

In the Brigid Council.

No. 18 of 1950.

ON APPEAL FROM THE WEST AFRICAN
COURT OF APPEAL
(GOLD COAST SESSION)

UNIVERSITY OF LONDON
W.C.1.
20 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

- 1. CHIEF KOFI OWUSU for and on behalf of Toase Stool
- 2. YAW TARKU (Defendants) Appellants

AND

CHIEF KWAME DAPAAH, for and on behalf of Aferi
Stool (Plaintiff) Respondent.

CASE FOR THE APPELLANTS

1.—This is an Appeal from a Judgment of the West African Court of Appeal, delivered on the 21st February, 1949, which, in allowing an Appeal, set aside a Judgment of the Chief Commissioner's Court, dated the 21st May, 1948, but which in so doing varied a Judgment of the Asantehene's " A " Court, dated the 25th August, 1947. RECORD.
p. 62.
p. 59.
p. 46.

The said Asantehene's " A " Court in allowing an Appeal from the Judgment of the Asantehene's " B " Court, dated the 7th December, 1942, as against the present First Appellant, at the same time gave Judgment in favour of the present Second Appellant. p. 37.

10 2.—Prior proceedings were as follows :—

The present Respondent, by a Writ of Summons, dated the 28th January, 1941, in the Supreme Court of the Gold Coast, Ashanti, Divisional Court, Kumasi, claimed from the present second Appellant £240 as land and cocoa tribute for 24 years. p. 70.

By an affidavit sworn on the 14th February, 1941, Yaw Tarku denied any such indebtedness. p. 71.

20 The present first Appellant by an affidavit sworn on the 25th April, 1941, said that Yaw Tarku was one of his subjects ; that the land on which he lived was part of his Stool lands ; that no tribute was due as alleged ; and that he should be made a co-defendant. p. 74.

p. 75.

On the 5th May, 1941, Mr. Justice Doorly gave Judgment to the effect that he was bound by the Judgment in *Odikro Osafo Agyeman & Ors. v. Kwame Panin* (delivered on the 16th February, 1940, and reported in 6 W.A.C.A. p. 11) and so stopped future proceedings in that Court and referred the parties to the Asantehene's Divisional Court for the Kumasi Division.

p. 1.

p. 2.

3.—By an application for Summons and a Writ of Summons, dated respectively the 27th and 29th May, 1941, the present Respondent, as Plaintiff, claimed as against the First and Second Appellants, as Defendants.

(1) As against both Defendants that he as representing the Aferi Stool is the owner of all that piece or parcel of land situate lying and being at Nkwakom and bounded on the north by Nerebehin and Akrofuomhene's lands ; on the south by Esuowisau and Moduans Stream ; on the east by Aboabo Stream and Wherekesiom, and on the west by Kobri Stream known as Kobrisu. 10

(2) As against the Second Defendant damages or mesne profits for the use of portion of the said Plaintiff's land for the last 24 years for the cultivation of cocoa, and

(3) For an injunction to restrain the Defendants from committing any acts of trespass on or entering upon the said land in the absence of payment of recognised Native Customary Tribute by the Defendants to the Plaintiff for their occupation and use of the said Plaintiff's stool land. 20

p. 4, l. 7.

4.—The Plaintiff, in his evidence before the Asantehene's " B " Court, said that the land in question had been presented to an ancestor Akyeampon Akwasi, the then Afarihene, by a former Otumfuo, Nana Asantehene, called Oti Akenten.

p. 4, l. 41.

He tendered two Judgments all on one paper which were accepted and marked Exhibits " A " and " B."

p. 64.

Exhibit " A " is a finding in a Judgment of Mr. L. H. Wheatley, District Commissioner, dated the 17th January, 1917, and which is in these words :— 30

" That the village of Inkwa Krom belongs to the Stool of Aferi and that his boundary with the Nkawe Panin lands shall be as follows :—From the Essuawinsu to the source of the Moduasu thence to its junction with the Kobiri thence the Kobiri."

p. 66.

Exhibit " B " is a final decision in a Judgment of Sir F. C. Fuller, Chief Commissioner, Ashanti, dated the 17th April, 1917, and which reads thus :—

" Plaintiff has no right to the Nkawe Penin lands. This case is therefore dismissed." 40

p. 68.

His exhibits " C " and " D " are indentures, both dated the

16th January, 1924, in which one Yaw Berku and one Kweku Anwhere agree to pay the sum of £20 and £10 respectively to the Plaintiff for land to be used as a cocoa farm. p. 69.

The remaining exhibits "E" and "F" tendered by the Plaintiff in this Court are merely letters dealing with a proposed visit to the land by a Surveyor. p. 72.
p. 73.

In cross-examination the Plaintiff said, in passages, that his Claim included the Nkuran lands. p. 8, l. 37.
p. 10, ll. 17, 23.

5.—The First Defendant, in his evidence, said that it was during the reign of the Asantehene Nana Osei Tutu that his great grandfather and predecessor, Barfuor Ayim, came from Denkyira to settle in Ashanti to assist the Otumfuo Asantehene to administer his affairs; that the latter allotted a parcel of land to his grandfather to settle on; that his great grandfather settled first at Afarsie Bon while his son settled at Twedieh village; that his great grandfather further founded the present Nkuran village; that later there were settlements at Toase and other places; that later one Kwafram founded a cottage at Nkwaakom where his people were already farming; and that whenever game or rubber accrued from the land, it was sent to the occupant of his Stool. p. 24, l. 33.

20 He went on to say that the Second Defendant had lived on his Nkuran land for 24 years and had never been called upon by the Plaintiff to pay tribute until the present proceedings were instituted.

He said that Mr. Justice Fuad in the earlier proceedings, refused to admit in evidence the decision of Sir F. C. Fuller, dated the 17th April, 1917, (Exhibit "B") as that Judgment referred to Nkawe Panin lands and not to the Nkwaakom land. p. 27, l. 50.

6.—The Second Defendant, in his evidence, said that it was the First Defendant who gave him part of the Nkuran land; that he had never paid tribute to anybody; that he transmitted the customary share of game killed to the First Defendant; and that his ancestors had farmed on the land from time immemorial when Nana Ayim was Toasehene. p. 31.

30 The Odikro of Wiredu, on being examined by the Court, said that he had a boundary with the First Defendant at the place where the Second Defendant had his cottage. He had more fully described his boundary with the First Defendant in his evidence in chief. p. 35, l. 47.
p. 34, l. 36.

7.—On the 26th February, 1942, the Asantehene's "B" Court made an order for the three members of the Court, the Linguist Kwabene Kwaaku and the Registrar Mr. I. K. Agyeman, to go and view the land in dispute and to report before Judgment was given. p. 36, l. 40.

40 The view of the land began on the 16th September, 1942, and continued for some days in presence of the parties whose claims and evidence on the spot were duly noted by the Viewers who, on the 30th September, 1942, signed the Report of Inspection. p. 76.
p. 78.

p. 37, l. 23. The said Report was submitted on the 7th December, 1942, by Linguist
Kwaaku who was sworn. It was accepted by the Court and marked as
p. 76. Exhibit " K."

p. 39, l. 5. 8.—On the 7th December, 1942, the Asantehene's " B " Court found
p. 68. that, in the Agreements between the Plaintiff and certain farmers to pay
p. 69. tribute, the Defendants were not parties, and so were not bound by them.
The Court treated Exhibits " A " and " B " as one Exhibit " A,"
p. 66. being on one paper when admitted as evidence and held that so far as the
p. 39, l. 14. Judgment of Sir F. C. Fuller was concerned, the Plaintiff had no claim to
the parcel of land in dispute and therefore entered Judgment in favour of 10
the Defendants with costs.

p. 76. 9.—In his Supplementary Grounds of Appeal, dated the 28th April,
p. 41, l. 3. 1943, the Plaintiff said that the Viewers Report, Exhibit " K," is not in
accordance with the facts elicited during the course of inspection; and
p. 41, l. 26. that Court " B " took too literal a view of the Chief Commissioner's
Judgment to the detriment of the Plaintiff.

p. 46, l. 36. 10.—The Asantehene's " A " Court, on Appeal, ordered a survey of
the land in dispute to be made on the 27th November, 1944.

p. 46, l. 38. On the completion of the survey, the membership of the Court which
gave the order for the survey, had changed and so the hearing started with 20
a new panel of members on the 5th August, 1947.

p. 42, l. 31. On this date, the Surveyor tendered in evidence his plan which was
accepted and marked Exhibit " L," a separate document.

p. 43, l. 13. The Surveyor, when examined by the present First Appellant, said
that from Nkwakuom to Nkuran farms were owned by Nkuran people and
this was admitted by the present Respondent; that the owners of these
p. 43, l. 14. farms were present and showed these farms; that they said they paid no
p. 43, l. 17. tribute to the present Respondent; and that the present Second Appellant
was one of these according to the present First Appellant.

p. 43, l. 26. In answer to the Court, the Surveyor said he inserted everything 30
shown to him by the parties; that it was approximately $1\frac{1}{2}$ miles from
Nkwakuom to the footpath crossing the Esuowin Stream where the farmers
said they paid no tribute; and that the present Respondent yet claimed
the land there.

p. 44, l. 6. The present Respondent tendered in evidence two documents :—

p. 65. (1) A copy of a validated Executive Decision in the case of
Chief Kwame Anapah v. Chief Akwesi Jewu reference " Inkwa
Krom Land Dispute," dated the 17th January, 1917, and approved
p. 65, l. 21. later by the then Chief Commissioner, Sir John Maxwell, on the
6th September, 1928, and

p. 66, l. 23. (2) A certified copy of a Bills of Costs, being a claim on the
18th April, 1917, by the present Respondent against one Chief

Akwesi Jaiwoo for expenses incurred in some case which had been decided in his favour. These expenses were allowed by the Chief Commissioner on the 19th April, 1917. RECORD.
—
p. 67, l. 19.

The present First Appellant objected to these documents being accepted in evidence inasmuch as they had not been tendered before the Court below. p. 44, l. 12.

The Court overlooked the objection, accepted them in evidence, and marked them as Exhibits " M " and " N " respectively. p. 44, l. 15.
pp. 65, 66.

When examined by the Court, the present Respondent said he was not claiming the Nkuran lands. p. 44, l. 23.

As he had claimed the Nkuran lands in the Court below, and the Surveyor had entered the Nkuran lands as claimed by him on Plan " L," the Court put the following questions :—

Q. What is your boundary between Nkwakuom and Nkuran ?

A. Esuowin to Ayankama Stream.

Q. Do you own the left hand or right hand side ?

A. I own the left hand side.

When examined by the Court, the present First Appellant said that he owned the people of both Nkwakuom and Kkuran ; that the boundary between Nkwakuom and Nkuran is Obuohu thence towards the left to Sankori ; and that the land from Obuohu to Abotanso was his. In his submissions to the Court, he further elucidated his case. p. 45, l. 20.
p. 45, l. 30.

11.—The Judgment of the Asantehene's " A " Court was delivered on the 25th August, 1947. The Court mentioned the Judgment of the District Commissioner, dated the 17th January, 1917, and said that an Appeal had been lodged against it to the Chief Commissioner's Court by the predecessor of the present First Respondent. In construing the latter Judgment, dated the 17th April, 1917, the Court considered Exhibit " N," a Bill of Costs, which had not been before the Lower Court, and held that the word " Plaintiff " in the Chief Commissioner's Judgment must mean " Appellant " and was accordingly in favour of the present Respondent. p. 46.
p. 46, l. 41.
p. 64.
p. 66.

The Court failed to observe :—

(1) that the Decision of the 17th January, 1917, found that a village named Inka Krom belonged to the present Respondent and that his boundary with the Nkawe Penin lands shall be from the Essuawinsu to the source of the Moduasu, thence to its junction with the Kobiri, thence to Kobiri. p. 64.

(2) that the said Decision later became a Validated Executive Decision with the approval of Sir John Maxwell on the 6th September, 1928, when he was Chief Commissioner. p. 65.

(3) that Exhibit " M " which gives the validated Decision was not before the Lower Court.

RECORD.

- (4) that if the judgment of the 17th April, 1917, had been an appeal from the Finding of the 17th January, 1917, no approval to validate it was required in 1928.
- (5) that the Judgment of the 17th April, 1917, deals with the ownership of the Nkawe Penin lands and not with the ownership of the village of Inka Krom or its boundary with the Nkawe Penin lands.
- (6) that Exhibit " N " does not mention the name or particulars of the Appeal with which the Bill of Costs was concerned so as to connect it with an appeal from the Finding of the 17th January, 1917. 10

p. 47, l. 27. The Court found that the present Respondent had made a definitely untrue statement in basing his title to the lands in question on a gift by the Asantehene Otumfuo Oti Akenten, while the basing of his title by the present First Appellant on a gift from a subsequent monarch Nana Osei Tutu was more correct historically. But the Court went on to say that incorrect dates should not defeat actual facts and so it did not consider a wrong date as a material fact. In cross-examination in the Court below, the present Respondent had stated that his claim included the Nkuran lands, but in Court " A " he had stated to the contrary. 20

p. 47, l. 49. " This Court is therefore bound to come to the conclusion that the Nkuran lands on which are several farms admitted to belong to subjects of the First Defendant-Respondent (the present First Appellant) should belong to the First Defendant-Respondent's Stool. If Yaw Tarku's village formed part of the Nkakuom land, why did the Plaintiff-Appellant (the present Respondent) not collect tribute from Yaw Tarku for 24 years or enter into agreement with him as in the case of Yaw Berku and Kwaku Anwhire." 20

pp. 64, 65. The Court then defined the boundary between the parties, having regard to Exhibits " A " and " M," in these words :— 30

p. 48, l. 10. " It is for this Court therefore to define the boundary as between Aferi and Toase and this shall be from the Essuowinso in a straight line northwards to Obuohu and from that point to Abutanso. The land on the left to belong to Aferi and that on the right to belong to Toase. The latter having his easterly boundary with the Odikro of Wiredu." 30

The Court dismissed the second claim as against the present Second Appellant with costs in both Courts.

p. 48, l. 26. The Court allowed the Appeal with costs in both Courts against the present First Appellant with a declaration of ownership of the Nkakuom lands in the present Respondent, the boundaries of which being those declared in Exhibits " A " and " M " between Aferi and Nkawe Penin and in this Judgment as defined between Aferi and Toase. 40

pp. 64, 65.

12.—The present Respondent appealed from the Judgment of the Asantehene's " A " Court.

In his Grounds of Appeal and Supplementary Grounds of Appeal he said that the "A" Court had no jurisdiction to lay down a new boundary since the boundary had been laid down in Exhibits "A" and "M"; that Court "A" had awarded part of his lands to the present First Appellant; and that the "Nkwakuom lands," "the whole of the Nkwakuom lands," and "the entire lands of Nkwakuom" belonged to him.

He ignored his own admission that he did not claim the Nkuran lands, and he failed to observe that Exhibits "A" and "M" merely referred to a specific village called Inka Krom with boundary with Nkawe Panin lands, and said nothing about any boundary with Toase.

13.—The Chief Commissioner's Court, in a Judgment dated the 21st May, 1948, dismissed the Appeal of the present Respondent with costs to be paid to the present First Appellant.

From this Judgment of the Court of the Chief Commissioner, the present Respondent appealed. His Counsel in argument said his clients would be satisfied with the area north of the blue line and west of the river to that point and would relinquish claim to area south of the blue line awarded to the present First Appellant by the Asantehene's "A" Court.

14.—The West African Court of Appeal, on the 21st February, 1949, set aside the Judgment of the Chief Commissioner's Court of Ashanti, with costs to the present Respondent and said "Appeal allowed. Judgment of Court 'A' varied by deleting the words 'and from that point to Abutanso' and substituting therefor the words 'and thence from Obuohu eastward along the Blue Line on Plan Exhibit "L" to the Stream "Asubompan alias Anyankama and thence northward along the said stream to Obotanso,' and deleting the words 'the latter having his easterly boundary with the Odikro of Wiredu.' The Judgment of Court 'A' to be read throughout in the light of this variation."

15.—An Order granting Final Leave to Appeal to the Privy Council was made on the 25th June, 1949.

16.—The Appellants humbly submit that the Judgment of the West African Court of Appeal, dated the 21st February, 1949, which set aside the Judgment of the Chief Commissioner's Court of Ashanti, dated the 21st May, 1948, and confirmed the Judgment of the Asantehene's "A" Court, dated the 25th August, 1947, with a variation of boundary, is erroneous and should be reversed, and this Appeal allowed by the restoration of the Judgment of the said Asantehene's "A" Court with costs throughout for the following, among other,

REASONS

1. BECAUSE the West African Court of Appeal gave no reasons as required by Rule 16 of The Judicial Committee Rules, 1925.

2. BECAUSE the West African Court of Appeal varied the boundary declared by the Asantehene's "A" Court to be in accordance with what the Respondent herein said would satisfy him.
3. BECAUSE the Asantehene's "A" Court fulfilled its duty "to ascertain a boundary existing as matter of title."
4. BECAUSE the boundary declared by the Asantehene's "A" Court was in accordance with
 - (a) the evidence generally
 - (b) the evidence of the Respondent that he did not claim 10 the Nkuran lands
 - (c) the evidence of Plan "L" which clearly shows that the Nkuran lands go Northwards towards Obotanso or Abutanso.

T. B. W. RAMSAY.

In the Privy Council.

No. 18 of 1950.

ON APPEAL FROM THE WEST AFRICAN COURT
OF APPEAL.
(GOLD COAST SESSION.)

BETWEEN
CHIEF KOFI OWUSU and
Another *Appellants*
AND
CHIEF KWAME DAPAAH *Respondent.*

CASE FOR THE APPELLANTS

BURCHELLS,
9 Bishopsgate, E.C.2,
Solicitors for the Appellants.