GH3. G7 23,1956

No. 24 of 1953.

UNIVERSITY OF LONDON W.C.1.
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INSTITUTE OF ADVANCED LEGAL STUDIES
46021

In the Privy Council

On Appeal from The West African Court of Appeal

(GOLD COAST SESSION)

BETWEEN NANA OWUDU ASEKU BREMPONG III OHENE OF AMANFUPONG (substituted for Nana Owudu Aseku Brempong II alias Albert Robertson Micah Korsah (since deceased) and NANA OTSIBU ABABIO II OHENE OF APERADE (substituted for Nana Agyeiku Afari, Ohene of Aperade (abdicated)) for themselves and on behalf of their respective Stools (*Plaintiffs*) *Appellants*

AND

NANA DARKU FREMPONG II, OHENE OF TARKWA ACHIASE in the Akim Abuakwa State for himself and on behalf of the Stool of Tarkwa Achiase and people ... (*Defendant*) *Respondent.*

Case for the Appellants

RECORD.

1. This is an appeal from a Judgment of the West African Court of Appeal dated the 11th January, 1952, allowing with costs an appeal by the Respondent (hereinafter called "the Defendant") from a Judgment of Mr. Justice Dennison in the Supreme Court of the Gold Coast, Lands Division, Cape Coast, and setting aside the said Judgment of the said Court whereby the learned Judge granted to the Appellants (hereinafter called "the Plaintiffs") a declaration of title to certain land claimed by them together with damages for loss of mesne profits and the costs of the action.

pp. 50-52.
pp. 42-46.

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2. THE PRESENT SUIT

pp. 1-2.

was instituted by a Summons issued on the 26th March, 1949, in the Native Court "B" of Asikuma Asikuma Breman State Gold Coast against Chief Kobina Amoo of Tarkwa Achiase.

pp. 2-3.

3. By a direction made the 22nd June, 1949, the suit was transferred to the Lands Division of the Supreme Court of the Gold Coast for hearing.

p. 4.

4. On the 21st March, 1950, the name of the Defendant was substituted on his application for Chief Kobina Amoo and an order was made for the appointment of one Odonkor a surveyor to make a plan.

pp. 53-54.

5. By an Order of Her Majesty in Council dated the 1st February, 1955, the names of the Plaintiffs were substituted on their application for the original Plaintiffs who had respectively died and abdicated and this appeal was revived accordingly. 10

p. 2, lines 1-8.
p. 6, lines 7-14.

6. The Plaintiffs, the occupants of the Stools of Amanfupong and Aperade respectively, claimed for themselves and on behalf of their respective Stools a declaration of title to all that piece or parcel of land commonly known and called Amanfupong and Aperade Stool land situate in the Western Akim District and bounded on the North by lands belonging to the Stools of Eduasa and Ewisa respectively, on the South by lands belonging to the Stools of Wurakessi, Jamra and Asentem 20 respectively, on the East by lands belonging to the Plaintiffs' Stool and Surasi Stool respectively and on the West by Akenkensu Stream and Wurakessi Stool land (the said piece of land is hereinafter called "the disputed land") and £500 damages as for mesne profits.

pp. 4-6.

7. In their Statement of Claim the Plaintiffs alleged *inter alia* :—

p. 4, lines 19-21.

(A) that they were the joint owners of the disputed land, which was attached to their respective Stools.

p. 4, lines 22-25.

(B) that before 1700 they and their peoples were the only people known as Akims living on the disputed land.

p. 4, line 32, p. 5, line 10.

(C) that a predecessor of the Second Plaintiff gave per- 30 mission to a predecessor of the Defendant for him and the Achiase people to live on a portion of the disputed land near the boundary between the Plaintiffs' land and Surasi land in return for the annual presentation of rum and a sheep at the Plaintiffs' Stool Festival and the customary share in treasure trove.

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(D) that the Defendant's predecessor regularly made the said presentation until about 1879, when the son of a Chief of Achiase instituted an action in the Divisional Court Cape Coast against a predecessor of the Second Plaintiff claiming ownership of a portion of the disputed land near Achiase village, but that the action failed.

p. 5, lines 11-17.

(E) that after the First Plaintiff had discovered sometime in 1948 that the Defendant had clandestinely sold a cedar tree growing on the disputed land a dispute arose between the parties about the ownership of the boards into which the said tree had been cut and was referred by the police to the Land Court.

p. 5, lines 18-32.

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(F) that by a Judgment of the Divisional Court, Cape Coast, dated the 19th December 1926 in a suit brought by the Plaintiffs' predecessors against Odikro Kojo Dufoh, a sub-chief of the Defendant, the disputed land was declared to be the property of the Plaintiffs (the said Judgment is hereinafter called " the 1926 Judgment ").

p. 5, lines 33-39.

(G) that the Defendant was estopped by conduct and by the acts of his predecessors from disputing the Plaintiffs' title to the disputed land.

p. 6, lines 4-7.

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(H) In an amendment made by leave of the Court the Plaintiffs further alleged that long before and after the date of the 1926 Judgment they had granted portions of the disputed land on the Abusa or Tribute system to various tenants who were then in possession and had been paying tribute to the Plaintiffs.

p. 20.
p. 6, lines 16-19.

8. In his Defence the Defendant joined issue with the Plaintiffs in their Statement of Claim and alleged that he was the owner of a portion of the disputed land, the said portion being hereinafter referred to as " the Achiase land ". The Defendant further alleged *inter alia* :—

pp. 6-12.

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(A) that the Achiase land was previously vacant and empty.

p. 7, line 17.

(B) that the Defendant's predecessor assisted the King of Denkyira in his conquest of the surrounding peoples and that thereafter the said King raised him to the rank of superior chief and placed the conquered lands and people under his rule.

p. 7, lines 26-35.

(C) that after the said conquest in the 17th century the people of Aperade submitted to the authority of the Defendant's predecessor and served the Defendant's chiefdom, paying no tribute except annual service, feudal or customary due.

p. 8, lines 4-25.

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p. 9, lines 4-7, 20-23.

(D) that in the 19th century the Defendant's predecessor transferred his allegiance from Denkyira to the Paramount Stool of Akim Abuakwa and the Second Plaintiff's predecessor transferred his allegiance to Akim Busume.

p. 11, lines 1-4.

(E) that the Defendant had at all times granted concessions, leases and other rights of land to other people on the Achiase land without interference by either of the Plaintiffs before 1948.

p. 11, lines 5-17.

(F) that the 1926 Judgment did not affect the Stool of Achiase in regard to its title to the Achiase land in that the Defendant was not a party to the suit nor a privy to the said Kojo Dufoh. 10

p. 12, lines 5-6.

(G) that the Defendant had continuously lived on the Achiase land and exercised rights of ownership thereover from time immemorial.

p. 12, lines 1-2, 14-22.

(H) that the Defendant owned the Achiase land by original settlement and/or conquest and that about a hundred years ago the following customary boundaries of the Achiase land grew up : On the South with Kokoso by the Asuakwa (Asiakwa) Stream, on the South-East with Brakwa Stool land up to Duodukrom, at the source of the Bonwora Stream which flows 20 into the Okyi, on the North-East with Osoroase on the Awora River, on the North with Awusa by the Asuakyere Stream flowing into the Kosiko River, on the West with the Aperade Stool at Nkukuoso and on the South-West to join the Asuakwa Stream.

p. 24.

(I) In his Reply to the said Amendment to the Statement of Claim the Defendant denied that the Plaintiffs had tenants on the Achiase land on the Abusa or Tribute system and further alleged that he had been in effective and undisturbed occupation thereof for over 300 years and had tenants thereon who had 30 been paying Abusa or Tribute for several years without question by the Plaintiffs.

p. 13.

9. The trial of the said Suit commenced on the 18th June 1951 before Mr. Justice Dennison and an Assessor, Okyeame Kwadjo Pong. After Counsel for the Plaintiffs had opened, Counsel for the Defendant objected to the Assessor and another Assessor, Nana Kweku Egyir Gyepi II, was chosen as Assessor and the trial recommenced. Evidence was taken on the 18th, 19th, 20th and 25th June and on the 9th, 10th and 11th July 1951. Fifteen witnesses gave evidence for the Plaintiff, including the following :— 40

The First Plaintiff deposed that the Second Plaintiff and he were joint owners of and original settlers on the disputed land, the former in the north and he in the south, and that they had boundaries with Ewusa, Surasi, Asantem, Jambra, Wurakessi and Eduasa. He stated that a predecessor of the Second Plaintiff had granted Nyankumasi to the Achiase people at a rent of £1 4s. per annum. He further stated that he had about thirty tenants on the Achiase land. In cross-examination he said that Amanfupong was conquered by the Denkyira, but the people were not driven from the land. Recalled at a later stage, he deposed that he had granted land to tenants on the Ebusa or Tribute since before the 1926 Judgment. He gave the names of a number of these tenants and also the names of three persons to whom he had granted timber concessions.

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p. 13, lines 16-21.

p. 13, lines 25-30.

p. 14, lines 15-17.

p. 14, line 24.

p. 14, lines 32-33.

p. 26, lines 25-32.

p. 27, lines 12-13.

KWEKU EFFAH, the Mankrado of Aperade, deposed that the Plaintiffs had given permission for the Defendant's people to live on the land they occupied and that the people of Nyankumasi still paid £1 4s. to his Stool every year. He further deposed that he was the Plaintiff in the suit brought in 1926 and that KOFI ODAMI, the then occupant of the Defendant's Stool, had given evidence for the Defendant in that suit, and that since the 1926 suit the Defendant's people had laid claim to the disputed land and although the Defendant had not paid tribute some of his people had agreed to do so.

p. 17, lines 33-35.

p. 17, lines 37-39.

p. 18, lines 22-25.

As to the Plaintiffs' boundaries, ATTA KARIKARI, the Odikro of Ewusa, KOKO EDUWA, the Odikro of Wurakessi, KOJO NKRUMAH, an elder of Eduasa, and ADUA NUA AFORI, the Odikro of Asentem, each deposed that their respective lands had boundaries with the Plaintiffs. The said ATTA KARIKARI further deposed that the Defendant in the 1926 case was a sub-chief of the present Defendant and was claiming the land for himself and his subjects, the Achiase, as they had no land of their own. The said KOJO NKRUMAH further deposed that the Defendant's people were given permission to settle by the Second Plaintiff's predecessor at the request of his (the deponent's) predecessor and that his (the deponent's) predecessor gave customary thanks to the Second Plaintiff's predecessor, but that the grant was a free gift.

p. 16.

p. 18.

p. 21.

p. 26.

p. 16, lines 24-28.

p. 21, lines 14-25.

As to payment of tribute to the Plaintiffs, YAW DURO, a farmer of Nyankumasi (which is in the middle of the Achiase land) and ANDOH BENIN, the former Odikro of Nyankumasi, deposed that the people of Nyankumasi paid tribute to the Plaintiffs for living at Nyankumasi, and KOFI BUDU, a cocoa farmer of Nsansa (which is inside the Achiase land) deposed that he had paid tribute to the First Plaintiff for over 10 years, and he produced a letter from the Defendant's Solicitor requesting him in future to pay tribute to the Defendant (Exhibit "C").

p. 19.

p. 22.

p. 28.

p. 62.

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p. 25.
p. 23.

HENRY HAGAN, licensed surveyor, produced a plan which he had made for the purposes of the 1926 suit, which was admitted as Exhibit " A ". EKOW SELBY, licensed surveyor, produced a plan based upon Exhibit " A " which he had made for the purposes of the present suit, and which was admitted as Exhibit " B ".

p. 30.

ROGER VAN DER PUIJE, the Registrar of the Land Court at Cape Coast, produced a certified copy of the 1926 Judgment, which was admitted in evidence as Exhibit " D ".

10. Eight witnesses gave evidence for the Defendant including the following :— 10

p. 30, lines 20-21.
p. 30, line 30.
p. 31, lines 1-20.
p. 32, line 20.
p. 32, line 25.
p. 32, lines 33-36.
p. 32, line 44.
p. 33, lines 1-3.
p. 34, line 11.

KOJO AMOAFU deposed that he was in charge of all Achiase land and that his people did not obtain the place from anyone. He said that Amanfupong was destroyed by the Denkyira Army before his people arrived and that after the Denkyira war the people of Aperade were scattered and were given a place to settle in by the Defendant's predecessor. He further stated that in 1889 his people granted land to the Basel Mission Church, that they had been cutting the timber for years, that although Kofi Odame was an Achiase Chief he was not authorised by the Achiase people to give evidence in the 1926 case, that his people granted land to the U.A.C. about 30 years ago to build a store and also 20 land many years ago to the U.T.C. and also to the Agricultural Department in 1938. They had also granted a concession to James Colledge, Cocoa, Ltd. to build a sawmill but this was being opposed by the Plaintiffs.

p. 35, lines 9-11.

KOJO BOAPIM deposed that the Achiase people took part in the war against the people of Nyanwan (Amanfupong) and were made overlords of the villages in that vicinity.

p. 36.

OKYIR MENSAH, the Ohene of Kokoso, and YAW OFORI, the Ohene of Brakwa, deposed that their Stool lands had boundaries with the Defendant at the Ochi and Bonwura streams respectively.

p. 37.

KOJO DEBRA, Safuhene of Achiase, deposed that the inhabitants 30 of Nyankumasi all came from Achiase and all farmed cocoa and paid tribute to the Defendant.

p. 28.

KWESI BAKAA and KWESI NDURO deposed that they had cocoa farms at Domoako and Jerusalem respectively and like many other tenants paid tribute to the Defendant.

p. 39.

THEOPHILUS MENSAH, licensed surveyor, produced a plan which he had made of the disputed land and which was admitted as Exhibit " E ". He deposed that the Plaintiffs did not attend his survey.

11. On the 11th August, 1951, Mr. Justice Dennison delivered Judgment, granting to the Plaintiffs the declaration which they claimed, £5 damages and the costs of the action. The learned Judge began by giving particulars of the land as claimed by the Plaintiffs in their Writ of Summons and then referred to the previous proceedings by the Plaintiffs in respect of the same land in the following passage :—

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pp. 42-46.

" The land claimed is the same as that the same Plaintiffs claimed from Odikro Kojo Dufoh in a case tried and determined in 1926 by, as he then was, Hall, J. The Plaintiffs in paragraph 9 of their Statement of Claim have pleaded that the present Defendants are estopped by reason of the Judgment of this said case from contesting the Plaintiffs' title, especially having regard to the fact that Dufoh was a sub-chief of the present Defendants. After argument I admitted this judgment in evidence, my reasons for doing so were that the said Judgment being a judgment *in personam* would, on the disclosed facts, bind the Defendants if they had not taken part in the proceedings as it affected their interests, and they were aware of the suit. However in 1926 the Defendants did endeavour to be joined as Co-Defendants, their application was refused on the grounds that they were tardy in making the application. In his Judgment Hall, J. was at pains to point out that the Achiases, the Defendants, were in a position to take action if they so desired—*vide* pages 169 and 172 of the said judgment in the Record of Appeal in the 1926 case—in view of the Defendants' attempted joinder and this latter dictum I agree that this judgment does not in itself act as an estoppel against the Defendants."

p. 42, line 28 *et seq.*

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The learned Judge then dealt with an objection to the joinder of the two Plaintiffs and in the course of this part of his Judgment expressed his view as to the reliability of the evidence given by the first Plaintiff and Kweku Effah the Mankrado of Aperade in the following passage :—

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" Mr. Benjamin submitted in his closing address that the Plaintiffs had not any community of interest and this being so they were not entitled to bring this action. This same point was dealt with in the 1926 case and I have come to the conclusion, with respect, that the learned trial Judge was correct in ruling that the joinder was proper. The reasons being that the 1st Plaintiff who struck me as a witness of truth, whilst stating he was not under any chief, claimed that he and the 2nd Plaintiff jointly owned this land, in this he was supported by the 3rd witness for the Plaintiffs, who is the Mankrado of

p. 43, lines 5-19.

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Aperade. In this respect it is to be noted that the 2nd Plaintiff did not give evidence to support his case, relying presumably on the evidence of the Mankrado. I accept the evidence of these two witnesses when they state the land is owned jointly between the 1st Plaintiff and the Stool of Aperade, this being so they have a clear community of interest and are, therefore, entitled to sue jointly in this suit."

It will be contended on behalf of the Plaintiffs that the foregoing passage contains a finding by the learned Judge that the disputed land belonged to the Plaintiffs jointly. 10

p. 43, lines 20-43.
p. 45, line 32.
p. 44, line 6.
p. 44, lines 24-40.
p. 44, line 41 *et seq.*

After reciting the opinion of the Assessor (with which in a later passage he expressed his disagreement) and finding as a fact that each party was in actual possession of parts of the disputed land and dealing with certain procedural questions and the value to be attached to the traditional evidence tendered the learned Judge proceeded to examine the question whether the Plaintiffs had so slept upon their rights as to disentitle them to ask the Court to make the declaration claimed. In this matter the learned Judge found that the Defendant was the worst offender. The relevant passage in the Judgment is as follows :—

p. 45, lines 11-41.

" The Court of Appeal for Western Africa have in many 20 cases laid it down that a person with a right or interest in land must act timeously. I refer especially to the case of Nchirahene Kojo Addo *v.* Bouyemhene Kwadwo Wusu in 4 W.A.C.A. page 96 and the case therein referred to at page 100. I intend to approach this case, as I have done in other similar cases, from this very equitable proposition of the law. Litigants who let other occupy and improve their land and take no action until the value of the produce of the land has risen, as have the prices of cocoa and timber in this Colony, can expect no sympathy from this Court. 30

In this case both parties have slept on their rights and I have to consider who is the worse offender.

In 1926 the Plaintiffs brought their action against Dufoh and it was only when the proceedings were nearly finished that the present Defendants thought of protecting their rights. Although Hall, J. expressed his views on what he considered the Achiases might do in the light of the 1926 case they have taken no action whatsoever. The Plaintiffs also have allowed a long gap of time to intervene before taking action against these alleged trespassers ; it is however in their favour that 40

they have again taken action. That is to say that twice in the last 25 years they have filed proceedings in this Court in order to protect their rights.

The Assessor has based his opinion principally on the evidence of traditional history and the rights of the Conquerors. My disagreement with his views in no way reflects on his appreciation of this history. It is not to be expected that the Assessor would be aware of the decisions of the West African Court of Appeal regarding people with rights to land acting timeously.
10 By reason of the two cases filed by the Plaintiffs in respect of this land, and having regard to the fact that the Defendants have never sought a declaration of title, I am satisfied that of the two parties it is the Plaintiff only who can be said to have acted timeously in asserting their rights, this being so the Plaintiffs are entitled to the declaration sought and I so order."

12. The appeal by the Defendant to the West African Court of Appeal was heard on the 3rd January, 1952. The Judgment of the West African Court of Appeal was delivered on the 11th January, 1952, by Foster-Sutton, P., Coussey and Manyo-Plange, J. J., concurring,
20 allowing the appeal with costs. The Judgment summarised the evidence and the view taken upon it by the learned Trial Judge in the following passage :—

pp. 48-49.
pp. 50-52.

" In the Court below a considerable amount of evidence, usually described as " traditional history ", was led by both parties, and although the learned Trial Judge says in his Judgment " I would not care to have to decide a case on such evidence," I think it is clear that he regarded it, on balance, as in favour of the defendant-appellant. He also found as a fact that both parties are in actual possession of parts of the
30 area of land in dispute, and that the appellants have made grants of land in the area to various concerns and that only one of such grants has been contested by the respondents ".

p. 50, lines 22-30.

No reference is made to the fact that the learned Trial Judge accepted the evidence of the first Plaintiff and the Mankrado of Aperade that the disputed land was owned jointly by the Plaintiffs. Further it is respectfully submitted that the learned Trial Judge no-where in his Judgment indicated a preference for the " traditional " evidence of the Defendant to that of the Plaintiffs.

The learned President then referred at length to the passages in the
40 Judgment of the learned Trial Judge upon the question of the timeous

p. 50, line 31.
p. 51, line 16.

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conduct of the parties and in the following passage drew the inference that the Judge had neglected to satisfy himself that the Plaintiffs had discharged the requisite burden of proof :—

p. 52, lines 4-15.

> " In applying the principles laid down in the case of Ado V. Wusu the trial Judge appears to have lost sight of the fact that the respondents were the persons seeking relief at the hands of the Court, not the appellants. The former were asking for a Declaration of Title, and the onus of proving that they were entitled to such relief was clearly upon them. In order to succeed they had to prove that they were entitled to be declared 10 the owners of the land in question.
>
> I agree with the submission made by Counsel for the appellants that the proper test to apply in a case such as this is that laid down in the Judgment of Webber, C. J., to which I have already referred. Applying that test I am of the opinion that the respondents signally failed to discharge the onus which was upon them."

The Plaintiffs will contend that the West African Court of Appeal was wrong in concluding that the learned Trial Judge had reached his decision by the application of an improper test. Alternatively the Plaintiffs 20 will contend that, even if upon its true construction the Judgment of the learned Trial Judge leads to such a conclusion, the previous conduct of the parties in respect of their claims was proper matter to be considered in testing the weight to be given to the evidence of the witnesses of the respective parties and that the West African Court of Appeal, instead of purporting to apply the proper test themselves without having heard the evidence or seen the witnesses, should have sent the suit back for a new trial.

p. 52.

13. By an Order made the 26th June 1952 the West African Court of Appeal granted to the Plaintiffs final leave to appeal to Her Majesty 30 in Council.

14. The Plaintiffs respectfully submit that this Appeal should be allowed and that the Judgment of the West African Court of Appeal should be set aside and that the Judgment of the Supreme Court of the Gold Coast, Lands Division, Cape Coast, should be restored or that this suit should be sent back for a new trial, and that in either event they should be granted the costs of these proceedings throughout, for the following, amongst other

REASONS

1. Because the learned Trial Judge who saw and heard the several witnesses accepted the evidence adduced on behalf of the Plaintiffs and found that the Plaintiffs were jointly the owners of the disputed land.

2. Because there was ample evidence adduced on behalf of the Plaintiffs to support the said finding.

3. Because the West African Court of Appeal was in error in concluding that the decision of the learned Trial Judge to grant a declaration of title was based solely upon the fact that the Plaintiffs had been more timely than the Defendants in taking proceedings to protect the rights which they claimed.

4. Because the learned Trial Judge was entitled to consider evidence as to the previous conduct of the parties in relation to their respective claims both as a test of the evidence tendered in support of them and to determine whether the Plaintiffs by their delay had disentitled themselves to ask for the declaration of the Court.

5. Because the decision of the learned Trial Judge was right and ought to be restored.

6. Because if the learned Trial Judge applied the wrong test in considering the evidence the West African Court of Appeal ought to have remitted the suit for a new trial.

MAURICE LYELL.

JOSEPH DEAN.

No. 24 of 1953.

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Between:

NANA OWUDU ASEKU BREMPONG III and Another ... ... (*Plaintiffs*) *Appellants*

AND

NANA DARKU FREMPONG II (*Defendant*) *Respondent.*

Case for the Appellants

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