

ON APPEAL
FROM THE COURT OF APPEAL, GHANA

B E T W E E N

NAJA DAVID, C.H. GHASSOUB and N.H.
GHASSOUB trading in Partnership as
NAJA DAVID SAWMILL COMPANY
(Defendants)

NANA OSEI ASSIBEY III, representing
the Stool of Kokofu
(Co-Defendant)

Appellants

- and -

EDWARD KOTEY ANNAN SASRAKU substituted
for Emmanuel Kotey Quao (deceased) as
Head and Representative of a Family -
Company of Teshie people claiming
certain lands near Chempaw
(Plaintiff)

Respondent

CASE FOR THE RESPONDENT

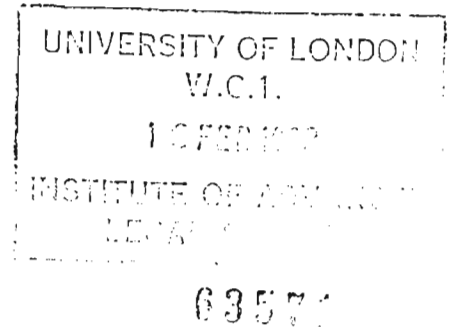
20 1. This is an appeal from the Judgment and Order
of the Court of Appeal of Ghana (Granville Sharp,
J.A., Van Lare, Ag. C.J., and Ollennu, J.) dated
the 12th day of January 1959, dismissing, subject
to a variation only as to costs, an appeal from
the Judgment of the Land Court, Kumasi (Sarkodee-
Adoo, J.) dated the 17th day of December 1957,
whereby the Plaintiffs (the Respondent herein)
had been granted a declaration of Title to certain
lands and an injunction against the Defendants and
30 Co-Defendant (the Appellants herein) restraining
them from trespassing on the said land and whereby
the Co-Defendant's counterclaim was dismissed.

2. The Respondent's claim was as Head and Repre-
sentative of a family-company for an injunction
restraining the Appellants, Naja David and others,
trading in partnership as Naja David Sawmill Company,

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pp.101-110
pp.110-111

pp.67-95

pp.2-4



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- from trespassing on certain lands which the Respondent claimed as owner by virtue of a sale by native custom to the said family-company by the Stool of Chempaw with the knowledge and consent of the Paramount Stool of Kokofu.
- pp.8-9 3. The Appellants, Naja David and others, having set up a defence that they were put in possession of the said land by virtue of a felling agreement with the Stool of Kokofu, the Appellant, Nana Osei Assibey III, as representative of the said Stool was added as Co-Defendant and a declaration of title to the ownership of the said land was claimed. 10
- p.5
- pp.11-12 4. By his Defence, the Appellant, Nana Osei Assibey III, denied the sale of the said land or alternatively averred that if it had been sold by the Stool of Chempaw it had been without the knowledge and consent of the Paramount Stool of Kokofu and therefore was void. He further averred that no sale of stool land was permitted by the custom of Ashanti and counterclaimed for a declaration of title to the said land, recovery of its possession and damages for trespass. 20
- p.17
- pp.19-22 5. At the hearing evidence was called for the Respondent that the said land had been bought by the said family company about 30 years previously; that the sale had been by the ceremony of "Guaha" - the native ceremony of absolute sale; that later written conveyances had been prepared which were produced as exhibits.
- Ex. "G", "H", "P"
pp.119,137,131
6. Further witnesses were called and further documents were produced by the Respondent to establish that land had been sold in Ashanti by the custom of Guaha. 30
- pp.46-48 7. One Peter Armah gave evidence that the Defendants, Naja David and others, had by their agents entered on the said land and cut wood.
- pp.49-51 8. The manager of the said Sawmill Company produced the felling Agreement between the said Company and the stool of Kokofu whereby it was alleged that they had the right to enter on the said land. 40
- pp.52-57 9. Nana Osei Assibey, the Appellant, gave evidence that all lands in Kokofu belonged to his stool and that the Odikro of Chempaw is the

caretaker of Chempaw land for the Kokofu Stool; that lands in Ashanti are not saleable. He said under cross-examination:-

"My defence to this action is two-fold:-

p.53, 1.43 -
p.54, 1.1

1. That land is not saleable in Ashanti; and

2. The land in question was sold to the Plaintiff's company by the Odikro of Chempaw without the knowledge and/or consent of the Omanhene of Kokofu, Nana Kofi Adu."

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Further, under cross-examination, he admitted that on a previous occasion he had said that "a sub-stool cannot give away or sell land to a stranger or Ashanti man without my permission." He was further asked:-

p.54, 11.33-37

"Did you say that 'If I find that land has been sold without my knowledge I claim the land back and tell the purchaser to claim his money back?'"

p.55, 1.5

20 and answered,

"Yes I said so, because if the land is sold without my knowledge it is against our custom".

p.55, 1.9

He further stated:-

"I am fully aware that the Plaintiff's Company is in possession of the land in dispute to farm on it merely but not in possession thereof as owners by right of outright sale to them. The Chempaw Odikro informed the Kokofu Stool and the elders of the presence of the Plaintiff's Company on the land for farming purposes before they actually settled there. I now say they (Plaintiff's Company) have never paid any tribute or rent."

p.55, 11.21-28

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10. James Wellington Kweku Appiah, Chief Secretary to the Asanteman Council said:-

p.57

"I have heard of the custom of 'Guaha' but not in Ashanti. In Ashanti we have 'Trama' which is the equivalent of 'Guaha' in other Akan States. 'Trama' is the effective means or

p.57, 11.18-22

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ceremony of sale outright in Ashanti of all properties."

p.57; l.22 -
p.58, l.18

He further gave evidence that Chief Kofi Adu of Kokofu had been destooled in 1951 on certain charges which included the sale of land without the consent of the Oman.

p.60
p.61, ll.5-11

11. A further witness for the defence, one Baffour Osei Akoto, was shown and accepted an exhibit, "C", which was a Conveyance, dated the 7th September 1940, prepared by Mr. F.C. Asafu-Adjaye, Legal Adviser and Solicitor to the Golden Stool and the Kumasi State which referred to the sale and conveyance of land "by the native custom of 'TRAMA' or 'GUAHA'".

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p.69

12. The learned judge defined the issues as follows:-

1. Whether or no according to Ashanti custom land is saleable in Ashanti generally and in particular in different states (or Divisions) and at any rate in the part of Ashanti in which the land the subject of this Action is situated.

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2. Whether or no the "Company" has legitimately purchased the land from the Stool of Chempaw.

3. Whether or no the purchase was with the knowledge and consent of the Paramount Stool of Kokofu.

4. Whether or no the native custom of "Guaha" is performed and recognised in Ashanti.

5. Whether or no the native custom of "Guaha" was performed at the sale.

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6. Whether or no there has been an Agreement between the Plaintiff and the Co-Defendant whereby their relations as to the ownership of the land has changed.

7. Whether or no in or about 1950, the Otumfuo the Asantehene in Council made a binding order or decision depriving the "Company" and all other purchasers of land in Ashanti of their absolute ownership thereof.

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8. Whether or no the Otumfuo the Asantehene claimed or now claims the lands in the different States (or Divisions) in Ashanti.

9. Whether or no this Action is maintainable.

13. The learned judge after an exhaustive review of the land Law applicable held that the custom of "Guaha" had been established as locally recognised and that the Appellants' defence was wholly demolished and concluded:-

10 "The Co-Defendant's version is garbled and on the settled rule of law that the Plaintiff must succeed on the strength of his own case in a claim of this nature and not on the weakness of the Defence, I am satisfied that the Plaintiff has satisfactorily discharged the onus of proof which lies on him.

p.94; 1.20 -
p.95, 1.32

20 I was not impressed by the Co-Defendant, and I have no hesitation that not only was he not telling the truth as to the facts, but has also not stated the true principles of native customary law on Land-Tenure applicable to this case. He has taken refuge under the allegation: land is not saleable in Ashanti - a statement far too sweeping and in no way supported by the facts and the circumstances of this case.

30 The evidence (oral and documentary) is overwhelmingly in support of the Plaintiff's contention that land is saleable in Ashanti, particularly in the Divisions or States where the Asantehene does not claim lands qua Kumasi lands.

On the evidence I am satisfied that where a sale is without the requisite knowledge, consent or approval it is not void ab initio but voidable.

40 I am satisfied by the preponderance of evidence before me that the Plaintiff is entitled to the reliefs sought in his Writ of Summons and in his Pleadings as amended.

In the result, I find that the Plaintiff's Company is in possession of the said land as owners thereof by right of purchase under an

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absolute sale by 'Guaha' from the Stool of Chempaw with the knowledge and consent of the Paramount Stool of the Kokofu State: and there will be the declaration of Title and also an Order for an Injunction for the Plaintiff against the Defendants and the Co-Defendant jointly and severally as claimed.

The Co-Defendant's Counterclaims as per his Notice of Amendment of his Defence and Counterclaim for (a) A Declaration of Title to the piece or parcel of land the subject-matter herein; (b) Recovery of possession of the piece or parcel of land the subject-matter of the dispute herein; and (c) Damages for Trespass are dismissed and Judgment entered for the Plaintiff. 10

The Plaintiff is entitled to his costs against the Defendants and the Co-Defendant jointly and severally: Counsel's Brief Fee is assessed at 2,000 guineas: other costs to be taxed. 20

The Plaintiff will also have his costs of the abortive proceedings in pursuance of my Order bearing date the 19th day of June, 1957."

pp.96-97

14. The Appellants herein appealed to the Court of Appeal of Ghana on the following grounds:-

1. Judgment against the weight of Evidence.

2. Because the Plaintiffs-Respondents herein were unable to discharge the onus of proving that the alleged sale of the lands subject matter of dispute was with the knowledge consent and/or approval of the Stool of Kokofu State. 30

3. Because it was not proved by the Plaintiffs-Respondents herein that the ceremony of Guaha is a Custom obtaining in the Ashanti Kingdom.

4. Because the performance of the Guaha Custom in this case was not proved; especially as it is denied by the Defendants and the Co-Defendants-Appellants. 40

5. Because no trespass was proved; in particular the spot of the trespass was not specifically indicated nor proved.

6. Because the Learned Judge being bound by precedent was wrong in dissenting from the decision in the case Aye Mensah & others versus Wiaboe & others which was brought to his notice.

10 7. Because the Brief Fee of 2,000 guineas awarded to the Plaintiffs-Respondents' Counsel is excessive in the circumstances.

8. Because the quotation from unrecognised Authors are legally irrelevant to the point for decision in the case.

9. Because the Learned Trial Judge without specifically rejecting the evidence of Mr. Appiah and Baffuor Akoto rejected them and failed to give effect to them in his Judgment.

20 10. Because Plaintiffs-Respondents herein failed to prove that lands are saleable in Ashanti.

15. The Court of Appeal dismissed the Appeal, save as to the question of costs and in his judgment Granville Sharp J.A., said:-

"Both the claim and the counterclaim therefore contended for absolute ownership of the land subject matter of the action.

p.102, 1.18 -
p.103, 1.20

30 It was not disputed that the co-defendant was the Paramount Stool served by the Chempaw Stool, and the Chempaw Stool did not appear to dispute the sales set up by the plaintiff.

There was no dispute either as to the identity of the land in question and Counsel for the co-defendant admitted that the lands described in the several documents produced by the plaintiff constituted in fact the whole of the land for which the rival claims were set up in the action.

40 At the trial the plaintiff admitted that these documents in themselves could not, in the light of the Concessions Ordinance, be relied

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upon as constituting valid documents of title, but contended that they had important evidentiary value as being confirmatory of the earlier customary sales to which they referred at which, in each case, the custom of 'Guaha' had been performed. The family company represented by the plaintiff was a Ga family, and would seem to have wished, 'Ex abundanti cautela', that the Ga custom should be observed, even in Ashanti.

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In the course of the hearing before the Land Court the issues became narrowed. It could not be questioned on the evidence that the three purported sales relied upon by the plaintiff had in fact taken place and it was not seriously disputed that 'Guaha' had been performed on each occasion. The evidence upon these matters was all one way. There remained only the issues as to whether land in Ashanti was alienable by sale and if so, whether the sales herein question were carried out without the knowledge and consent of the co-defendant and Paramount Stool over the vendor Stool, the Chempaw.

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The learned Judge at the Land Court resolved both these questions favourably to the plaintiff. He therefore dismissed the counterclaim and entered judgment for the plaintiff granting him a declaration of title to ownership of the land and an injunction as prayed. He awarded no damages for trespass, but in his award of costs fixed Counsel's Fee at Two thousand (2,000) guineas."

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* * * * *

p.105, 1.19 -
p.110, 1.20

"Passing now to the legal substance of the appeal I would say first that the Notice of Appeal seems to me to be somewhat supercharged with reasons set up to support the view that the learned Judge was wrong in his decision and in his reasoning. There are no less than ten grounds of appeal, but learned Counsel did not find it necessary to argue all of them because it is reasonably clear that they are, taken as a whole, variations upon three main themes: (a) that the sales by custom of 'guaha' were not proved and (b) that it was not proved that the sales were made with

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the knowledge and consent of the Paramount Stool, the co-defendant, and (c) that sale of land in Ashanti is not possible under native custom.

I cannot accept any of these contentions.

10 The learned Judge made exhaustive research into the question whether land in Ashanti is capable of alienation by sale, much of which research it is true entered channels which could not be expected to lead very far in a Court of Law. He did however consider the opinions of learned writers whose views are authoritative and found there what is supported by the evidence on the record, that over the past quarter of a century and more the impact of western ideas of land holding upon what was at one time a rigid system of native customary law had led to a relaxation of these ancient laws, so that it is not un-
20 common, though it is not usual, to find land being sold in parts of the country, including Ashanti, where in former days such a transaction would not have been sanctioned by native customary law.

30 The evidence given by the co-defendant and his main supporting witness goes a very long way in itself to support this view. The co-defendant admitted to having expressed the view that: "A sub-stool cannot give away or "sell any land either to a stranger or Ashanti "man without my permission." He said further "I still say that before land could be sold "by the Chempaw Odikro, being a caretaker "merely he must first seek the approval of "the Kokofu Stool and the elders."

40 References were made by him to other cases in which chiefs and sub-chiefs had sold land and whose only offence would appear to have been that they did it without consulting the elders.

One of the co-defendant's witnesses, one Appiah, the Chief Secretary to the Asanteman Council, said "I have heard of the custom of "'Guaha', but not in Ashanti. In Ashanti "we have 'Tramma' which is the equivalent of "'Guaha' in other Akan States. 'Tramma' is

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"the effective means or ceremony of sale
 "outright in Ashanti of all properties."
 In cross-examination he went further.

This is a part of his evidence: "So far as
 "I know and can remember there has never
 "been any declaration before or after 1952"
 (i.e. since the date of the State Councils
 (Ashanti) Ordinance 1952) "that lands are not
 "saleable in Ashanti. Before lands became
 "valuable in Ashanti there was gifts of land 10
 "in Ashanti. The transfer of the whole
 "interest in land is a common incident of
 "native customary law, but sometimes only
 "agricultural rights are transferred. When
 "I said land in Ashanti is not saleable that
 "was the case when land had no value but it
 "was a common practice to transfer the whole
 "interest in land for services rendered
 "subject to the share (if any) of the gran-
 "tor in case of treasure trove and for 20
 "mineral rights in case of Stool lands."

It is clear to my mind that the co-defendant
 really had no faith at all in the contention
 that land was not saleable in Ashanti. His
 real defence was that the land was sold
 without the knowledge or consent of his Stool
 although he said in evidence "My defence in
 "this action is twofold (1) that land is not
 "saleable in Ashanti and (2) the land in 30
 "question was sold to the plaintiff's company
 "without the knowledge and/or consent of the
 "Omanhene of Kokofu, Nana Kofi Adu. Of these
 "the first defence that land is not saleable
 "in Ashanti is more important." Neither his
 evidence nor that of his supporting witness,
 Appiah, can be said to uphold this latter
 contention. Indeed it traverses the whole
 of it, and in my view the learned Judge was
 perfectly right in holding as he did on this
 part of the case. There was a mass of evi- 40
 dence led by the Plaintiff in support of such
 a finding to which I need not refer.

Mr. Hayfron-Benjamin for the appellant re-
 ferred to the case of Aye Mensah & Others
versus Wiaboe & Others (Selected Judgments
 of the Divisional Court 1921-1925 p.170) a
 case by which, so he argued, the learned
 Judge was bound. The learned Judge was not,

10 in my view, in any way bound by a decision of a Court of equal and concurrent jurisdiction with his own, and even if he were bound by it, this Court is not, and I would find it impossible to uphold the principle that appears to be enunciated in the case, and for which learned Counsel invited our support, that no evolutionary change in native customary law since 1874 can be recognised in these courts, and that only those elements of that law which subsisted before the date mentioned can be administered by the Judges in Ghana. Stagnation of the law in a fast developing state should be regarded with abhorrence.

20 As I have already said there was strong evidence that 'Guaha' was at the time of these sales recognised in Ashanti though generally it is referred to there as 'Tramma'. The documents produced by the plaintiff referred to the customary law, and it is legitimate to draw the inference from this that what is referred to is 'Guaha' or 'Tramma'.

The question then arises, whether the transactions evidenced by the documents were carried out with the knowledge and/or consent of the Omanhene of Kokofu, at that time Kofi Adu.

30 There was evidence that the Omanhene had in fact assented to other sales of lands in the locality and it was proved that certain destoolment charges against him to which he made no answer, included complaints in respect of such sales. Two important facts emerged in the course of the evidence. In relation to the first and the third sales, the documents are witnessed by the Linguist to the Omanhene of Kokofu which signature is binding on the Omanhene, and it would be unlikely that he could have been in ignorance of the intervening sale, though no signature affecting him appears on the relevant document. The three sales were of contiguous parcels of land comprising in all an area of 40 some eight (8) square miles.

These portions had, at the date of the objection raised by the later occupant of the Stool, been occupied by the plaintiff family-

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company for periods varying between 20 and 30 years. The whole area had been clearly demarcated and the boundary cuts and marks had, it appears, been meticulously kept and cleared. Even if it could not be said, as I hold it could, that on this evidence the learned Judge was correct in finding knowledge and consent on the part of the Kokofu Stool, the facts clearly constitute proof of such laches and acquiescence on the part of the Stool as would render it inequitable to interfere with the plaintiff in occupancy of the land, and still less so if it should be in the interest of the Sawmill Company whose felling agreement is in the most general terms and would seem to grant them 'carte blanche' to wander over the whole length and breadth of the Kokofu Stool lands and fell wherever they encountered fellable timber, this to the extent of thousands of trees.

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The learned Judge, rightly in my opinion, summed up his view of the co-defendant's conduct in the following words: "Such attempts ... from the evidence, constitute concerted determination of a Stool occupant to regain Stool lands lawfully sold by his predecessor to strangers, in order to acquire further use or rents therefrom." He said, and I respectfully agree with him that to encourage such a manoeuvre would constitute ... a travesty of the administration of justice."

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I agree with the learned Judge in his finding that the plaintiff proved his case that the land was sold to his family with the knowledge and consent of the Kokofu Stool occupant and his elders. Even if I were to disagree I would hold that the co-defendant is estopped by laches amounting to acquiescence.

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It remains to be considered what estate was transferred by the "sales" of which the documents are evidence. The plaintiff as I have said earlier conceded that no title could pass by the documents themselves. They cannot operate as validated concessions because they sin against the Concessions Ordinance in two respects (a) the area

involved exceeds 25 acres and (b) no certificate of validity exists; no enquiry having been sought or held. They are however evidence of the facts stated in them, that the land was sold according to native custom. It therefore follows in my opinion that such estate passed as would usually pass on such a sale, as between natives, of Stool lands. This is not an unqualified ownership or right to the land, but a possessory right to occupy the land and enjoy the usufruct thereof; in other words the usual native tenure. The price paid by the plaintiff can be looked upon as payment of tribute partly in advance, and that further tribute was payable was recognised by the parties in a document dated 23rd December 1927 which reads as follows:-

"THIS AGREEMENT made the 23rd day of
 "December 1927 that we the undersigned
 "have agreed that if any Gold Manganese or
 "Ore will be found out in the said land
 "from Hill or Hills by any Miner or Miners
 "the Profit or Profits thereof will be
 "divided into three equal parts.

"That two-thirds of the said profit or
 "profits will go into the hands of the
 "Purchasers aforesaid and one-third thereof
 "should go into the hands of the Vendors
 "aforesaid being friends to the said
 "Purchasers.

"In witness whereof we have hereunto set
 "our hands this 23rd day of December 1927."

By this document the allodial right of the real owner was recognised and so long as this is so, and the plaintiff family does not become extinct, or desert the land, they are entitled to remain on the land and have the same protection as if they were in fact the owners. This must in my view be taken to be what the learned Judge of the Land Court meant when he pronounced "a declaration of title to the piece or parcel of land the subject matter herein." The Order for possession followed naturally upon the finding of trespass, which was fully justified by the evidence.

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In the result, apart from revising the Order for costs made by the learned Judge in the respects I have indicated, I would dismiss this appeal. For 2,000 guineas Counsel's fee I would substitute 500 (five hundred) guineas, having already dealt with the costs of the abortive hearing."

p.113

16. Final leave to appeal to Her Majesty's Judicial Committee of the Privy Council was granted on the 25th day of May 1959.

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17. The Respondent humbly submits that this appeal should be dismissed for the following among other

R E A S O N S

1. THE Respondent established his title to the land in dispute.
2. THE learned trial Judge and the Court of Appeal were right in holding that land was alienable by sale in Ashanti.
3. THE learned trial Judge and the Court of Appeal were right in holding that the land in dispute had been sold by the Chempaw Stool with the knowledge and consent of the Paramount Kokofu stool.
4. IN any event the Appellant, Nana Osei Assibey III, is estopped by laches amounting to acquiescence.

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THOMAS O. KELLOCK.

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL, GHANA

NAJA DAVID, C.H. GHASSOUB and N.H.
GHASSOUB trading in Partnership as
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EDWARD KOTey ANNAN SASRAKU substituted
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(Plaintiff) * Respondent

C A S E

- for -

THE RESPONDENT
