Privy Council Appeal No. 56 of 1937

Nana Akpandja - - - - - - *Appellant*

v.

Fiaga Egblomesse - - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY, 1939

Present at the Hearing:

LORD ROMER
LORD PORTER
SIR GEORGE RANKIN

[*Delivered by* LORD PORTER]

The appellant and respondent who are concerned in the dispute which their Lordships have to consider are the chiefs of certain districts in Togoland. The appellant is the paramount chief of Buem Borada which is in the part of Togoland under British mandate whilst the respondent is the chief of Akposso Badu which is in the portion of Togoland under French mandate.

The dispute concerns the ownership of certain lands approximately 15 square miles in extent situated on the British side of the international boundary between the French and British mandated territory. The dispute also extends to land on the French side of the boundary, but that portion is not subject to British jurisdiction and is not the subject matter of appeal.

The case has already been the subject of three decisions —firstly, before the Assistant District Commissioner, who found that each party was entitled to about half of the land in dispute; secondly, before the Acting Commissioner of the Eastern Provinces who decided in favour of the appellant, and thirdly, before the West African Court of Appeal, who restored the judgment of the Acting District Commissioner. From that decision the appellant appeals to His Majesty in Council.

Substantially the appellant's case is that the land in dispute was originally his; that many years ago a tribe called the Kwawus applied to his predecessors for leave to settle on it; that they gave permission; that the Kwawus came and increased so much in power that they wished the appellant's subjects the Akpandja to serve them; that two battles took place—in the first the Kwawus were victorious with the help of the Ashanti, that the Akpossos gave no help but that both

the Akpandja and the Akpossos had to pay tribute to the Ashanti as a result of their victory. Later in a second battle the Akpandja were victorious, and having driven out the Kwawus retook possession of the disputed territory and retained it ever since. The Akpossos had once, he said, been subordinate to the Akpandja but had ceased to be so, and had taken no part in either battle, or given any help, or made any payment except through him to the Ashanti by way of tribute.

The respondent also spoke of the fighting with the Kwawus and Ashanti. Both were agreed that it took place before the Germans came, i.e., more than 55 years ago. He also said that the respondent's subjects had been subordinate to the appellant's people but had ceased to be so; that the land was originally theirs; that it was they who granted it to the Kwawus; that the battles with them and the Ashanti did indeed take place, but that the Akpossos took part in the struggle and assisted in defeating the enemy. He agreed that, as the Akpandja had joined with his people and helped to reclaim the land, they ought to have received a share of the recovered territory, but said that the appellant's predecessor agreed that it was a long way for him to go and therefore sold the land in exchange for a quantity of men, sheep and cloths. He accordingly claimed the whole.

The respondent who was plaintiff in the original action was represented by his son and the appellant by his second linguist. In addition to the respective representatives the respondent called five witnesses and the appellant four.

After hearing the evidence the Acting District Commissioner proceeded to inspect the land in question, and after doing so gave his judgment, dividing the land between the two chiefs. To this judgment he attached a sketch map, which though it does not purport to be accurately drawn, gives a sufficient picture of the land in dispute.

The eastern portion, being in French territory, cannot be exactly defined, but the other boundaries consist of the Kadibenum River on the north, the path from Kadjebi to Ahamansu on the west and the River Menu on the south. The whole of this country was claimed by the respondent, whilst the appellant maintained that it was his and that the boundary between the two chieftains was at Abotoasi in French territory. The Acting District Commissioner gave the portion north of the River Ojinji to the appellant and the southern portion to the respondent.

The evidence was conflicting. Each side claimed to have been the original owners of the disputed land each gave a history of its later acquisition from the Kwawus by conquest, and each relied upon evidence of pathclearing by their people as evidence of ownership. The respondent also set up an alleged judgment by the Germans in his favour, relied upon the existence of a heap of stones on the River Menu said to mark the boundary, and upon the alleged purchase of a portion of the land from the respondent by a witness who says he first approached the appellant but was

told by him that the respondent was the owner. The question is one of fact and is essentially for the determination of a tribunal which has seen the witnesses and inspected the *locus in quo*. It is true that the Acting District Commissioner does not appear to place much, if any, reliance on the German judgment or on the alleged purchase of the land from the respondent by the appellant's direction. Nor does he find himself able to place any reliance upon the traditional evidence. Indeed, it appears that he rejects the story that the respondent purchased half of the land from the appellant after the conquest of the Kwawus.

But equally he puts no confidence in the first two of the appellant's witnesses and by inference rejects the traditional evidence of the other two. In their Lordships' view however he had evidence on which he could find that the appellant was entitled to the half, and the respondent has not appealed against his finding.

Having regard to these circumstances their Lordships agree with the Court of Appeal that on the evidence given at the trial, an Appeal Court ought to be very chary of reversing the trial Court's finding of fact, and that there was not sufficient justification for reversing that Court's finding. But it is said that there are two grounds on which that judgment can be criticised; (1) that the trial Judge decided the case not on the evidence before him, but on the unsworn testimony given in the course of his inspection, and (2) that since the trial a German map has been discovered from which it appears that the boundary of the Akpossos is well to the east of the land in dispute. A petition for the admission of this map in evidence was presented to their Lordships and the question of its admissibility considered by them on the hearing of the appeal.

(1) As to the first ground the Acting District Commissioner had evidence at the trial from one of the respondent's witnesses as to the existence of a heap of stones on the River Menu which was said to mark the boundary between the two peoples, and on finding such a heap at the spot indicated was entitled to accept its existence as corroboration of that evidence. He appears also to have taken into consideration the fact that on the portion awarded to the respondent he found farms in possession of his subjects or acquired by purchase from him, just as he found farms held by subjects of the appellant or acquired from him on the portion awarded to the appellant. Their Lordships cannot agree that he was not entitled to take these circumstances into account. He was accompanied by representatives of each party and no objection appears to have been made to his proceedings. Their Lordships would be loth to lay too much stress upon the fact that two chiefs unaided by legal assistance took no objection to the taking of such evidence, but no objection to its reception appears to have been taken even in the Court of Appeal where the parties were professionally represented, and their Lordships do not think that such an objection should prevail when taken for the

first time before them. The ownership of the farms may well have been admitted, and in any case it is not clear how much assistance the Acting District Commissioner received from observation alone and how much or little from oral evidence.

(2) As to the German map their Lordships do not consider they ought to accede to the petition for its admission.

The map was in the possession of the defendant before the hearing of the action before the Acting District Commissioner, but in the case of a dispute between two African chiefs who cannot be expected to attribute the same importance to written documents as would be attributed to them by a lawyer or even by a layman in this country, their Lordships would be unwilling to shut out the evidence on that ground alone.

This part of Togoland is under the jurisdiction of the Gold Coast, and the map is said to be admissible in evidence under the Supreme Court Ordinance of the Gold Coast, Schedule 1, Order VI, R. 14, whereby all maps made under authority of any Government or of any public municipal authority and not for any litigated question, shall prima facie be deemed correct and shall be admitted in evidence without further proof. It is said that this map was made under the authority of the German Colonial Office.

From the evidence adduced it is not absolutely clear that the map was made under that authority. It may merely have been made at their suggestion. But whatever the true view upon this question, their Lordships, having regard to the two affidavits of Dr. Johannes Grüner, one produced by each side, do not find themselves able to rely upon the boundaries marked upon it as authoritative.

Their accuracy must depend upon the source from which the information is obtained, and in their Lordships' view no sufficient evidence as to the chiefs or other informants who have been questioned is forthcoming, nor is it clear how far that evidence has been tested by checking the evidence of one informant against that of another. Dr. Grüner himself acknowledges that corrections have to be made from time to time, and this Board refused to place reliance on a map forming one of the same series in the unreported case of *Abotchi Kponuglo & ors.* v. *Adja Kodadja* (Privy Council Appeal No. 123 of 1931).

But even if the map would have been admissible and prima facie accurate when tendered in evidence in the Trial Court, their Lordships would have not have felt justified in admitting it before this Board when all effective challenge of its accuracy is precluded. At best they could only have sent back the case for trial before the Court of first instance upon all the material now available and such an order would only have been possible at the expense of the appellant, an expense which they were no doubt well advised to refuse to incur.

In the result the appeal fails. No formal order appears to have been made, and in their Lordships' view the Acting District Commissioner at p. 22 l.35 of his judgment inserted

boundary post 78B instead of 78A. Their Lordships consider that the proper order is to declare that the respondent as chief of the Akposso Badu is the owner of that portion of the land in dispute situate in British territory south of the River Ojinji between the path from Kadjebi to Ahamansu and boundary post 78A and that the land in dispute which lies to the north of the Ojinji is the property of the appellant.

Subject to this formal amendment the judgment of the West African Court of Appeal will be affirmed and the appellant must pay the costs of this appeal.

Their Lordships will humbly so advise His Majesty.

(15382—3A) Wt. 8168—30 110 3/39 P. St. G. 318

In the Privy Council

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DELIVERED BY LORD PORTER

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