*Privy Council Appeal No. 21 of 1936*

**Kwamina Kuma** - - - - - - *Appellant*

*v.*

**Kofi Kuma** - - - - - - - *Respondent*

FROM

## THE WEST AFRICAN COURT OF APPEAL

---

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH NOVEMBER, 1938

---

*Present at the Hearing*:

LORD ATKIN
LORD PORTER
SIR LANCELOT SANDERSON

[*Delivered by* SIR LANCELOT SANDERSON]

---

This is an appeal by Kwamina Kuma, who was the plaintiff in the suit, against a judgment of the West African Court of Appeal dated the 20th of November, 1934, which reversed a judgment dated the 30th of July, 1934, of Mr. Justice Strother-Stewart in the Divisional Court, held at Cape Coast, of the Supreme Court of the Gold Coast Colony.

The suit was brought by the plaintiff to obtain a declaration of his title to certain land lying near Abrobonku and known as Otenkyiren land:

The learned Judge who tried the suit made the declaration in favour of the plaintiff as far as the land claimed by the defendant was concerned.

The Appeal Court allowed the appeal which was brought by the defendant against the judgment of the learned Judge and directed that a nonsuit should be entered with costs in that Court and in the Court below. It is against the above mentioned decision of the Court of Appeal that the plaintiff has appealed to His Majesty in Council.

The plaintiff is the Odikro of Abrobonku in the State of Oguaa or Cape Coast—Abrobonku lies to the south of the land in dispute: The defendant is a farmer living in the village Yowuma, which is situated to the north-east of the said land.

The plaintiff claims a large tract of land which is surrounded by a boundary coloured green on the plan which was exhibited at the trial and marked A. The judgment of the trial Judge however related to a portion only of such land, which on the said plan was encircled by a boundary coloured red—and this appeal is in respect of the said portion only.

The cause of the litigation was that in or about 1926 the defendant, Kofi Kuma proposed to sell the land in suit to a certain Mr. Sekyi. The plaintiff gave notice of his objection to the proposed sale, which consequently was not completed. The present defendant then brought a suit against the present plaintiff in the Supreme Court of the Gold Coast Colony, which ordered a survey of the land by an independent surveyor. Accordingly a Mr. Hagan made a survey and prepared a plan which is the plan already referred to and marked A; it was proved at the trial of the present suit by Mr. Hagan. The Supreme Court considering that the matter was more fit for a native tribunal than for that Court, discontinued the suit and referred the parties to a native tribunal. Apparently no further step was taken by the defendant to prosecute his suit.

The plaintiff on the 4th February, 1931, instituted the present suit in the native tribunal of the Paramount Chief of Oguaa: It was transferred by order of the Provincial Commissioner's Court to the Divisional Court sitting at Cape Coast: It may be noted that the suit was heard without pleadings and their Lordships have not had the advantage of hearing counsel on behalf of the defendant who was not represented in the appeal to His Majesty in Council.

Both parties relied upon traditional history and upon present occupation and cultivation of parts of the land in suit.

The plaintiff relied upon his stool being the owner of the lands within the green verge line.

Both parties agreed that the village of Yowuma where the defendant lives was founded by one Ampenseni, and that Ampenseni was an Abura.

The defendant claims to derive his title from one Kweku Andoh, a follower of Ampenseni, who it was alleged was the first person to clear the virgin forest by permission of Ampenseni. The plaintiff, however, alleged that Ampenseni and his followers founded Yowuma by permission of one Duku, who was a successor of the plaintiff's ancestress, Acquah Brafu, who was the owner of the land and whose stool the plaintiff now occupies.

There seems to be no doubt that at some time there was a war between the Abura and the Asebu, and it was alleged that the Abura were victorious. There is no evidence, however, to show when the war took place or to prove with any certainty which were the lands if any from which it was alleged the Asebu were ousted:

Their Lordships attention has been drawn by the learned counsel who appeared for the plaintiff to the evidence produced at the trial. In a case such as this, where the evidence as to title and boundaries rests to such a large extent upon the witnesses' recollection as to the tradition to which they speak, it cannot be expected to be as precise and specific as in a case where documentary evidence is available.

Certain facts, however, in their Lordships' opinion are made clear by the evidence, and they are material for the consideration of the questions in issue.

The first matter to which reference may be made is that, whether the plaintiff's stool embraces the whole area of land enclosed by the green verge on the plan (as to which their Lordships express no opinion) or not, the evidence goes to show that the plaintiff's stool does appear to comprise lands in the immediate vicinity of the land which is in dispute, on the east, south and west:

There is further the evidence of Amanfi III who is the Omanhene of Asebu whose territory is to the north and east of the alleged boundary of the lands belonging to the plaintiff's stool. His evidence in their Lordships' opinion is important. He is obviously a man of position, and he was speaking about matters which would naturally be of great interest to him viz.: the boundaries of his territory and he would know the tradition relating to them: He said that the Asebu lands form boundary with the plaintiff's land which includes Yowuma village, and that the said boundary was demarcated before Yowuma was built.

If the above-mentioned evidence be accepted it appears that the plaintiff's stool comprises some lands on all sides of the portion of land in dispute.

It is further to be noted that the area in dispute consists of farm land only and that there is no village, not even huts, upon it.

In view of the above-mentioned evidence it is difficult to accept the traditional history alleged by the defendant that it was land acquired by an ancestor of the defendant as the result of a war waged by the Abura against the Asebu many years ago.

The Court of Appeal referred to the fact that in 1899 one Chief Coker attempted to purchase the village Yowuma from an ancestor of the defendant called Bekwi, but was stopped. The learned Judges attached no importance to this evidence for the reason that the said village is not situated on the land in dispute. With deference to the learned Judges, their Lordships are of opinion that the said evidence is material to the case of the plaintiff, viz., that the lands of his stool are on all sides of the area in dispute and when taken in connection with the other evidence, it goes to show that the plaintiff's allegation in that respect is correct. As already stated the Court of Appeal held that the plaintiff should be nonsuited as there was not sufficient evidence to grant a declaration of title.

Their Lordships do not agree with that conclusion: in their opinion the evidence produced on behalf of the plaintiff, if accepted, was sufficient to establish his title.

The learned Judges, however, further held that the defendant and his ancestors had been in occupation of the land in suit for six generations without let or hindrance by

the plaintiff or his ancestors, that they have never paid tribute, performed acts of fealty, or given drink to the plaintiff for permission to farm.

Their Lordships are not prepared to accept without qualification the evidence as to the length or continuance of the occupation by the defendant and his predecessors, but even assuming that the defendant and his predecessors have been to some extent in occupation of parts of the land in question, for some considerable time without paying tribute to the plaintiff or his predecessors, such possession in their Lordships' opinion is not conclusive evidence of the defendant's title.

It is to be noted that the evidence of the plaintiff was to the effect that he followed the practice of his forebears in not extracting tribute from the persons occupying the land: and that he only objected when the defendant tried to dispose of it. This was confirmed by other evidence which went to show that the plaintiff followed the precedent set by his ancestors, and that the occupiers were allowed to remain on the land as long as they behaved themselves.

It appears that the practice thus adopted by the plaintiff is not by any means exceptional or unusual and in considering this aspect of the case, it is necessary to bear in mind what was said by Lord Haldane in giving the judgment of the Board in *Amodu Tijani* v. *The Secretary, Southern Nigeria,* [1921] 2 A.C. 399, at page 402, viz.:—

> " Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists."

At page 404 of the said case their Lordships referred to the character of the tenure of the land among the native communities as described by Rayner C.J. in his report on land tenures in West Africa and they came to the conclusion that the view expressed by him was substantially the true one—

> " The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or built a house upon, goes to him for it. But the land so given still remains the property of the community or family. He

> cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger."

It appears, therefore, that among the natives, occupation of land is frequently allowed for the purpose of cultivation but without the ownership of the land being parted with. The owner of the land being willing to allow such occupation so long as no adverse claim is made by the occupier; the occupier knowing that he can use the land as long as he likes provided he recognises the title of the owner.

If the evidence as to occupation be considered with the caution which has been deemed essential by the Board in such cases as the present, it is in the opinion of their Lordships not inconsistent with the title of the plaintiff and it is by no means conclusive of the defendant's title.

In this connection the fact that in two instances, one in 1899 and the other about 1926, the predecessor of the plaintiff and the plaintiff himself took steps to prevent and did prevent proposed sales of land which were claimed to be included in the plaintiff's stool, is a material and important piece of evidence.

This was a case which depended very largely upon the verbal evidence of the witnesses, and the learned Judge who tried the case had the great advantage of seeing the witnesses and of hearing them give their evidence. He accepted the evidence of the plaintiff's witnesses in respect of the material questions in issue. Their Lordships have considered the evidence which was produced by both sides and they are of opinion that there was sufficient evidence to justify the conclusion at which the learned Judge arrived, and that there is no reason for interfering with his decision.

It should be noted, as already mentioned, that the declaration of title, which the learned Judge made, was limited to the area surrounded by the verge coloured red on the plan A, and that such a declaration does not amount to an order for ejectment of the persons occupying the same.

For these reasons their Lordships are of opinion that the judgment of the Court of Appeal should be set aside and that the judgment of the trial Judge should be restored.

The defendant must pay the plaintiff's costs in the Court of Appeal and of this appeal and their Lordships will humbly advise His Majesty accordingly.

(13549—2) Wt. 8168—30 110 12/38 P. St. G. 338

In the Privy Council

---

KWAMINA KUMA

*v.*

KOFI KUMA

---

DELIVERED BY SIR LANCELOT SANDERSON

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
POCOCK STREET, S.E.1.

1938