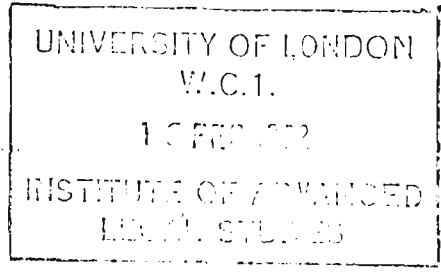


GH B. G. 11

29, 1961



1.

IN THE PRIVY COUNCIL

No.46 of 1959

ON APPEAL  
FROM COURT OF APPEAL, GHANA

6353

B E T W E E N:

YAW DUEDEU (Defendant) Appellant

- and -

EVI YIBOE (Plaintiff) Respondent

CASE FOR THE APPELLANT

Record

10 1. This is an Appeal from a Judgment of the Court of Appeal, Ghana, (Van Lare Ag. C.J., Granville Sharp J.A., Adumua Bossman J.) dated the 4th November 1957 allowing an appeal by the Respondent (the Plaintiff in the original proceedings), from a judgment of Ollennu J. of the High Court of Justice (Land Division) in the Eastern Judicial Division held at Victoriaborg, Accra, Ghana, dated 22nd March 1957, which affirmed the decision of the Buem-Krachie Native Appeal Court dated 18th September 1956 which also affirmed the decision of the Nkonya Native Court "B" dated 22nd May 1956.

p.62  
p.48  
p.41  
p.31

20 2. On 10th January 1956 the Plaintiff-Respondent issued a civil summons No.8 of 1956 of the Native Court "B" of Nkonya in which he claimed a declaration of title to land in the following terms:-

p.1

30 "The Plaintiff's claim is declaration of his title, and for that matter, the title of the Amandja clan of Akloba, with possession, to all that piece or parcel of land with everything thereon, commonly known and called: "Logloto-Sakada" land, situate at Akloba in the Nkonya area with boundaries and dimensions as set forth in the Statement of Claim attached, and the Plan sketched and delineated by the consent of both parties."

3. In paragraph 4 of his Statement of Claim the Plaintiff-Respondent referred to a plan which had

p.5, 1.20

- Record been tendered in evidence in previous proceedings between the parties but in which the present Defendant-Appellant was the Plaintiff in an action for trespass.
- p.4, 1.5 4. On 21st January 1956 the Defendant-Appellant issued a civil summons in the Native Court "B" of Nkonya on which was endorsed a counterclaim in the following terms:-
- "The Defendant also counterclaims that the said 'Logloto-Sakada' is a communal land for the town of Akloba and being the overlord of Akloba the said land is under his control and administration." 10
- p.4, 1.20 5. The hearing of the proceedings in the Native Court commenced on 14th March 1956 when the Plaintiff-Respondent's representative tendered in evidence a writ being suit No. 44/1944 issued in the Magistrate's Court at Kpandu on the 17th July 1944 by the Defendant-Appellant claiming damages for £25 for trespass by the Plaintiff-Respondent. 20
- p.8, 1.9 After outlining the history of the suit, the representative also tendered in evidence the judgment of the West African Court of Appeal dated 7th March 1952 together with the Appeal Record from the Magistrate's Court to the Land Court.
- p.8, 1.28
- p.9, 11.17-20 6. The Defendant-Appellant did not object to any of the three documents being tendered in evidence but upon the tendering of the third document (the Record referred to in paragraph 5 above) the Registrar has recorded as follows:- 30
- "Defendant did not object but emphasized that the case had been disposed of long ago and had nothing to do with this case."
7. The Plaintiff-Respondent's representative was questioned by the Defendant-Appellant's representative but the former refused to answer any question relating to the substance of the matter declaring that this had been decided in the previous proceedings.
8. The Plaintiff-Respondent called no other evidence. 40
- p.15, 1.6 et  
seq 9. The Defendant-Appellant was represented by his acting Linguist who stated the history of the land

in dispute and referred to the previous proceedings in the following terms:-

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- 10 "The Plaintiff gave portions of the area to some strangers for cultivation without the knowledge of the Defendant as the Chief of Akloba and as a result, the Defendant called him before the Omanhene, but he refused to attend and the Defendant took action against him at the Registrar's Court, Kpandu, claiming £25 damages for refusing to take his orders. The Magistrate decided against the Defendant that the Plaintiff was his subject and had no right to sue him as such. The Defendant appealed to the Land Court. Both the Magistrate's Court and the Land Court gave title of the land to the Plaintiff. The Defendant again appealed to the W.A.C.A. which decided against the Defendant but cancelled the title given by both the Magistrate's and Land Courts. The land then remained as it was which every subject has right to cultivate as being a communal land."
- 20
10. The Defendant-Appellant through his representative tendered in evidence the judgment of the W.A.C.A. in suit No. 44/1944. The Defendant-Appellant called five witnesses who testified as to the location and history of the land.
- 30 11. The Court inspected the locus in quo on 16th May 1956. The plaintiff-respondent's representative stated he did not desire the inspection and did not attend. He reaffirmed that he relied on the previous proceedings.
12. On 22nd May 1956 the Native Court "B" of Nkonya delivered judgment. In dealing with the plaintiff-respondent's case the Court found as follows:-
- 40 "He based his claim upon the old proceedings. This Court is of the opinion that, the action before it is not an appeal but a new claim and in an action for a declaration of title to land, the onus is on the Plaintiff but he failed to produce witnesses to prove it."
13. The Court then referred to the evidence called for the defendant-appellant and then to the inspection. The purpose of the latter was stated as follows:-

p.16, 11.29-46

p.16, 1.50

p.29, 1.31

pp.31-34

p.34, 11.2-7

- Record  
p.34, 11.22-24 "To enable the Court to satisfy itself whether the locus in quo was a communal land or a private property, it was inspected by members."
14. After setting out what had been seen at the inspection the Court then concluded its judgment:-
- p.34, 11.33-37 "From the evidence on record therefore coupled with the personal view of the area, the Court is satisfied that the area in dispute is a communal land for the town of Akloba. Judgment therefore for the Defendant with costs to be taxed." 10
- p.34, 11.39-42 15. Thereupon the Court made the following Order:-
- "The Court orders that the land being a communal land, it should remain as it is under the control of the Defendant as the head of the town of Alkoba."
- p.35  
pp.36-37  
pp.37-39 16. On 31st May 1956 the plaintiff-respondent lodged an appeal to the Buem-Krachi District Native Appeal Court, Jasikan, and filed Additional Grounds of Appeal on 26th July 1956. The defendant-appellant replied on 13th August 1956. The parties were heard solely on the point as to the binding nature or otherwise of the judgment of the West African Court of Appeal in the previous proceedings. 20
17. The Native Appeal Court gave judgment on 18th September 1956 and affirmed the judgment of the Court below for the same reason and said:-
- p.42, 11.38-41 "... this Court is of the opinion that this action is a new claim and differs from the previous action which went before the Higher Courts ... " 30
- p.44  
p.45 18. The plaintiff-respondent appealed to the Supreme Court of the Gold Coast, Eastern Judicial Division (Land Court) and filed Grounds of Appeal on 5th October 1956 and Additional Grounds of Appeal on 2nd January 1957. The suit was heard in the Supreme Court of Ghana (to which Court jurisdiction to hear and determine it had been transferred) in the Eastern Judicial Division (Land Division) by Ollennu, J. on 19th March 1957. On behalf of the plaintiff-respondent it was argued:- 40
- (1) that the defendant-appellant was estopped by

the previous proceedings from claiming (by way of counterclaim) the land to be communal land.

Record

- (2) that "the matter is res judicata".
- (3) that "If the matter is not res judicata, the evidence given by the Plaintiff together with the judgments in the previous case is sufficient evidence to warrant a declaration of title in favour of the Plaintiff."

10 19. On behalf of the defendant-appellant it was argued (inter alia):-

- (1) that the issue in the former proceedings was trespass and not ownership to land.
- (2) that the defendant had called witnesses whose evidence was not rebutted by the Plaintiff.

20. The judgment of the High Court, Ghana, was delivered by Ollennu J. on 22nd March 1957. After reciting the history of the previous and present litigation the learned Judge stated as follows:-

20 "In a claim for trespass, a plea of ownership by the Defendant usually puts the title of the Plaintiff in issue especially where the Defendant is in possession."

p.51, l.43 -  
p.52, l.2

21. He then considered and distinguished from this general principle "the case of a claim by a Stool against a subject in respect of Stool land, or the head of a family against a member of Stool family." He stated the legal position regarding these two cases as follows:-

p.52, ll.12-15

30 "In these latter cases the ownership of the Defendant in possession could only be the usufruct while absolute title may be vested in the Stool or family. Therefore a declaration of ownership in favour of the individual against the Stool or the family may amount to nothing more than a declaration that the individual is entitled to the usufructuary or the possessory right in the land and that declaration may not affect the absolute title to the Stool or family.

p.52, ll.15-28

40 "For that reason it is only in rare cases that a Stool can succeed against a subject in an

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action for trespass, and for that matter a family against a member thereof."

p.53, 1.3 et  
seq

22. The learned Judge distinguished the decision of Coussey J. in Chief Tengey Djokoto IV v Chief Saba III, which had been cited by Counsel for the Plaintiff-Respondent, where the plea of res judicata had succeeded on the ground that "that was a claim by one tribe against another."

p.53, 1.37

23. The learned Judge then considered the effect of the previous litigation (suit 44/1944), upon which the plaintiff-respondent in the present proceedings had relied throughout, and he found as follows:-

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p.54, 1.34 -  
p.55, 1.20

"One fact stands out pre-eminently in it namely, the contention by the Respondent that the land belongs to his Stool that is to a community consisting of 4 clans including the Appellant's clan and that any member of the community has right to occupy any portion of it with the customary permission of the Stool or head of the community. In such a case all the Appellant, a subject or member of the community, need prove to succeed in the action for trespass by the Stool or head of the community against him is that he is in possession or occupation.

20

"I do not therefore see how the West African Court of Appeal could have come to any other conclusion than the one to which they came.

"It means that the questions as to the title of the Respondent's Stool or the Akloba community in the land as well as the issue as to whether the land is the Appellant's absolute property in which the Respondent's Stool or the Akloba community have no interest were not in issue nor were they necessarily decided for the determination of the issue of trespass.

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"In my opinion the proceedings and judgment in the former suit cannot operate as res judicata in the present suit. Therefore to succeed in his present claim to ownership of the land by his clan to the exclusion of the other three clans in Akloba, the Appellant must discharge the onus which lies upon any Plaintiff in an action for declaration of title, and prove

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his case to the satisfaction of the Court.  
This he failed to do."

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24. Finally the learned judge considered the plea of estoppel and held that this was not available to the plaintiff-respondent as the issue raised in the counter-claim of the defendant-appellant had not been decided in the former suit. p.55, 11.21-37
25. The learned judge therefore dismissed the appeal with costs and indicated that he would grant leave to appeal further upon application being made. p.56, 1.2
26. On 3rd May 1957 the plaintiff-respondent gave notice of appeal to the Court of Appeal, Ghana, and his Grounds of Appeal were in substance as throughout, namely, that the effect of the previous litigation between the parties operated as res judicata and that the defendant-appellant was estopped from claiming the land as his Stool property. p.56, 1.11
27. On 4th November 1957 the Court of Appeal, Ghana, gave judgment. The main judgment was given by Van Lare Ag. C.J. who stated the issue to be decided by the Court in the following terms:- pp.62-80
- "The real matter for a decision in this case must therefore be whether absolute ownership of the 'Logloto-Sakada' land is vested exclusively in the appellant representing the Amandja clan of Akloba or in the respondent representing the Stool of Akloba as a communal land for all the inhabitants of that town." p.63, 11.18-24
28. Van Lare Ag. C.J. then referred to the previous suit and stated that in answer to the claim in trespass brought by the defendant-appellant, the plaintiff-respondent had pleaded absolute ownership. According to the learned judge this plea by plaintiff-respondent who was the defendant in the previous proceedings put in issue the ownership of the plaintiff in those proceedings (the plaintiff being the defendant-appellant). The learned judge held that this was so in the two cases distinguished by the learned trial judge namely a claim by a Stool against a subject or by a family against a member. The learned judge dealt with the matter in the following passage:- p.63, 1.27 et seq
- "Surely a claim founded in trespass must involve the question of ownership in the plaintiff if the defendant puts up and claims p.64, 1.25 et seq

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absolute ownership of the land. This is so whether the claim is by a Stool against a subject, or by a family against a member; once the subject or member puts up an adverse title of exclusive absolute ownership he thereby challenges the title of the Stool or family in respect of the land. Title can only be excluded if the defendant in an action for trespass concedes the title of the plaintiff. Here definitely was therefore a case where the appellant's title conflicted with that of the respondent. The clan put forward exclusive ownership against the Stool. In my view the question of usufructuary right or determinable interest did not arise in the case as appears to be the opinion of the learned Judge from whose judgment this appeal lies. With respect to the learned Judge of the Land Court erred in his view. Neither party conceded ownership to the other in respect of the land. If it has been so I would have agreed with the view of the learned Judge."

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29. In considering the judgment of the trial Magistrate Van Lare Ag. C.J. emphasized the following phrase in respect of the defendant-appellant:-

p.65, 11.29-30

"a person who had a valid claim of ownership of land"

as showing that this was the claim and contention of the defendant-appellant who had thus litigated title.

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30. Van Lare Ag. C.J. then set out and adopted the following conclusion of the trial magistrate:-

p.65, 11.44-49

"I can therefore only conclude that the land specified by plaintiff [now respondent] in his claim is not Akloba Stool land but belongs to the defendant [now plaintiff] whether in his personal capacity or as head of his family or of the Amandje Clan."

And the learned Judge continued:-

p.66, 11.1-5

"The respondent thus failed against the appellant in 1948 because he could not establish a superior title to that claimed and put forward by the appellant, justifying his possession and dealings with the land as owner."

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31. Van Lare Ag. C.J. dealt with the unsuccessful appeals in the previous suit and after referring to the fact that in the West African Court of Appeal the defendant-appellant did not counterclaim for a declaration of title, he stated as follows:-

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"There is no doubt whatsoever that if he had counterclaimed he would have got a decree of such declaration of his title."

p.66, 11.12-14

10 32. After referring to the decision of the West African Court of Appeal that the declaration of title by the trial Magistrate should not be operative, Van Lare Ag. C.J. stated that the plaintiff-respondent failed to obtain a declaration "because of mere procedural technicality." The learned judge referred to the decision of the West African Court of Appeal of 17th February 1947 in *Fiaga Abutia Kwadjo II and Anor etc. representing the people of Abutia v Fiaga Addai Kwasi Awadome* and the decision of the Land Court, Accra on 28th June 1950 in *Chief Tengey Djokoto IV etc. v Chief Saba III of Djita etc.* The learned judge held that the effect of the first decision was that the defendant-appellant was bound by the doctrine of *res judicata* and contrary to the learned trial judge he held that the second case cited "appears to be on all fours with the present case." Consequently the learned judge, overruling *Ollennu J.*, held that the judgment of the West African Court of Appeal of 7th March 1952 in the previous proceedings between the parties did not vary or amend the judgment of the trial Magistrate dated 26th November 1948 and in particular it did not delete the passage set out in paragraph 2 above in which the plaintiff-respondent was declared to be the owner of the land in dispute.

p.66, 1.29

p.66, 1.40 -  
p.67, 1.38

p.67, 1.42

30 33. The learned judge then dealt with the present proceedings and held that the Courts below had misdirected themselves in two respects:-

40 "because (a) the matter was *res judicata* by reason of the judgment in the previous suit, and (b) that the respondent is estopped by the findings of fact made in the previous suit both from disputing the claim of the appellant and maintaining his counterclaim."

p.69, 11.3-9

He examined the contentions of Counsel for the defendant-appellant that the matter was not *res judicata* because the issue in the previous suit was that of

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possession arising out of a claim in trespass as opposed to absolute ownership. The learned judge agreed that:-

p.69, 11.19-24

"The West African Court of Appeal was only concerned with the decision as affecting right of possession because at the hearing of the appeal the respondent appeared to have changed his front as to concede the appellant's right of possession as one of the four clans of Akloba ... "

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Nevertheless the learned judge held that absolute ownership was an issue in the proceedings because it had been made so by the plaintiff-respondent.

p.70, 1.25

34. Finally, in allowing the appeal, Van Lare Ag. C.J. held that the plea of res judicata was available as much to a plaintiff as a defendant and he referred to Okadjokrom Stool v Atonkor Stool 1 W.A.L.R. 162 at 163 and Long v Gowlett (1923) 2 Ch. 177.

35. A concurring judgment was delivered by Adumua-Bossman J. who held that the claim in trespass of the defendant-appellant in trespass -

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p.71, 1.42

"was based or founded on the alleged ownership or title of the Akloba Stool."

He also found that the plaintiff-respondent -

p.71, 1.45

"had asserted ownership or title to the disputed land".

In these circumstances he held that ownership or title was clearly an issue in the proceedings.

p.73, 1.40 et  
seq

36. The learned judge considered the judgment of the trial Magistrate and found that he had adjudicated upon ownership or title. Inter alia the learned judge cited that part of the judgment of the trial Magistrate set out in paragraph 30 above. The effect of the West African Court of Appeal that this finding of the trial Magistrate was not to be considered as a declaration of title was in view of the learned judge that the findings of fact remained "in full force and effect" but that no orders or decrees could be made upon them.

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p.78, 1.41 et  
seq

The learned judge referred to Civil Appeal No. 42/43 Fiaga Addai Kwasi and Mankrado Danku v Fiaga

Abutia Kwadjo and Fiaga Ayipey 22nd February 1944  
W.A.C.A. (unreported) and Transferred Suit No.11/49  
Chief Djokoto IV etc. v Chief Saba III Land Court  
27th June 1950 as supporting his view that the plea  
of res judicata operated and consequently he held  
that the appeal should be allowed.

Record  
p.79, l.17

37. On 21st April 1958 the Appellant in these proceedings obtained an order on motion granting final leave to appeal to Her Majesty in Council.

pp.80-81

- 10 38. The Appellant submits that the Judgment of the Court of Appeal, Ghana, dated 4th November 1957 be set aside and that the Judgment of the High Court, Ghana, dated 22nd March 1957 be restored for the following amongst other

R E A S O N S

- (1) BECAUSE the Respondent as Plaintiff claiming a declaration of title to land did not properly or adequately discharge the onus of proof that was upon him.
- 20 (2) BECAUSE the Appellant as Defendant ought not to have been held by the Court of Appeal, Ghana, to have been estopped from either disputing the Respondent's claim or from making a counter-claim relating to the ownership of the land in dispute.
- 30 (3) BECAUSE the Court of Appeal, Ghana, fell into error in holding that the matter was res judicata as a result of previous proceedings between the parties (suit 44/1944) in which the Appellant as plaintiff sued the Respondent as defendant in trespass and in which the Respondent did not request or obtain a declaration of title.
- 40 (4) BECAUSE the Court of Appeal, Ghana, failed to consider and distinguish the concepts of ownership and possession in relation to land claimed by the Appellant as Stool or communal land and the occupation of a part thereof by subjects of the Stool or community namely the Respondent and the clan he represented.
- (5) BECAUSE the decisions cited and relied upon by the Court of Appeal, Ghana, as to the operation

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of the doctrine of res judicata in proceedings concerning land did not relate to the occupation of Stool or communal land by subjects of the Stool or community.

- (6) BECAUSE the findings of the trial Magistrate in the previous proceedings relating to the Respondent's interest in the land in dispute were unnecessary and extraneous to such proceedings which were brought by the Appellant as plaintiff in trespass and particularly when such claim was held by the trial Magistrate to have failed. 10
- (7) BECAUSE the Court of Appeal, Ghana, fell into error in holding that in the previous proceedings the West African Court of Appeal had not varied or amended the judgment or effected the findings of the trial Magistrate referred to above when it held that such findings did not constitute a declaration of title.
- (8) BECAUSE the judgment of the Court of Appeal, Ghana, dated 4th November 1957 was wrong and ought to be reversed. 20
- (9) BECAUSE the judgment of the High Court, Ghana, dated 22nd March 1957 was right and ought to be restored.

PHINEAS QUASS

GILBERT DOLD

No.46 of 1959

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ON APPEAL  
FROM COURT OF APPEAL, GHANA

B E T W E E N:

YAW DUEDU (Defendant)  
Appellant

- and -

EVI YIBOE (Plaintiff)  
Respondent

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CASE FOR THE APPELLANT

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