Privy Council Appeal No. 140 *of* 1929.

Kobina Ninson - - - - - - - - *Appellant*

v.

Adjuah Aduwah - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE GOLD COAST COLONY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH FEBRUARY, 1932.

Present at the Hearing :

LORD BLANESBURGH.
LORD TOMLIN.
SIR GEORGE LOWNDES.

[*Delivered by* LORD BLANESBURGH].

In form the action out of which this appeal arises was one to recover £25 damages for trespass to the plaintiff's land. In truth it was an action for the recovery of an area of property situate at Agona Abodom in the Central Province of the Gold Coast Colony and at time of action brought, and for over nine years before, in the possession of the defendant and his predecessor in title. Such difficulty as the case now presents seems due to the fact that the Native Tribunal before which it first came, as well as the Full Court of the Gold Coast Colony from which the present appeal is brought, regarded the claim as one of trespass to land of which the plaintiff was to be treated as being in possession and not as an action in ejectment against a defendant who, himself in possession, had put the plaintiff to proof of her title by his plea of not guilty. This misapprehension of the Native Tribunal was apparently due to its acceptance of an answer made in evidence on behalf of the defendant to one of its own questions to the effect that the land in suit had remained in possession of the plaintiff "until now." That answer is referred to in the judgment of which indeed it is the foundation. Yet, inconsistently

enough the Tribunal by its order gave leave to the plaintiff " to take possession of the land in dispute as per her boundaries shown." The Provincial Commissioner, to whom an appeal was brought from the judgment of the Native Tribunal, corrected this mistake; but unfortunately the Full Court before which the case finally came reverted to the same answer and also based its judgment in favour of the plaintiff upon it. Their Lordships cannot but regard the result as unfortunate. The answer, if it be correctly transcribed, and upon this their Lordships feel grave doubt, must have been given *per incuriam*. For while there was a conflict upon the point whether the plaintiff and her son, Kofi Tawiah, had nine or more years before action peaceably delivered up possession of the lands to the predecessor of the defendant as true owner, there was no dispute that ever since the plaintiff and her son had been out of possession. Her grievance in evidence, indeed, was that she had not since been allowed with her two feet to enter the property in suit at all. And that this position was the true one is shown in every direction. Their Lordships, for instance, notice that in an affidavit sworn in support of an application for a stay of execution pending this appeal—an application which, on terms, was granted—the defendant says :—

> " 6. That since the year 1918 when Kofi Tawiah, the son of Adjuah Aduwah, plaintiff-respondent-appellant herein, was ejected by my elder brother Yaw Chey, the members of my family and I have been solely in occupation of the said land."

Their Lordships cannot doubt that it is on that footing that the respondent's case must stand or fall and it will be found that the final advice of the Board to His Majesty is based upon their Lordships' view that of the three Tribunals below the Provincial Commissioner alone correctly appreciated the true nature of the plaintiff's action and the extent of the burden thereby thrown upon her.

The actual proceedings in the Courts below were as follows : On the 11th May, 1927, the action came on for hearing before the Native Tribunal (composed of the Omanhene or Paramount Chief of the District and his Councillors), and that Tribunal, after an inspection of the lands, gave judgment for the plaintiff. The defendant appealed to the Provincial Commissioner and he, having heard parties and inspected the lands, treating the cause as one of ejectment, by his judgment dated the 30th July, 1927, allowed the appeal, reversed the judgment of the Native Tribunal, and dismissed the action. On final appeal by the plaintiff to the Full Court of the Gold Coast Colony, that Court by its judgment of the 15th April, 1929, restored the judgment of the Native Tribunal.

The present is the defendant's appeal from that judgment. The facts, as admitted by the respondent, or found by the Provincial Commissioner, may be shortly stated as follows. For many years prior to 1918, the predecessor in interest of the

respondent under a title which is in dispute between the parties, had been in occupation of and was working on the land, and the respondent herself and her sons were then in occupation and worked there. In 1918 one of the respondent's sons claimed to be owner of the land. Thereupon Yaw Kyei, the appellant's predecessor in title asserting the property to belong to himself and his family, ordered the respondent's son off the land, took possession and retained such possession until his death. Neither the respondent nor her family then disputed Yaw Kyei's title to the land or attempted to re-enter except for the purpose of removing their effects which Yaw Kyei gave them leave to do. Indeed, so far from disputing Yaw Kyei's title, the respondent and her family as found by the Provincial Commissioner subsequently approached Yaw Kyei and a meeting was held at which they begged to be allowed to pay pacification money to Yaw Kyei, and offered an annual rent if they were allowed to re-enter the land. But, on the ground that the respondent's son had claimed ownership of the land, Yaw Kyei rejected the offers made and refused to allow the respondent or her sons to re-occupy. Until the present action, over nine years later, neither the respondent nor any of her family took any steps to recover the land, which has since been held first by Yaw Kyei and after his death by the appellant, and has been cultivated and developed by them as their own.

These facts, not dealt with in any way by the Native Tribunal, are found by the Provincial Commissioner on the evidence to have been proved and to be true. The only answer by the respondent to the circumstantial story of the appellant's witnesses was that she was not present at any such meeting as they described, although the exclusion of her son from the land she admitted was known to her at the time. Her explanation of her delay in claiming the land was that she had herself been continuously ill for nine years, and that she could not herself induce any member of her family to take action. The learned Commissioner, and on the evidence their Lordships see no reason to doubt the correctness of his finding, rejected the first answer of the respondent as untrue, and the excuse for delay as inadequate.

The origin of the possession of the lands by the respondent and her family has not so far been dealt with. The fact that they were in possession for many years prior to 1918 was not in issue. But the respondent's case on this subject was that many years ago her ancestor Onyina settled the land in question, which was then forest, and that in course of time it descended to her uncle Kwesi Yamoah who gave it to her. The case for the appellant on the other hand was that many years ago his predecessor in title gave to Okomfu Amu, the respondent's grandmother, a portion of his family land to cultivate for the purposes of food only, the oil palms being retained by his predecessors: that Yaw Kyei, the appellant's immediate predecessor, saw Kofi

Towiah, the respondent's son, on this land : that subsequently Kofi Towiah claimed the land as his own property : and that the meeting took place with the result already stated.

Now, whether the appellant's account of the respondent's original possession, or the respondent's own account is the correct one, may be doubtful if the substantive evidence in the case alone is regarded. The actual evidence on each side is vague and shadowy. It is, however, true to say that the respondent's evidence is the less convincing of the two, and her inability to explain her admission of Yaw Kyei's title, nine years before action, and the peaceable possession by the appellant and his family ever since, facts found against the respondent, supply strong confirmation of the case put forward by him. In other words, this plaintiff in ejectment has entirely failed to prove her own title and on that ground alone her action must fail.

The Full Court, strangely enough, seem to have accepted the appellant's version of the history of the land in question, and gave judgment in favour of the respondent solely it would seem by reason of the admission in evidence as to the respondent's possession made on behalf of the appellant as already mentioned. In other words, they seem to have treated the action as an action of trespass by a Plaintiff in long possession or, at all events, as one in which this Plaintiff had never given up possession, and, instead of recognising had consistently disputed the appellant's or maintained her own title : as, in other words, an action commenced under the conditions of 1918, prior to the meeting of that year and not one under those of 1927. Whether, if the appellant's version of the history of the land be accepted, the Court was entitled to decide in favour of the respondent even if she was in possession of the land at the commencement of the action need not concern their Lordships, for at that date she was and for nine years had on her own showing been out of possession altogther.

Their Lordships regret that they have not had the advantage of any argument on behalf of the respondent. But they have been much assisted by Sir Brandford Griffith's impartial presentation of the case on behalf of the appellant. Moreover, they are entirely satisfied with the judgment and reasoning of the Provincial Commissioner.

For these reasons their Lordships will humbly advise His Majesty that this appeal be allowed, the order of the Full Court of the 15th April, 1929, be discharged, and the judgment of the Provincial Commissioner of the 30th July, 1927, restored.

The respondent must pay to the appellant his costs in the Full Court and the costs of this appeal.

In the Privy Council.

KOBINA NINSON

v.

ADJUAH ADUWAH.

DELIVERED BY LORD BLANESBURGH.

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