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JUDGMENT 5, 1949 and
7, 1954

5, 1949

No. 24 of 1944.

In the Privy Council.

37730

ON APPEAL
FROM THE WEST AFRICAN COURT OF APPEAL
(Gold Coast Session.)

UNIVERSITY OF LONDON
W.C.1
24 FEB 1955
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

CHIEF KWAME ASANTE Tredehene for and on behalf of his Stool (Defendant) - - *Appellant*

AND

10 CHIEF KWAME TAWLA for and on behalf of the Asafu (otherwise Akwamu) Stool of Kumasi (substituted for Chief Asafu Boakyi II Akwamuhene) (Plaintiff) *Respondent.*

Case for the Respondent.

RECORD.

1. This is an appeal by special leave from a judgment of the West African Court of Appeal (Gold Coast Session) dated the 22nd November 1940 which affirmed a judgment of the Chief Commissioner's Court of Ashanti, dated the 14th November 1939 affirming a judgment of the Asantehene's Divisional Native Court "A" Eastern Province, Kumasi dated the 16th December 1937, affirming a judgment of the Asantehene's Divisional Native Court "B" dated the 1st July 1937 which upheld the Respondent's claim to the ownership of all the land situate at Tredeh and Winisu south of Kumasi in the Kumasi State (or Division) of Ashanti occupied by the Appellant and his people. A plan of the land in dispute was made by order of the Chief Commissioner's Court and was put in evidence in that Court (exhibit I).
 - p. 59.
 - pp. 46-49.
 - p. 31.
 - pp. 25-27.
 - p. 2, ll. 1-14.
 - p. 33, ll. 37-39.
 - p. 38, l. 32.
 - p. 39, l. 11.
2. There had been earlier proceedings in respect of the land in dispute. After an inquiry at which he heard evidence, Sir Francis Fuller, Chief Commissioner of Ashanti, gave an executive decision on the 19th April 1907 that all the land on the left of the main road from Kumasi through Aburaso Tekiman and Terebum should belong to the Stool of Asafu and that from the 1st January 1914 the Bantama villages on the land should pay tribute to the Chief Asafu and should not collect rubber on the land without his permission.
 - pp. 63-66.
 - p. 66, ll. 15-28.

p. 69, l. 28.
p. 71, l. 31.

3. In 1914 in a claim by the Respondent's predecessor in title against the Appellant for damages for refusing to give the Respondent's predecessor a share of the rubber tapped on the land in dispute the District Commissioner after giving judgment for the Appellant reviewed his decision and on the 7th May 1914 gave judgment for the Respondent's predecessor with costs.

p. 72.

4. On the 28th July 1914 by an agreement the making of which was disputed by the Appellant, the Appellant and the Respondent's predecessor in title agreed upon the tribute to be paid in respect of the produce of the disputed land.

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p. 1, ll. 11, 13.

5. The present proceedings arose from a claim made against the Appellant by Chief Asafu Boakyi II on behalf of the Asafu Stool and decided against the Appellant in the Asantehene's Divisional Native Court " B " on the 1st April 1936. After an unsuccessful appeal to Court " A " the Appellant appealed to the Chief Commissioner's Court which on the 17th December 1936 sent the case back to Court " B " for rehearing.

p. 1, l. 14.
p. 1, ll. 16-20.

p. 1, ll. 3-10.

6. The rehearing began on the 4th February 1937 when the Court consisted of Adontenhene J. K. Frimpong (President), Toasehene Kofi Wusu, Dadiasuabahene Akwasi Edusei, Hiahene Boakye Adade II, and Kyeame Kofi Awuah. No objection was taken to the Court as so constituted, nor was any objection taken on appeal to Court " A " on appeal to the Chief Commissioner's Court, or originally on appeal to the West African Court of Appeal. The grounds of appeal in the West African Court of Appeal were dated the 15th January 1940, and were supplemented on the 23rd May 1940 by additional grounds. The hearing of the appeal began on the 4th June 1940 and on the next day was adjourned until the autumn session of the Court. It was, however, not until the 4th November 1940 that the Appellant sought to add a further ground of appeal alleging that three of the chiefs who had heard the case in Court " B " were not legally empowered to sit.

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p. 49, ll. 24-40.

p. 50.
p. 52, ll. 15-25.
p. 53, l. 33—
p. 54, l. 18.

p. 59, ll. 1-11.

7. The West African Court of Appeal which resumed the hearing of the appeal on the 21st November 1940 held that this further ground of appeal was filed without leave and that it had been raised too late. The Court moreover was not satisfied that there was any substance in the point.

p. 31, ll. 20-27.

8. The Respondent submits that there is no evidence to establish or to support the allegation that Court " B " was not properly constituted. It appears that under the order of the Chief Commissioner's Court directing a fresh hearing special chiefs were appointed to hear the case. Even if any of the chiefs who heard the case in Court " B " were not qualified to sit the Respondent contends that the defect was cured by the subsequent proceedings. The Appellant knew or must be deemed to have known the law governing the constitution of the Court and sought to obtain from that Court and from appellate courts a decision favourable to himself without raising any question of jurisdiction. The Respondent's contention is that if any of the chiefs were not qualified the principle of *Dimes v. Proprietors of the Grand Junction Canal* (1853) 3 H.L.C. 759 would apply,

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and the decision of Court " B " would be voidable but not void. When that decision had been affirmed by a competent Court of Appeal it was, in the Respondent's submission, too late to avoid a decision.

9. At the hearing in Court " B " evidence was given on both sides about the history of the land, the making of the agreement in July 1914 and the collection of tribute from the Appellant. Documents mentioned in chronological order in the judgment given later in the Chief Commissioner's Court where their effect is summarised, were also put in evidence. These documents included Sir Francis Fuller's decision mentioned in paragraph 2, the judgment mentioned in paragraph 3 and a disputed copy of the agreement mentioned in paragraph 4.
10. Judgment was given in Court " B " on the 1st July 1937. After setting out the nature of the dispute and referring to traditional narratives on both sides based on no material proof, the Court stated its decision to attach more importance to the documents tendered in evidence. Having referred to the agreement of the 28th July 1914 Sir Francis Fuller's decision in 1907 and the District Commissioner's judgment in 1914, the Court summarised the Appellant's criticisms of this evidence and mentioned the proceedings and transactions upon which the Appellant relied. The Court came to the conclusion that the copy of the agreement of the 28th July 1914 had been accepted in evidence in the District Commissioner's Court in 1925 and it was too late to dispute its genuineness, that the Plaintiff's claim was supported by the litigation of 1907 and 1914 and that indeed the issue was *res judicata* by reason of the 1914 judgment. On the other hand the Court held that the documents on which the Appellant relied did not bear upon the issue. Accordingly judgment was entered for the Plaintiff with costs.
11. The Appellant appealed to Court " A " which by judgment dated the 16th December 1937 dismissed the appeal, expressing itself satisfied that the judgment below was in order and must be upheld, but adding that the Appellant's story was quite inconsistent with the history of the land.
12. The Appellant then appealed to the Chief Commissioner's Court. While the appeal was pending the Court ordered a plan to be prepared and directed that the Respondent should be substituted for the Plaintiff in the case (who had come under a taboo) as the representative of the Asafu or Akwamu Stool. Before the appeal was heard the plan prepared pursuant to the Court's order was put in evidence.
13. In his judgment dated the 14th November 1939 the Acting Assistant Chief Commissioner described the various documentary exhibits in chronological order and dealt with their effect. In his opinion the documents and the plan supported the Respondent's case. He also stated that he was impressed with the historical evidence that the land was not Ashanti land when the Appellant alleges it was given to him. He held the evidence to be against the Appellant and dismissed the appeal with costs.

pp. 2-24.

p. 46, l. 39—

p. 48, l. 13—

pp. 63-85.

pp. 63-66.

p. 69, l. 28—

p. 71, l. 31.

p. 72.

pp. 25-27.

p. 25, l. 41.

p. 26, ll. 3-31.

p. 26, l. 32—

p. 27, l. 11.

p. 27, ll. 12-33.

p. 27, ll. 34-39.

p. 27, ll. 40-42.

p. 31.

p. 31, ll. 32-39.

p. 33, ll. 25-43.

p. 38, ll. 1-21.

p. 37, ll. 5-11.

p. 38, l. 32—

p. 39, l. 11.

p. 46, l. 27—

p. 49, l. 22.

p. 49, ll. 15-18.

p. 49, l. 19.

p. 51, l. 30.
p. 51, l. 23—
p. 52, l. 8.
p. 5, ll. 26-29.
p. 25, l. 8.
p. 52, l. 16—
p. 53, l. 30.

14. The Appellant brought a further unsuccessful appeal to the West African Court of Appeal, where for the first time the parties were represented by counsel. The hearing of the appeal began on the 4th June 1940 when the Appellant alleged that the decision of Court " B " was a nullity because Boakye Adade II was absent from the hearing on the 11th February 1937 but participated in the judgment. The Court adjourned the hearing for investigation, and it was established that Boakye Adade II had been present throughout the hearing on the 11th February 1937.

p. 54, l. 33—
p. 58, l. 41.

15. The hearing of the appeal was resumed on the 21st November 1940. The Court heard full argument for the Appellant in support of all grounds of appeal still relied on, including the new ground which the Appellant sought to raise and which is dealt with in paragraphs 6, 7 and 8 of this Case. 10

p. 59.
p. 27, ll. 27-33.

16. On the 22nd November 1940 the Court after holding that it was too late to challenge the constitution of Court " B " and saying that the Court was not satisfied that the point had any substance, stated that they could find no substance whatever in any other point and agreed with the three lower courts, and concurred in the finding of Court " B " but that the issue was *res judicata*. 20

17. The Respondent submits that the judgment of the West African Court of Appeal was right and should be affirmed for the following amongst other

REASONS

- (1) BECAUSE the chiefs who sat in the Asantehene's Divisional Native Court " B " were qualified so to sit, or alternatively there is no evidence that any of them was not qualified.
- (2) BECAUSE if there were any defect in the constitution of the Court the judgment was not a nullity but only voidable, and could not be avoided after it had on appeal been affirmed by competent courts without any objection being taken to its validity. 30
- (3) BECAUSE by judicial proceedings in 1914 a competent court had decided the issue in favour of the Respondent's predecessor in title and against the Appellant.
- (4) BECAUSE by concurrent findings of fact the lower courts rightly held that the Appellant's contention that his predecessor had received an independent grant of the land in dispute is unfounded. 40
- (5) BECAUSE the evidence established that the land in dispute belongs to the Asafu or Akwamu Stool and that the claim made on behalf of that Stool is well founded.

FRANK GAHAN.

In the Privy Council.

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*From the West African Court of Appeal.
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AND

CHIEF KWAME TAWIA for and
on behalf of the Asafu (otherwise
Akwamu) Stool of Kumasi (sub-
stituted for Chief Asafu Boakyi II
Akwamuhene) (Plaintiff)

Respondent.

Case for the Respondent

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