Privy Council Appeal No. 6 of 1954

Chief Kwame Kwanin - - - - - - - - - - *Appellant*

v.

Chief Kojo Ewuah - - - - - - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH JUNE, 1955

Present at the Hearing:
LORD RADCLIFFE
LORD SOMERVELL OF HARROW
MR. L. M. D. DE SILVA

[*Delivered by* LORD RADCLIFFE]

This is an appeal from a Judgment of the West African Court of Appeal at Accra, Gold Coast, dated 5th February, 1953, which dismissed the appeal of the appellant, Chief Kwame Kwanin, from a Judgment of the Supreme Court of the Gold Coast, Lands Division, dated 18th July, 1950. The action out of which the appeal arises concerns a dispute over the title to certain lands situate in Denkyire State, Central Province, Gold Coast, which are said to cover an area of some 56 square miles; and the appellant and the respondent, Chief Kojo Ewuah, represent respectively the Stools of Obuasi and Nyinawusu, on whose behalf the contending claims to the land are put forward.

The original plaintiff in the action was Chief Kofi Kuran on behalf of the Nyinawusu Stool. He died during the course of the proceedings, which were begun as long ago as 14th August, 1945, and the respondent, Chief Kojo Ewuah, has been substituted in his place. By the Writ and Statement of Claim in the action the plaintiff claimed a declaration of title to lands which he described as "known and called Apunpun otherwise known as Buakyi-Krome, Twapiase, Gyapon-Krome, Ekakyerenyansa, Enekoko, Nkwantanum and the stream called 'Kunite'", together with damages for trespass and an injunction. The effect of the judgment of the Lands Division of the Supreme Court, dated 18th July, 1950, was to grant him a declaration of title to the whole area that he claimed and £25 for damages. The effect of the Court of Appeal judgment, dated 5th February, 1953, was to confirm this declaration, though in this case the land intended to be covered by it was identified by the Court as 'the area enclosed within the green and pink lines shown on the plan, Exhibit 1, which has been signed by the President of this Court."

It is sufficient to say of this description that the plan in question had been prepared for the purposes of the action by a surveyor, Joseph Annu-Esuman, with the assistance of the rival parties and that the plan thus prepared was duly proved in the course of the trial. It shows the village, Nyinawonsu, which may be taken as the head village of the plaintiff's stool, lying on the E. side of the plan, close to the Ofin river, and almost due W. of it, on the W. side of the plan, lies the village, Oboasi, the head village of the defendant's stool. A green border indicates the extent of the lands west of the Ofin River which were claimed by the plaintiff: a pink border to the E. of it indicates the E. boundary of the lands claimed by

the defendant. Thus the area in dispute can be seen by reference to the plan to be enclosed within a pink border on the E. and a green border on the W. and S., and it is this area of land that their Lordships understand to be affected by the declaration of title which has been granted by the Court of Appeal.

The appellant is therefore inviting the Board to review two successive judgments which have upheld the respondent's title to disputed land. Subject to two points which will be noticed later, his appeal is nothing but an attempt to reopen and reverse concurrent findings of fact which have been made against him. Their Lordships are satisfied that this is not a case in which it would be right or in accordance with established practice that they should undertake such a review. Briefly, the trial involved the calling of numerous witnesses on both sides, apart from the plaintiff, Kofi Kuran, and the appellant Kojo Ewuah. The evidence of these witnesses provided plenty of material upon which a judge could properly conclude that the plaintiff's title to the whole area had been made good. It also provided a certain amount of material in support of the appellant's claim to, at any rate, part of the area. At the close of the evidence the trial Judge, Windsor-Aubrey, J, who sat with an assessor, decided that he preferred the evidence of the plaintiff and his witnesses and concluded that he had made out his title to the whole area that he claimed. The assessor arrived at the same opinion. When the case went to the Court of Appeal it is evident that the Court was invited to review the burden and effect of the evidence given at the trial and to uphold the appellant's contention that it was insufficient to support the plaintiff's title. This contention the Court rejected with the finding " 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 ".

It remains to notice two points upon which the appellant relied as constituting errors of law on the part of the trial Judge and therefore as entitling him to a reversal of the judgment, even though it had to be said that the facts themselves were covered by concurrent findings. The first point relates to a judgment given on the 4th May, 1917, in proceedings before the Native Tribunal of Jukwa under the Omanhin Kojo Nkwantabissa II of Denkera, Gold Coast Colony, Central Province. It is common ground that the parties to these proceedings were the predecessors of the appellant and respondent respectively in the right of their respective stools. The appellant claims that the 1917 judgment constitutes an estoppel *per rem judicatam* in his favour and that it precluded the plaintiff in this action from disputing his title to all that part of the area within the green and pink boundaries which is shaded on the reference plan, Exhibit 1. The shading was inserted by the hand of the trial judge.

This 1917 judgment is included in Exhibit A, which also records part of the 1917 proceedings. The purport of them was a claim by Chief Kweku Sebbe, the plaintiff's predecessor, that certain lands styled " the lands and River Kwarantin " were his property, and not the property of Chief Kofi Fori, the appellant's predecessor, who was asserting title to them. The judgment concluded that Kweku Sebbe had failed to prove his title to " the land and the River Kwarantin ", and that the claim of Kofi Fori ought to be upheld by the Court.

This judgment could only be material for the purpose of the present action if it could be clearly established what were and what was the extent of the lands described as " the land and the River Kwarantin ". This the evidence at the trial entirely failed to achieve. There is no River Kwarantin marked by the surveyor on his plan, though there is a " Kuranti Pond " and " Kuranti lands " close to the south end of the shaded area on the east side. The trial judge could do no more than do his best to construe the words used in the 1917 judgment aided by such factual evidence of topographical features and nomenclature as could properly be put before him. After hearing some conflicting evidence from several

witnesses, not all of which was necessarily admissible or relevant, he came to the conclusion and so found that " the judgment of 1917 does not include the land now claimed by the plaintiff, except perhaps for a minute distance in one direction which does not merit serious consideration ". His assessor's opinion, as separately recorded in writing, coincided with this. The assessor did not think that the 1917 case related at all to the land now in dispute. The Court of Appeal were no less positive. They regarded the judge's view as supported by ample evidence on the record and had no doubt that the subject matter of the 1917 suit was outside the area covered by the present action.

Their Lordships' view is that the appellant must fail on this point. It is quite clear that, even if the concurrent findings of the Courts in the Gold Coast were not to be treated as conclusive, the identification of " the lands and River Kwarantin " is not sufficiently precise, if it is precise at all, to be capable of founding an estoppel in the present action. That in itself is sufficient to make further consideration unnecessary. But their Lordships think it well to add, since the matter was fully argued before them, that the weight of the evidence appeared to them very much to favour the view taken by the Courts in Africa, that the area of dispute in 1917 whatever its exact boundaries, lay substantially outside the area of the present dispute. The considerations that support it are not affected by the fact that some of the map measurements directed by the trial judge were a departure from the measurements mentioned in the 1917 judgment.

The second point bears upon the procedure at the trial, which, as has been said, was conducted with the aid of an assessor. According to the printed record of the case the hearing of the evidence and of counsel's addresses on behalf of the parties was concluded on 16th March, 1950: on 12th April, 1950, the trial judge recorded in writing and signed the assessor's opinion on the issues involved in the evidence : and on 18th July, 1950, the judge delivered his judgment, in the course of which he referred briefly to the assessor's opinion as confirming his own. On the face of this no defect of procedure is apparent. The appellant's counsel has however raised before the Board the argument that the trial was defective because the assessor's opinion was not delivered in open court in the presence of the parties. He raises the point, which is in the first instance a question of fact, on instructions from the appellant's legal representatives in Africa : and it is evidently the same point as that which is presented in paragraph 1 (*a*) and (*b*) of the grounds of appeal dated 4th November, 1950, prior to the hearing before the Court of Appeal. These were as follows:—

> " (*a*) 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.
>
> (*b*) 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 herein on or about the 24th September, 1950."

All this may be an accurate statement of the facts. But it is not the view of the facts which was taken by the Court of Appeal in dismissing the appeal. What they said was " The contention of counsel for the 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. It would appear that after counsel for the parties addressed the Court, the hearing was adjourned to 12th April, 1950, on which date the opinion of the assessor was recorded by the judge ".

With matters in this state it would be wrong for their Lordships to deal with the point as if it were proved before them that the assessor's opinion had not been delivered *ex facie curiae*. It is not satisfactory that a defect in procedure which is said to invalidate the judgment in a trial should be imputed by instructions to counsel: if it occurred, it should have been proved to the Court by affidavit in the usual way. No doubt it

would be open to the Board, on its own motion, to require further information from the Gold Coast as to what did take place, a course which was followed in *Mahlikilili Dhalamini and Others* v. *Rex* [1942] A.C. 583, where a somewhat similar point was raised with regard to opinions given in a criminal trial in Swaziland.

In that case however the relevant enactment positively required that opinions should be given in open court. There is no corresponding requirement in the Civil Procedure Ordinance of the Gold Coast. Their Lordships have not been able to discover any reason for thinking that, even supposing the facts to be as stated in the appellant's grounds of appeal, the conduct of his case was prejudiced at the trial or his right of appeal impaired. In those circumstances their Lordships do not propose to take any further action on the point suggested. They think it desirable however to invite the attention of the legal authorities in the Gold Coast to the point that has been raised. *Prima facie* at any rate it seems incongruous that any material, such as an assessor's opinion, which ostensibly forms part of the record of a trial should not be available to the parties before or at the time when judgment is given. It may well merit consideration whether procedure on this point needs further regulation, so that for the future no doubts can arise on the point.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs.

(39373) Wt. 8064—69 120 6/55 D.L.

In the Privy Council

CHIEF KWAME KWANIN

v.

CHIEF KOJO EWUAH

DELIVERED BY LORD RADCLIFFE

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
DRURY LANE, W.C.2.

1955