20/1955

~~P.C. 44 of 1953~~

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 (Deceased) . . (Plaintiff) *Respondent.*

Case for the Respondent.

1. This is a Defendant's Appeal from a Judgment of the West African Court of Appeal of the 5th February 1953 dismissing the Defendant's Appeal from a Judgment of the Supreme Court of the Gold Coast, Central Judicial Division, Divisional (Land) Court, Cape Coast, of the 18th July 1950. p. 44 *et seq.* p. 34 *et seq.*

2. On the 14th August 1945 the Plaintiff Chief Kofi Kuran issued a summons in the Native Court of Denkerahene, Denkera State, Central Province, against the Defendant, Chief Kwame Kwanin, claiming a declaration of title to certain lands there named and a stream. The area in dispute was subsequently defined by a plan, Exhibit "1." On the 20th June 1947, by order of the Supreme Court of the Gold Coast, Lands Division, Cape Coast (Mr. Justice Jackson), the matter was transferred to the Lands Division of the Supreme Court of the Gold Coast for hearing under Section 54 (1) (*c*) of the Native Courts (Colony) Ordinance, 1944. pp. 1-2. pp. 2-3.

3. On the 30th August 1947 Mr. Justice Jackson ordered that a Statement of Claim, with a Plan, and Statement of Defence be filed. Such pleadings were accordingly delivered and a plan filed. A reduced copy of such plan, Exhibit "1", is part of the printed Record in this appeal. Thereon the disputed area, roughly triangular in shape, is enclosed on the west and south by a green line and on the east by a red line. p. 3.

The Plaintiff's village, Nyinawusu (Nyinawonsu), lies immediately beyond the eastern boundary of the lands in dispute, and the Defendant's present village, Oboasi, lies immediately beyond the western boundary of the lands in dispute, almost due east of, and a little less than two miles distant from, the Plaintiff's village.

The original locations of the Defendant's villages had, however, been about 1½ miles in a northerly direction from the present site and also immediately beyond the said western boundary.

p. 8, l. 27. p. 34, l. 26. The whole area in dispute is approximately 56 square miles.

4. (A) The case of the Plaintiff, as set up in the Statement of Claim 10
p. 4, l. 1. dated the 26th September 1947, was that his ancestors were the first to settle upon Nyinawusu lands, in which at that time were comprised lands to the west of the green line shown upon the plan. Later, in or before the year 1837, the ancestors of the Defendant emigrated from Ashanti and obtained permission to settle upon some part of Nyinawusu lands lying west of the green line. By customary law such permission would not divest the superior title of the Stool of Nyinawusu as owners of the said lands by virtue of their first settlement, but it would entitle the ancestors of the Defendant and their successors to live upon that land so long as they in no way disputed the superior title of the Stool of Nyinawusu and paid the 20 customary tribute, if any.

p. 4, l. 16. p. 48. (B) The Plaintiff admitted however that, by a Judgment of the Tribunal of the Paramount Chief of the Denkera State pronounced on the 4th May 1917 (Exhibit " A ") (hereinafter referred to as " the 1917 Judgment ") in a suit between his predecessor Kweku Serbeh as Plaintiff and the Defendant's predecessor Fori as defendant, these lands to the west of the green line had been held to belong to the Defendant's predecessor.

p. 4, l. 23 to p. 5, l. 2. (C) He however claimed that subsequent to this judgment there had been an admission by the Defendant of the title of the Plaintiff's Stool to Nyinawusu lands between the green and the red lines, arising out of the 30 conduct of the Defendant with regard to land between the village of Nyinawusu and the Ahunfuna stream following upon a judgment
p. 51. (Exhibit 2) of the 6th December 1920 (hereinafter referred to as " the 1920 Judgment "), being a judgment of the same Paramount Chief's Tribunal in an action between the Plaintiff's predecessor Chief Yaw Mensah and the Defendant. This action was for £25 damages for unlawfully preventing by force the Plaintiff therein from selling timber trees on the
p. 52, l. 1. area. The Plaintiff therein recovered £10 damages. This judgment did not purport to determine the title to the land. Thereafter the Defendant took no steps to assert the title of his Stool to this land but, on the contrary, 40 admitted the title of the Plaintiff's Stool to the timber trees in question (which amounted to an admission of the title to the land) by returning to the purchasers from the Plaintiff's predecessor a sum of £50 which the Defendant had exacted from them for granting them permission to cut the timber sold to them by the Plaintiff's predecessor.

(D) The Plaintiff accordingly claimed a declaration of title to the land enclosed by the red and green lines, £100 damages for trespass and an injunction against further trespass.

5. By his Defence dated the 30th October 1947 the Defendant joined issue with Plaintiff on the whole of the Statement of Claim. His affirmative case was that his ancestors had been the first settlers upon the land to the west of the red line from the Subin stream on the north (which includes the whole disputed area) over 500 years ago and that they were the first settlers of all the land claimed by the Plaintiff except the Plaintiff's village and certain land east of a motor road leading to that village, the Plaintiff's ancestors having arrived from east of the Offin River at a date later than the Defendant's settlement at their former village of Obuasi Nkwawina. p. 5.

With regard to the said judgment of 1917 (Exhibit A) the Defendant alleged that this was in respect of an area which included the northern part of the disputed area down to an old hammock path (shown upon Exhibit 1) situate just north of the Afunfuna Stream and that such judgment was to that extent a *res judicata* and estoppel against the Plaintiff's claim.

He also alleged that the judgment of 1920 was in a criminal cause and did not determine the ownership or possession of the land between the Ahonfuna Stream and the Plaintiff's village.

He pleaded possession and title.

6. The trial of the action extended over 10 days before the Judge of the Land Court with an Assessor, who was a Chief in his own State of Oguaa or Cape Coast. At the trial 13 witnesses were heard for the Plaintiff and 10 for the Defendant. A considered judgment was delivered four months later, granting the Plaintiff a declaration of title to the whole area claimed by him, £25 for damages for trespass and the costs of the suit. p. 37, l. 24.

7. (A) The Learned Judge commenced his judgment by stating that apart from the consideration of the effect of the judgments of 1917 and 1920 the issues were largely questions of fact and comparatively simple.

(B) He proceeded to say that the Plaintiff had pleaded estoppel with regard to part of the land in dispute by virtue of the 1920 Judgment and that the Defendant had pleaded estoppel with regard to other part of the land in dispute by virtue of the 1917 Judgment. p. 34, ll. 27-38.

It is apparent, however, from the Statement of Claim that the Plaintiff had not pleaded estoppel by virtue of the 1920 Judgment, and his Counsel had expressly said so during the trial. p. 19, l. 34.

(C) He then dealt with the pleas as follows.

With regard to the judgment of 1917 he held it bound both the parties to the suit before him but, there being a doubt as to the extent of the land to which it related, as a question of fact, after considering the evidence of two licensed surveyors and particularly the evidence of Surveyor Ekow Selby as to certain measurements which appear in this judgment, he held that it did not include the land claimed by the Plaintiff except perhaps for p. 38, l. 20.

a minute distance in one direction which did not merit serious consideration. He accordingly held that the Defendant's plea of estoppel based upon the Judgment of 1917 failed.

p. 34, l. 39. (D) With regard to the judgment of 1920, he held that this was a quasi criminal case and was therefore not relevant to prove that the Plaintiff was the owner of the land over which the Defendant was alleged to have trespassed. But he held it relevant as indicative of consistency of claim since 1920 at least.

p. 35, ll. 23–33. 8. (A) The learned Trial Judge then proceeded to consider the facts of the case, and included therein the demeanour of the principal witnesses : He said :

> " It is now necessary to consider the facts and in doing so it is relevant to consider the demeanour of the principal witnesses. At one time I formed the impression that the Plaintiff was deliberately evasive but his subsequent examination satisfied me that his apparent evasiveness was due to stupidity. The Plaintiff is an old man, illiterate, and sick man when he testified. He is of the simple type lacking in astuteness or cunning who is likely to be imposed upon by others. The Defendant is far more mentally altert and was in good health when he gave evidence. He is of the aggressive, acquisitive, and pugnacious type, whose own admissions reveal that he will not tolerate interference by others. "

(B) Among the acts of ownership relied upon by the Defendant as giving him title was the fact that compensation had been paid to him, and not to the Plaintiff, by the Gold Coast Government in respect of a Railway Line Construction. Dealing with this piece of evidence the learned trial judge observed :

p. 35, ll. 38–43. > " It is clear, however, that the Plaintiff has never admitted the Defendant's grant of the Railway. Further the Plaintiff instituted proceedings in the Native Court but these proved abortive because the Defendant declined to attend on the ground that he refused to recognise the sovereignty of the Paramount Chief of the Denkyire State. The Defendant has given no convincing reasons for disputing the Sovereignty of the Paramount Chief."

(C) The learned Trial Judge continued, and dealt with other evidence put in by the Plaintiff and Defendant respectively :

p. 35, ll. 44–46. > " Plaintiff has also led evidence that attempts were made to demarcate boundaries as a result of the 1917 litigation. No boundaries were cut because the Defendant obstructed them."

(D) Dealing with the overall strength of the Plaintiff's case the learned trial Judge said :

p. 36, ll. 4–13. > " In support of his evidence the Plaintiff has called a number of witnesses from various places on the land he claims to prove they paid tribute to him or otherwise recognised his title to the land, and to establish that Defendant has never interrupted or disturbed their possession. The Defendant has called none as regards the area North of the Dunkwa–Obuasi road, and the Assessor attaches great significance to this.

"As regards the area south of the Dunkwa–Obuasi motor road the Plaintiff has not called a great volume of evidence but he has called a witness to prove that his title in the Kachireyansa lands was recognised by some occupants thereof."

Dealing with the area south of the Obuasi–Dunkwa motor road the learned Trial Judge observed :

"... the Plaintiff has called few witnesses to prove occupation by him or by his subjects but it must be remembered that this area is thick forest and virtually uninhabited." p. 36, ll. 45–46.

9. Finally, in a passage where the learned Trial Judge made some positive findings of fact, he said :

"Of the Plaintiff and Defendant I consider the former to be far more the reliable witness, and as regards the area North of the Dunkwa–Obuasi motor road the Plaintiff has called convincing evidence. As regards the area south of that road his case is not so strong and taken alone might be insufficient to establish the onus which is upon him. I am, however, satisfied that from their inception, the Plaintiff has always protested at the acts of ownership asserted by the Defendant. I believe the Plaintiff's witnesses as to the original settlement of the land claimed by him and the Defendant and reviewing the whole evidence I am satisfied that the Plaintiff has been telling the truth and I find that he is entitled to a declaration of title to the whole area claimed by him." p. 37, ll. 7–17.

10. The Defendant Stool being dissatisfied with the judgment of the Supreme Court, Lands Division, Cape Coast, dated the 18th day of July 1950, appealed to the West African Court of Appeal on the 4th day of November 1950. On the 19th January 1952, owing to the death of the Plaintiff, the present Respondent was substituted as Respondent to that appeal. pp. 37 *et seq.*

11. On the 5th day of February 1953, the West African Court of Appeal (Foster Sutton, P., Coussey, J.A., and Korsah, J.) gave judgment dismissing the appeal, the judgment (in which the other two Judges concurred) being delivered by His Honour, Korsah, J. The Court of Appeal agreed with the manner in which the Trial Judge had dealt with the judgments of 1917 and 1920. They repelled arguments that the assessor had not been duly appointed, that he had intervened improperly and that the Trial Judge had been improperly influenced by the opinion of the Assessor, holding that the Trial Judge had come to his conclusion independently of whatever views the Assessor might have expressed, but that he had been fortified by the latter's views. Vis-à-vis the questions of fact, there occurs the following passage, which is in agreement with the judgment of the learned Trial Judge : pp. 44–46. p. 44, l. 28 to p. 45, l. 23. p. 45, l. 24 to p. 46, l. 3.

"In addition to the traditional evidence, Plaintiff-Respondent adduced clear evidence of effective occupation by his subjects and licensees, and of the collection of tributes and rents from tenants who occupy farming or village sites within the area in dispute." p. 46, ll. 3–6

12. Being aggrieved by the judgment of the West Afrian Court of Appeal of the 5th day of February 1953, the Defendant Stool applied for leave to appeal to Her Majesty in Council, and on the 30th day of June 1953, final leave to appeal was granted.

pp. 46–47.

13. The Respondent respectfully submits that the Appeal should be dismissed with costs for the following amongst other

REASONS

(1) BECAUSE the matters in dispute were matters of fact and there was ample material upon which the learned trial Judge could arrive at his findings in the Plaintiff's favour.

(2) BECAUSE in the Courts below there were concurrent findings of fact in the Plaintiff's favour.

(3) BECAUSE the Plaintiff showed a good title by clear evidence relating (A) to original settlement of the land in dispute and (B) to effective occupation by his subjects and licensees.

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

DINGLE FOOT.

GILBERT DOLD.

No. 6 of 1954

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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 (Deceased) . . Plaintiff) *Respondent.*

Case for the Respondent.

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