land which had been sold to Dompseh lay not in the Stool of Asafo but in the Stool of Tafo, and had therefore been effectively sold to Kisiedu by the Ohene of Tafo and the Odikro of Adjapoma.

On appeal this decision was held by Kingdon C.J. (Nigeria) and Webber C.J. (Sierra Leone) to be against the weight of evidence. They entered judgment for the defendants in the first action, and in the second action they awarded £10 damages for trespass and an injunction against the defendants in the second action.

From this it will be seen that the findings of fact of the trial judge based upon his consideration of the evidence given by the witnesses who were called before him, were dissented from and reversed by the Appellate Tribunal. That to do so is within their power cannot be doubted, but in order to ascertain whether they were justified in the present case in reversing the trial judge upon a question of fact largely dependant upon oral evidence, necessitates a consideration of that evidence, of the respective judgments and of the reasons given by the Appellate Tribunal for differing from the trial judge on questions of fact.

One question must be mentioned at the outset. Evidence was given, and was cross-examined to in some detail, as to the exact boundaries of the property which had been purchased by Kisiedu, and suggestions were made that as a result of the evidence he had not proved his parcels with sufficient certainty to establish that his purchase in fact included any portion of the land purchased by Dompseh. A plan (exhibit A) was put in evidence. This had been prepared as the result of a survey made in 1927 by a licensed surveyor named Kwantreng. It shows the land claimed by Kisiedu surrounded by a yellow edging, and (as part thereof)

the land claimed by Domp reh surrounded by a green edging. It will be convenient to refer to the former as the yellow land, and to the latter as the green land.

The trial judge took the view that in the result the question of parcels and boundaries was immaterial to his decision of the case. What he said was this:—

A lot of evidence has been given in the course of the case as to the boundaries of the land shown to the respective parties when they acquired the lands and what they did subsequent to the purchase. All that evidence in my opinion is beside the point since at the end neither Kisiedu or Domp reh and Jarkwa seriously contest a *bona fide* purchase by their opponents of the lands claimed by each. It must I think be taken as proved that in the year 1907 Kisiedu acquired from the Ohene of Tafo and the Odikro of Adjapoma all that parcel of land delineated in yellow shown on plan "A" and that in the year 1919 Domp reh and Jarkwa acquired by purchase from the stool of Asafo all that parcel of land delineated in green on the same plan "A."

Their Lordships think that this view of the learned judge was correct. There was really no dispute between the parties as to the fact that two different grantors had purported to grant the green land, and the question for decision was which grantor had the title to grant the green land. That this was so was made abundantly clear by counsel for Domp reh upon the application which resulted in the orders of the 13th March 1934. The following is an extract from the judge's note—

Mr. Quist states the question really to be decided is whether the Odikro of Asafo or the Odikro of Adjapoma had the title in the land to sell—The same piece of land has been sold to the respective parties by these 2 stools. It will be therefore necessary to join these stools in order that their title may be investigated.

The Court of Appeal took a different, and as their Lordships think, a wrong view as to this. They argued from the price paid by Kisiedu, from the fact that the green land remained uncultivated by him, and from the absence of any name plate on a certain tree at the south-eastern corner of the green land, that Kisiedu had only purchased the yellow land which is situate to the north of the green land. They went further and discredited, as their Lordships think without justification, the evidence of Kwantreng, the licensed surveyor, who was an independent witness, and who testified to the fact that a tree at the south-western corner of the green land had borne one of Kisiedu's name plates. In view of counsel's language, already cited, and of the trial judge's statement set out above, the case must necessarily have proceeded upon the footing that the green land had purported to have been conveyed to both; and in their Lordship's opinion the question whether the green land was included in the conveyance to Kisiedu was not open to doubt or question in the Court of Appeal.

Nevertheless the learned judges in the Court of Appeal investigated this question, and came to the conclusion that Kisiedu has failed to prove that the land conveyed to him included any of the green land. That in itself, if true, would have been fatal to Kisiedu in the litigation, but it

would in no way have affected the larger question as between the rival Stools. As already indicated their Lordships think that the Court of Appeal ought not to have reached that conclusion, and they fear moreover that that Court's view of the case has been to some extent coloured by its view of this matter.

Although four points were argued in the Court of Appeal as grounds for reversing the decision of the trial judge, only one succeeded, viz.: that the judgment was against the weight of evidence; and before their Lordships, counsel for the respondents rightly based his claim to succeed on the appeal, upon that point alone.

It is necessary now to explain the point to which the evidence was directed, and the question of fact upon which the case depended. The case turned upon the question whether the lands which the Odikro of Adjapoma held in 1904 (the reason for the selection of that date will appear later) and with which he served the Stool of the Ohene of Asiakwa had originally belonged to the Stool of Tafo or to the Stool of Asafo. This in turn depended upon tradition, as to what had happened in the dim and distant past. Up to a point the traditions deposed to, were in agreement. Long ago the Chief of Asiakwa, one of the Ashanti invaders, obtained permission for his servant (one Koyo a hunter) and his wife, Adjapoma, to settle and hunt on lands subsequently and now known as the Adjapoma lands. From this beginning had sprung the Stool and lands of Adjapoma. The point upon which the evidence of tradition given on behalf of Kisiedu and his side, differs from that given on behalf of Dompseh and his side, is as to the Stool from which the Chief of Asiakwa had sought and obtained the aforesaid permission; in other words to which Stool the Adjapoma lands then belonged. Kisiedu's witnesses said that according to tradition the Stool of Tafo was applied to and gave permission; Tafo supplied the land for Koyo and Adjapoma to occupy; the Adjapoma lands belonged to Tafo. Dompseh's witnesses asserted that according to tradition the Stool of Asafo was applied to and gave permission; the Adjapoma lands belonged to Asafo. If the Adjapoma lands belonged to Tafo, the title in the green land had passed to Kisiedu. If the Adjapoma lands belonged to Asafo the title in the green land had passed to Dompseh.

The trial judge heard the witnesses, and although it is true that the acceptance of one version of the tradition does not necessarily involve that a man who deposed to a different version was testifying to something which he knew to be untrue, it is none the less true that *prima facie* a trial judge who hears and sees how the witnesses give their evidence as to tradition, is better qualified to form an opinion as to which is the accurate version, than those who have not that advantage.

In this case the trial judge after a long trial and a close and careful examination of the evidence, came to the conclusion that the version of the tradition which gave Tafo as the owner of the lands was the correct one and decided

accordingly. In reaching this conclusion he based himself on corroborative matters of different kinds. But first and foremost he fastened upon one matter which was undisputed and indisputable, to which their Lordships now refer.

In or about the year 1904 the Odikro of Adjapoma became indebted under a judgment to a neighbouring chief (the Chief of Okoko), in a considerable sum. He applied to his over-chief the Ohene of Asiakwa for assistance to pay the debt. The Ohene of Asiakwa was unable to find the necessary money, and told the Odikro of Adjapoma to apply to the Ohene of Tafo, as the Adjapoma lands had been given by the Ohene of Tafo. That evidence was given by Kofi Peasah who was the Ohene of Tafo at the time of the trial, and the nephew of Kwadjo Peasah, who was on the Stool of Tafo in 1904. His evidence runs thus:—

The Odikro of Adjapoma owed about £750 expenses in the dispute. The Adjapoma Odikro went to the Ohene of Asiakwa and asked him to help him to pay the debt. The Ohene of Asiakwa refused to pay more than £30 but said that Adjapoma land was given to him by the Ohene of Tafo, so they should go to him to pay. The Odikro came to my uncle and my uncle sent messengers to the Ohene of Asiakwa to ask him if what the Odikro of Adjapoma said was true. The Chief sent back by the messengers to say yes it was true. Then my uncle paid the debt and the Chief of Adjapoma served him.

Their Lordships appreciate that this is evidence given by an interested witness, but the truth of it is, they think, established, and the weight of it placed beyond doubt by the undisputed facts that Adjapoma *did* apply to Tafo for the money and obtained it from Tafo, and by the evidence which was given by an important witness called on the other side, viz., Kwesi Kromo the representative of the Ohene of Asiakwa, who made the following statement:—

The Chief of Asiakwa gave £30 and that was not sufficient so Adjapoma refused to take it. They went to the Ohene of Tafo and obtained the loan. I have not heard if the Ohene of Tafo sent to the Ohene of Asiakwa about the matter. I know since then the Odikro of Adjapoma has served the Ohene of Tafo and not the Ohene of Asiakwa, but I don't know why or of any arrangement. It is the custom if a man gets into debt to go to the man on whose land he is living for help. I can't explain why the Adjapoma people went to Tafo and not to Asafo.

Here at all events is a solid fact upon which a trial judge might well rely, in arriving at a decision in a case in which vague and uncertain evidence abounds. There were no doubt many other matters deposed to which gave indications pointing some in one direction, some in the other, and from which inferences could be drawn favourable to one view of the facts or the other. Their Lordships do not think it necessary to go through these other matters in detail. Suffice it to say that Deane C.J. considered them, weighed them, and came to the conclusion that the title to the green land was in Tafo, when Tafo and the Odikro of Adjapoma sold it to Kisiedu; with the result that Dompkeh had acquired no title to the green land and was a trespasser thereon.

Their Lordships find it impossible to say that the Court of Appeal could, on the materials before them, properly be

satisfied that this finding of fact by the trial judge must be erroneous. No doubt an appeal in a case tried by a judge alone, is not governed by the same rules which apply to an appeal after a trial and verdict by a jury. It is a rehearing. Nevertheless before an Appellate Court can properly reverse a finding of fact by a trial judge, who has seen and heard the witnesses, and can best judge not merely of their intention and desire to speak the truth, but of their accuracy in fact, it must come to an affirmative conclusion that the finding is wrong. There is a presumption in favour of its correctness which must be displaced. As Lord Esher, M.R. said in *Colonial Securities Trust Co. v. Massey* ([1896.] 1. Q.B. 38.) "Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on facts was right, and that presumption must be displaced by the appellant." Their Lordships must, they think, apply the same test, and ask themselves whether in their opinion the presumption in favour of the findings of the trial judge has been displaced; and they feel bound to answer this question in the negative.

In the Appellate Court the importance of Kwesi Kromo's evidence, as bearing on the incident of 1904, appears to have been overlooked. The whole incident is disposed of by Kingdon C.J. with the observation that "the explanation given by the appellants that Adjapoma turned to Tafo for financial assistance because Tafo was the wealthy neighbour who was able to give it, is a possible one." This appears to their Lordships to be an unsatisfactory treatment of a crucial piece of evidence. Webber C.J. does not even refer to it, but devotes the greater part of his judgment to the question whether Kisiedu had proved that his parcels included the green land.

Their Lordships are unable to discern in these judgments any solid grounds for displacing the presumption which properly exists in favour of the correctness of the facts which have been found by the trial judge; and dealing with the matter as though it came before them directly on appeal from his decision, they find no reason either for displacing that presumption, or for disagreeing with the judgment which he pronounced.

Their Lordships are of opinion that the appeal should be allowed and the judgment of Deane C.J. restored, and they will humbly advise His Majesty accordingly. The respondents must pay the appellants' costs of the appeal to His Majesty in Council, and to the West African Court of Appeal.

In the Privy Council

CHRISTIAN YAO KISIEDU AND OTHERS

v.

DJORBUAH DOMPREH AND OTHERS

DELIVERED BY
LORD RUSSELL OF KILLOWEN.

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