Privy Council Appeal No. 123 *of* 1931.

Abotche Kponuglo and others - - - - - *Appellants*

v.

Adja Kodadja - - - - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST NOVEMBER, 1933.

Present at the Hearing:

LORD THANKERTON.
LORD ALNESS.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD ALNESS.]

This is an appeal by the defendants from a judgment of the West African Court of Appeal, dated 18th May 1931, reversing a judgment of the learned Chief Justice of the Colony of the Gold Coast, dated 30th September 1930.

The action with which the appeal is concerned was raised at the instance of the Head Chief of Tafi Atome, and was directed against the Head Chief of Djokpee and certain of his subjects. In his writ of summons the plaintiff claimed damages from the defendants for trespass, and an injunction restraining them from entering on certain lands, or in any wise interfering with the plaintiff's possession of them. The territory in dispute is designated as "Bunya land," and it is delineated by boundary lines marked R.E.H. upon a map (Exhibit B) in the West African Court of Appeal, these boundaries having been so initialled by Hall, Acting Chief Justice.

It is not in dispute between the parties that, in the year 1927, the appellants or their representatives cut down an odum tree

within Bunya land, and that, accordingly, if the title to that land is in the respondent, as he claims, a trespass was committed by the appellants.

The respondent's claim being one of damages for trespass, and for an injunction against further trespass, it follows that he has put his title in issue. His claim postulates, in their Lordships' opinion, that he is either the owner of Bunya land, or has had, prior to the trespass complained of, exclusive possession of it. The principal question to be decided in the appeal would accordingly seem to be—Has the respondent discharged the *onus* which rests upon him of demonstrating beyond reasonable doubt that the title to the disputed land is in him ? The appellants say—Nay ; the respondent says—Aye.

The learned Chief Justice divided the evidence adduced by the respondent into two classes :—(1) Traditional evidence as to how he became possessed of the land in dispute, and (2) evidence of use and occupation of the land. On the first of these topics the learned Judge held that the respondent's case, which was that the land was acquired by him by gift, failed, and that the appellants' case, which was that the land was theirs by conquest, succeeded. As regards the second topic, the learned Chief Justice held that no such use and occupation of the land by the respondent as would displace the title of the appellants had been proved. Indeed, so far as possession is concerned, the learned Judge stated that the appellants, in his opinion, had the better case for a title by occupation.

In the Court of Appeal Gardiner Smith J., who delivered the judgment of the Court, expressed the view that the learned Chief Justice had paid excessive heed to tradition, and insufficient heed to what he termed the " existing facts." The Court of Appeal gave no considered opinion on the competing contentions of gift and conquest which had been so fully canvassed in the Court below. They based their judgment, reversing that of the Chief Justice, and finding in favour of the respondent, mainly upon the contents of certain German maps, and, to a lesser extent, upon evidence of possession by the respective parties of the land in question. The Court of Appeal also dealt at length with certain evidence relating to an arbitration said by the respondent to have been entered into between him and the appellants, in virtue of which their competing claims to Bunya land were submitted to and decided in favour of the respondent by the Chief Delame V of Vey. While the Court of Appeal dealt with this evidence, they were careful to state that they completely disregarded, in reaching the conclusion which they did, the evidence relating to the arbitration in question.

In their Lordships' opinion, the first question logically and chronologically, to consider in the appeal is the traditional evidence regarding the acquisition of a title to the disputed territory. Behind that question lies another, viz. : What

weight is to be attached to that evidence? On the first question, the learned Chief Justice, who had the advantage of seeing and hearing the witnesses, held, as their Lordships have already pointed out, not only that the respondent's case of gift failed, but that the appellants' case of conquest succeeded. The learned Chief Justice, after a careful analysis of the evidence on this topic tendered by the respondent, refused to accept it. On the other hand, he held that the evidence tendered by the appellants was reasonable and consonant with the facts as he found them. The Court of Appeal, while minimizing the weight to be attached to such evidence, did not suggest that the learned Chief Justice was wrong in the conclusion which he reached on the evidence, and their Lordships see no reason for thinking that the decision of the learned Chief Justice on the evidence adduced was other than sound. On the question of the weight to be attached to evidence of tradition, their Lordships do not differ from the carefully expressed view of the learned Chief Justice at p. 62, line 29, of the Record regarding the function of traditional evidence in such an enquiry as this. Such evidence, in their Lordships' opinion, falls to be considered and weighed, *quantum valeat*, along with the other evidence in the case.

As, however, the Court of Appeal in effect based its judgment upon certain German maps, it is appropriate *in limine* to advert to them, and to their implications. There are two German maps, the one map marked Exhibit C, and the map marked Exhibit A. The first question which arises is whether these maps, or either of them, fall within the provision of Schedule I, Order 6, Rule 14, of the Rules of the Supreme Court. The rule is in these terms :—" All maps made under the authority of any Government, or of any public municipal body, and not made for the purpose of any litigated question, shall *prima facie* be deemed to be correct, and shall be admitted in evidence without further proof."

Now, Exhibit A, on which chief reliance was placed by the respondent, purports to have been issued by the German Colonial Office. It was tendered in evidence in the Court of Appeal, and, to say the least, it was not objected to by the appellants. Whether in these circumstances they can now be heard to demur to the Board considering the map may be doubtful. Whether the map may be regarded as falling within the description " made under the authority of any Government "—in this case the German Government—may also be doubtful. Their Lordships do not find it necessary, however, for the purposes of this appeal to determine either of these questions.

For, assuming, while not affirming that the map falls under the Rule, it must be remembered that it only enjoys a presumption of correctness, which may be rebutted by other evidence. Their Lordships are of opinion that, on the assumption stated, there

are considerations which neutralise, if they do not outweigh, the benefit conferred upon the map by the Rule. Their Lordships note that the map is on a very small scale : that it is, and must in the circumstances be, doubtful whether it was intended to be used for the purpose for which the respondent seeks to use it, viz., to set out accurately tribal boundaries : and that, moreover, it has been shown to contain inaccuracies, which were pointed out in argument. In short, the map is of such a character that it would not be safe to draw an inference from it regarding the tribal boundaries now in dispute. In these circumstances, their Lordships are unable to agree with the Court of Appeal that " if the evidence of the maps is accepted, the title is in the appellant." Their Lordships think that the Court of Appeal attached undue importance to the maps, and that their legal effect has been much exaggerated. They are unable to hold that in the circumstances the maps neutralise the traditional evidence, which is in favour of the appellants.

The Court of Appeal considered with somewhat meticulous care the evidence relating to the award said to have been made by Delame in an arbitration between the parties. The learned Chief Justice excluded evidence regarding the terms of the award when it was tendered by the most appropriate, if not the only appropriate witness, namely, Delame himself. This exclusion, their Lordships think, was unfortunate. They are of opinion that *quantum valeat* Delame should have been allowed to state what his award was. It is, however, enough for the purposes of this appeal to say that there is weighty evidence, which their Lordships are prepared to accept, to the effect that the appellants resiled from the arbitration proceedings before the award was issued. Moreover, it is proved that, though the respondent's evidence is that Delame cut a line as a boundary, when the respondent's surveyor inspected the land, no objective trace of a boundary could be discovered. His evidence is that he found no boundaries. How in these circumstances the so-called award can be of any value in determining the problem before their Lordships they are unable to apprehend. It is not perhaps surprising that, in the circumstances stated, the Court of Appeal abstained in their judgment from treating the award as even an ingredient in the conclusion which they reached.

The Court of Appeal next considered the evidence of " existing facts," and their bearing on the issue between the parties. The first of these facts relates to certain farms said to have been cultivated in Bunya land by the respondent. Now, in the first place, it must be remembered, as the learned Chief Justice points out, that these are not farms in the sense in which the word is understood in England. They are merely small patches of land which yield a catch crop. Their Lordships are unable to hold that, assuming that these small pieces of land were cultivated by the respondent, that fact yields an inference that the whole of Bunya land, in which they are situated, and which was stated by

Counsel to measure $1\frac{1}{4}$ miles in length by half a mile in breadth, must also and in consequence be deemed to be in the exclusive ownership or possession of the respondent. Their Lordships cannot agree with the Court of Appeal in thinking that the evidence of farming in part of Bunya is evidence of title to the whole land.

Next, the respondent relied on the evidence relating to certain roads in or near the disputed area. The Court of Appeal, because one of these roads is not to be found on a small-scale map, held, despite evidence to the contrary, that there was no road there. This conclusion appears to be unwarrantable. In any event, their Lordships are unable to apprehend how these roads in themselves can yield any independent inference of possession —far less exclusive possession by the respondent. After all, these so-called roads are mere paths, and there is no evidence that they were used in face of a challenge of right to do so. If, as would appear to be the case, the roads are founded on as leading to the respondent's farms, the inference to be drawn from that fact seems to their Lordships to be negligible.

As regards the evidence relating to fish traps on the Bunya river on which the respondent founded, it seems plain that these fish traps, which were connected with the farms already mentioned, were movable in their character, and that, again, any inference drawn from their existence and position must be of but small importance.

As regards the evidence of timbering, counsel for the respondent described it as a "dead heat." In these circumstances, their Lordships consider themselves absolved from reviewing the evidence relating to that matter in detail.

The evidence relating to fetishes was treated lightly by the Chief Justice, and was treated in the Court of Appeal as irrelevant.

Certain evidence was tendered by the respondent from neighbours of his on the subject of boundaries, regarding which it is probably enough to say that the learned Chief Justice refused to accept it as worthy of credence. Indeed, the evidence of the respondent regarding boundaries generally consists of mere assertion—which is not helpful, and the red lines relied on do not reproduce any physical features which can be found upon the land in dispute.

Finally, the respondent founded on the evidence relating to what was termed the "Mahoon incident." It was argued for the respondent that he had proved that certain members of the appellants' tribe were fined by Mahoon for hunting, and so trespassing, on Bunya land. The respondent's counsel contended that it was a significant fact that, while substantive evidence was given by him to the effect that the first defendant was one of the hunters who was fined by Mahoon, that defendant did not, though he was present in Court, enter the witness box to deny the charge. The comment of the

respondent's counsel is *prima facie* just and forcible, and no convincing explanation of the first defendant's failure to give evidence to the contrary was forthcoming. But their Lordships think it is enough to say regarding the Mahoon incident that the Judge of first instance, who saw and heard the witnesses, and observed their demeanour, did not accept as truthful the evidence given on behalf of the respondent regarding this matter. That evidence was given—so he says—"in a parrot-like fashion." Now, while even on questions of fact and credibility, a Court of Appeal must not abdicate its functions, it is nevertheless trite law that, not possessing the advantages of the Judge of first instance, a Court of Appeal should be chary of overruling his opinion on a pure question of credibility. In their Lordships' opinion, no reason for altering the conclusion of the learned Chief Justice on this matter was adduced by the respondent in argument. Their Lordships cannot in these circumstances regard the Mahoon incident as established.

The evidence regarding possession would seem to be, in point of fact, neutral. Both parties can lay claim to certain acts of possession within the disputed territory, many of which were, as the learned Chief Justice says, fleeting in their character. But what seems quite clear—and it is decisive, in their Lordships' view, of this part of the case—is that the respondent has failed to prove exclusive possession by him such as is necessary to instruct a title to claim the remedy which he seeks. Nor must it be forgotten that, in regard to possession, as in regard to tradition, the attitude of the learned Chief Justice to much of the respondent's evidence is one of incredulity, and that, commenting on the demeanour of the witnesses, he regards the respondent's case on this topic as honeycombed with false and even manufactured evidence.

In the circumstances stated, their Lordships are of opinion that the respondent has failed to discharge the onus of establishing beyond reasonable doubt that the title to the disputed area, *i.e.*, Bunya land, is his, either by gift or by exclusive possession. They are also of opinion that the respondent has failed to prove that the Delame award is binding on the appellants. That being so, the respondent's action for damages, and for an injunction, which postulates a title in him to the land, fails in fact and in law. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, that the judgment of the West African Court of Appeal should be set aside, and that the judgment of the Chief Justice should be restored, the appellants to have the costs of this appeal, and their costs in the Court of Appeal.

In the Privy Council.

ABOTCHE KPONUGLO AND OTHERS

v.

ADJA KODADJA.

DELIVERED BY LORD ALNESS.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1933.