Privy Council Appeal No. 36 *of* 1928.

Abraham Essell - - - - - - - - - *Appellant*

v.

Rebecca Davis *per* **John Ekwan Sampson** - - - - *Respondent*

FROM

THE SUPREME COURT OF THE GOLD COAST COLONY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH NOVEMBER, 1929.

Present at the Hearing:

LORD BLANESBURGH.
LORD WARRINGTON OF CLYFFE.
SIR CHARLES SARGANT.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

This appeal raises a question as to the title to certain lands in the Gold Coast Colony. The lands are not tribal or family lands, and it is common ground that the title to them must be determined substantially in accordance with English law.

The action was in form an action by the respondent, Rebecca Davis, claiming as owner of the land an account against the appellant as caretaker thereof of the tributes, tolls and rents collected by him since the year 1911, and an order for payment of the amounts found due. The appellant defended on the ground that the respondent was not the owner of the land, but that the ownership thereof was vested in one Sara Quagrainie, the devisee thereof under the will of her father, Charles Barnes Acquah, deceased, for whom and for whose devisees the appellant was caretaker. It is common ground that the question of title is properly raised and may be determined in such an action.

The action was commenced on the 13th December, 1923. The name of one J. E. Sampson, a brother of the respondent, appears on the writ, which purports to be in the name of the

respondent, "per J. E. Sampson." Mr. Sampson is dead. He appears to have had no personal claim to the land. The respondent was the real plaintiff.

The Native Tribunal before whom the action first came on for trial decided the question of title in favour of the respondent. On appeal to the Cape Coast Provincial Commissioner this order was reversed and the action was dismissed and the appeal allowed with costs. The respondent appealed to the Supreme Court of the Gold Coast Colony, who on the 9th July, 1927, allowed the appeal with costs and restored the order of the Native Tribunal. The present appeal is brought by leave granted on the 17th December, 1927.

The parties concerned are all natives of the Colony.

It will be convenient for the sake of clearness to state first the facts supporting the title of the said Sara Quagrainie, on whose behalf the appellant is prosecuting the appeal, and then to consider the claim set up by the respondent.

The lands in question are called Agissu, and are part of a larger area called Ekwambassie, situate in the Saltpond District. Ekwambassie includes also three other parcels of land, the names of which need not be mentioned, but may be referred to as "the three other parcels." These three other parcels were formerly the property of Charles Barnes Acquah. The nature of his title is immaterial to the present question.

Prior to the 16th February, 1881, the Agissu lands were the property of one Abina Owoodoowa (hereinafter referred to as Abina).

She appears to have been indebted to one F. A. Parker, who recovered judgment against her in an action in the Supreme Court of the Colony.

On the 16th February, 1881, the following certificate was issued under the hand of the Judge or Commissioner, viz. :—

CERTIFICATE OF PURCHASE OF LAND.

IN THE SUPREME COURT OF THE GOLD COAST COLONY,
PROVINCE.

A.D. 1881. Suit No.

Between FRANCIS A. PARKER - - - - - *Plaintiff*

and

ABINA OWOODOOWAH - - - - - *Defendant.*

THIS IS TO CERTIFY that FRANCIS A. PARKER has been declared the Purchaser of the right, title and interest of Abina Owoodoowah in the messuages, lands and tenements hereinafter that is to say all that land situated at Aguisoo called Aguisoo on the North is lied a river called Kina on the East the same river Kina on the West is bounded with three Coconuts trees, 1 Boxwood tree in the End which said messuages lands and tenements were sold in execution of a decree in the above suit by order of this Court dated 24th day of January 1881.

Dated at Saltpond the 16th day of February 1881.

(Signed) JOHN SMITH,
(Signature of Judge or Commissioner.

On the 19th February, 1881, Parker executed a conveyance of the Agissu land to Charles Barnes Acquah, his heirs, executors and assigns. The explanation appears to be that the debt, the subject of the action, though nominally owing to Parker, was really a debt due to Acquah, Parker being a mere nominee or trustee for him. This appears from a document signed by Abina and printed at p. 64 of the record.

The title of Acquah to the Agissu lands was impeached by or on behalf of Abina in an action tried on the 17th August, 1882, before the then acting Chief Justice, who decided in favour of Acquah, though he, for reasons not now apparent, considered the transaction by which Parker obtained the land from Abina to be of a very doubtful character.

There is no direct evidence of any further claim of Abina against Acquah in respect of the ownership of the Agissu lands.

On the other hand, on two occasions in his lifetime, viz., in 1895 and in 1909, Acquah successfully maintained actions for trespass upon the said lands. Acquah died on the 18th May, 1909, having by his will dated the 6th March, 1907, devised the Agissu lands and the three other parcels of land to his wife, Elizabeth Acquah, for her life, and after her death to his daughter, Sarah Quagrainie, absolutely. By a deed of gift dated the 8th March, 1907, he gave the same lands to his wife, but as this deed contains no words of inheritance, she presumably took thereunder a life estate only. This last fact is not disputed.

The present appellant was appointed by Acquah, caretaker of the Agissu lands, and this appointment was continued after his death by Elizabeth, his widow, and after her death by Sarah Quagrainie. The caretaker of land, according to the law or custom of the Colony, appears to be not a mere rent collector, but to be entitled to the possession or receipt of the rents and profits of the land in his own right as against third persons, though of course, he has to account to the real owner.

The appellant as such caretaker regularly collected tribute from farmers on the land, both before and after the death of Acquah. He has successfully maintained actions for trespass on several occasions, in one of which a rival caretaker appointed on behalf of the respondent was a defendant. In this action he obtained a judgment, dated the 27th February, 1914, declaring that he was entitled to hold, possess and occupy the Agissu lands as caretaker against the respondent. Subsequently by another order in the same action, dated the 10th June, 1914, it was declared that, according to the true construction of the order of the 27th February, 1914, the appellant had no authority to evict any person living or being on the lands other than persons living or being on such portion of the lands as he was entitled to occupy himself. This order appears only to affect his right as against certain occupiers to actual possession, but not his right to receive tribute. In giving judgment on the 27th February, 1914, the Court expressly declined to make any declaration as to the right or title of the present respondent to the Agissu lands.

So far, from the date of the transactions in 1881 down to the present time, the actions of the parties and the results of the somewhat extensive litigation were consistent with the ownership by Acquah and his successors of the Agissu lands. In 1911, however, during the trial of an action in which Elizabeth Acquah was plaintiff and Rebecca Davis was defendant, an incident happened which has proved the occasion for the present trouble. The writ in that action has not been produced, but it appears from the judgment of the Full Court in the present action that the action was one in which Elizabeth Acquah claimed as against the respondent a declaration that she was entitled to the three other parcels of land, as, indeed, under the will and the subsequent deed she was, but as tenant for life only. Whether this claim extended to the Agissu lands is not proved, but their Lordships think that it may be inferred that it did from what took place at the trial. The case was heard before Earnshaw J. on the 28th April, 1911. Mr. Bucknor was counsel for the plaintiff, who, it must be remembered, was only tenant for life of the Agissu lands. The defendants as to the three other parcels of land relied on a deed of gift, dated the 20th June, 1898, by Acquah to the respondent. It would seem that this was accepted as sufficient evidence of her title to the three other parcels of land, and the judgment declared that she was so entitled. There appears in the record in that action the following passage as quoted by Hall J. in his judgment in the present case.

> " Mr. Bucknor for plaintiff.
>
> " Mr. Brown and Sampson for defendant.
>
> " Mr. Bucknor for plaintiff said that on going through documents he had found a certificate of purchase showing that Rebecca Davis had purchased and was the owner of Agissu land. The plaintiff Kojo Mbroh possesses through Rebecca Davis. Mr. Bucknor therefore asked to withdraw the claim. Mr. Brown consented.
>
> " Claim struck out with costs for defendants to include yesterday and to-day.
>
> " Certificate of purchase with receipt attached was produced on notice by the plaintiff and was delivered to the defendant Davis as being hers by the Court."

This judgment was afterwards attacked by Sera Quagrainie, Elizabeth Acquah having died, but only so far as it related to the three other parcels of land, and on the ground that the deed of gift of 1898 was a fraud on creditors.

The documents produced were a Certificate of Purchase given in an action in which Acquah was plaintiff and Abina was defendant, and a receipt endorsed thereon.

The certificate is in the following terms, viz. :—

> " This is to certify that Rebecca Davis has been declared the Purchaser for the sum of Ten Pounds Ten Shillings of the right, title and interest of Abina Owoodooah in the messuages lands and tenements hereinafter mentioned, that is to say :

"All that piece or parcel of land situate at Agissoo bounded on the North by river Kina on the South by Charles B. Acquah's land and on the East by Abams land and river Oki and on the West by Ocra and Kobina Buatin's land.

"Which said messuages land and tenements were sold in execution of a decree in the above suit by order of this Court, dated the 31st day of October, 1892.

"Dated at Cape Coast the 11th day of January, 1893.

"HAYES REDWAR,
"(Signature of Judge) Acting."

And it purports to be signed by the Acting Judge.

The endorsed receipt is as follows :—

"£10 10*s*. 0*d*.

"Received from Mrs. REBECCA DAVIS the sum of Ten Pounds Ten Shillings being a piece of land which she bought in the satisfaction of the Writ of Fi. Fa. issued on the above case.

"Ekuamabasi,
"30th November, 1892.

"(Signed) C. S. VERTAGE,
"Sheriff Messenger."

The Court in the order now appealed from have accepted the view that the lands mentioned in this certificate were identical with those mentioned in the certificate and transfer of 1881, and that, notwithstanding the last-mentioned certificate and transfer, the transaction of 1893 effectually vested the lands in the respondent.

The Provincial Commissioner avoided the difficulty by holding that there was no sufficient evidence of the identity of the lands described in the two certificates respectively. On this point their Lordships are of opinion that there are no sufficient materials on which to arrive at a definite conclusion, but they are willing for the purposes of this judgment to assume that both certificates related to the same lands.

The title of Acquah and his successors under the transactions of 1881 appears to be a perfect title not only on paper, but one that is consistent with the subsequent conduct of Acquah and others, and it surely would require a clear case to defeat this by a subsequent transaction, not being, of course, a conveyance by Acquah or someone claiming under him.

Now, this certificate does not purport to relate to the sale and purchase of any right, title or interest of Acquah in the lands, and it would indeed be absurd to sell an interest of the plaintiff in execution of a judgment against the defendant. Nor can their Lordships accept the view that Acquah can be estopped from saying that Abina had no interest to sell. He is not the vendor. It is quite possible, especially seeing that in 1882 Abina had disputed the validity of the sale in 1881, that she, although there is no direct evidence to that effect, was again asserting some claim, and that he himself became the purchaser, through

the respondent who was his niece as nominee, of that claim, whatever it might be, especially as any money paid to the Sheriff would go towards discharge of the judgment debt under the Fi. Fa. Some colour is given to this possible solution by the fact that the certificate and receipt were retained by Acquah and were found, apparently by accident, among his papers two years after his death. Moreover, the respondent, though still alive, was not called to give any account of the alleged sale in 1893, or to say that she paid the purchase money, an omission all the more striking seeing that her evidence in support of her claim to the property given in 1914 was then described in the judgment of the Court as being most unsatisfactory. The receipt is signed by the Sheriff's messenger and not by Acquah, and does not amount to an admission by the latter of any payment by the respondent. No evidence was adduced to show that, by some means in the interval between 1881 and 1893, the land had reverted to Abina or that the transaction of 1881 was not a genuine transaction. Any admission by Counsel in the action of 1911 would not bind Sarah Quagrainie, who was not his client.

Under these circumstances their Lordships are driven to the conclusion that the title prior in point of date must prevail, and that accordingly the judgment appealed from should be set aside and the judgment of the Provincial Commissioner restored, and that the respondent should be ordered to pay the costs in the Courts below. As to the costs of this appeal: When the case was called on the appellant was not represented by Counsel, for no Counsel had then been instructed, and but for their Lordships indulgence in delaying the hearing to permit of Counsel being instructed the appeal would have been dismissed with costs. Afterwards Counsel was instructed and the case proceeded, but their Lordships think that, under the circumstances above mentioned, the appeal should be allowed without costs.

They will humbly advise His Majesty accordingly.

In the Privy Council.

ABRAHAM ESSELL

v.

REBECCA DAVIS *per* JOHN EKWAN SAMPSON.

DELIVERED BY LORD WARRINGTON OF CLYFFE.

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