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6/1963

IN THE PRIVY COUNCIL

No. 2 of 1962

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O N            A P P E A L

FROM THE COURT OF APPEAL FOR

SIERRA LEONE

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UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

19 JUN 1964

25 RUSSELL SQUARE  
LONDON, W.C.1.

SULAY SEISAY

v.

PA. SHEKA KANU AND TWELVE OTHERS

74078

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CASE FOR THE APPELLANT

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HATCHETT JONES & CO.,  
90, Fenchurch Street,  
LONDON, E.C.3.

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O N        A P P E A L

FROM THE COURT OF APPEAL FOR SIERRA LEONE

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B E T W E E N

SULAY SEISAY  
Defendant/Appellant

- and -

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1. PA SHEKA KANU
  2. ALUSINE BORBORCONTEH
  3. KAMARA SESAY
  4. FENTI SESAY
  5. BAI SESAY
  6. KAPR LAWYER KANU
  7. BOBOR KANU
  8. KAPR THONTEH
  9. SANTIGIE KANU
  10. FENTI SESAY
  11. MOMOH KANU
  12. SORIE KANU
  13. MOSERAY KANU
- Plaintiffs/Respondents

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CASE FOR THE APPELLANT

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RECORD

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1. This is an Appeal from the Judgment of the Court of Appeal for Sierra Leone dated the 21st July 1961 allowing by a majority of two to one the Appeal of the Plaintiffs/Respondents against the Judgment of the Supreme Court of Sierra Leone dated the 21st July 1960 which dismissed their claim for a declaration that the election of the Defendant/Appellant as Paramount Chief of the Bonkolenken Chiefdom was invalid he not being descended from a ruling house within the said Chiefdom and for an injunction restraining him from acting as such

RECORD

Paramount Chief. The Defendant/Appellant is hereinafter referred to as the Defendant and the Plaintiffs/Respondents are hereinafter referred to as the Plaintiffs.

2. Under Section 5 of the Protectorate Ordinance (Chapter 60 of the Laws of Sierra Leone 1960) it is the duty of the Tribal Authority to elect a Chief to be in charge of a chiefdom. In this case it was common ground between the parties that the present Bonkolenken Chiefdom had been formed out of an amalgamation of the former Bonkolenken, Yele, Masakong, Mayopo and Poli Chiefdoms, that the Paramount Chief was required to be a descendant in the male line of or the full brother of a former Chief of one or other of these Chiefdoms, that each of the Plaintiffs possessed the required qualification, and that on or about the 6th February 1959 the Tribal Authority elected the Defendant as Paramount Chief of the Bonkolenken Chiefdom. The sole issue in the case was therefore whether the Defendant was qualified or disqualified or was proved to be qualified or disqualified as the duly elected Paramount Chief.

p.10 1.12

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3. The present suit was begun by a Writ of Summons dated the 16th February 1959. The contentious issue between the parties was set out in Paragraph 3 of the Amended Statement of Claim delivered on the 11th May 1959 and in Paragraph 3 of the Amended Statement of Defence delivered on the 30th January 1960. Paragraph 3 of the Amended Statement of Claim is as follows :-

p.1

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p.4 1.26

"3. The Defendant was and is not a descendant in the male line nor the full brother of any Paramount Chief who has previously been recognised as a Paramount Chief of the Bonkolenken Chiefdom or of one or other of the Bonkolenken Yele, Masakong, Mayopo and Poli Chiefdom which were by an act of Union dated the 15th day of December 1956 amalgamated to form the present Bonkolenken Chiefdom and therefore does not descend from a ruling house within the Chiefdom."

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p.8 1.1

Paragraph 3 of the Amended Statement of Defence is as follows :-

10 "3. The Defendant admits paragraphs 1 and 4 of the Plaintiffs' Statement of Claim and contends as regards paragraph 3 of the Statement of Claim that he is a descendant in the male line of Bai Komp Othernip (deceased) who was recognised as Paramount Chief of the Bonkolenken Yele Chiefdom, which was by an act of Union dated the 15th day of December, 1956, amalgamated as set out in the said Paragraph 3 of the Statement of Claim with the other Chiefdoms as set out therein, and therefore does descend from a ruling house within the Chiefdom."

20 4. After interlocutory proceedings not material to this Appeal the trial of the action opened on the 14th July 1960. Two witnesses were called on behalf of the Plaintiffs.

30 Kumrai Seisay (apparently the same person as Kamara Sesay, the third Plaintiff) testified that his father was Bai Kompa Orthenip and that he was the only surviving son. There had been three other sons called Bainsira, Momoh Kaseh and Sheka Seisay. They had no sons. Bai Komp Orthenip had three brothers called Kapri Bana, Paboth and Pa Bainsira. Kapri Bana had two sons Seisira and Pa Limami. Paboth had one son called Yamba Ngeru. Bainsira had no children. He stated that the Defendant came as a trader to Yele from Baoma about 15 years ago and was not related to him by blood and that he did not regard any others except those stated as descendants from Orthernip.

p.17 l.8

40 In cross-examination he denied that he was the son of Kapribana, or that Orthernip had had a son called Nana Seisay, who was killed in a tribal war, or that he knew that Kaba Seisay was the son of Nana Seisay. He admitted that his family name was Seisay and that the Defendant was called Sulaiman Seisay and that he had not known him by any other name. He further stated that before the election there was a sacrifice in which they all took part - "We offered a sacrifice in our house. Defendant offered a sacrifice in his house."

p.17, p.36

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- p.19 1.3            Kapri Gbagboso Kano testified that Paramount Chief Othernip was his uncle, that he himself was an officer in the Chieftaincy and that he had known the Chief's wives and his children. He said that the previous witness was a son of Othernip and that the Defendant was not a grandchild of Othernip.
- p.19 1.15            In cross-examination he said that he recalled the war of 1898, but that none of Othernip's sons had been killed. His evidence then reads as follows :-            10
- "I was long to answer because I am getting old. The Chief had 3 sons. The elder son was not Nana Seisay. I do not know him. My father was Mbolu. Othernip's sons were Paboth Yele Bana, Bainserie. No they were Kumrai, Kaprebana, Pa Both. Kumrai is one, I cannot remember the others. Pa Both, Kaprebana Bainserie. I don't remember."            20
- p.19, 1.36            5. On behalf of the defence the Defendant himself testified that he knew the Plaintiffs' witness Kumrai Seisay, who was the son of Kaprebana the brother of Othernip. He said that his father was Kaba Seisay, the son of Nana Sesay, the son of Othernip I; that he was born in Yele and had a house and property there; that he was sent for by Fenti Seisay, the fourth Plaintiff, to contest the Chieftaincy; they went together to see Alhaji (who also gave evidence for the Defendant); that he put up for election in the house of Othernip and was elected; that a sacrifice was made for him in which Fenti Seisay and Ansumana Kanu and Pa Sheka Kanu (the first Plaintiff) took part, and nobody suggested then that he was not of the line.            30
- p.21, p.28            In the course of cross-examination he said that his father had told him of his grandfather's death in the war.            40
- p.22 1.5            Alhaji Alimami Souri, the Paramount Chief of Makale, testified as follows :-
- "I knew the Defendant. I knew his father Kaba Seisay. I knew him as a child, I know his mother. I

10 did not know of their marriage. The father of Kaba Seisay was Nana Seisay. I do not know him. My house is not related to the Seisays. I was on friendly term with Kaba Seisay. He told me that his father was Nana Seisay and that he had died in the war. He told me Nana's father was Bai Kump Othernip. I knew Pa Fenti Seisay. We live in the same Chiefdom. He came to me with the Defendant and another man. Pa Fenti Seisay said that he had come to take his brother referring to the Defendant. He said the Chiefdom had reached the house of Orthernip. ... I knew Kumra Seisay. I knew him well. I knew his father. His father is Kaprebana."

20 In cross-examination he stated that Kaba had told him about his father before the witness became chief; that the Defendant's elder brother had contested the chieftainship with his uncle; that the Defendant was his son-in-law; and that he had brought Fenti Seisay up. p.22 1.26

30 Rogue Malike testified that he was the son of a former Chief of Yele who had succeeded Bai Kump Othernip; that he (the witness) knew Bai Kump Othernip and helped to build his compound and that he knew his sons; that the Defendant's father was Kaba Seisay, and that the father of Kaba Seisay was Pa Nana who was the son of Othernip and who died in the war when the witness was a young man. p.24 1.34

The Defendant was recalled and in answer to the Court described the method of the election. Evidence in support of the Defendant was also given by Farouk Falla, but his evidence was disregarded as unreliable by the trial Judge. p.25, p.34

40 6. In the course of his Judgment the learned trial Judge (P. Watkin Williams J.) gave an exhaustive analysis of the evidence and reached a clear conclusion in favour of the Defendant, which conclusion is summarised in the following passage at the end of his Judgment :-

"I have approached this case in the expectation that every witness p.31 1.39

RECORD

called would tend to be prejudiced in favour of the side calling him and I have come to the conclusion that the Defendant and Alhaji are truthful witnesses. They gave their evidence in a manner which seemed to display that they had nothing to conceal. The Plaintiffs' witnesses on the other hand appeared to be evasive. I am left in no doubt that the Defendant is descended from the house of Othernip. The fact that he has spent much of his life away from Yele may have disposed persons to regard him as something of an alien but this action is nothing but a plot to establish false grounds for his removal."

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p.33 1.14

7. The Plaintiffs appealed to the Sierra Leone Court of Appeal on 5 grounds, all of which were rejected unanimously, except ground 2, upon which two of the three learned appeal Judges decided in favour of the Plaintiffs. Ground 2 was as follows :-

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p.33 1.22

"That the learned trial judge wrongly admitted in evidence the evidence of the 2nd defence witness, Alhaji Souri in so far as it purported to prove that the Defendant was the direct grandson of Bai Komp Othernip."

The two learned appeal Judges upheld this ground of appeal on the ground that this evidence was rendered inadmissible by the decision of the House of Lords in the Berkeley Peerage Case 1811 4 Campbell 401. The Judgment of R.B. Marke, J. contains the following passages :-

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p.46 1.21

"As regards the second ground of appeal the Plaintiffs/Appellants' complaint is that the learned trial judge was wrong in giving probative value to the evidence of Alhaji Alimami Souri and even making it one of the grounds for arriving at his decision in view of the fact that :

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(1) Alhaji Alimami Souri was deposing so far as his evidence went as to the ancestry of Suliman Seisay,

what he said he had been told by Kaba:  
and

(2) That apart from Kaba's own statement as to his descent there is no evidence establishing his relationship aliunde.

10 As to the first ground of complaint the evidence of Alhaji Alimami Souri is that Kaba told him that his father was Nana who had died in a war. From the decision in Berkeley Peerage case, before Alhaji Alimami Souri's evidence can be accepted as evidence of the lineage of Kaba, there must be evidence of Kaba's lineage apart from his own statement."

.....

20 "This leaves us with the evidence of Rogue Malim. He said that the Chief's father was Kaba Seisay. That Kaba Seisay's father was Nana who died in the war when this witness was a young man. But in cross-examination he admitted that he was too young to have gone to the war. This witness went on to say that he was head of the Poro Society and that Suliman Seisay was a member of his house. The learned trial Judge did not make any specific reference in his judgment on  
30 the evidence of this witness.

p.47, l.26

But this witness nevertheless fails the test set up in the Berkeley Peerage case: that is

"You must by evidence dehors the  
"declarations connect the person  
"making them with the family."

40 That connection has not been proved here and on the authority of the Berkeley Peerage case, I am unable to say that Suliman Sesay has successfully proved his descent from Orthernip."

The Judgment of Luke, Ag.J. was as follows :-

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p.50 1.17

"I concur with my brother Marke J. In agreeing these are my reasons. I feel the main ground in this appeal which needs consideration is ground 2. The Defendant upon who as the learned trial judge rightly found in his judgment the burden of proof rested did not discharge it. He had to prove that he was a direct descendant in the Orthernip I line. To prove it he called as his witness Alhaji Alimami Souri who declared what he had been told.

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In order that it should have the probative value proof aliunde should be given. This, although not so mentioned by the Court below, could have been said to be supplied by Rogue Malime. But it fell short of what is required in the Berkeley Peerage case by the decision of Eldon L.C. when he said that the witness should also prove he is a relation of the family."

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8. The dissenting Judgment of Ames, Ag.P. dealt with this question in the following passage :-

p.40, 1.1

"The main argument before us was in reference to the second ground of appeal. The Defendant/Respondent had to prove his descent from the house of Orthernip. One of his witnesses, Alhaji Alimami Surie, gave evidence that he had been a friend of Kabba Seisay, the Defendant/Respondent's father and that this same Kabba Seisay had told him that his father was Nana Seisay, who had died in the war of 1898, and that Nana Seisay's father was Bai Komp Orthernip.

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It was argued before us that there must be evidence aliunde to connect Kabba Seisay's family with the Orthernip house. The Berkeley Peerage case (4 Camp. 401) was cited as the authority for this proposition. This case is usually cited in text books in connection with the admission in evidence of declarations as to pedigree;

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for example Phipson, 9th Edition at Page 322 states :-

"The declarants relationship must  
"be shown aliunde and cannot be  
"established by his own evidence."

10           Actually, however, the point was not in issue in that case. It was apparently assumed to be so, and it was one of the premises of the first question propounded for the opinion of the judges. Lord Mansfield's opinion included a dictum to that effect and Lord Eldon recalled the opinion of the judges in the Banbury case. The Berkeley case was concerned with the admissibility of depositions and declarations made post litem motam (and with entries in family bibles).

20           Now what is it that the evidence aliunde had to show in the instant case? That the declarant Kabba Seisay was in the male line of Bai Komp Orthernip? I think not. If it were, it would be proof aliunde of the declarant's declaration. In my opinion, all that was required was proof aliunde of the relationship of the declarant to the Plaintiff.

30           I find evidence as to that in the evidence of Alhaji Souri to whom the declaration was made, and in that of the witness Rogue Malime, who said that when he was a boy, he knew Bai Kump Orthernip; that he had helped to build his compound, that he knew Nana Seisay as one of his sons; that Orthernip had children "in a number of compounds"; that the Defendant/Respondent's father was Kabba Seisay; that he was born at Makump where the witness was also born; 40           that the father of Kabba Seisay was Pa Nana the son of Orthernip; that Pa Nana died in the war; that he (the witness) was then a young man, too young to go to war."

9.       It is respectfully submitted that the learned trial Judge did in fact refer to and

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take into account the evidence of Rogue Malime. Having summarised the evidence of the Defendant and Alhaji Alimami Souri, he said :

p.28 1.42

"The Rogue Malima also gave evidence to the effect that he had known Bai Komp Othernip when he, the Rogue, was a child, and had helped to build his compound. He also said that he knew Nana, his son who had died in the war and he knew that Kaba was his son and that the Defendant was the son of Kaba."

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He then discussed the evidence of Rogue Farana Fella and, having rejected it, stated:

p.29, p.20

"We are none the less left with a considerable body of evidence that Nana was the son of Othernip, that Kaba was the son of Nana and that Defendant was the son of Kaba."

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10. R.B. Marke J. gave a further reason in support of allowing the appeal, namely, that Alhaji Alimami Souri had said in answer to a question about the Defendant's parents, "I do not know of their marriage." The judgment of the learned Judge contains the following passage :-

p.48 1.23

"The question then arises - Is there any evidence that Suliman Seisay was the issue of the marriage of his parents? I have been unable to find any such evidence on the record. If he was the issue of a marriage, one would have expected in view of the pleadings, such evidence to have been led on behalf of Suliman Sesay, or some explanation given why such evidence was not forthcoming. Although this was not a specific ground of appeal, and was not argued before us, as the Court is seised of the whole case the Court is therefore entitled to express an opinion on it."

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It seems to me that the learned trial judge did not have present in his mind the test in Berkeley Peerage

case, and that he slipped in giving such high probative value to the evidence of Alhaji Alimami Souri in establishing the descent of Suliman Seisay from Kaba Seisay. In view of what I have said this ground of appeal in my opinion succeeds."

10 The judgment of Luke Ag.J. does not refer to this point, but it is dealt with by Ames Ag.P. in the following passage :-

20 "My brother Marke considers the question of legitimacy. Did the Respondent prove his legitimacy? With respect, I do not think that the question arose. Reading the pleadings and the evidence it seems to me that all references to relationship are references to legitimate relationships. It is true, as my brother has pointed out that the witness Alhaji Alimami Souri said: "..... I knew the Defendant. I knew his father Kabba Seisay. I knew him as a child. I know his mother. I did not know of their marriage....." p.41 1.21

30 I do not know what this meant exactly. It could mean that they were married before he knew them; he knew them by repute as the parents of the Defendant. It could be a hint that Defendant was illegitimate: but if it was meant for the latter, I should have expected it to be pounced upon by the other side in cross-examination to make this meaning clear. But it was not mentioned in cross-examination."

40 11. By Order dated the 9th September 1961 the Defendant was granted Conditional Leave to Appeal to Her Majesty in Council and by Order of the Court of Appeal for Sierra Leone dated the 3rd November 1961 the Defendant was granted Final Leave to Appeal to Her Majesty in Council. p.51

12. The Defendant respectfully submits that this Appeal should be allowed and that the Judgment of the Sierra Leone Court of Appeal should be set aside and the Judgment of the Supreme Court of Sierra Leone restored and

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that the Defendant should be granted the costs of these proceedings throughout, for the following amongst other

R E A S O N S

1. Because the requirement for the admissibility of declarations of deceased persons laid down in the Berkeley Peerage Case and other English decisions is satisfied by evidence aliunde that the declarant is related to the person whose pedigree is in issue, and such evidence was given in this case. 10
2. Because even if the rule in the Berkeley Peerage Case as applied to this case requires evidence aliunde that Kaba was descended from Bai Komp Othernip, such evidence was given in this case.
3. Because the Berkeley Peerage Case has no application to the evidence of Rogue Malime, who testified to his own knowledge of the relationship between the Defendant and Bai Komp Othernip. 20
4. Because the rule in the Berkeley Peerage Case has no application to disputes of title or kinship tried in accordance with the native law and custom of Sierra Leone.
5. Because the legitimacy of the Defendant was neither challenged nor in issue and was in any event sufficiently established by the evidence. 30
6. Because even without the evidence of Alhaji Alimami Souri the learned trial Judge was entitled to decide as he did.
7. Because the learned trial Judge having seen and heard the witnesses founded his decision on their demeanour and credibility and the Court of Appeal erred in law in reversing it.
8. Because the burden of proving that the election of the Defendant as Paramount Chief was invalid lies on the Plaintiffs and they have not discharged it. 40

9. Because the decision of the learned trial Judge was correct and ought to be restored.

JOSEPH DEAN

IN THE PRIVY COUNCIL

No. 2 of 1962

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