

In the Privy Council

On Appeal from  
The West African Court of Appeal  
(GOLD COAST SESSION)

46086

BETWEEN NANA KWEI GYARKU III, Odikro of  
Ayinasu (substituted for Ebusuapanyin Kweku  
Abaka, applicant for substitution in place of  
the deceased Plaintiff, Odikro Kojo Esiam) ... *Appellant*

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AND

JOSEPH SAM BREW and NANA OBU II,  
Mankradu of Esiam (substituted for  
Ebusuapanyin Kweku Eduful, deceased, who  
had been substituted for the co-defendant  
Mankradu Kwamin Ayebuah, deceased) ... *Respondents.*

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**Case for the Respondents**

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RECORD.  
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1. This Appeal is from a Judgment of a West African Court of Appeal dated 21st December, 1951, pursuant to leave granted by such Court on the 26th June, 1952, whereby the Court dismissed the Appellant's Appeal from an Order dated 17th September, 1949, of the Supreme Court of the Gold Coast, Lands Division. p. 37 p. 56 p. 47

2. The Appellant has been substituted for the original Plaintiff. The First Respondent was the First Defendant and the Second Respondent has been substituted for the Second Defendant. p. 57

HISTORY OF PROCEEDINGS IN THE FIRST COURT

3. These proceedings were commenced by the Plaintiff in the Native Court "B" of Ayan Denchira and Breman Esiam, Cape Coast District, Western Province. Proceedings can be commenced in such Court either by Oath or Writ of Summons. No Writ of Summons is included in the record, but its existence may be inferred from the Defendants' preliminary objections at the trial. The record does not disclose the date on which these proceedings were commenced. p. 2, l. 14

4. The record of the hearing in such Native Court commenced on the 11th February, 1947. This date can be taken to be the first date of the actual trial. On such date and, in accordance with its rules,

the Court entered into a Record Book a statement of the Plaintiff's claim as follows :

p. 1, ll. 33-34                   “ Plaintiff claims from the Defendant the sum of £50 damages for enterfering with the Plaintiff's tenants on Plaintiff's land called Ntabilta ”.

p. 2                               **5.** Further, on the 11th February, 1947, the Court entered in its Record Books that both Defendants pleaded that they were not liable. The Second Defendant further raised some preliminary objections which were over-ruled, and the proceedings were then adjourned until the 14th February, 1947. 10

**6.** The precise nature of the Plaintiff's case is immaterial because the Plaintiff in this Appeal is not seeking a review of the merits. Therefore, the general facts are irrelevant. It is sufficient to state that it is common ground that the dispute between the parties was a dispute in relation to land.

p. 3, ll. 22-26               **7.** Between the 14th February, 1947, and the 28th July, 1947, there were 16 hearing days. Further, the Court inspected the land. On the 28th July, 1947, Judgment was entered for the Plaintiff. During the course of the Judgment, the Court said, “ This Court, after hearing the evidence adduced by the parties and their witnesses, found that the land Ntabilta in dispute belongs to the Plaintiff ”. 20

**8.** The Defendants appealed from this Judgment to the Native Court of Appeal of Ayan-Na-Breman Confederacy, Cape Coast District, Western Province, Gold Coast Colony.

#### HISTORY OF PROCEEDINGS IN NATIVE APPEAL COURT

p. 10                           **9.** After a long hearing, of which the Plaintiff had notice but during which neither the Plaintiff nor a representative attended, the Native Court of Appeal on the 3rd May, 1948, allowed the Appeal with costs, and set aside the Judgment of the Court below.

**10.** The Respondents contend that, as from this date, the Native Court of Appeal were *functus officio*, and that the only remedy which the Plaintiff Respondent can pursue is to appeal from such Judgment. No appeal has been made. 30

pp. 16-17                   **11.** However, on the 28th June, 1948, the Court (wrongly, so the Respondents contend) granted the application of the Plaintiff to discharge their decision delivered in his absence on 3rd May, 1948, and to re-hear the appeal under Section 51 of the Native Courts (Colony) Ordinance No. 22 of 1944.

**12.** The above Section is in the following terms :

“ No Appeal shall lie from the decision of any Native Court in any suit or matter where the Defendant or Respondent has not appeared, but in any such case the Native Court shall satisfy itself that a copy of the decision has been served on the Defendant, or Respondent, and any Defendant or Respondent aggrieved by any such decision may, not later than one month after the date of the service on him of the copy of the decision, apply to the Native Court which gave or made the decision to reverse, vary or discharge it, and where the Court refuses so 40

to reverse, vary or discharge the decision upon such application, an Appeal shall lie in like manner as an Appeal from any other decision of a Native Court ”.

- 13.** The re-hearing was fixed for the 27th July, 1948, but on the 23rd July, 1948, the Plaintiff died. On the 27th July, 1948, however, the Court, *inter alia*, made an Order postponing the re-hearing of the Appeal until the 14th September, 1948. p. 17, l. 10  
p. 19
- 14.** On the 23rd August, 1948, Ebusuapanyin Kweku Abaka applied to be substituted for the deceased Plaintiff. p. 23
- 15.** This application was listed for hearing on the 14th September, 1948, being the same date as that fixed for the re-hearing of the Appeal. On such date such Applicant did not appear and the matter was adjourned until 18th September, 1948. p. 23, ll. 28-30  
p. 26, ll. 1-3
- 16.** On the 18th September, 1948, such Applicant was still absent. The re-hearing was before the same panel of Judges as that which heard the original Appeal. The Native Court of Appeal thereupon held that their original Judgment dated 3rd May, 1948, held good and firm. pp. 26-28  
p. 28, ll. 12-15
- 17.** One of the difficult features of this case, however, arises from the fact that on such date the Native Court of Appeal rejected the Application of the Applicant for substitution instead of allowing the Application and then finding in favour of the Defendants. p. 20
- 18.** There has not been any Appeal against the refusal of this Application. The matter has been allowed to proceed as if the Applicant for substitution was himself a Plaintiff. On this basis, such Applicant obtained an *ex parte* order from a magistrate purporting to stay any proceedings that were pending between the parties in the Native Court of Appeal, obtained an Order for the transfer of any such proceedings to the Land Division of the Supreme Court of the Gold Coast, was represented before such Court, obtained leave to Appeal from that Court to the West African Court of Appeal, was represented before such Court of Appeal, and finally obtained leave to Appeal from such Court to Your Majesty's Judicial Committee of the Privy Council. p. 37, ll. 28-40  
pp. 38-39  
p. 47  
p. 50  
pp. 52-53  
p. 56

### MATTERS IN DISPUTE

**19.** The present dispute between the parties is best explained by quoting the opening passage from the Judgment of Foster-Sutton, P. in the West African Court of Appeal.

“ It was conceded by both Mr. Hayfron-Benjamin, for the Appellant (the present Appellant) and Mr. de Graft Johnson, for the Respondent, that the only question for determination on this Appeal is whether Lingley, J. was right in holding that there was nothing ‘ pending ’ in the Native Appeal Court of Ayan-Na-Breman Confederacy, Cape Coast District, which could be transferred for determination by the Land Court ”.

**20.** In answering the above question the relevant date of pendency is 29th March, 1949.

## RESPONDENTS' CONTENTIONS

p. 10 **21.** As appears from Paragraph 10 hereof, the Respondents' first contention is that the proceedings terminated in the Native Court of Appeal when that Court made its final determination on 3rd May, 1948. In this context the Respondents firstly contend that Section 51 of the Native Courts (Colony) Ordinance, 1944, does not entitle the Native Court of Appeal to re-open its findings on the Application of a Respondent to the Appeal. The Respondents secondly contend that, if such Section does so entitle the Native Court of Appeal, nevertheless the Plaintiff Respondent in that Appeal did appear in the suit or matter within the 10 meaning of such Section.

p. 25 **22.** In the alternative, the Respondents contend that the proceedings terminated on the 18th September, 1928, when the Native Court of Appeal, with full knowledge of all material facts, made a second final Order. The Respondents contend that the only legitimate method of attacking such Order is by appealing from it, and no such Appeal has been made.

## STEPS TAKEN BY THE PLAINTIFF AFTER 18th SEPTEMBER, 1948

**23.** The subsequent history is set out as if the Plaintiff were still 20 alive, or someone had properly been substituted for him.

p. 37 **24.** Under the local Ordinances, there is provision for the transfer of Appeals pending before the Native Court of Appeal from that Court to the Lands Division of the Supreme Court of the Gold Coast. The procedure to be followed by a person seeking the transfer is to report to a Magistrate the fact of a pending Appeal. The Magistrate has then to decide whether the matter is a Land Cause. If he so decides, it is his duty to report the pendency to the Land Judge and ask for directions as to the mode of trial and where the case shall be heard and determined. The Plaintiff adopted this course and on the 29th March, 1949, District 30 Commissioner Miln, sitting in a Magistrates Court, Cape Coast, made a "Stop Order and Report".

p. 38 **25.** The Report was received by the Lands Court and, on the 2nd May, 1949, Lingley, J. made an Order under Section 54 (1) of the Native Courts (Colony) Ordinance, 1944, directing that the Cause between the Plaintiff and the Defendants be transferred to the Lands Division of the Supreme Court of the Gold Coast, and that the original Writ of Summons and any proceedings in the said Cause then pending in the Native Court of Appeal be forwarded to the Supreme Court.

p. 39 **26.** On 7th May, 1949, in pursuance of the directions given by 40 Lingley, J. an Order was made transferring the Cause between the parties from the Native Court of Appeal to the Supreme Court.

**27.** Each of the Orders in the last three preceding paragraphs were made in consequence of *ex parte* action on behalf of the Plaintiff.

p. 42 **28.** On the 25th August, 1949, the Defendants applied by Motion to the Supreme Court for an Order to discharge the Order of that Court dated 2nd May, 1949. The Affidavits in support show that the ground on which discharge was sought was that there was no pending Cause to transfer.

p.44, ll. 8-12

**29.** The hearing before the Supreme Court came on before Lingley, J. on the 10th September, 1949. The record of the proceedings is brief. If the Respondents were correct, there was nothing for the Judge to determine, save the very fact that there was nothing to determine since the Respondents' case was that there was no pending Cause. p. 47

**30.** It is contended that the Judge upheld such contention of the Respondents, although he did not do it in such precise terms. As will be seen from Paragraph 19 hereof, this view of his Judgment is taken by the West African Court of Appeal. Lingley, J. actually delivered 10 Judgment on the 17th September, 1949, in the following words :

“ In my opinion, this Court has no power to hear the Appeal. Appeal dismissed with seven guineas costs ”. p. 47, ll. 24-25

**31.** On the 29th September, 1949, Special Leave was granted to Appeal to the West African Court of Appeal and such Appeal came on for hearing on the 13th December, 1951, before Foster-Sutton, P. and Coussey and Korsah, JJ. p. 50 pp. 52-53

**32.** On the 21st December, 1951, the Court of Appeal unanimously dismissed the Appeal. Foster-Sutton, P. held that the proceedings in the Native Court of Appeal terminated on the 3rd May, 1948. He further held that Section 51 of the Native Courts (Colony) Ordinance, 1944, did not apply so as to entitle that Court of Appeal to re-open its decision on the Application of a Respondent to that Appeal. pp. 51-55

**33.** Coussey and Korsah, JJ. concurred.

**34.** The Respondents, therefore, humbly submit that this Appeal should be dismissed for the following, among other

#### REASONS

1. Because the proceedings in the Native Court of Appeal terminated on the 3rd May, 1948, by Order of that date.
2. Because Section 51 of the Native Courts (Colony) Ordinance, 1944, does not entitle the Native Court of Appeal to re-open its own decision on the application of a Respondent. 30
3. Because the Plaintiff did appear in the suit or matter within the meaning of Section 51 of the Native Courts (Colony) Ordinance, 1949.
4. Because, alternatively, the proceedings in the Native Court of Appeal terminated on the 18th September, 1948, by Order of that date.
5. Because the remedy, if any, of the Appellant against the operation of the Order dated 18th September, 1948, of the Native Court of Appeal was by way of Appeal from such Order, and no such Appeal has been made. 40
6. Because both the decision and the reasonings of the West African Court of Appeal are right.

IAN BAILLIEU.

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(GOLD COAST SESSION)

BETWEEN :

NANA KWEI GYARKU III, Odikro of Ayinasu  
(substituted for Ebusuapanyin Kweku Abaka,  
applicant for substitution in place of the deceased  
Plaintiff, Odikro Kojo Esiam) ... *Appellant*

AND

JOSEPH SAM BREW and NANA OBU II,  
Mankradu of Esiam (substituted for Ebusuapanyin  
Kweku Eduful, deceased, who had been substituted  
for the co-defendant Mankradu Kwamin Ayebuah,  
deceased) ... .. *Respondents*

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**Case for the Respondents**

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