

25, 1957

No. 19 of 1950.

In the Privy Council.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

BETWEEN

10 KWAMINA ACQUAH (substituted for KWEKU
APAWU deceased), KODWO EGYIN, KOBINA
QUANSAH (substituted for YAW BERETUA
deceased), KODWO ABURA BA (under Asebu
Paramount Stool) and TWAFOHENE NANA
ANDZIE VII (substituted for NANA AMANFI III)
(Defendants)

Appellants

AND

NANA AMONU AFERI II, Omanhene of Anomabu
(substituted for NANA BAFFOE, Regent and
Caretaker of the Stool of Anomabu, substituted
for NANA AMONU ABABIO deceased) (Plaintiff) . *Respondent.*

UNIVERSITY OF LONDON
W.C.1.
25 FEB 1958
INSTITUTE OF ADVANCED
LEGAL STUDIES

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Case for the Appellants.

1. This is an Appeal from a judgment of the West African Court of
20 Appeal, Gold Coast Session, dated the 12th July, 1948, affirming a judgment
of the Lands Division of the Supreme Court of the Gold Coast (Jackson, J.),
dated the 9th August, 1947. The Appellants are the Omanhene (Paramount
Chief) of Asebu, his sub-chief at Butuesi or Botosi and subjects of the latter ;
the Respondent is the Omanhene (Paramount Chief) of Anomabu. The main
question for determination in the Appeal relates to the overlordship of the
Obuabasa lands, which adjoin Asebu land and are detached from Anomabu
State. A map of the land (Exhibit 2) was put in evidence by the Respon-
dent, but the Court pointed out that the boundaries shown on the plan
were not proved to have been shown by persons who had any knowledge
30 whatsoever. To show the position of the lands in relation to Anomabu
Asebu and other places, some sheets of the Gold Coast Ordnance Survey
were admitted by the Court of Appeal as " W.A.C.A.1 " and purport to
contain a replica of Exhibit 2 on a reduced scale.

RECORD.

p. 129.

p. 109.

p. 129, l. 42.

p. 29, l. 6.

p. 115, l. 25.

p. 29, l. 8.

p. 94.

p. 125, l. 38.

p. 129, l. 15.

2. The appeal arises out of a suit brought by the Respondent (here-
inafter referred to as " the Plaintiff ") against the Appellants (hereinafter
referred to as " the Defendants ") for a declaration that " the lands called

p. 3.

p. 7, ll. 2-10.

‘ Butuasi ’ or ‘ Obuabasa ’ situate at Abuenu including the village of Abuonu and lands immediately belonging to it are attached to the Stool on which the Plaintiff sits as Omanhene of Anamabu ” and for an injunction “ restraining the Defendants, their servants or agents, and each of their respective female relatives in the female line as supports the Defendants from dealing in any way with the said land or any portion thereof from carrying on any cultivation or other work thereon.”

[sic.]

p. 110, l. 21.

The suit was originally heard by Mr. Justice Jackson sitting as a Land Judge in the Land Court for the Central Judicial Division of the Gold Coast Colony of the Supreme Court of the Gold Coast without an Assessor. 10
By his Order dated the 4th July, 1946, the suit was heard *de novo* by him sitting as aforesaid with an Assessor.

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The Defendants raised a preliminary objection as to jurisdiction which was overruled for the reasons stated in paragraph 13 hereof. The Appellate Court upheld the Trial Court’s decision as to jurisdiction.

Both Courts below have granted the Plaintiff the declaration and the injunction in the terms asked for.

3. The questions for determination in this appeal are :—

- (1) Whether the Trial Court had jurisdiction to entertain the suit ; 20
- (2) Whether the Plaintiff was entitled to the declaration granted ; and
- (3) Whether the Plaintiff was entitled to an injunction at all or an injunction in the terms asked for and granted.

p. 94, l. 6.

p. 115, l. 32.

p. 6, l. 39.

p. 109, l. 15.

p. 109, l. 13.

4. The present litigation commenced in 1928 in the Divisional Court of the Supreme Court of the Gold Coast sitting at Cape Coast. The Plaintiff then claimed only the western half of the land, edged pink on Exhibit 2. After the said action had been instituted, the Omanhene of Asebu, Nana Amanfi II, was joined as co-Defendant. He was succeeded by Nana Amanfi III. On the 22nd February, 1930, the Divisional Court 30 held that the clause was one relating to the ownership, possession or occupation of land and accordingly by virtue of the provisions of Section 92 (2) (b) of the Native Administration Ordinance, the Supreme Court were prohibited from exercising jurisdiction. The Divisional Court accordingly referred the parties to the Provincial Council. In 1931 the Respondent applied to the Provincial Council of the Central Province of the Gold Coast for a Writ of Summons but did not make the deposit required by Regulation 19 and Schedule 2 of the Native Administration Regulations. The Provincial Council, however, on the 24th August, 1931, issued a Writ No. 2 of 1931 out of the Provincial Council of Chiefs’ 40 Tribunal at Saltpond, at the instance of “ Nana Omanhene of Anamabu or Substitute on behalf of the Stool of Anamabu State ” against Nana Amanfi III, Omanhene of Asebu, the principal Defendant, and the rest of the Defendants, who were described as “ under Asebu Paramount Stool.”

p. 1.

5. Section 13 of Ordinance No. 23 of 1931 (incorporated in Section 99 (1) of the Native Administration Ordinance) empowered

Provincial Councils to act by Judicial Committees, and on the 23rd February, 1934, the suit came before a Judicial Committee of the Provincial Council, which allowed an amendment of the title of the suit. On the 3rd March, 1934, that Court struck out the suit No. 2 of 1931 with costs to the Defendants. Another Writ No. J.1 of 1934 was purported to be issued in the same Provincial Council on 9th March, 1934, at the instance of Nana Amonu Ababio, Omanhene of Anomabu State. This writ also was issued without the necessary deposit of £100 having been made. Later the name of the Plaintiff was changed to Nana Amonu VIII. He was destooled, and, on the 8th July, 1938, Nana Amonu IX was substituted as Plaintiff. In both these Writs in the Provincial Council the original claim was extended to include the village of Abuonu and lands immediately surrounding. Why the Plaintiff extended his original claim has not been explained. Abuenu (also referred to as Abuonu, Abonu, or Abunoo) is said to have been named Abu-Enu (Two Stones).

p. 134.
p. 135.
p. 138, ll. 5-28.
p. 3.
p. 139, l. 6.
p. 22, ll. 18-24.
p. 22, l. 26.
p. 138, l. 30.
p. 115, l. 36.

6. For nearly twelve years suit J.1 of 1934 was not brought on for hearing. On the 1st April, 1945, by the provisions of section 24 (4) (c) (i) of the Courts Ordinance 1936 c. 4 (as amended by No. 23 of 1944) causes then pending in a Provincial Council became causes within the jurisdiction of a Land Court of the Lands Division of Supreme Court of the Gold Coast and were to proceed in the appropriate Land Court. The Land Court to which, under the Ordinance, a suit pending in the Provincial Council for the Central Province was transferred was the Land Court for the Central Judicial Division of the Gold Coast Colony of the Supreme Court of the Gold Coast. That Court appears to have assumed that the suit in the Provincial Council No. 2 of 1931 had been transferred to it. On the 24th September, 1945, pleadings were ordered.

p. 110, l. 17.
p. 5, l. 7.
p. 5, l. 28.

7. The Plaintiff delivered his Statement of Claim on the 24th October, 1945. The relevant pleas are as follows :—

p. 6.
p. 6, ll. 17-33.

“ 1. The Plaintiff is the Omanhene of Anomaboe, and the Defendants are respectively natives of the village of Abonu or Abuenu, and the Omanhene of Asebu.

2. The land called Butuesi or Obuabasa situate at Abonu or Abuenu aforesaid, has since the days of Nana Amonu I, a predecessor of the Plaintiff, been attached to the Stool of the Plaintiff.

3. The Defendant Apawu's ancestors were permitted by the Plaintiff's said predecessor to act as Caretaker of a portion of the said lands, as they came with the ancestors of the present Chief of Abonu or Abuenu, Apotua Dekyem or Apotuo Dekyem, immigrants from Osurasi in Akyem, during the Ashanti Wars, and are of the same (Nsona) tribe as the said Apotua Dekyem.

4. The Defendant aforesaid and his supporters, male and female, having claimed the land as belonging to themselves, and they having claimed to be no longer subjects of the Stool of Anomaboe but rather of the Stool of Asebu, this action was instituted by a predecessor of the Plaintiff, Nana Amonu VIII.”

8. The Defendants filed their Statement of Defence on the 14th November, 1945.

Not printed.

p. 23, l. 16.

9. The cause came before Mr. Justice Jackson for trial without an Assessor on the 3rd, 4th, 5th and 6th June, 1946, when Judgment was reserved. In view, however, of a decision of the West African Court of Appeal "and in view of the fact that a claim to title of ownership of Stool lands must inherently raise a question of the customary law" Mr. Justice Jackson, on the 4th July, 1946, decided that the case must be heard *de novo* with an Assessor.

p. 9.

p. 10.

p. 17.

10. On the 25th June, 1947, the Defendants filed a Notice of Motion for leave to amend the said Statement of Defence, and for an Order striking out or dismissing the suit for want of jurisdiction. The amended Defence 10 was filed by leave of the Court on the 27th June, 1947. The Defendants pleaded ownership and possession of the lands in dispute.

p. 111, ll. 18-21.

11. The issue before the Court was as follows :—

"Is that area of land shown on the plan exhibited and marked as Exhibit No. 2 attached to the Stool of the Plaintiff (paragraph 2 of the Statement of Claim) or is it attached to the paramount Stool of Asebu through the Stool of Botoasi, the first Defendant?"

p. 19.

12. The preliminary objection as to the jurisdiction was heard on the 30th June, 1947. This was made on the supposition that the suit No. 2 of 1931 had been transferred to the Supreme Court and in apparent 20 ignorance of suit J.1 of 1934.

p. 11, ll. 29-31.

The Defendants submitted that, inasmuch—

(1) as the deposit of £100 required by Regulation 41 had not been paid, the writ in No. 2 of 1931 was invalid ;

p. 21, ll. 18-32.

(2) as the suit was called in the Provincial Council of Chiefs' Judicial Committee Court on the 3rd March, 1934, and struck out by that Court with costs to the Defendants any Orders which were purported to have been made by that Court after the said striking out of the suit were null and void, therefore, there was no suit or action pending on the 1st April, 1945, in the Provincial Council 30 of Chiefs' Judicial Committee Court which was transferable to the Land Court under the Native Courts (Colony) Ordinance on the 1st April, 1945, for hearing or determination by that Court.

p. 21, l. 38.

p. 22, ll. 1-5.

p. 22, ll. 1-44.

p. 24, ll. 10-14.

p. 23, ll. 1-7.

13. Mr. Justice Jackson after hearing the arguments on both sides, appears to have discovered the existence of the suit J.1 of 1934. In his written ruling dated the 30th June, 1947, he pointed out that Counsel for both Defendants and Plaintiff were under a misapprehension, and that, though the suit (No. 2 of 1931) had been struck out on the 3rd March, 1934, yet, on the 9th March, 1934, another suit (i.e., J.1 of 1934) had been issued. He therefore proceeded to deal with the objection as to the non-payment 40 of the deposit of £100 in reference to the writ of the 9th March, 1934. He overruled this objection as to the jurisdiction, on the ground that he was "in precisely the same position as was the Council when the Writ was issued thirteen years ago," that the "Council had jurisdiction to either remit in whole or in part any deposit made," that he was vested with the same powers as the Council, and that accordingly if any deposit may have been made he ordered that the whole thereof be remitted.

14. It is respectfully submitted that the learned Judge erred in overruling the preliminary objection as to jurisdiction, and that the submission made by Counsel in the Court below, applied to writ and suit J.2 of 1934, was correct and ought to have been upheld.

15. It is respectfully submitted further that a suit between two Paramount Chiefs as to overlordship arising from suzerainty and allegiance is a question or matter relating to political or constitutional relations under native customary law in terms of Section 2 (1) (c) of the Native Authority (Colony) Ordinance, 1944 (No. 21 of 1944), and, accordingly, the Suit No. J.1/1934 fell within the jurisdiction of a Committee of Enquiry in terms of Section 25 of the said Ordinance and that, therefore, the Trial Court had no jurisdiction to entertain the said suit.

This submission was not raised nor considered in the Courts below.

16. The trial then proceeded. By this time five of the original Defendants, subjects of Asebu Stool, had died and no persons were substituted for them. Both parties adduced evidence. The Plaintiff Amonuababio in his evidence made the following admissions :—

(A) The ancient seat or Headquarters of Asebu State was and has always been where it is now situate.

(B) Abunoo Village was between 3 and 4 miles from the ancient seat of Asebu and was North of the said Seat.

(C) Asebus or Asebu State had never paid allegiance or tribute to Anomabu State.

(D) There were two Native States between Anomabu State and Asebu State going Southwards from Asebu to Anomabu.

(E) The Plaintiff did not know the State boundary between his State and Asebu State.

17. Mr. Justice Jackson delivered his judgment on the 9th August, 1947.

18. The learned Judge dealt first with the historical background. He found that in 1705 Asebu was an independent State, while the Fantis (to whom the Plaintiff belongs) were loosely organised bodies; that by the beginning of the nineteenth century the Fantis appeared to have established themselves upon the greater part of the land formerly occupied by the Etsis, but the picture was kaleidoscopic.

19. The learned Judge then considered the case for the Plaintiff, which was that Abuonu was founded in 1706 by one Apote Dekyem on land granted to him by the Omanhene of Anomabu. The learned Judge found that the followers of Apote Dekyem and those of the Defendants had farmed this land for many generations, and that each have their allocated portions.

p. 114, ll. 16-37.

20. The learned Judge referred to Sarbah's "Fanti National Constitution" to describe the position of an Odikro (village Headman). The founder of the village and his successor is called Odikro (founder). The Odikro with the village Council has the control of village land, and is considered as caretaker for the Omanhene (Paramount Chief) of the unoccupied land in the district. The Appellants accept this as a statement of the position where both the people and the land are subject to the same Paramount Chief. The learned Judge observed :—

p. 114, ll. 24-28.

"It is admitted that Apote Dekyem's ancestor was the Odikro of Abonu and that generations of the immediate descendants of the first Apoto Dekyem have been enstooled as Odikros in Abonu, and that Kofi Egyebu (2nd witness) for Plaintiff is the Odikro to-day."

The learned Judge observed :—

p. 114, ll. 36-38.

"The evidence of the present Odikro is that he and his predecessor in title at all times have rendered allegiance to the Omanhene of Anomabu. This fact has not been disputed by the Defendants."

21. The learned Judge reached the conclusion that :—

p. 115, ll. 1-5.

"I am satisfied that recognition of the suzerainty of a Paramount or Omanhene's Stool by the Odikros of such settlements is afforded by their attendances each year at the celebration of the annual festival, which the Odikros and the more prominent men on the village council attend, bringing with them presents of yams."

22. It is respectfully submitted that the Appellants do not dispute these findings, but submit that they are not proof of ownership.

p. 84, ll. 20-30.

The Ebusa system of cultivation means the system under which the farmer pays the Landlord a one-third share of the crop (ebusa) in recognition of the latter's ownership. The Defence led evidence that ebusa was paid to the Appellant, Chief Kweku Apawu (now deceased). The Court then put this question to the Assessor :—

p. 86, ll. 3-9.

"If a person farm on the Ebusa system in circumstances as had been described in this case—would the tenant pay to the Head of the Family, to the Odikro, or to both?"

The Assessor Prah Agyin Saim IV, replied :—

"He should pay to the Odikro and not to the Head of the Family. If the Odikro were a stranger—he would not receive it—but otherwise he would. He used "Ebusa" for makings of libation, etc."

In the present case, ebusa was not paid to the Odikro Apotu Dekyem. 40

p. 115, ll. 8 *et seq.*

23. The learned Judge then considered the conduct of the parties within living memory and certain Court proceedings to which Kweku Apawu had been a party. The point of this evidence was that Kweku Apawu had previously sworn that he was a subject of Anomabu. The

learned Judge drew the inference that Amanfi III of Asebu must have heard of this before he was enstooled, and discredited his denial. The learned Judge referred to *Bura and Amonoo v. Ampima* (Fanti Customary Law, 2nd ed. 214). This case involved a claim by the Omanhene of Anomabu to suzerainty over certain Stools of the town of Abuonu. The learned Judge found it astonishing that not a soul contested this claim. The Appellants submit that the judgment was inadmissible, the suit not being between privies, and that, in any case no inference adverse to the Defendants can properly be drawn from these proceedings.

10 24. The learned Judge reached the following conclusion :—

p. 116, ll. 30-38.

“ That is the Plaintiff’s case and in my judgment in an action founding a claim for a declaration of title that lands belong to a Paramount Stool a *prima facie* case is established if the Plaintiff can show that the persons in possession of the land, have through the Odikro, in charge of that land, discharged their duties by attendance at the annual stool festival. That has been done. If, as the Defendants claim, the land was the Stool property of the Asebu State similar evidence would necessarily be available in support of that fact.”

20 25. The learned Judge found that the case set up by the Defendants could not be supported by their evidence, and he was satisfied that the Plaintiff had discharged the onus placed upon him, and accordingly granted to the Plaintiff the declaration of title and injunction as prayed.

p. 118, ll. 39-42.

26. Final leave to appeal to the West African Court of Appeal together with stay of execution, was granted on the 15th November, 1947, on the Grounds of Appeal filed on 21st November, 1947.

p. 123.

p. 123.

pp. 123-125.

30 27. The Judgment of the Court of Appeal was delivered on the 12th July, 1948, dismissing the appeal with costs. The Court of Appeal held that the original kingdom of Asebu may well have included the lands in dispute, and sympathised with the efforts of the Omanhene of Asebu and his predecessors to recover them, but considered that it was now too late. The Appellants submit that there is no prescription in Native Customary Law, and that the assumption that the Kingdom of Asebu had ever lost these lands begs the very question at issue. After conceding that the lands in dispute may have belonged to the Kingdom of Asebu in 1729 (the date of Claridge’s map) the judgment goes on to describe a period of confusion lasting for some time. It is respectfully submitted that the maxim of the Native Customary Law that no land is without an owner applies, and, accordingly, the ownership of the land in dispute originally in the Stool of Asebu remained within that Stool.

pp. 129-131.

p. 130, l. 38.

p. 131, l. 30.

p. 131, l. 37.

p. 130, l. 38.

p. 131, l. 1.

28. The Defendants gave notice of appeal. Nana Amonu Ababio, Omanhene of Anomabu, having died, Nana Baffoe, Regent and Caretaker of Anomabu Stool, was substituted as Plaintiff, on 28th May, 1949. On the 10th June, 1949, final leave to appeal to the Privy Council was granted. The Appellant, Kweku Apawu, died, and Kwamina Acquah was substituted on the 8th September, 1949. By Order of Her Majesty in Council, dated

p. 132, l. 17.

p. 132, l. 37.

p. 133.

the 22nd December, 1953, Nana Amonu Aferi II, Omanhene of Anomabu, was substituted as Respondent in place of Nana Baffoe, and Kobina Quansah as an Appellant in place of Yaw Beretua, deceased, and Twafohene Nana Andzie VII as an Appellant in place of Nana Amanfi III late Omanhene of Asebu, deceased.

29. The Appellants submit that the Judgment of the West African Court of Appeal, dated the 12th July, 1948, which affirmed the Judgment of the Land Court of the Supreme Court of the Gold Coast, dated the 9th August, 1947, is erroneous and wrong in law and should be reversed and this Appeal be allowed, with costs throughout, for the following, 10 among other,

REASONS

- (1) BECAUSE the Trial Court had no Jurisdiction to entertain the Suit.
- (2) BECAUSE according to Native Customary Law allegiance to a Paramount Chief is personal and is not dependent on the ownership, possession or occupation of land, accordingly the Courts below are wrong in holding that because the descendants of Apotu Dekyem now living at Abuenu owe allegiance to the Anomabu Stool, 20 therefore the Plaintiff is owner of the land in dispute.
- (3) BECAUSE therefore the finding of fact of the Courts below as to allegiance to the Plaintiff does not entitle the Plaintiff to the grant of a declaration of title as owner of the land in dispute.
- (4) BECAUSE on the Plaintiff's admissions as set out in paragraph 16 hereof the Courts below were wrong in holding that the Plaintiff had discharged the onus of proving his title to the land in dispute.
- (5) BECAUSE the Defendants' admitted and acknowledged 30 possession and occupation of the lands in dispute has not been challenged in the pleadings or in the issues in any way whether as being wrongful or otherwise and therefore no case for an injunction was ever made out.
- (6) BECAUSE the Judgments of the Courts below were wrong in law.

S. P. KHAMBATTA.

S. N. BERNSTEIN.

In the Privy Council

ON APPEAL

from the West African Court of Appeal

BETWEEN

KWAMINA ACQUAH (substituted for
Kweku Apawu, deceased), **KODWO**
EGYIN, KOBINA QUANSAH
(substituted for **Yaw Beretua,**
deceased), **KODWO ABURA BA**
(under **Asebu Paramount Stool**)
and **TWAFOHENE NANA ANDZIE**
VII (substituted for **Nana Amanfi III**)
(Defendants) *Appellants*

AND

NANA AMONU AFERI II, Omanhene
of **Anomabu** (substituted for **Nana**
Baffoe, Regent and Caretaker of the
Stool of Anomabu, substituted for
Nana Amonu Ababio, deceased)
(Plaintiff) *Respondent*

Case for the Appellants

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