

~~GH 103~~ 19, 1952

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No. 18 of 1950.

In the Privy Council.

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 . . . . . *Appellants.*

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AND

- CHIEF KWAME DAPAAH for and on behalf of  
AFERI STOOL . . . . . *Respondent.*

Case for the Respondent.

RECORD.

1. This is an appeal from a judgment of the West African Court of Appeal dated the 21st February, 1949, whereby the said Court of Appeal allowed the Respondent's appeal from the judgment of the Chief Commissioner's Court of Ashanti dated the 21st May, 1948, and varied a judgment of the Asantehene's "A" Court, dated the 25th August, 1947, which allowed in part the Respondent's appeal from the judgment of the  
20 Asantehene's "B" Court dated the 7th November, 1942.

2. The issue in this appeal is whether the West African Court of Appeal were right in varying the aforesaid judgment of the Asantehene's "A" Court with regard to certain land at Nkwakom and holding that the boundary between the land owned by the Respondent as representing the Aferi Stool and the land owned by the first Appellant as representing the Toase Stool should be from the Essuowinso in a straight line northwards to Abuohu eastward along the Blue line on Plan Exhibit "L" to the stream Asubompan alias Anyankama and thence northwards along the said stream to Obotanso.

30 3. In January, 1917, the Respondent instituted proceedings in the District Commissioner's Court held at Nkawie Kuma against Chief Akwesi Jewu, who was the first Appellant's predecessor-in-title, claiming £100 damages for trespass, receiving tribute and the stirring of the inhabitants p. 64, l. 3.

of Inkwa Krome against the Respondent. On the 17th January, 1917, the District Commissioner (L. H. Wheatley) arrived at and recorded his findings as follows :—

“ That the village of Inkwa Krom belongs to the stool of Aferi and that his boundary with the Nkawe lands shall be as follows :—

p. 64, l. 15.

From the Essuawinsu to the source of the Moduasu thence to its junction with the Kobiri thence the Kobiri.”

Chief Akwesi Jewu appealed to the Chief Commissioner who on the 17th March, 1917, recorded his final decision in the following terms :— 10

p. 66, l. 5.

“ Plaintiff has no right to the Nkawe Penin lands this case is therefore dismissed.” [sic].

p. 66, l. 22.

On the 18th April, 1917, the Respondent applied to the Chief Commissioner for permission to claim from Chief Akwesi Jaiwoo [sic] £13. 14s. 0d., as expenses in respect of these proceedings. On the following day the Chief Commissioner directed that the said sum should be paid to the Respondent out of Jewu's appeal deposit.

p. 67, l. 19.

p. 65, l. 19.

On the 6th September, 1928, the District Commissioner's aforesaid Executive Decision was approved by the then Chief Commissioner of Ashanti. 20

p. 1, l. 15.

4. By an Application for Summons dated the 27th May, 1941, the Respondent instituted

#### THE PRESENT SUIT

claiming (1) as against both Appellants that he as representing the Aferi Stool was 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 ; (2) as against the second Appellant damages or mesne profits for the use of portion of the said land for the last 30 24 years for the cultivation of cocoa and (3) an injunction restraining the Appellants from committing any act of trespass on or entering upon the said land in the absence of payment of recognised Native Customary Tribute by the Appellants to the Respondent for their occupation and use of the Respondent's stool land.

pp. 4-37, 36, l. 40.

5. Oral evidence was given by and on behalf of all the parties. On the 26th February, 1942, the Court deputed five of its members to go and view the land in dispute and report before judgment. The said members inspected the said land in the presence of the parties on the 17th September, 1942, and made their report in writing on the 30th September, 1942. 40

pp. 76-78.

p. 38.

6. The Asantehene's " B " Court in their judgment considered the terms of the Chief Commissioner's decision in the earlier litigation and observed that in the case referred to the plaintiff was the same as in the present case, while the first defendant's predecessor was the then defendant. Since Nkawie Panin lands were distinct from Toase lands the Court was of

opinion that the Chief Commissioner's aforesaid judgment was rather in favour of the first Appellant's predecessor in office and that the Respondent was still bound by the said judgment. They therefore entered judgment for the Appellants and against the Respondent with costs to be taxed.

7. The Respondent appealed to the Asantehene's "A" Court. The supplementary grounds of appeal included the following:—

"3. The claim before Commissioner Wheatley was one for trespass and the judgment being clear in its terms should have been accepted by Court 'B.' p. 41, ll. 10-20.

10 4. That Chief Jewu having lost the action appealed to the Chief Commissioner's Court. It is submitted that the Chief Commissioner's judgment when properly construed meant that the appeal had been dismissed. The word 'case' used in the judgment obviously referred to the appeal. If this construction be not placed on the judgment, it becomes unintelligible and meaningless. There are only two ways of dealing with an appeal:—

(A) It is either allowed or

(B) It is dismissed.

20 If the appeal is allowed it is submitted that it means the Appellant has succeeded. If the appeal is dismissed it means the Appellant has not succeeded. Court 'B' therefore should have accepted the contention of Plaintiff that the Appellant in the case before the Chief Commissioner's Court namely Chief Jewu lost as the 'case was dismissed.'

Court 'B' took too literal a view of the Chief Commissioner's judgment to the detriment of the Plaintiff."

8. On the instructions of the said Court one Charles Emmanuel Newman, a licensed surveyor of Kumasi, proceeded to the area in dispute with the parties and made a plan which was tendered in evidence p. 42, l. 22.  
 30 (Exhibit "L"). At the hearing Appellants tendered in evidence two documents, namely a copy of the Validated Executive Decision in the case of *Chief Kwame Dapaah v. Chief Jewu* and the certified Bill of Costs in the p. 44, l. 6.  
 Chief Commissioner's Court.

9. With reference to the judgment of the Chief Commissioner in 1917 the Asantehene's "A" Court held that in referring to the plaintiff the Chief Commissioner meant the Appellant in that case and that the Chief Commissioner's decision was in favour of the Respondent. Their judgment p. 47, l. 47.  
 also included the following passage:—

40 "In cross-examination, the Plaintiff-Appellant stated before the Court below that his claim included the Nkuran lands, but before this Court he stated to the contrary, but the indictment even is clear. No mention of Nkuran was made. 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 1st Defendant-Respondent 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 not collect tribute from Yaw Tarku for 24 long years or enter into agreement with him as in the case of Yaw Berku and Kwaku Anwhire ?

The boundary as between the Plaintiff-Appellant and the Nkawie Panin stool was defined in Mr. Wheatley's judgment (Exhibits 'A' and 'M'). It will be noticed, however, that the dispute was between Aferi and Toase. 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 (Plaintiff-Appellant) and that on the right to belong to Toase (1st Defendant-Respondent). The latter having his easterly boundary with the Odikro of Wiredu."

As regards the second claim the Court held that the second Appellant's village and farm did not fall within the lands claimed by the Respondent. In their opinion the ownership of the land as between the Respondent and the first Appellant should have been first determined before any action for damages or mesne profits could have been taken against the second Appellant. They allowed the appeal as against the first Appellant and set aside the judgment of the Asantehene's "B" Court and declared the Respondent the owner of the Nkakuom lands, the boundaries of which were defined in Mr. Wheatley's Judgment as between Aferi and Nkawie Panin and in their own judgment as between Aferi and Toase. They awarded the Respondent his costs in both Courts as against the first Appellant but dismissed his claim against the second Appellant with costs in both Courts.

10. The Respondent appealed from the said judgment of the Asantehene's "A" Court to the Chief Commissioner's Court of Ashanti on the grounds (*inter alia*) that since the boundary had already been laid down by Mr. Wheatley in his Executive Decision in a dispute relating to the land now in dispute and since this decision had been duly recorded in the Boundary Book in pursuance of Section 3 of "The Boundary, Land, Tribute, and Fishery Disputes (Executive Decisions Validation) Ordinance" (Cap. 120) the question was in effect *res judicata* and the Asantehene's "A" Court had no jurisdiction to lay down a new boundary between the parties.

p. 59, l. 1. 11. On the 21st May, 1948, the Acting Chief Commissioner dismissed the Respondent's appeal as aforesaid, stating that he saw no reason to interfere with the judgment of the Asantehene's "A" Court.

p. 60, l. 19. 12. The Respondent appealed to the West African Court of Appeal on the ground that the new boundary demarcation laid down by the Asantehene's "A" Court in its judgment was inconsistent with Wheatley's findings and should have been amended by the Chief Commissioner's Court to give the whole Inkwa-Krom land to the Respondent in terms of the said findings.

13. The Judgment of the West African Court of Appeal was in the following terms :—

"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 Obuoho 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 Odekro of Wiredu'. The Judgment of Court 'A' to be read throughout in the light of this variation." p. 62.

14. Final leave to appeal to the Judicial Committee of the Privy Council was granted by the West African Court of Appeal on the 25th June, 1949. p. 63.

10 15. The material provisions of "The Boundary, Land, Tribute and Fishery Disputes (Executive Decisions Validation) Ordinance" (Cap. 120) are annexed hereto.

16. The Respondent submits that this appeal should be dismissed and the Judgment of the West African Court of Appeal upheld for the following, among other,

### REASONS.

- 20 (1) BECAUSE the ownership of the Nkwakom lands was decided by the District Commissioner in the earlier proceedings and his finding was in fact upheld by the Chief Commissioner: the question was therefore *res judicata*.
- (2) BECAUSE the ownership of the Nkwakom lands had been the subject of an Executive Decision within the meaning of the Boundary, Land, Tribute and Fishery Disputes (Executive Decisions Validation) Ordinance and the matter could not, therefore, be reopened.
- 30 (3) BECAUSE the line of demarcation laid down by the Asantehene's "A" Court and confirmed by the Chief Commissioner's Court was inconsistent with the said finding and executive decision.
- (4) BECAUSE Section 3 of the aforesaid Ordinance is applicable to the present case.
- (5) BECAUSE in the alternative the question in issue was purely a question of fact and involves no question of principle and is therefore not a question that should be made the subject of an appeal to His Majesty in Council.
- (6) BECAUSE there was evidence upon which the West African Court of Appeal were entitled to arrive at their decision.
- 40 (7) BECAUSE the judgment of the West African Court of Appeal was right and should be upheld.

C. S. REWCASTLE

DINGLE FOOT.

In the Privy Council.

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**ON APPEAL**

*from the West African Court of Appeal  
(Gold Coast Session).*

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**BETWEEN**

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for and on behalf of  
TOASE STOOL

2. YAW TARKU . . . *Appellants*

**AND**

CHIEF KWAME DAPAAH  
for and on behalf of

AFERI STOOL . . . *Respondent*

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**Case for the Respondent**

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