Privy Council Appeal No. 8 *of* 1953

Kweku Minta Ebu – – – – – – – – *Appellant*

v.

Kwamin Antradu Ababio – – – – – – – *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH JULY, 1956

Present at the Hearing:

LORD OAKSEY

LORD RADCLIFFE

LORD SOMERVELL OF HARROW

MR. L. M. D. DE SILVA

[*Delivered by* MR. L. M. D. DE SILVA]

This is an appeal by the defendant against a judgment of the West African Court of Appeal of the 5th January, 1952, which dismissed an appeal from a judgment of the Supreme Court of the Gold Coast which granted to the plaintiff, the present respondent, a declaration of title to a tract of land and £100 damages for trespass. The parties are litigating on behalf of their respective Stools, the plaintiff-respondent being the Ohene (Divisional Chief) of Assin Bisiasi and the defendant-appellant being the Ohene of Koshea. They are both substituted parties the original parties having been the Ohenes before them. The land in dispute is shown upon a plan, Exhibit D, and is approximately 7 miles from North to South and of width varying from 4 to 2 miles from East to West.

On this appeal the appellant does not seek to have the award of damages set aside. It is sufficient for the purposes of this appeal to say that the land to which it relates is not within the area depicted in Exhibit D, and is not now claimed by the appellant.

The respondent alleges that the area in dispute is part of a larger area called " Swedru " land which is attached to his Stool and extends beyond the disputed area towards the west. The appellant alleges that the area is part of a larger area of Koshea land extending towards the north-east of the disputed area.

The action was instituted as long ago as the 12th June, 1930, in the Tribunal of the Provincial Council of Chiefs and after certain abortive proceedings, which their Lordships do not find necessary to discuss, was still pending when, by virtue of the Native Courts (Colony) Ordinance, 1944, the Lands Division of the Supreme Court of the Gold Coast became seised of it.

Pursuant to an order of the Supreme Court pleadings were delivered by the parties. In them each party claimed original title by occupancy and alleged that the other party was an immigrant who had been permitted to occupy land by the party possessing title. Each party relied upon acts

of possession and alleged that a named number of villages on the land belonged to it. The respondent alleged that during the nineteen years prior to the filing by him of his Statement of Claim in the Supreme Court the appellant had placed a number of tenants on portions of the land in dispute. The respondent also alleged that his Stool had granted many concessions on the land. The appellant alleged that his Stool had made extensive cocoa farms on the land thereby suggesting that the right to cultivate the land belonged to, and had been exercised, by it.

The case went to trial before a judge and an assessor. Traditional evidence was led by each side to establish original occupancy and title. Upon this evidence the assessor gave an opinion which is not clear but which on the whole appears to decide that the respondent had failed to establish original occupancy as he had failed to lead sufficient evidence that the appellant had migrated to the land.

The learned trial judge was not prepared to arrive at a finding on the conflicting traditional evidence relating to the history of the land on the limited material furnished by the evidence in the case. He disagreed with the assessor upon the degree of importance to be attached to a point regarding migration which appears to have weighed with the latter. In the result there is no finding in favour of the appellant on the traditional evidence although the learned trial judge thought that the respondent's evidence was "as reasonable as that" of the appellant.

The learned trial judge went on to consider the evidence of occupation given by each side. He was impressed by the documentary evidence furnished by the Exhibit F which established that so long ago as 1907 the respondent's predecessor had granted a concession on a part of the land in dispute. He thought that the evidence of the respondent and his witnesses was reliable and accepted it. He was of the opinion that the evidence of the appellant and his witnesses was unsatisfactory. The learned judge held that on the evidence of occupation the respondent was entitled to a declaration of title to the disputed area.

The Court of Appeal affirmed the findings on the facts of the learned trial judge and the conclusion that the respondent was entitled to the declaration claimed by him.

There is nothing in this case to justify a departure from the general rule with regard to concurrent findings of fact and counsel for the appellant could not, and did not, press their Lordships to review them. He argued however that upon those findings the respondent's case could not succeed.

It was argued that the respondent could not succeed without a finding in his favour on the traditional evidence. In his Statement of Claim the the respondent set out not only what, according to him, were the historical facts relating to the original occupancy of the land but also alleged that "from time immemorial possessory rights have been exercised" by the respondent and his predecessors. The evidence led by him as to acts of possession has been accepted. Traditional evidence has a part to play in actions for declaration of title but there are cases in which a party can succeed even if he fails to obtain a finding in his favour on the traditional evidence.

It was next argued for the appellant that the evidence led for the respondent established possession only of isolated portions of land and that such evidence was insufficient to establish title to the whole of the tract in dispute. In support of this argument their Lordships were referred to the judgment of the Board in Omanhene Kobina Foli v. Chief Obeng Akesse [1934] A.C. 340 at p. 346.

In the course of the judgment Lord Thankerton said:—

> "In questions of disputed ownership of land, occupation and possession of portions of the disputed area is not relevant evidence of title to the whole area unless it can be reasonably attributed to a right to the whole area. The portions so occupied may be so numerous and so closely adjoining that they practically cover the

whole area. No such conditions exist in the present case. Alternatively, the occupation of a portion may be reasonably attributable to a right of ownership in a larger area, as, for instance, occupation of a portion of a field may be attributed to a right extending over the whole field."

The question whether the possession of the portions of the disputed area to which the respondent's evidence related can be reasonably attributed to a right to the whole area in dispute is essentially a question, if it arises, for consideration by the Courts in Africa with knowledge of local conditions. It was not raised by the appellant in those Courts and it is not discussed in the judgments referred to above. There is nothing in the record and nothing has been urged before their Lordships, which satisfies them that the point now taken arose at the trial as a point with regard to which there could have been any doubt on the facts established. Even if it had been shown to be such a point their Lordships would not normally permit it to be taken for the first time before them.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the respondent the costs of this appeal.

(39774) Wt. 8069—3 110 7/56 D.L.

In the Privy Council

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DELIVERED BY MR. L. M. D. DE SILVA

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