Privy Council Appeal No. 24 *of* 1944

Chief Kwame Asante - - - - - - - - - *Appellant*

v.

Chief Kwame Tawia - - - - - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JANUARY, 1949

Present at the Hearing :

LORD SIMONDS
LORD UTHWATT
LORD MORTON OF HENRYTON
LORD REID

[*Delivered by* LORD SIMONDS]

This appeal, which is brought from the West African Court of Appeal, relates to the ownership of a considerable tract of land in the Kumasi State or Division of Ashanti, which is claimed on the one hand by the appellant the Chief Kwame Asante Tredehene on behalf of his Stool and on the other by the Chief Kwame Tawia on behalf of the Asafu (or Akwamu) Stool of Kumasi. The latter chief was in the course of the proceedings substituted for his predecessor Chief Asafu Boakyi II Akwamuhene, by whom in the year 1936 they had been commenced.

The dispute, since it related to the ownership of land in the Kumasi State of Ashanti, was properly and solely cognisable by a Native Court, the Asantehene's Divisional Court, a Court of the " B " Grade, which was constituted under the Native Courts (Ashanti) Ordinance 1935 and will be referred to as " Court B ". This Court, in which the Chief Asafu preferred his claim, on the 1st April 1936 decided in his favour against the appellant. After an unsuccessful appeal to Court " A " (also a Native Court established under the same Ordinance) the appellant appealed to the Chief Commissioner's Court which on the 17th December 1936 sent back the case to Court B for rehearing.

On the 1st July 1937 after a rehearing of the case Court B again decided in favour of Chief Asafu. The appellant appealed to Court A, which on the 16th December 1937 dismissed his appeal; thence to the Chief Commissioner's Court which on the 14th November 1939 dismissed his appeal, and finally to the West African Court of Appeal, which in turn on the 22nd November 1940 dismissed his appeal.

Their Lordships do not at this stage express any opinion on the merits of the case. But a question has been raised both in the West African Court of Appeal and before their Lordships which must be disposed of before a final judgment can be given. It arises in this way.

When this case reached the West African Court of Appeal it was for the first time suggested and made a ground of appeal that the Trial Court, Court B, was not validly constituted for the rehearing of the case in that

certain chiefs had sat as Judges in that Court who were not qualified to sit, and that the proceedings before that Court must accordingly be regarded as "*coram non judice*" and its judgment as a nullity. Upon this the West African Court of Appeal observed that this additional ground of appeal was filed without the necessary leave of the Court, and that it was too late in the proceedings to raise a point of this nature which was not raised in any of the three Courts below or at the beginning of the hearing of the appeal in that Court. Their Lordships cannot assent to this view. If it appears to an Appellate Court that an order against which an appeal is brought has been made without jurisdiction, it can never be too late to admit and give effect to the plea that the order is a nullity. The West African Court of Appeal however went on to say "In any case having heard all that the appellant had to urge in support of the ground we are not satisfied that there is any substance it it". It is clear that this is not in form or content such a judgment as the learned Judges would have pronounced, if they had not (wrongly, as their Lordships hold) thought that the point was not open to the appellants. Before their Lordships the question was fully argued, first at the original hearing and again at a later date at the request of the appellant, who wished to call the attention of the Board to the provisions and in particular Section 9 of the Interpretation Ordinance (Chapter 1 of the Laws of the Gold Coast 1936 Revision), and they have come to the conclusion that there is at least a prima facie case which requires investigation.

But, in order that they may have all the necessary material for a final decision, they think it proper that the case should be remitted to the West African Court of Appeal. They will thus not only have the advantage of the considered opinion of the learned Judges of that Court upon questions which lie peculiarly within their province, but an opportunity will be given, of which advantage should in their Lordships' opinion be taken, to obtain evidence upon two material points. The first is one upon which, it would appear from the notes of argument, there was some discussion but no conclusion, viz.: whether the members of Court "B" which reheard the case in fact held any of the offices specified in the 4th Schedule to the Confederacy Native Courts Order, 1935. The second is whether any and what other order was made or purported to be made under the Native Courts (Ashanti) Ordinance of 1935 or otherwise appointing persons to be members of the "B" Court and, if so, whether any such order was promulgated in the Gazette.

When the West African Court of Appeal has considered and pronounced upon this matter of jurisdiction, the parties are to be at liberty to apply to restore the present appeal, confining it, so far as any further hearing is concerned, to that single question, upon which either party may challenge the decision of the Court.

As already stated, in the circumstances their Lordships do not think it expedient yet to express any opinion upon the substantial merits of the case. They will deal with this and with the question of costs at a later stage. They will humbly advise His Majesty accordingly.

(63199) Wt. 8062—31 125 2/49 D.L. G. 338

In the Privy Council

CHIEF KWAME ASANTE

v.

CHIEF KWAME TAWIA

DELIVERED BY LORD SIMONDS

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1949