No. 27 of 1952.

In the Privy Council.

ON APPEAL

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

BETWEEN

(1) MARY VANDERPUYE
(2) ANNA VANDERPUYE
(3) PETER JACOB VANDERPUYE
(4) JACOB NEE VANDERPUYE
(5) ISAAC VANDERPUYE
(6) JOHN VANDERPUYE
(7) EMILY VANDERPUYE
(8) BETTY VANDERPUYE
(9) JACOBA VANDERPUYE
(10) ELLEN VANDERPUYE
(11) MARIA VANDERPUYE
(12) ABRAHAM KOJO VANDERPUYE
(13) JOANA VANDERPUYE
(14) JERSEY NA OYO VANDERPUYE
(15) DINA VANDERPUYE
(16) JACOB NEE VANDERPUYE (Junior) and
(17) RICHARD VANDERPUYE (Plaintiffs) . . *Appellants*

AND

MARY AKUA BOTCHWAY (substituted for JOEL DOUGLAS KWAKU BOTCHWAY, deceased, original Defendant) as Head of the Family of the JACOB VANDERPUYE, deceased . . . . . *Respondent.*

Case for the Appellants.

1. This is an appeal from a judgment of the West African Court of Appeal dated the 8th March 1951 which dismissed the Appellants' Appeal from a judgment of the Supreme Court of the Gold Coast dated the 29th September 1948 which had allowed the appeal of Joel Douglas Kwaku Botchway, the original Defendant, from a judgment of the Native Court " B " of Ga dated the 25th November 1947.

2. This appeal and the suit concern the respective rights under Ga customary law of the Plaintiffs-Appellants (hereinafter referred to as " the Plaintiffs ") as children of one Jacob Vanderpuye, deceased, and of the original Defendant (hereinafter referred to as the " Defendant ") and the present Respondent as representing the matrilineal relatives of the deceased in respect of the succession to the property of the deceased. Jacob Vanderpuye (hereinafter called " the deceased ") died intestate in October 1918; leaving matrilineal relatives, among whom were the original Defendant and the present Respondent, and also leaving children, namely the 17 Plaintiffs and two other children, Peter Richard Vanderpuye and P. Bruce Vanderpuye.

3. The main questions for decision in this Appeal are as follows :—

(i) A preliminary question, whether the appeal from the Native Court, who awarded the whole estate to the children of the deceased, was to the District Commissioners Court as being a suit concerning the succession to the property of the deceased or was to a Land Court of the Supreme Court as being a suit relating to the ownership possession or occupation of land. If the answer to the preliminary question is that the appeal was properly brought to the Land Court.

(ii) Whether the Land Court was right in reversing the judgment of the Native Court on questions of fact and of native law.

(iii) Whether the West African Court of Appeal was right in the variation it made in the order of the Land Court.

The deceased was the son of a woman Kordey Adjuah who had a sister from the same womb, Kai Ashong. The Defendant and the present Respondent are children of Kai Ashong. Kordey Adjuah had, besides the deceased, a son Richard Vanderpuye and a daughter Afua Mingle. Afua Mingle had, among other children, a son, E. A. Solomon.

All the persons concerned are inhabitants of the Ga State in the Gold Coast Colony and are subject to the Ga Customary Law.

It is now well established as a broad general proposition that, upon the death of a Ga Intestate, his self-acquired property passes to some or all of his matrilineal relatives as a body and is under the control of one of them, but his children, if by a form of marriage termed a " six cloth " marriage, are entitled to some portion of such property.

In the English language the body of matrilineal relatives on the Gold Coast is usually referred to as " the family " and the person in control as " the successor " but sometimes as " the head of the family." " The successor " and " the head of the family " may be different persons or one person may combine the two capacities. But all these terms are ambiguous. The description " Family " may refer to either the whole body of living matrilineal relatives or to some section of them in the nature of a sub-family.

pp. 40–42. 4. Before the present suit there had been much litigation concerning the property of the deceased as is narrated in the judgment under appeal.

The general effect of this litigation had been to establish that the Plaintiffs and the two other children of the deceased, Peter Richard Vanderpuye and P. Bruce Vanderpuye, had been issues of " six-cloth marriages," that the original Defendant J. D. K. Botchway was, at the time of the institution of the present suit, " the head of the family " and that Kai Ashong and her children and the children of her daughters were members of " the family," as well as E. A. Solomon (and no doubt the other children of Afua Mingle and the children of her daughter or daughters). What persons precisely comprise " the family " is not material to this present appeal as the whole body of them, whomsoever they may be, were represented by the Defendant and are now represented by the Respondent.

5. By a Civil Summons in the Ga Native Court " B " dated the 28th June 1947, against the said J. D. K. Botchway as " Head of the Family of the late Vanderpuye " the Plaintiffs instituted p. 1.

THE PRESENT SUIT

claiming—

" (A) A declaration of the share (Gbena) to which they are " entitled and the appropriation to them of such of the Estate as " represent the share to which they are entitled according to Ga " Native Customary Law.

" (B) An account of all rents and profits as have accrued to the " estate since June 1935, and the payment to the Plaintiffs of such " amount as represents their share of the estate which may be found " due."

6. Upon the suit coming on for hearing (summarily without pleadings) upon the 30th July 1947, the Defendant pleaded " not liable." p. 3.

Evidence on behalf of the Plaintiffs and Defendant respectively was heard. The Court also called an expert witness on custom. This witness deposed (*inter alia*) as follows :— pp. 4–14.

" If the deceased left no brothers or sisters or nephews the " property goes to the children. The eldest son of the deceased is " the proper person to share the property amongst the children. " No ~~Material~~ material cousin is to be the head of a (deceased) father in the " family." p. 10, l. 24.

The Defendant admitted (*inter alia*) that he had been caretaker since December 1935, looking after the property for the children and family of the deceased but had never given the children any share. p. 11, ll. 9–15.

His case was that, since the judgment of the Supreme Court of the 30th October 1945 (which had declared that the Plaintiffs and Peter R. Vanderpuye were children of the deceased by six-cloth marriage and that as such they were respectively entitled to share in the deceased's estate), he had, on three occasions, called the Plaintiffs to have their share and that the Plaintiffs had not attended but had been notified through their lawyer of the share allotted to them. p. 14, l. 35. p. 56, ll. 18–25.

pp. 15–17, 7. Before giving judgment the Court viewed the properties of the deceased with the parties and found them neglected and in need of proper management and reconditioning.

p. 17. 8. By their judgment dated the 25th November 1947, the Native
p. 18, l. 25. Court held that the appointment of a person as the head of a family did not of itself constitute succession to the self-acquired property of a deceased and that there was no native custom whereby a head of family who is not a brother or a nephew should inherit the deceased's properties, that by Ga custom a maternal cousin could not succeed to the self-acquired estate of a deceased person while his children were alive. 10

p. 18, l. 45. The Court found that since 1935 when the Defendant became the head of the deceased's family, he had deprived the children of their rights and interests in their father's self-acquired properties and had been recklessly mismanaging and wasting the estate and using the rents and profits for his own purposes to their detriment, that in their opinion,
p. 19, l. 14. guided as they were by the principles of the Native Customary Law, the persons at that time entitled to inherit the properties of the deceased " in the peculiar circumstances of the family under consideration " were the children of the deceased who had been declared by the judgment of the Supreme Court pronounced by Mr. Justice McCarthy, dated the 20 30th October 1945 to be " six-cloth " children of the deceased. The Court stated that it had, among other considerations, regarded " the significant fact that there is no brother or nephew or niece of the deceased alive." The Court therefore declared that the interest of the children in the estate was the whole estate and gave judgment for the Plaintiffs
p. 19, l. 28. accordingly. In view however of the fact that since his birth or childhood the Defendant had lived in one of the houses of the deceased, known as " Garden House " and would have nowhere to live if he was deprived of the rooms he occupied, the Court ordered that the Defendant and his sister, the present ~~Appellant~~ Respondent, who also occupied a room in that house, 30 be permitted to occupy their rooms for life, such rooms to revert to the children on their respective deaths. It was further ordered that one-third of the rents accrued in the hands of the Receiver and Manager of the estate at the date of the judgment after deducting the rates, taxes and other expenses should be given to the Defendant, in the interests of peace and harmony of the family. Finally the Defendant was ordered to file within a month account of rents and profits as claimed by the Plaintiffs and the costs were ordered to be taxed and borne by the estate.

9. By section 46 of the Native Courts (Colony) Ordinance 1944 an aggrieved party has a right of appeal to the Magistrate's Court, or, in 40 the case of a Land Cause, to the Land Court. By section 2 of the Ordinance, " Land Cause " and " Land matter " means " a cause or matter relating to the ownership, occupation or possession of land " and " Land Court " means " a Land Court constituted and formed under the Courts Ordinance." A Land Court is part of the Supreme Court of the Gold Coast constituted by section 24 of the Courts Ordinance, Chapter 4 of the Laws of the Gold Coast, as then amended.

10. The Defendant appealed to the Land Court for the Eastern Judicial Division of the Supreme Court challenging the decision of the ~~Supreme~~ Native Court on the following grounds :— pp. 22–23.

(1) that the claim had been to a share of the deceased's estate and not to the whole ; p. 22, l. 13.

(2) that the issue had been how the estate was to be divided between the family represented by the Defendant and the Plaintiffs and the decision that in the circumstances the children were entitled to the whole was palpably wrong ; p. 22, l. 22.

(3) that, by the judgment of the West African Court of Appeal of the 31st May 1943 (reported 9 W.A.C.A. 127) in *Solomon and Another* v. *Botchway*, the Plaintiffs were precluded from averring and the Native Court from finding as a fact that the Family had no interest and that the Plaintiffs were entitled to the whole ; p. 22, l. 34.

(4) that the judgment was completely against the weight of the evidence.

11. The Land Court overruled an objection that the suit was not a land case but a succession case in which the appeal was not to the Land Court but to the District Commissioner's Court (meaning the appropriate Magistrate's Court, which might under section 38 (3) of the Courts Ordinance (Laws of the Gold Coast 1936 Revision) have been constituted by a District Commissioner). pp. 24–25.

By a Judgment of the 29th September 1948 the Land Court allowed the appeal and declared that the Plaintiffs were entitled to one-third of the property of the deceased and to an account from the Defendant of one-third of the rents and profits from December 1935 to December 1946. p. 28.

12. From this decision the Plaintiffs duly appealed to the West African Court of Appeal upon the grounds— p. 29.

(1) that the Land Court had no jurisdiction, the suit not being a land cause or matter ; p. 29, l. 17.

(2) that the judgment of the trial Native Court should not have been reversed on questions of fact and native law ; p. 29, l. 21.

(3) that the judgment of the Land Court was against the weight of authority and of evidence. p. 29, l. 24.

13. The Defendant having died on the 13th May 1950, the present Respondent was substituted as the duly appointed Head of the Family of the deceased upon the 30th January 1951, upon which date the hearing of the appeal began. p. 30, l. 27.

14. Upon the 1st February 1951, the Court of Appeal delivered a ruling upholding the jurisdiction of the Land Court. pp. 34–36.

In such ruling, they mentioned certain decisions which Appellant's Counsel had cited, namely, *Adum & Ors.* v. *Hagan & Ors.* 5 W.A.C.A. 35 (Privy Council), *Adu Kofi* v. *Brentuo* 10 W.A.C.A. 92, *Kwesi Adu* v. *Dapaa*

1949–50 (unreported). The ruling then referred to his argument, based upon these decisions that the ownership of land was not in dispute, that the only issue was as to the share to which the Plaintiffs were entitled of the estate of their deceased father and that that question was a matter relating to succession to the property of deceased native.

p. 35, ll. 9–22. On this the Court observed that in *Adu* v. *Dapaa*, the Court of Appeal had held that, in deciding whether a suit related to the ownership, possession or occupation of land or to the succession to the property of a deceased native, search should be made for the basic issue as revealed by the record and the suit classified accordingly, disregarding any other issue raised which is subsidiary to the main issue.

p. 35, ll. 23–45. They then referred to the claim made in the Civil Summons and to such claim being based upon the said judgment of the Supreme Court (of the 30th October 1945 Exhibit " A ") which had declared as against the Defendant that the Plaintiffs were entitled to a share of his estate in accordance with Ga Customary law and which judgment had observed that the estate was limited to real property (i.e., it consisted at the time of the judgment of what in English law is known as real property). They also stated that the record in the present suit showed that the Plaintiffs claimed a share in seven properties.

p. 35, l. 46. In these circumstances they distinguished the present suit from *Adum* v. *Hagan* and from *Ekuah Mansah* v. *Kofi Ambradu & Ors.* (7 W.A.C.A. 204) upon the ground that, in the present suit " there was no real issue as to " succession before the Court. The Defendant was estopped from contesting " the Plaintiffs' rights to a share—no special right to succession beyond " what had been declared in the 1945 suit was set up by the Plaintiffs " but they claimed, as flowing from that decision a share of the properties " or of the rents and properties forming the estate."

p. 36, l. 14. The Court of Appeal considered that the present suit was more analogous to *Archie Kwow* v. *Ohene Essien Eku II* (2 W.A.C.A. 180) upon which the Respondent had relied, that the right of succession had been decided (i.e. in the previous suit) and that the basic or real issue (i.e. in the present suit) was " what share of the properties, or of the rents of the properties " should the Plaintiffs be given in respect of their interest therein. That " is an issue as to property and not to succession."

It is respectfully submitted that this ruling was erroneous and that the suit was basically a suit relating to the succession to the property of deceased, it being merely accidental that at the time when the suit was instituted the property consisted wholly of land. There had been been moveable property.

p. 40, l. 39.

Though by the judgment of the Supreme Court of the 30th October 1945 it had been established that the Plaintiffs and Peter R. Vanderpuye were " six-cloth " children and therefore entitled to share in the deceased's estate, it remained to be ascertained by the present suit what that share or Gbena was and what allotment should be made in respect of the share so ascertained. Until at least the proportionate share had been ascertained and even until an allotment had been made of some definite

p. 56, ll. 18–27.

p. 2, l. 25.

portion of land belonging to the estate, it is submitted that it was not possible that there could be a suit by any Plaintiff which would be a land cause, that is, a suit relating to the ownership occupation or possession of land and that consequently the present suit was not and could not have been a land cause. It is submitted that it was a suit for the distribution of the estate of the deceased in all material respects identical with the suit *Effuah Adum & Others* v. *George Hagan & Others* dealt with in Privy Council Appeal No. 82 of 1936 (5 W.A.C.A. 35) which was held to be a suit relating to succession and this notwithstanding that two houses formed part of the succession and were not situate within the State, so that, if the suit had been regarded as to those houses as a suit relating to the ownership possession or occupation of lands, the Native Trial Court would have had no jurisdiction to adjudicate upon their ownership possession or occupation. It is submitted that it follows that, if the whole of the succession in *Adum & Ors.* v. *Hagan & Ors.* had consisted of immoveables outside the State, nevertheless the Native Trial Court would still have had jurisdiction upon the ground that the suit was a succession suit and not a land cause and that a fortiori, the present suit is a succession suit and not a land cause.

15. The Court of Appeal then heard arguments as to the rights of succession according to Ga Customary Law to the property of a deceased person. pp. 37–39.

On the 8th March 1951 they dismissed the appeal from the decision of the Land Court but set aside that part of the decision which declared that the plaintiffs were entitled to one-third of the property of their late father and to an account of one-third of the rents and profits of the estate (from December 1935 to December 1946) and, with it, the further order remitting the suit to the Native Court (to effect the division and the accounting) because the Court of Appeal held the allotment of the deceased's estate made by the defendant to the " six cloth " children was binding and effective, save that, if it should be the fact that a certain part of the estate, referred to as the Adabraka property, had been sold, the Plaintiffs were entitled to apply to the head of the family for the allotment of other property of the estate sufficient to implement the allotment made. pp. 40–47. p. 47, ll. 2–5.

The Court of Appeal further held that the Plaintiffs were entitled to an account of the properties, allotted, or which might be allotted, as their share, from December 1935 to December 1946, but that family property was indivisible and no part of the estate could be particularly alienated to the children so as to effect a severance of the family property unless the parties agreed to that course. p. 47, ll. 16–24.

16. It is respectfully submitted that the Court of Appeal should have allowed the appeal, set aside the judgment of the Land Court and restored the judgment of the Native Court.

It is respectfully submitted that the judgment of the Native Court should not have been set aside by the Land Court unless it were clearly shown that it was wrong and that no error either of fact or in the application of the customary law to the facts of this particular case had been clearly shown.

17. The Court of Appeal stated the following principles as principles of Ga Native Customary Law :—

p. 45, l. 17. " The members of a family are traced through the maternal " ancestor, and the family is the unit for the purpose of ownership " of property. All the members have a joint interest in the family " property which is indivisible. The interest of the children of an " owner of self-acquired property amounts to a right of support " out of the estate. This right of support is termed a share of the " estate and to ensure that this right may not be affected or defeated " it is said that the children may be regarded as inheriting in " conjunction with the heir, and the real property cannot be disposed " of without their consent. But this right of support does not " operate to set aside the ordinary rule of customary law that " descent of property is through the female line which rule none of " the cases cited to us affect."

It is submitted however that this statement of principles cannot be wholly supported.

It is submitted that the " family," being traced through a maternal ancestor, are necessarily a distinct body from the children of a deceased, whether " six cloth " children or other children, and further that " six cloth " children are a body distinct from children who are not " six cloth " children.

It is submitted that, in considering the rights of the family in relation to the rights of the children and of the " six cloth " children it is necessary first to ascertain the ambit of the " family " for succession purposes, that is—whether all of the maternal relatives of a deceased male Ga acquire a beneficial interest in his self acquired property upon his death intestate and, if all of them do not, which of them do, and whether and to what extent the existence or ambit of the body constituting the beneficiary " family " is dependent on the existence or non-existence of children of the deceased and particularly of " six cloth " children of the deceased.

It is further submitted that the Court of Appeal failed to distinguish between " the family " in its widest scope and the narrower scope of " the family " which may have beneficial rights in the estate of a Ga male deceased intestate. Furthermore the Court of Appeal failed to distinguish between the rights of " six cloth " children and other children.

Even if it be the fact that children who are not " six cloth " children have merely a limited right of support out of the estate, amounting to no more than a burden upon the succession and a limitation of the family's right of disposition, it is submitted that the right of " six cloth children " is a right of succession to at least some part of the estate ; the extent of such right, if a partial right only, to be determined by some " Head of the family," in the first instance by the head of the restricted family interested beneficially in the succession but, whether the right is claimed is a right to part of or to the whole of the succession, with a procedural right by the " six cloth " children and by the claimant " family " to call in as conciliators the heads of the wider " maternal family " and " paternal family " and ultimately to resort to a Court of competent jurisdiction.

It is further submitted that this right of the " six cloth " children to a share in the estate, if not to the whole, is, where the right is not to the whole, a partible interest, entitling them to an allotment either (A) of specific assets to be distributed to them or such one of them (e.g. the eldest son) who is entitled to receive, on behalf of the whole body of " six cloth " children, the share of such children or (B) of an undivided share in the whole or some part of the estate with the right to a partition of the assets in which such undivided share exists.

It is submitted that it is an evident contradiction that " family property," that is, property impressed with the quality of matrilineal succession, should be indivisible from property that is not impressed with that quality and belongs to persons not members of the matrilineal family, and that there is no authority for such a proposition as to impartibility which the Court of Appeal have stated. Such a confused impartible mass is not properly described, as the Court of Appeal have described it, as " family property " and the severance of the non-family property is not a severance of family property but a segregation of family property from non-family property. p. 47, l. 23.

18. The Court of Appeal also relied largely upon the authority of *Sackeyfio* v. *Ayichoe Tagoe* (reported 11 W.A.C.A. 73). p. 46, ll. 1–18.

It is respectfully submitted that in itself the *Sackeyfio* case is not decisive of the present case, so as to justify the overruling of the decision of the Native Court. In the *Sackeyfio* case there was not a decision of the Native Court (which it is submitted ought not to be overruled unless patently wrong) but an opinion of the State Council as to Ga customary law which the Supreme Court was free to accept or not.

19. Furthermore, it is submitted that the Court of Appeal have not taken into account that the Native Court have had regard to the peculiar circumstances of this particular case, and decided accordingly. Ga customary law does not lay down the exact share which " six cloth " children get or consequently the exact share which " the family " (if they are entitled at all) may retain for themselves. These are matters ultimately to be considered and decided, if not agreed, by the Native Court and, native custom being applied by doing what is reasonable in the circumstances, the determination of the shares is a matter essentially proper for the consideration of a Native Court having regard to the circumstances of the particular case.

The particular circumstances in this case are that the Plaintiffs' father died in October 1918 and it is not alleged that they have ever received any share of the estate during the 29 years which preceded the judgment of the Native Court. During this period it seems that it was wholly administered and enjoyed by the maternal family or its members or persons acting on behalf of such family and the children were given nothing nor was any allotment purported to be made in their favour until that on the 16th December 1945 which the Court of Appeal have held to be valid. The Native Court upon inspection found that the estate (or such of it as remained in the hands of the Defendant) had been grossly neglected, recklessly mismanaged and wasted. pp. 52–53. p. 7, l. 24. p. 11, l. 11. p. 57. p. 17, l. 3. p. 19, l. 8.

p. 19, ll. 12–51. In the circumstances, it is submitted that the judgment of the Native Court awarding to the six cloth children of the deceased such part of the estate as remained in its then condition and the ancillary relief of an account from the Defendant Spoliator without mulcting him in costs and even reserving certain benefits to him and the present Respondent was a proper judgment which should not have been disturbed upon appeal.

20. The Appellants humbly submit that this appeal should be allowed, the judgments of the Supreme Court of the Gold Coast of the 29th September 1948 and of the West African Court of Appeal of the 8th March 1951 be set aside and the judgment of the Ga Native Court " B " of the 25th November 1947 restored with the variation that the Respondent be directed to account to the Plaintiffs for all rents and profits of the estate of Jacob Vanderpuye as have accrued to the estate from June 1935 up to the date when the assets of the estate are delivered up to the persons who, by the judgment of the Supreme Court of the Gold Coast pronounced on the 30th October 1945 in the suit *P. R. Vanderpuye* v. *J. D. K. Botchway*, were declared to be children of the deceased Jacob Vanderpuye by six cloth marriage and that the costs of the appeals to the Supreme Court of the Gold Coast and to the West African Court of Appeal be paid by the Respondent to the Plaintiffs for the following (among other)

REASONS

(1) BECAUSE the Land Court of the Supreme Court of the Gold Coast had no jurisdiction to entertain an appeal against the judgment of the Ga Native Court.

(2) BECAUSE the judgment of the said Land Court was erroneous and misconstrued Ga Customary Law.

(3) BECAUSE the West African Court of Appeal ought to have sustained the objection to the jurisdiction of the Land Court.

(4) BECAUSE the judgment of the West African Court of Appeal was erroneous and misconstrued Ga Customary Law.

(5) BECAUSE the Ga Native Court were right in holding that the mere appointment of a head of a family does not constitute succession to a deceased's self-acquired property and that there is no native custom indicating that such a head of a family who is not a brother or a nephew of the deceased should inherit the deceased's property, and because the West African Court of Appeal were wrong in holding to the contrary.

(6) BECAUSE the Judgment of the Ga Native Court was right and should be restored.

DINGLE FOOT.

GILBERT DOLD.

-- ~~27/4/1952~~

Judgment 17/1956

THESE ARE THE ONLY PAPERS AVAILABLE IN THIS APPEAL.

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(Gold Coast Session)

BETWEEN

VANDERPUYE and Others
(Plaintiffs) . . . *Appellants*

AND

BOTCHWAY (Defendant) . *Respondent.*

Case for the Appellants

5 Jan 51

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