Privy Council Appeal No. 51 of 1931

Omanhene Kwamin Bassayin, since destooled, and Chief Kweku Achah substituted - - - *Appellant*

v.

Omanhene Bendentu II - - - - - *Respondent*

FROM

WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH JUNE, 1937.

Present at the Hearing:

LORD RUSSELL OF KILLOWEN.
LORD ROCHE.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

This appeal arises in a litigation between the Stool of Aowin as plaintiff and the Stool of Upper Wassaw as defendant, the main question in the litigation being what is the boundary between Aowin and Upper Wassaw. Aowin says that the boundary throughout is the River Tano. Upper Wassaw, on the other hand, says that northward from the point where the River Anwia flows into the River Tano the boundary is the River Anwia up to its source, and thereafter northward from that point along a bush track up to the River Huro and then along the Huro for a short distance of half a mile or a mile. There is also in the action a subsidiary claim to damages for trespass by the defendant, or people claiming under the defendant, upon certain land which is situated within the boundary of Aowin, if the River Tano is the true boundary.

The trial Judge, Mr. Justice Gardiner Smith, has held upon the oral evidence adduced before him, that Aowin's claim is right; that is to say, that throughout, the boundary between these two territories is the River Tano, and he made a declaration to that effect. He also upon the claim for trespass, awarded damages to the amount of £100. His decision was affirmed unanimously by the Court of Appeal, and it is from that decision that Upper Wassaw now appeals to His Majesty in Council.

The whole case, as their Lordships view it, turned upon two questions of fact. The first question of fact arose in this way:—In the year 1925 the Omanhene of Aowin had affixed his mark to a document which purported to be an agree-

ment to refer to arbitration the dispute between Aowin and Upper Wassaw as to their boundaries; and, in pursuance of that agreement, an award had been made which declared that the River Anwia, from its source to its junction with the Tano, was the boundary between those points; but expressly left undecided the further course of the boundary beyond those limits. That award was therefore obviously incomplete, and was open to objection upon that ground. It was, however, relied upon in the present action by Upper Wassaw as being a bar to the present suit, upon the footing of *res judicata*. The plaintiff, Aowin, on the other hand, alleged that the document in question was not binding on Aowin, because it (i.e., the agreement for reference, which purported to confer jurisdiction upon the arbitrator) was in the English language and had not been properly explained and interpreted to the Omanhene of Aowin when he affixed his mark to it; in other words, that it had not been explained and interpreted to him so as to make him understand its true import. There is no doubt that, as the document was in the English language and the Omanhene knew no English, the onus lay upon Upper Wassaw to establish that the document had in fact been properly explained and interpreted so as to make the Omanhene of Aowin understand its real import. That is a pure question of fact on which the trial Judge found in favour of Aowin, and his finding was affirmed on appeal. There are those two concurrent findings of fact, and, although their Lordships, if they were convinced that those findings of fact were erroneous, would have power to reverse them, and although there is evidence in the case upon which the trial Judge might conceivably have come to a different conclusion, nevertheless their Lordships do not in the present case feel in any way disposed to reverse, or indeed feel justified in reversing, those concurrent findings of fact. The award, accordingly, is no bar to the present action, and the question of the true boundary is entirely a question of fact to be determined upon the evidence adduced at the trial of this action; and that is the second question of fact found by the trial Judge, whose finding in that respect also was affirmed on appeal.

Their Lordships have had the advantage of a very full and skilful argument by Counsel for the appellant; the evidence was closely and carefully examined and analysed by him, and certain objections were taken to the admission or rejection of evidence, and to the weight attached by the trial Judge and by the members of the Court of Appeal to some of the evidence which had been adduced. Their Lordships having considered the evidence, are not prepared to hold that any evidence was wrongly admitted or wrongly excluded; and in any event they are unable in the present case to find that any undue weight was attached to evidence, or that there was any evidence admitted or excluded which, by its admission or exclusion could have in any way materially altered the trial Judge's findings of fact as to the true

boundary. The trial Judge rightly stated at the very commencement of his judgment that the plaintiff could only succeed on proof of his title. He heard the witnesses, he observed their demeanour in giving evidence, and he formed his conclusion as to the direction in which the balance of the evidence, and the weight of the evidence as a whole told; and he held that the plaintiff's title had been proved to his satisfaction. Here, again, the Court of Appeal affirmed his finding; so here again there are two concurrent findings of fact from which their Lordships, from their own appreciation of the evidence, see no reason to differ.

In the result, their Lordships are of the opinion that this appeal should fail and they will humbly advise His Majesty accordingly. The appellant will pay the costs of the appeal.

(43366—3A) Wt. 8151—17 110 7/37 P.St. G. 338

In the Privy Council

OMANHENE KWAMIN BASSAYIN,
SINCE DESTOOLED, AND
CHIEF KWEKU ACHAK
SUBSTITUTED

v.

OMANHENE BENDENTU II

DELIVERED BY
LORD RUSSELL OF KILLOWEN

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