20/1955

No. 6 of 1954.

In the Privy Council

On Appeal from
The West African Court of Appeal

(GOLD COAST SESSION)

BETWEEN CHIEF KWAME KWANIN for and on behalf of the Stool of Obuasi ... (Defendant) *Appellant*

AND

CHIEF KOJO EWUAH for and on behalf of the Stool of Nyinawusu, substituted for Chief Kofi Kuran, Decd. ... (Plaintiff) *Respondent.*

Case for the Appellant

RECORD

1. This is an appeal from a Judgment of the West African Court of Appeal at Accra in the Gold Coast, dated the 5th day of February 1953, which dismissed the appeal of the Defendant, Chief Kwame Kwanin, from a Judgment of Windsor-Aubrey, J. in the Lands Division of the Supreme Court of the Gold Coast at Cape Coast, dated the 18th day of July 1950, whereby the learned Judge granted to the Plaintiff a declaration of title to certain lands claimed by him and ordered the Defendant to pay £25 damages for trespass on the said lands. pp. 44-46. pp. 34-37.

2. THE PRESENT SUIT p. 1.

was originally started on the 14th August, 1945, in the Denkyira Confederacy Native Tribunal at Dunkwa.

3. On application of the Defendant the said suit was transferred to the Lands Division of the Supreme Court of the Gold Coast at Cape Coast pursuant to an Order on the 20th day of June 1947 of Jackson J. who, on the 30th day of August 1947 ordered pleadings. p. 2. p. 3.

4. Chief Kofi Kuran (hereinafter called "the Plaintiff") by his Writ issued on the 14th day of August 1945 (which was transferred from the said Native Tribunal pursuant to the said Order) and by his Statement of Claim dated 26th day of September 1947, claimed a declaration of title to all the lands known and called Apunpun, otherwise known as Buakyi-Krome, Twapiase, Gyaponkrome, Ekakyerenyansa, Enekoko, Nkwantanum, and the stream called "Kunite," £100 damages for trespass to the said lands and stream and an injunction. p. 1. p. 2. pp. 4-5.

In the said Statement of Claim it was alleged *inter alia* that the ancestors of the Plaintiff were the first to settle on Nyinawusu lands: that later the ancestors of the Defendant migrated from Ashanti and obtained permission from the ancestors of the Plaintiff to settle on Obuasi lands.

pp. 5-6. **5.** Chief Kwame Kwanin (hereinafter called "the Defendant") by his Defence dated the 30th day of October 1947, joined issue with the Plaintiff and alleged *inter alia* that the Defendant's ancestors settled on the land claimed by the Plaintiff over 500 years ago and have ever since been in possession without payment of tribute or acknowledgment of the Plaintiff's title to the said land and pleaded possession and ownership.

p. 6. It was therein further alleged that a Judgment given by the Native
p. 49. Tribunal of Jukwa in Denkyera State on the 4th May 1917 between Chief Kweku Sebbe and Chief Kofi Fori, the respective predecessors of the Plaintiff and the Defendant on the Stools of Nyinawonsu and Denkyera Obuasi was *res judicata* in respect of part of the said land (namely, West of the Afiefi Stream from the North on to the old hammock road on the Ahunfuna stream on the South) and that the same constituted
p. 6. an estoppel against the Plaintiff's claim. It was still further alleged that
p. 51. the judgment in the suit of Chief YAW MENSAH *v.* Chief KWAMI KONIN (6th December 1920) herein relied on by the Plaintiff in the Statement of Claim did not determine the ownership or possession of the land between Ahunfuna Stream and Nyinawonsu village.

6. The trial of the said Suit commenced on the 2nd day of March 1950 before Windsor-Aubrey, J. assisted by an Assessor, Nana Gyasehene of Ogua State, and fourteen witnesses gave evidence for the Plaintiff including the following: JOSEPH ANNU ESUMAN deposed *inter alia* that he
p. 7. was a licensed Surveyor: that on the order of the Court he had surveyed the area in dispute and made a plan (which was put in evidence as
p. 8. Exhibit 1). Under cross-examination he stated that the said Judgment
p. 48. of Jukwa Native Tribunal dated the 4th May 1917 covered the area Afiefi-Subinsu to the Abokoe Tree up to which point both parties had an agreed boundary, thereafter from Abokoe Tree to the Kurenti lands which extend to the left bank of the Ahunfuna river.

p. 30. Recalled by the Court the said witness deposed that his said statement concerning the area averred by the said Judgment was not based entirely on the measurements in the said Judgment: that the said measurements gave only an indication whereby the site about which there was a dispute
p. 30. was located: that the said measurements merely gave the site of a cleared
p. 31. area intended for a Town which he himself had seen: that he was still of opinion that the dispute in the said case covered the whole area between the green and pink lines on the said plan from the Ahunfuna stream to the Afiefi stream.

The said witness further deposed that he had never seen two chiefs litigate about a small area such as the said site which measured only two acres.

p. 11. Chief KOFI KURAN the Plaintiff deposed, *inter alia*, that the litigation with the Defendant in 1917 concerned land from the junction of the Afiefi and Subin rivers to the 2nd deserted Obuasi.

p. 26.
p. 27. EKOW SELBY deposed, *inter alia*, that he was a Licensed Surveyor and that he had never surveyed the area in the 1917 case.

In response to a request by the Court he looked at Exhibit A (being a certified copy of the said Judgment and proceedings to which the same related) and then stated that it referred to a measurement of 486 yards; that from Obuasi (1st deserted) a distance of 486 yards measured horizontally from West to East just reaches the green line on Exhibit 1; that from 2nd Obuasi a line in the same direction of the same length passes the boundary coloured green for a distance of 300 yards, and that the distance of 737 yards from 1st Obuasi in the direction of the Kuranti Pond just touches the green boundary line. The witness inserted certain markings on Exhibit 1 in red ink. p. 26. p. 48.

7. Ten witnesses gave evidence for the Defendant. Documentary evidence put in by the Defendant was the certified copy of the said Judgment (Exhibit A) and the proceedings, part of which are omitted from the record. The Appellant will refer to the said exhibit and will rely *inter alia* on the following passages in the said judgment. p. 48.

" In this action Plaintiff with oath seeks to establish his right and title on the river Kwarantin and all the adjoining lands thereof a portion of which Defendant has trespassed and cleared with intent to erect a village thereon. Defendant has pleaded not guilty and has further raised issue of the title to the land with oath in response to the Plaintiff: for doubtless the action was brought to test the title ". p. 49. p. 49.

" We think the claim of the Defendant should be upheld by this Court and we give judgment for the Defendant with costs ". Counsel argued against the admission of Exhibit 2, the judgment of the 6th December 1920, and contended that it could not be tendered as an estoppel. p. 50. p. 19. p. 51.

8. After Counsel for the Plaintiff and Defendant had addressed the Court, the Court was adjourned on the 16th day of March 1950.

According to the record, the Assessor gave his opinion in the Plaintiff's favour, on the 12th day of April 1950. The Appellant will contend that the said opinion was not given in open Court and/or that it was not given in the presence of Counsel or the parties. p. 33.

9. Mr. Justice H. M. Windsor-Aubrey delivered judgment on the 18th day of July 1950 granting the Plaintiff a declaration of title to the whole area claimed by him with costs and awarding him £25 damages for trespass. The learned trial Judge attached much weight to the opinion of the Assessor. pp. 34-37. p. 37.

The learned Judge held *inter alia* that if the witness Selby were believed the area comprised in the said judgment of 1917 was small and almost entirely comprised land not claimed by the Plaintiff in the present Suit, that he believed Selby and accordingly that no question of estoppel arose. p. 35.

10. From the said Judgment the Defendant appealed to the West African Court of Appeal on the following, amongst other, grounds: pp. 38-39.

(1) The Assessor gave no opinion, *ex facie curiae* either at the close of the Addresses of Counsel on the 16th March 1950

or before or after the Judgment of the Court on the 18th July 1950.

(2) The Assessor's recorded opinion appearing on the Record on the 12th April 1950 was unknown to the Defendant-Appellant and/or his Counsel until the receipt of Certified True Copy of the proceedings on or about the 24th September 1950.

(3) On the pleadings and evidence and on the admissions made by the Plaintiff-Respondent respecting Exhibit A the Court below was wrong in law and on the facts in holding that the Judgment in *Sebbe* v. *Kofi Fori* in 1917 did not create an estoppel.

p. 40. **11.** On the 19th day of January 1953 the West African Court of Appeal ordered that Chief Kojo Ewuah, the present Respondent be substituted for Chief Kofi Kuran who had died subsequent to the hearing in the Land Court as Respondent in the said appeal.

pp. 41-43. **12.** On the 19th and 20th January 1953 the case was argued in the West African Court of Appeal.

pp. 44-46. **13.** The West African Court of Appeal by judgment dated the 5th day of February 1953 dismissed the said appeal but rectified the judgment of the trial Judge so as to exclude therefrom any reference to the stream called " Kunite ".

p. 45. The judgment of the West African Court of Appeal includes *inter alia* the following passages :

" The contention of Counsel for Appellant that the Assessor gave no opinion *ex facie curiae* either at the close of the addresses of Counsel or before or after the judgment is not supported by the record ".

" With regard to the plea of estoppel by the Defendant-Appellant the learned trial Judge held that the judgment of 1917 is binding on both parties but it is not a judgment with respect to the land in dispute 'except for a minute distance in one direction which does not merit serious consideration'. In this view he is supported by ample evidence on record which he fully discussed in the judgment. A careful comparison of the plan with references to sites contained in the evidence leaves no doubt in my mind that the subject matter of the suit to which the judgment of 1917 relates, is outside the area in dispute ".

pp. 46-47. **14.** On the 30th day of June 1953 the West African Court of Appeal granted Final Leave to Appeal from the above-mentioned Judgment of the 5th February 1953.

15. The Appellant humbly submits that the said judgment of the West African Court of Appeal dated the 5th February 1953 and the Judgment of the learned trial Judge dated the 18th July 1950 are erroneous and should be reversed, or that this Suit should be sent back for a new trial, and that in either event he should be granted his costs of these proceedings throughout for the following, among other,

REASONS

1. Because the trial was irregular in that the Assessor did not give his opinion in open Court and in the presence of the parties or their Counsel.

2. Because the West African Court of Appeal erred in holding that the Assessor had given an opinion *ex facie curiae.*

3. Because the trial was irregular in that the Assessor exceeded his functions and as recorded by the Trial Judge gave his decision on all the issues in the case some three months before the Trial Judge delivered judgment.

4. Because the Trial Judge and the West African Court of Appeal erroneously construed the above-mentioned Judgment in *Chief Kweku Sebbe* v. *Kofi Fori* of the 4th May 1917 or alternatively failed to direct themselves as to the question of construction arising in respect thereof in that they held that the said Judgment did not relate to a substantial part of the area in dispute in the present suit.

5. Because the judgments of the Courts below are in conflict with the said Judgment of the 4th May 1917.

6. Because the Courts below were not entitled to receive the evidence of the witness Selby in explanation of the said Judgment of the 4th May 1917.

7. Because the witness Selby upon whom the Courts below relied gave evidence inconsistent with the said Judgment.

8. Because the Trial Judge misinterpreted the evidence of the said witness who did not have, and did not purport to have, any personal knowledge of the site in question, and whose testimony was of no evidential value in regard to the matters in dispute between the parties.

9. Because the Courts below failed to appreciate that on a correct reading of the evidence the testimony of the witness Esuman, was uncontradicted.

10. Because the Plaintiff failed to prove the boundaries of and in particular failed to establish the Southern limit to the lands claimed by him.

11. Because the Plaintiff did not call the neighbouring Chiefs in support of his case.

12. Because the judgment of the Trial Judge and of the West African Court of Appeal were wrong and ought to be set aside.

PHINEAS QUASS.

T. B. W. RAMSAY.

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Case for the Appellant

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