Privy Council Appeal No. 18 *of* 1950

Chief Kofi Owusu and another - - - - - - - *Appellants*

v.

Chief Kwame Dapaah - - - - - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD JULY, 1952

Present at the Hearing :

LORD NORMAND
LORD TUCKER
LORD ASQUITH OF BISHOPSTONE
LORD COHEN

[*Delivered by* LORD ASQUITH OF BISHOPSTONE]

This is an appeal from a judgment of the West African Court of Appeal dated 21st February, 1949. The second appellant can for the purposes of the present appeal be ignored. He has an unappealed decision in his favour and seems to have been joined as appellant by an oversight. The effective parties to the appeal to this Board are the first appellant and the respondent. Both of these are chieftains in Ashanti. The first appellant—Chief Owusu—occupies the "Toase" Stool, and the respondent the "Aferi" Stool in that country: and the issue in substance is, whether certain lands, to be specified hereafter, belong to the one Stool or the other. Before coming within their Lordships' purview the litigation followed a somewhat tortuous course and it may be convenient, by way of proem, to indicate its successive phases in chronological order.

The plaintiff was throughout Kwame Dapaah, the present respondent. When the litigation started the second appellant, Yaw Tarku, was the sole defendant. But the first appellant, Kofi Owusu, was then at his own instance, joined, and became the first defendant. The claim against Yaw Tarku put forward in a Writ of Summons, dated 28th January, 1941, had been for £240 claimed as arrears of land and cocoa tribute for 24 years. This claim was in the first instance put forward in the Supreme Court of the Gold Coast, Ashanti (Divisional Court, Kumasi:). Yaw Tarku by affidavit traversed the claim. Then the first appellant—Owusu—filed an affidavit deposing that Yaw Tarku was one of his subjects and that the lands occupied by Yaw Tarku were the lands of his—Owusu's Stool—the Toase Stool. He claimed to be made co-defendant.

By this time it had become obvious that the case raised issues of title to land involving questions of native tenure and custom: and Doorly J. of the Supreme Court, acting in conformity with decisions binding on him, on 5th May, 1941 renounced seisin of the case and referred it to the "Asantehene's Divisional Court 'B'"—a native court specially charged with the decision of such matters, as a Court of First Instance.

The title to the lands occupied by Yaw Tarku, upon which his liability to pay tribute (or his freedom from that liability) depended, had been originally the sole issue. But after Kofi Owusu intervened as a co-defendant with Yaw, and the proceedings were remitted to the native Court "B", the original issues were greatly widened when they came to be framed before that Court.

Dapaah, the plaintiff, in claiming that Yaw was his subject and liable therefore for tribute or mesne profits payable to him, did not limit his claims to the land farmed by Yaw—a small plot indicated on the plan (at square 1. 6) as " Yaw Terku village ": but in effect asked for a declaration that a very much larger area (including that village) belonged to the Aferi Stool. The extent of the claim is defined in the first of the three issues formulated by the Native Divisional Court B as being for its decision, in the following language:—

" The plaintiff claims:—

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 Nkakuom and bounded on the north by Nerebehin and Akrofuomhene's lands on the South by Esuowinsu and Moduasu stream on the East by Aboabo Stream and Wherekesiom and on the West by Kobri Stream known as Kobri.

2. As against the 2nd 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 abesnce 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."

The Native Court—" Divisional Court B "—took a large volume of evidence as well as a " view ", relating to matters of pure fact. (The order for the " view " is at p. 36, line 40 of the Record and the plan of the area involved is Exh. L.) But Court B ended by basing its decision on a point of law. To explain how this point of law arose, it is necessary (A) to record certain " executive decisions " (a term to be elucidated) made in 1917; (B) to call attention to the provisions of an Ordinance of 30th April, 1929, giving conclusive effect and validity to such past executive decisions under certain conditions [1936 Revision: Boundary Land, Tribute and Fishery Disputes (Executive Decisions Validation) (Ashanti)];

(B) It may be convenient to deal with the second topic first. The long title of this enactment is " An Ordinance to validate and invest with legal force and effect certain executive decisions given, confirmed, or approved by the Chief Commissioner, with respect to certain disputes and matters relating to boundaries, land, tribute and fishery rights '. The material provisions are the following:—

" 2. In this Ordinance the expression ' Boundary Book ' means and refers to any volume containing particulars of executive decisions made with respect to disputes and matters relating to boundaries, land, tribute and fishery rights, being a volume certified by the Chief Commissioner to be a ' Boundary Book ' for the purposes of this Ordinance.

3. (1) Any executive decision in a dispute or matter relating to the ownership or boundaries of any land or to tribute or fishery rights in Ashanti given, confirmed, or approved by the Chief Commissioner prior to the commencement of this Ordinance, and officially recorded in a Boundary Book is hereby validated and invested with full and definite legal force and effect for all purposes whatsoever as against all persons whomsoever the rights of the Crown alone being reserved.

3. (3) If in any case relating to the boundary of any land any doubt or question shall arise as to the correct interpretation or application of any such executive decision as aforesaid, the Court (which expression does not include a Native Court) may cause the boundary concerned to be fixed to the best of its ability, guided always by the principle of applying such decision as closely and with as much precision as the Court shall consider practicable. Where a boundary

is, either as of first instance or on appeal, so fixed by the Supreme Court, no appeal shall lie from the Court's judgment with respect to such fixing. (Amended by 14 of 1935, s. 4.)

4. If any person shall seek to assert or maintain any right in pursuance of any such aforementioned executive decision the production by such person of a copy of the appropriate entry in the Boundary Book purporting to be signed and certified by the officer of the Government for the time being having the custody and possession of the Boundary Book as being a true copy of such entry in the Boundary Book shall be sufficient and conclusive evidence in all Courts and Native Tribunals that the executive decision was in fact given, confirmed, or approved by the Chief Commissioner."

It will therefore be apparent that as a matter of law an "executive decision" given or confirmed by the Chief Commissioner (and entered in the "Boundary Book"), provided it is not ambiguous or hard of interpretation, is in respect of title to lands, conclusive. If it is hard of interpretation, then it may be construed by the Chief Commissioner or the Supreme Court.

Reverting now to (A) above, their Lordships note that there had been certain "executive decisions" in 1917 including one by a District Commissioner, Mr. Wheatley: this last a decision which might or might not have been given in relation to the lands now in issue, and which might or might not have been "confirmed" by the Chief Commissioner—at that time—Sir Francis Fuller. These decisions (and one of Sir J. Maxwell, Sir F. Fuller's successor, made in September, 1928) are fully set out below. Divisional Court "B", basing itself solely on the construction which it placed on the decisions of Mr. Wheatley and Sir F. Fuller, held (*a*) that Mr. Wheatley had on 17th January, 1917, adjudged that the land now in dispute or land including it, belonged to the Stool of Aferi, viz. to Dapaah, the present plaintiff-respondent; (*b*) that the Chief Commissioner, Sir F. Fuller, on appeal had reversed this decision and consequently decided that the land in dispute (whatever it may have been) belonged to the Toase Stool, viz. to Owusu. (The language of Court B at some points suggests that it decided the case on *res judicata*, but it is also consistent with the conclusion that the Court based itself on the Ordinance and the validation it confers, and it is difficult to suppose that it did not proceed on this basis, whether it misconstrued Sir F. Fuller's decision or not.)

Propositions (*a*) and (*b*) above both appear to their Lordships assailable: and both were in fact challenged on appeal from Divisional Court "B" to Divisional Court "A", also a Native Court. In particular (1) it is not clear that the award of Mr. Wheatley, the District Commissioner, decided anything in reference to the particular lands now in question; (2) it was not clear that Sir F. Fuller's decision on appeal reversed the decision of Mr. Wheatley. On the contrary, it would seem plainly to have confirmed that decision in relation to the lands covered by it. (3) So far as section 3 of the Ordinance is concerned, there is no evidence that Sir F. Fuller's decision was ever recorded in the "boundary book," and unless it was, the terms of the Ordinance (section 3 (1)) do not make it conclusive.

However, as will appear, Sir J. Maxwell, a successor of Sir F. Fuller as Chief Commissioner, did make an entry in the "boundary book" which confirmed, as on 8th September 1938, Mr. Wheatley's award. It is a reasonable conjecture that his motive was (*a*) to secure that a Chief Commissioner's decision should figure in the "boundary book"; and (*b*) to secure that it should be in unambiguous terms.

It is necessary at this point to set out:—

(1) the executive decision of Mr. Wheatley;

(2) the decision of Sir F. Fuller;

(3) Sir J. Maxwell's decision of September, 1928.

(1)

Chief Kwame Anapah
Vs.
Chief Akwesi Jewu

Plaintiff claims £100 damages for trespass, receiving tribute and the stirring of the inhabitants of Inkwa Krome against Plaintiff.

* * * * * *

Finding:

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.

(Sgd.) L. H. WHEATLEY,
District Commissioner.

17th January, 1917.

(Vide Palaver Book 71.)

(2)

JUDGMENT OF CHIEF COMMISSIONER

Case Appealed to the Chief Commissioner by Chief Akwesi Jewu of Tuasie. M.P. 50/1917.

Final Decision of C.C.A.:

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

(Sgd.) F. C. FULLER,
C.C.A.
17.4.1917.

(3)

17th January, 1917.

I hereby certify that the above is a copy of Executive Decision made by L. H. Wheatley District Commissioner on the 17th day of January, 1917, and approved by me on the 6th day of September, 1928.

Dated at Kumasi this 22nd day of October, 1929.

(Sgd.) JOHN MAXWELL,
Chief Commissioner Ashanti.

(1) Mr. Wheatley's decision, while it purports to decide a question between the present plaintiff Dapaah (= 'Anapah') the holder of the Aferi Stool, and one Jewu the holder of the Toase Stool (1st defendant's predecessor in title) only plainly decides what is the southern boundary as between the Aferi Stool lands and the Panin lands. This frontier is indicated in yellow on the plan. That decision is consistent with the boundary between the Aferi Stool lands and the Toase Stool lands being anywhere. The award decides nothing as to the northern and eastern boundary to the Aferi's Stool lands; it decides nothing as to the depth to which the hinterland, north and east of the yellow line which marks the southern frontier of the Aferi lands, belongs to the Aferi as opposed to the Toase Stool. The award does indeed say that the village of 'Inkwa Krom' belongs to the Stool of Aferi and the map shows a village at 'Ahinkwakrom' (a place allocated by every court to the first defendant): but there has been much dispute as to whether this means what it appears to say—or means Inka Kuom or Nkakuom and, if so, what precisely is covered by the latter term.

(2) Whatever Mr. Wheatley's decision precisely means it seems clear (*a*) that it was *not* reversed, as Court 'B' thought, by the Chief Commissioner, Sir F. Fuller (*b*) that it was confirmed by Sir J. Maxwell, whose confirmation of it was entered, as Sir F. Fuller's was not, in the boundary book, (*a*) is clear *inter alia* from the award of costs to the plaintiff. It seems plain that for 'plaintiff' one must read 'appellant' and for 'case,' 'appeal'.

Only so it is possible to explain why Dapaah—the plaintiff before Mr. Wheatley and the respondent in the appeal to Sir F. Fuller, was granted his costs of the appeal. Their Lordships are satisfied that on this particular point amongst others Divisional Court " B " was wrong and Divisional Court " A " was right.

The proceedings on appeal from Court " B " to Court " A " (the hearing of which began on 1st April, 1943) may be summarized as follows:—Court " A " heard a certain amount of additional oral evidence, which is of some importance. This is at pp. 44 and 45 of the Record. It seems to have been common ground between the parties that the so-called " Nkakuom " lands belonged to the Stool of Aferi and the so-called " Nkuran " lands, to the Stool of Toase: the problem for the court was to discover what land was covered by each of these designations: either on the evidence, or on the basis of an " executive decision " made conclusive by the Ordinance of 1929: if such a decision could be established.

The gist of Court " A's " decision is as follows:—First, the Court pointed out that Court " B's " judgment had been based on the misconception that Sir F. Fuller's decision in 1917 reversed that of Mr. Wheatley, whereas in truth it affirmed that decision. Their Lordships are in entire agreement with Court " A " on this point. It is obvious, as stated earlier, that by the " plaintiff " the Chief Commissioner meant the appellant (defendant) before him, and that by " Case " he meant appeal, and costs were awarded on this basis (£13 14s. 0d.—Exh. " N "). Secondly Court " A " dismissed as definitely untrue certain evidence given by the plaintiff Dapaah in the proceedings before them, which evidence alleged a grant to his grandfather, of the land in dispute by Asantehene Otumfuo Oti Akenten. On this point again their Lordships concur with Court " A ". The chief in question lived too long ago to have made such a grant to the plaintiff's grandfather.

Thirdly Court " A " holds that Mr. Wheatley's award which it rightly, but contrary to Court " B ", held to have been affirmed by Sir F. Fuller, was in substance an award as to the frontier between Aferi lands and Panin lands, and therefore irrelevant to the frontier between Aferi lands and Toase lands, or Nkakuom lands and Nkuran lands.

The Court set aside the decision of Court " B ". It defined the boundary between the Nkakuom lands and the Nkuran lands by reference to a line indicated in green on the main plan (exh. L.). This line runs more or less north to south from Obotanso through Obuoho to Essuowinso, everything to the left or west of this line being adjudged to be Nkakuom lands and to belong to the Stool of Aferi, and everything to the right or east of it being adjudged to be Nkuran lands and to belong to the Stool of Toase: until the river is reached which divides these last lands on the east from those of the Odikro of Wiredu.

From this decision it would seem necessarily to follow that the cottage or farm at Yaw Tarku of the second (originally the only) defendant Yaw, was adjudged to belong to the Toase Stool of Owusu, since it is situate to the east of the green line; and Court " A " expressly so decided in the last two paragraphs of its judgment.

The plaintiff appealed from this decision of Court " A " to the Chief Commissioner's Court, as he was entitled to do.

The only relevant ground of appeal, as the Chief Commissioner in their Lordships' view rightly held, was ground " B ", which reads as follows:—

> " Whether the new boundary made by " A1 " Court does not destroy or interfere with the old boundary demarcation made or laid down by Mr. Wheatley in his Judgment? And if it does not, was the " A1 " Court justified upon the evidence adduced to lay " (= fix) " the boundary so as to give a portion of the appellant's land to the first respondent? "

After argument heard the Chief Commissioner in giving judgment answered the first of these questions in the negative, and the second in

the affirmative. That was a victory so far as it went for the first defendant respondent in those proceedings, namely Owusu.

From this judgment the plaintiff appealed to the Court of Appeal for Western Africa.

Their Lordships have had occasion to refer above to the principal plan of the lands in dispute (Exh. " L "). This was prepared by a surveyor, Mr. Newman, on 18th June, 1947, and by him tendered in evidence in August, 1947 before Divisional Court " A ". The plan bears now upon it the green line running north and south which that Court found to be the boundary between the lands of the Aferi and Toase Stools. The area allocated to the Toase Stool is an oval shaped strip on the right of the plan bounded on the left or west by the green line, and on the right or east by a river which bears at least four names, but will be referred to as the Asimbopan. In the " legend " inserted in the left hand corner of this plan appears *inter alia* the statement that the blue line which appears on the plan is the boundary between Nkakuom and Nkuran lands as pointed out by Owusu to the maker of the plan. This blue line bisects from west to east the waist of the oval area awarded to the Toase Stool and divides it roughly in half. This entry in the " legend " was relied on strongly as an admission by Owusu that within the lands allotted by Court " A " to the Toase Stool the lands north of the blue line were wrongly so allotted being in fact Nkakuom and Aferi land, and that this conical area should be substracted from the Toase lands. The proceedings in the West African Court of Appeal are both as regards notes of the argument, and notes of the judgment, reported with extreme concision. Indeed no reasons are given for the judgment. The ratio on which the West African Court of Appeal proceeded must therefore remain a matter of conjecture. Although in his grounds of appeal to that Court Dapaah seems to have relied solely on the supposed binding character of Mr. Wheatley's award and the supposed inconsistency therewith of Divisional Court " A " decision, yet his counsel at the hearing of the appeal seems to have relied on the " blue line " argument, and that may well have determined or influenced the conclusion: which was that the area north of that line, previously included in the lands awarded to Owusu (Toase), was now held to belong to Dapaah, as representing the Aferi Stool. Dapaah, through his counsel, had offered a compromise in terms of his having the area north of that line. Owusu had refused it. The judgment affirmed the position embodied in this rejected offer. The judgment runs as follows:—

> " 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 Odekro of Wiredu.*' The Judgment of Court ' A ' to be read throughout in the light of this variation.
>
> Judgment of Chief Commissioner of Ashanti's Court to be set aside with costs to appellant to be taxed therein.
>
> Costs of this Appeal to appellant assessed at £53 16s. 6d."

Their Lordships while regretting that the West African Court of Appeal did not give reasons for their judgment, could not accede to the contention that this mere omission by the court, without more, was a sufficient ground for reversing its decision.

The position however in their view was this:

> (1) Divisional Court " B " arrived at a decision based entirely on a point of law which it decided erroneously. Most (though not all) of the evidence was given before that court: which however did not decide the issue as one of fact on the evidence.
>
> (2) Divisional Court " A ", rightly in their Lordships' view, reversed Court " B " on the legal point by holding that there was no

executive decision—neither that of Mr. Wheatley, nor that of Sir F. Fuller, nor that of Sir J. Maxwell—which concluded, or indeed was relevant to, the title to the particular lands now in dispute; and proceeded to determine that title on the evidence viz.:

(i) evidence given before Court "B"

(ii) evidence given before itself.

The result was the "green line" demarcation.

It is impossible in their Lordships' view to say that it was not open to Court "A" on the evidence to find this boundary proved or that such a finding was unreasonable.

(3) The Chief Commissioner on appeal in effect upheld Divisional Court "A" on both points: at least he held, as Court "A" had, that Mr. Wheatley's award did not conclude the question or fetter Court "A's" liberty to decide it on the evidence, and that on the evidence Court "A" was entitled to decide as it did.

Thus when the matter came to the West African Court of Appeal there were concurrent conclusions in the two preceding courts, and so far as these were conclusions of fact there was ample evidence to support them. In these circumstances their Lordships are of opinion that the West African Court of Appeal should either have accepted these findings, or explained its reasons for rejecting them, and they do not consider that the unexplained variation imposed by that Court on the boundary found by Divisional Court "A" and the Chief Commissioner, can be supported. They would therefore allow the appeal and restore the judgments of the Chief Commissioner and Court "A".

In conclusion their Lordships now wish to deal with two arguments:—

(*a*) it is objected that the green line frontier cannot reflect faithfully the distribution of the lands in point of title as between the rival Stools because it is a straight line, or to be exact consists of two straight lines enclosing a very obtuse angle at Obuoho. This objection seems baseless. An ideally exact demarcation would have no doubt to be life-size, and to show the ownership of every blade of grass. To ask a court to define a boundary in this way is to ask it to do the impossible. The court is bound in such a case to "paint with a broad brush", and cannot be blamed if it has.

(*b*) it was also argued that the alleged admission on the part of Owusu to Newman, the framer of the survey plan Exh. L., embodied in the "legend" to that plan, to the effect that the blue line on that plan was the frontier between Nkakuom and Nkuran lands, ought to be treated as conclusive. It was in fact a piece of evidence to be considered and weighed along with others, by the relevant tribunals of fact.

There was nothing conclusive about it, nor about the plan itself, which is packed with inconsistencies. It is agreed on all sides that Obuoho marked the material frontier, videlicet the frontier between Nkakuom and Nkuran lands (Aferi lands and Toase lands). There is much controversy as to whether the dividing line which runs through Obuoho, runs north and south (as suggested by the green line), or west and east, as suggested by the blue line, relied on by the respondent. It is said that this west and east line was admitted by Owusu to Newman, the map maker: if so, how comes it that this map maker placed large areas of what is described as Nkuran land in the disputed triangle north of the blue line which the West African Court of Appeal has allotted to Dapaah? The fact is that statements of the witnesses cannot be reconciled with each other, nor those of individual witnesses with other statements of the same witnesses. It would be easy to multiply examples of such contradictions.

This is the exact situation in which any tribunal which has seen and heard the witnesses—and Court "A" saw and heard some of the most important—and besides all this knows the topography and the customs of

the country, has an incalculable advantage on any Appellate Court sitting perhaps 1,000 miles away and denuded of these advantages, which are often all the greater, the more confused and self-contradictory is the evidence in cold print.

Their Lordships in these circumstances are of opinion that the conclusions of Divisional Court "A" and of the Chief Commissioner confirming those conclusions should not have been disturbed, and will humbly advise Her Majesty that they should be affirmed, that the conclusions of the West African Court of Appeal should be disaffirmed and the appeal allowed. The respondent must pay the costs of this appeal and of the appeal to the West African Court of Appeal.

(16050) Wt. 8096—1 100 7/52 D.L./P1/3

In the Privy Council

CHIEF KOFI OWUSU AND ANOTHER

v.

CHIEF KWAME DAPAAH

[DELIVERED BY LORD ASQUITH
OF BISHOPSTONE]

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