Privy Council Appeal No. 57 of 1937

Ohene Tekyi Akyin III, representative of the Stool and Oman of Ampenyi - - - - - - *Appellant*

v.

Kobina Abaka II, Ohene of Brenu Akyinm (substituted for Kwamin Mensah, deceased), suing on behalf of his Stool - - - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JULY, 1939

Present at the Hearing:

LORD THANKERTON

LORD FAIRFIELD

SIR LANCELOT SANDERSON

[*Delivered by* SIR LANCELOT SANDERSON]

This is an appeal by the defendant in the suit from the judgment of the West African Court of Appeal, dated the 21st of December, 1935, which affirmed a judgment dated the 14th of March, 1935, of Strother-Stewart J. sitting as a Divisional Court of the Supreme Court of the Gold Coast.

The suit was brought on the 5th January, 1931, by Kwamin Mensah, the Ohene of Brenu Akyinm Stool, against the Priest-in-charge of the Catholic Mission, Ampenyi, claiming damages for trespass alleged to have been committed on certain property belonging to the Stool of Brenu Akyinm and an injunction to restrain the defendant and his servants from continuing the said trespass.

On the 29th January, 1931, the appellant was joined as a defendant and on the 7th March, 1933, the respondent Kobina Abaka II was substituted as the successor of the original plaintiff who had died.

The Priest-in-charge of the Mission was only a nominal defendant, and he is not a party to this appeal.

The real dispute was between the plaintiff, the chief of Brenu Akyinm, and the defendant, Tekyi Akyin III, the chief of Ampenyi, as to the ownership of certain lands called "Botokul" or "Abutuku", which are on the west side of the Brenu Lagoon and are delineated upon the plan, which was exhibit A in the suit. The lands, which are the subject-matter of the action, are marked on the said plan as being within the red line thereon.

The suit was first tried in 1931 by Yates J., who entered judgment for the plaintiff. There was an appeal, and for reasons which need not be referred to, the Court of Appeal ordered that there should be a new trial "de novo."

The new trial began before Michelin J. on the 15th March, 1934; but the learned judge heard the opening statements of counsel and the examination and cross-examination of the plaintiff only.

The trial was resumed before Strother-Stewart J. on the 19th March, 1934, and it was then treated as if a claim and counterclaim for the delimitation of the boundaries of Botokul and a declaration of title were on the record. The learned Judge found that the boundaries of the present village of Ampenyi are from the mouth of the Brenu Lagoon along the course of Eduardu stream and thence in a more or less straight line to the mouth of the Inkani stream as marked by the yellow line on exhibit A.

He was satisfied that Eduardu Hill on which the Catholic Church was being built is outside such boundary and is land belonging to the Brenu Akyinm people.

He held further that the land within the red line on the plan exhibit A belongs to the Brenu Akyinm people and not to the Ampenyi people and is the land commonly known as Abutuku land.

He therefore held that a trespass had been committed by the Priest-in-charge of the Catholic Mission building and that such trespass was in consequence of permission to build the church given by the defendant appellant, who had no right to give such permission. He assessed the damages at £25 and granted an injunction to restrain the defendants, their agents, workmen or servants from continuing the said trespass.

The defendants appealed to the West African Court of Appeal.

The appeal was heard by the Chief Justice of Nigeria, the Chief Justice of Sierra Leone and Bannerman J., who affirmed the judgment of Strother-Stewart J. and dismissed the appeal. It is against this judgment that the defendant, the Ohene Tekyi Akyin III, representing the Stool of Ampenyi, has appealed to His Majesty in Council.

The main ground upon which the learned counsel for the appellant relied was that the trial Judge and the Court of Appeal were influenced in their decision by inadmissible evidence.

Reference was made particularly to two exhibits Q and V.

Q was a judgment of the Native Tribunal of the Paramount Chief of Elmina given on the 8th June, 1917, in a case which was brought by the Ohinba of Ampene in respect of land which was in the area now in dispute. Judgment was given for the defendants.

Their Lordships need not refer to these proceedings in further detail, inasmuch as the Court of Appeal were of opinion that exhibit Q was wrongly admitted in evidence in view of the fact that the proceedings therein referred to had not been certified as the " true copy " of the original tribunal record and for other reasons.

The Court of Appeal therefore did not rely upon exhibit Q

Exhibit V was relied upon by both Courts, and it must therefore be considered whether it was properly admitted in evidence.

This was what has been called by the learned trial Judge the "Oath case".

The case was heard in June, 1918, by certain persons, described as the representatives of the Ten Companies of Elmina.

It was headed, "In the matter of Kwamina Nkertsia Takie Mensay of Brenu Akynim" against certain persons, who were "charged with the offence of having violated the oaths of (1) the Oman of Elmina, (2) Sword of Omanhim of Elmina, (3) Brenu Akynim Sunday which the plaintiffs swore at Elmina for the purpose of prohibiting the people of Ampene from cultivating their lands without permission from them."

The plea was not guilty. Judgment was given for the plaintiffs and the defendants were ordered to pay oath fines of £10 1s. and costs £6 10s.

It was not disputed that this document, if admissible in evidence, was material to the issue between the parties to this appeal and would support the plaintiff's case.

It was however submitted that the tribunal which gave the decision referred to in exhibit V had no jurisdiction and therefore the proceedings and the decision in respect thereof were not admissible in evidence.

This depends upon certain provisions contained in the Native Jurisdiction Ordinance of 1883, chapter 113.

In section 2 "native tribunal" is defined as meaning a head chief or the chief of a subdivision or village as the case may be, sitting with the captains, headmen and others who by native customary law are the councillors of such head chief or chief.

Section 10, as amended by 7 of 1910, section 7, provides as follows:—

> "10. The head chief of every division and the chiefs of subdivisions or villages shall, with their respective councillors, authorised by native law, form native tribunals, having power and jurisdiction to try breaches of any bye-laws made and approved in the manner in this ordinance before mentioned, or existing at the commencement of this ordinance, and to exercise civil and criminal jurisdiction in the causes and matters after mentioned in which all the parties are natives, or in which any party not a native consents in writing to his case being tried by the native tribunal."

Section 11 provides that the said civil jurisdiction shall extend, among other matters, to the hearing and determination of suits relating to the ownership or possession of lands held under native tenure and situated within the particular jurisdiction of the tribunal.

The first clause of section 17 is as follows:—

> "17. The jurisdiction, civil and criminal, the exercise of which is facilitated and regulated by this ordinance shall be exclusive of all other native jurisdictions, and shall not be exercised by any other native tribunal on any pretext whatsoever."

The second clause of section 17 provides as follows:—

> "Provided that no proceeding or judgment shall be void by reason of any cause or matter having been brought or tried before any other tribunal than that before which it ought to have been tried, but shall be liable to be set aside or amended if the justice of the case so requires, upon being removed to the Court by appeal or otherwise."

It was argued on behalf of the appellant that representatives of the Ten Companies of Elmina did not constitute a native tribunal within the meaning of the above-mentioned section 10, inasmuch as the chief was not a member of the tribunal at the time it gave its decision.

On the other hand, at the trial it was submitted on behalf of the plaintiff that the tribunal of the representatives of the Ten Companies of Elmina was empowered by customary law to try cases of violation of the Great Oath, and that the jurisdiction of the tribunal had not been taken away. It seems to have been admitted at the trial that the representatives of the Ten Companies did not constitute a "Native Tribunal" within the meaning of the ordinance, and the learned trial Judge admitted the record of the proceedings referred to in exhibit V merely as some evidence of an act of possession giving no decision as to the question of *res judicata* or on their validity from the point of view of enforcing the judgment.

There is no specific finding by either of the Courts in Africa on the question whether the representatives of the Ten Companies of Elmina had jurisdiction by customary law to adjudicate in the "Oath" case as to the ownership of land, though both Courts seem to have assumed that they had such jurisdiction.

In the absence of any such finding by the Courts in that respect and of any satisfactory evidence on the point, their Lordships are not in a position to express an opinion upon the question whether the representatives of the Ten Companies would be a "tribunal" within the meaning of the second clause of section 17 of the ordinance; and it is unnecessary to consider the proper construction of the clause.

It was urged on behalf of the defendant at the trial that exhibit V should not be admitted as evidence on the ground that the case was not decided by the representatives of the Ten Companies, but that the parties had come to an agreement and that the settlement so arrived at was different to that set out in the judgment in exhibit V.

Their Lordships are satisfied that the trial Judge had evidence before him to justify his finding that there was no such settlement, although attempts at settlement may have been made.

There is no specific finding of the Court of Appeal affirming the conclusion of the trial Judge in this respect, but it seems that the Court of Appeal must have been of the same opinion as the trial Judge inasmuch as the learned Judges in the Court of Appeal held that exhibit V was

properly admitted in evidence, thereby impliedly holding that the settlement alleged by the defendants had not been effected.

Their Lordships are of opinion that the representatives of the Ten Companies did not constitute a native tribunal within the meaning of section 10 of the ordinance and that in view of the state of the record hereinbefore mentioned, and, having regard to the express terms of sections 10 and 11 and the first clause of section 17 of the Ordinance, the proceedings referred to in exhibit V should not be admitted in evidence.

This however does not dispose of the appeal, for it is necessary to consider whether apart from the evidence disclosed by the exhibit V there was sufficient evidence to justify the decision of the Court of Appeal in affirming the judgment of the trial Court.

There was documentary evidence which was admissable and which went to show that from time to time the representatives of the Stool of the Brenu Akyinm were successfully pressing their claim to some parts of the land now in dispute. Their Lordships do not think it necessary to refer in detail to such claims, but the case which was tried by Nicol J. in May, 1900, may be taken as an instance.

Further there was oral evidence as to the history and tradition of the two Stools.

Shortly stated, the appellant's case was that the Ampenyi were the first settlers in the part of the country where the land in dispute lies, and that the Brenu Akyinm people settled by permission of the Chief of Ampenyi at Brenu Akyinm on the east side of the Brenu Lagoon for the purpose of making salt, and that the Brenu Akyinm people had no land on the west side of the lagoon.

On the other hand the plaintiff's case was that the Brenu Akyinm people were the first to clear the land, and that the appellant's people had been licensed by the plaintiff's predecessors to occupy a portion of the Brenu Akyinm lands within certain defined boundaries, which did not include the lands now in dispute.

The learned trial Judge held that the traditional history given by the plaintiff was the correct one. He was of opinion that the evidence of the appellant's witnesses was the result of a careful study of the reports of former litigation and he did not take it at its full face value.

After inspecting the *locus in quo* and after due consideration of the oral evidence, he came to the conclusion that the plaintiff had established his case in this respect.

The Court of Appeal affirmed the decision of the trial Judge, saying that the learned Judge in the Court below carefully considered the traditional evidence on behalf of both parties and came to the conclusion he did.

The learned Judges in the Court of Appeal were of opinion upon the question now under consideration that overwhelming facts existed to sustain the finding of Strother-Stewart J.

In their Lordships' opinion these are concurrent findings of fact by the two Courts in Africa, and in such a case as this where the question is one which relates to the boundaries of the lands of two native chiefs, their Lordships would hesitate long before disturbing the concurrent findings of the Courts in Africa, who are in a much better position to weigh the value of the evidence than their Lordships.

Their Lordships' conclusion is that although there was certain evidence admitted which should not have been admitted, there was sufficient evidence, apart from the inadmissible evidence, to justify the decision at which the two Courts in Africa arrived, and consequently that the appeal should be dismissed with costs.

They will humbly advise His Majesty accordingly.

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In the Privy Council

OHENE TEKYI AKYIN III, representative of the Stool and Oman of Ampenyi

v.

KOBINA ABAKA II, OHENE OF BRENU AKYINM (substituted for Kwamin Mensah, deceased), suing on behalf of his Stool

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DELIVERED BY SIR LANCELOT SANDERSON

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