

**Kwamina Acquah (substituted for Kweku Apawu deceased),
and others** - - - - - *- Appellants*

v.

**Nana Amonu Aferi II, Omanhene of Anomabu (substituted for
Nana Baffoe, Regent and Caretaker of the Stool of Anomabu.)** - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER, 1957**

Present at the Hearing:

LORD REID

LORD SOMERVELL OF HARROW

MR. L. M. D. DE SILVA

[*Delivered by LORD SOMERVELL OF HARROW*]

This is an appeal by the defendants against a judgment of the West African Court of Appeal affirming a judgment of the Lands Division of the Supreme Court of the Gold Coast dated 12th July, 1948. The proceedings started by a writ issued out of the Provincial Council by the then Omanhene of Anomabu. The plaintiff claimed a declaration that certain lands "are attached to the Stool on which the plaintiff sits as Omanhene of Anomabu", and an injunction restraining the defendants from dealing in any way with the said land or any portion thereof and from carrying on any cultivation or other work thereon. The principal village in the disputed area is Abonu. The defendants were natives of that village and the Omanhene of Asebu.

Both courts below granted the relief claimed. Before the Board the defendants argued four points. It was submitted on two separate grounds that the courts below had no jurisdiction. Alternatively it was submitted that the decisions were wrong in law. Alternatively if the plaintiff was entitled to a declaration he was it was submitted not entitled to an injunction. As one of the jurisdiction points depends on the nature of the issues raised it will be convenient to deal first with the appeal on merits.

The plaintiff's case was that this land—there is no dispute as to its boundaries—was conquered from the Asebu many years ago: that the village of Abonu was founded by a man named Apotu Dekyem, a stool being created under the protection of the plaintiff's predecessors. The defendants' case was that the land from time immemorial had been and remained attached to the Paramount Stool of Asebu through the Stool of Botoasi, Kweku Apawu, the first defendant.

The judge found that the descendants of Apotu Dekyem had been installed as Odikros in Abona. The evidence of the present Odikro was that he and his predecessors in title had at all times rendered allegiance to the plaintiff's Stool. This was not disputed. In 1923 a claim was brought against Kweku Apawu, the original first defendant by one Elizabeth Smith. In that litigation Apawu swore that the land in question was the Stool property of the Omanhene of Anomabu and that he and the other defendants in those proceedings were subjects of the Omanhene. Apawu who gave evidence in the present case, having changed sides, was

cross examined on these earlier statements. His explanation seeking to discredit his earlier evidence did not commend itself to the learned judge. The present dispute arose when Apawu sought to annex Anomabu Stool lands to the Stool Asebu in or about 1929. The learned judge had the evidence which he accepted 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 of the plaintiff's stool. The defendants sought to establish Apawu's pedigree but this broke down. The learned trial judge after considering all the evidence held that the plaintiff had discharged the onus placed upon him and granted the declaration and injunction as prayed for in the writ. The defendants appealed and the appeal was dismissed.

If the question whether land is attached to Stool A or Stool B is a question of fact there are concurrent findings. The argument on law may be summarised as follows:—Allegiance is personal; the land on which a person owing allegiance to Stool A lives, is not necessarily land owned by or attached to Stool A; the courts below it is said based their decision on allegiance; this, it is submitted, was insufficient to discharge the onus. The courts below were of course well aware of the first two propositions. It is also plain that allegiance of those occupying land is relevant to and may in the absence of other evidence be sufficient to establish the ownership or attachment of the land. One need not go beyond paragraph 9 of the Defence in which it is alleged that before the year 1700 the people in the disputed land owed allegiance to the paramount Stool of Asebu. It is plain that before the learned trial judge both sides regarded the question of allegiance as relevant and important. There are no grounds for the submission that the learned judge went wrong in law on the weight he gave to it on the facts as he found them.

The first point as to jurisdiction was taken below and rejected by the trial judge and the Court of Appeal. Under the then Regulations a deposit of £100 was required to be made by a plaintiff before a writ was issued. The Provincial Council had power to remit the payment in whole or in part. It is quite clear, as the learned trial judge found, that the Provincial Council waived the deposit when the writ was issued and that was a matter entirely within their discretion. It would appear that the waiver was not unconditional as in May, 1938, the Registrar of the Provincial Council wrote to the plaintiff saying that the case would be struck out unless the deposit was paid. The case was not struck out and the learned judge was unable to say whether the full deposit had or had not been paid. Assuming it had not, he exercised his own powers and ordered that there should be full remission. Their Lordships agree that in these circumstances the argument fails.

The second jurisdiction point is more complicated but has equally little substance. It was not taken below. It was formulated in paragraph 15 of the appellants' case:—

“ 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”. This Ordinance has to be read with the provision that the Lands Division of the Supreme Court had exclusive original jurisdiction to hear and determine any cause or matter relating to the ownership, possession or occupation of land.

For the submission to succeed it would be necessary to establish that the issues between the parties was a question or matter relating to political or constitutional relations under native customary law, and further that the

jurisdiction conferred by section 25 excluded the jurisdiction of the Courts if the question or matter was one that could apart from section 25 be litigated. In considering whether a question or matter relates to political or constitutional relations one applies the test laid down in *Vanderpuye v. Botchway* [1956] A.C. 501. What is the real issue? The real issue is quite plainly the ownership of land. It may be wondered how it could be suggested that the issue was one within section 25. The suggestion was based on the fact that each side sought as has been said to rely on "allegiance" as relevant to the ownership issue. It is plain that this does not alter the nature of the real issue. Nor is there any ground for suggesting that evidence as to allegiance *per se* is within the words of section 25 as defined by section 2 (1) (c). Political and constitutional relations may involve questions of allegiance, but questions of allegiance may arise when no political or constitutional questions are involved. The argument as based on section 25 of the Ordinance of 1944 fails also on the other point. That section confers a discretionary power on a Provincial Commissioner to appoint a Committee of Inquiry to report on any matter of a constitutional nature if it is inexpedient to refer it to a State Council. It clearly is not purporting to limit what would otherwise be the jurisdiction of the High Court.

Later in his argument Mr. Khambatta referred to the provision which is now to be found in section 88 (3) of the Courts Ordinance cap. 4 in the 1951 Revision. It reads as follows:—

"88. The Supreme Court and Magistrates' Courts shall not have jurisdiction to entertain either as of first instance or on appeal any civil cause or civil matter instituted for—

(3) the trial of any question touching the political or constitutional relations subsisting according to native law and custom between two or more Paramount Chiefs or Head Chiefs, or between two or more Chiefs, or between a Paramount Chief and a Chief, or between a Head Chief and a Chief."

This does affect the jurisdiction but is irrelevant to this case as the cause or matter was not instituted for the trial of a question touching the political or constitutional relations within the section. It was a land dispute on familiar lines.

Finally it was submitted that an injunction was inappropriate as there was no claim for ejectment. It is clear that before the learned judge there was no argument that the injunction should not be granted if the plaintiff established his right to the declaration. The ground of appeal No. 10 reads:—"Because the order granting an injunction against the defendants and co-defendant was harsh, oppressive and unconscionable." In the note of argument under this head appears—"Injunction harsh as land in question is an 'island' in a foreign state." It was submitted by the plaintiff that he was entitled to an injunction against all persons who challenge his title. The Court of Appeal said "as to the injunction it must stand and it will be for Apawu and his followers to make their peace with the overlord whose suzerainty they once recognised."

It is clear that the matters argued or sought to be argued on this point before the Board were not argued below. The circumstances of a land dispute such as this differ greatly from the land disputes that arise or may arise in this country. An injunction is a discretionary remedy and although the principles of law and equity are to be applied, it would in their Lordships' opinion be wrong to allow points to be taken here which were not taken below.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs, if any, of this appeal.

In the Privy Council

KWAMINA ACQUAH (SUBSTITUTED FOR
KWEKU APAWU DECEASED), AND OTHERS

v.

NANA AMONU AFERI U, OMANHENE OF
ANOMABU (SUBSTITUTED FOR NANA
BAFOE, REGENT AND CARETAKER OF
THE STOOL OF ANOMABU.)

DELIVERED BY
LORD SOMERVELL OF HARROW