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P.C.A. No. 11 of 1951.

In the Privy Council.

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL

BETWEEN

1. OPANIN ASONG KWASI
2. ODAME KWASI
3. OBESE KWASI . . . . . *Defendants-Appellants*

AND

JOSEPH RICHARD OBUADABANG LARBI *Plaintiff-Respondent.*

Case for the Respondent.

CASE FOR THE RESPONDENT

RECORD.

1. This is a Defendants' Appeal against a judgment of the West African Court of Appeal, Gold Coast Session, dated the 1st June, 1950, reversing a judgment of the Land Court, Accra, dated the 10th day of June, 1949, which in turn had affirmed the judgment of the Native Appeal Court, Kibi, dated the 23rd September, 1948, setting aside the judgment of the Native Court "B" of Adonten dated the 10th August, 1948, in favour of the above-named Plaintiff, Joseph Richard Obuadabang Larbi, which last-named judgment upheld the decision of the Arbitration Panel of Apapam Elders that the land in dispute belonged to him. p. 20 *seq.* p. 17. p. 13. p. 8. p. 5.

2. The Plaintiff-Respondent commenced his suit in the Native Court "B" of Adonten at Akim Abuakwa in the Gold Coast Colony by a civil summons dated the 9th October, 1947, claiming against the above-named Defendants (now Appellants) a declaration of title to certain land more particularly described therein, and an injunction to restrain the Defendants, their agents, servants and/or workmen from working or in any manner interfering with the said land pending the hearing and determination of the action. The action was originally brought in the name of two persons, but it was subsequently discovered that one of them had died before action was brought, and there is only one Respondent. p. 1. p. 28, l. 28. p. 29, l. 7.

3. Some six weeks after the issue of the writ certain proceedings took place, the nature of which is in dispute between the parties. The present Respondent contends that the parties agreed to refer the dispute to an arbitration panel of Apapam Elders, that a sum of 5/– was paid as an adjournment fee, and that a sum of 16/– was paid by both parties to signify their consent to the matter being referred to the arbitrators. The p. 3, l. 15.

p. 19, l. 27. present Appellants, though only at a comparatively late stage, contended that the proceedings were not arbitration proceedings, but mere negotiations for a settlement.

4. It is desirable, therefore, to set out excerpts from the proceedings in question, which resulted in a decision of the Arbitration Panel of Apapam Elders of the 18th November, 1947. The President of the Panel said, *inter alia*, as follows :—

p. 5, ll. 20–36. " After hearing all the relevant statements on both sides and their witnesses and thoroughly satisfying themselves through cross-examination the Arbitrators decided to send messengers to view the land under dispute. Both parties were asked to pay an advance of £12 each which they paid. The following were appointed :—

Opanyin Kwame Ayim, President,

Opanyin Yao Adu and

Mr. A. E. Gyanfi Amonoo who acted as recorder for the arbitrators.

The date for viewing the land was fixed for the 13th November and both parties were asked to meet the party at the spot which they all agreed to do.

The viewing party actually met both parties on the land but the Defendants refused to show their boundaries. The Plaintiffs (present Respondents) on the other hand, took the party to the land and showed them their boundaries. After viewing the land the party instructed both the Plaintiffs and the Defendants to appear before the arbitrators at Apapam on the 18th November for their verdict."

5. The decision of the Arbitrators was in the following terms :—

p. 5, l. 38, to p. 6, l. 15. " At a sitting of the Arbitrators on Tuesday the 18th November, although the Plaintiffs arrived in compliance with our instructions issued to both parties the Defendants absented themselves but sent a letter per one Kwaku Gyau signed by the principal Defendant Opanyin Ashong Kwasi intimating their decision to dissociate themselves from the arbitration and actually demanding immediate refund of the £12 advance willingly paid in respect of the viewing of the land. After a lengthy discussion in which the matter was considered from every angle we decided to break the last-minute deadlock created by the Defendants, brush aside their objections and to proceed with the case. During the deliberation one fact forcibly struck the arbitrators and that was the flagrant omission of the Defendants to call into witness the principal member of the party who was alleged to have effected the sale of the land one Kwame Amoako now Gyasihene of Apapam. This omission struck us as a suspicious move and we could not help having the impression that the whole story of the defence was deliberate and impudent fabrication. I, the President of the arbitration panel of Apapam

do therefore declare that inasmuch as the persons who were alleged to have sold the land in question to the Defendants were irresponsible, unauthorised persons holding no position entitling them to sell land in accordance with native customary law and practice the said sale should be nullified and the land given to the Plaintiffs who have fully satisfied us that it was part and parcel of the main original holding acquired by purchase in complete conformity with native customary usages appertaining to the sale of land in the year 1914 by the late Kwakjo Asagyi and his company." (The Respondent's alleged predecessor in title.)

6. After hearing submissions by both sides, the Native Court "B" of Adonten, on the 10th August, 1948, decided that the arbitration award should be accepted as the judgment of that Court with costs to be taxed. p. 8.

7. The Defendants (present Appellants) applied for leave to appeal to the Native Appeal Court, Kibi, on the 8th September, 1948, and on the 16th September, 1948, leave to appeal was granted. p. 9. p. 10.

8. In their supplementary grounds of appeal, the Defendants raised certain specific grounds, *inter alia*, that there was no order of the Court below on record for the arbitrators to transmit to the Court below their findings, and that the arbitrators gave their decision *ex parte*, which, they submitted, rendered in consequence their decision null and void. p. 11.

9. The Native Appeal Court, Kibi, after setting out the various contentions of the parties, on the 23rd September, 1948, set aside the judgment of the lower Court and ordered the case to be sent to it for re-trial. p. 13.

10. The Plaintiff (present Respondent), feeling aggrieved by the judgment of the Native Appeal Court, Kibi, referred to in the preceding paragraph hereof, appealed to the Supreme Court, Eastern Judicial Division, Land Court, Accra, on the 20th November, 1948. p. 15.

11. On the 10th June, 1949, the Honourable the Supreme Court (S.O. Quashie-Idun, J.) dismissed the appeal but varied the Order made by the Native Appeal Court by remitting the case to that Court for hearing as a substantive case by a panel different from the one which heard the appeal to that Court. p. 17.

12. On the 23rd August, 1949, the present Respondent appealed to the West African Court of Appeal against the judgment referred to in the preceding paragraph hereof, and on the 1st June, 1950, the Appeal came on for hearing before a Bench composed of His Honour Sir Henry William Butler Blacknall, President, His Honour Allan Chalmers Smith, Acting Chief Justice, Gold Coast; and His Honour Arthur Werner Lewey, Justice of Appeal. p. 18.

13. The main judgment of the Court, which unanimously allowed the Appeal, was delivered by the learned President. In the course of his judgment the learned President said as follows:—

"It was contended, however, by Mr. Akufo Addo for the Respondents that the award was not binding under native p. 20, l. 39, to p. 21, l. 44.

customary law because at a certain stage, i.e., when the arbitrators went to inspect the land, the Defendants refused to point out their boundaries and withdrew from the proceedings.

"Now the general principle governing arbitrations is well known, and it is set out *inter alia* in the case of *Omanhene Kobina Foli* against *Ohene Obeng Akese* (1 W.A.C.A. 1). In that case Deane, C.J., said :—

'. . . in submissions to arbitration the general rule is that as the parties choose their own arbitrator to be the judge in the disputes between them, they cannot when the award is good on its face, object to his decision, either upon the law or the facts.'

"I might also refer to the case of *Ekua Ayafie* v. *Kwamina Banyea* (Sarbah's Fanti Law Reports, 2nd Edition, at p. 38) where it was held that where matters in difference between two parties are investigated at a meeting, and in accordance with customary law and general usage a decision is given, it is binding on the parties, and the Supreme Court will enforce such decision. In that case Bailey, C.J., said :—

'. . . after the arbitration was concluded, the Defendant objected to the award, because it was against him. The Plaintiff, no doubt, would have objected had the award been but this way.'

"But notwithstanding that objection the Court held the award was a good one. Mr. Akufo Addo suggests that this case is distinguishable from the present one, because the Fanti law does not exactly agree in detail with Akan law. That is no doubt true, but the general principles of native customary law are based on reason and good sense and it would take a lot to convince me that Akan customary law is so repugnant to good sense as to allow the losing party to reject the decision of arbitrators to whom he had previously agreed.

"Let us see then whether there is any cogent evidence in support of Mr. Akufo Addo's submission. I first look at the decision of Native Court 'B.' That Court had the arbitration award before it and was aware of the fact that the Defendants did not agree to it. But the Court nevertheless gave effect to the arbitration award. I infer from this that that Court did not hold the view that Akan law differs from Fanti law in this respect. Mr. Akufo Addo, however, argues that we must look at the judgment of the Native Court of Appeal, which he submits is in his favour.

"Now the *ratio decidendi* of that judgment seems to have been that they found there were many irregularities in the procedure of the lower Court, for although they did say that 'in the above circumstances we find out that the Defendant-Appellants did not accept the award.' They proceeded, 'in order to avoid misunderstanding and multiplicity of actions, the case should be sent to the lower Court for re-trial.' That judgment in my opinion should not be construed as meaning that the Native Court of Appeal differed from the Native Court on the question of the binding validity of an arbitration award. In the result it seems to me that

as there was a proper and valid arbitration both the learned Judge and the Native Appeal Court were wrong in ordering a re-trial and the award of the arbitrators should stand."

The other two judges concurred in the judgment of the learned President and in the result the judgment of the trial Court of the 10th August, 1948, was restored. p. 22.

14. On the 9th October, 1950, final leave to appeal to the Privy Council was granted by the West African Court of Appeal to the present Appellants, and the present Respondent respectfully submits that the Appeal should be dismissed with costs for the following, among other p. 29.

REASONS

(1) BECAUSE the West African Court of Appeal rightly held that the proceedings before the panel of Elders, Apapam, were not in the nature of mere negotiations, but were a formal arbitration according to Akan law.

(2) BECAUSE the arbitration award, which was made an order of court was good on the face of it and was, therefore, not appealable.

(3) BECAUSE, even assuming that the arbitration award was appealable, the learned Land Judge erred in law in remitting the case to the Native Appeal Court, Akim Abuakwa, as that Court was not properly constituted, and its judgment would consequently have been a nullity; alternately, because the Native Appeal Court, Akim Abuakwa, had no original jurisdiction and a remit to it by the Land Judge to try the case *de novo* was ineffective in law and any judgment of the Native Appeal Court would consequently have been a nullity.

(4) BECAUSE the judgment of the West African Court of Appeal was right and ought to be affirmed.

C. S. REWCASTLE.

GILBERT DOLD.

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P.C.A. No. 11 of 1951.

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2. ODAME KWASI and
3. OBESE KWASI - - *Defendants-Appellants*

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