Appeal No. 46 *of* 1959

Yaw Duedu – – – – – – – – – *Appellant*

v.

Evi Yiboe – – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL, GHANA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JUNE 1961

Present at the Hearing:
LORD DENNING.
LORD MORRIS OF BORTH-Y-GEST.
LORD HODSON.
[*Delivered by* LORD HODSON]

This is an appeal by the defendant from a judgment of the Ghana Court of Appeal dated the 4th November, 1957, allowing an appeal by the plaintiff from a judgment of Ollennu J. sitting in the Land Division of the High Court of Justice dated the 22nd March, 1957, which affirmed the decision of the Buem-Krachie Native Appeal Court dated the 18th September, 1956, which also affirmed the decision of the Nkonya Native Court " B " dated the 22nd May, 1956.

The dispute between the parties concerns a piece of land on the Eastern bank of the Volta river called " Logloto-Sakada ". The plaintiff claims a declaration of title to the land he being the head of the Amandja clan of Akloba and the defendant has counterclaimed that the land was communal land for the town of Akloba and that, he being the overlord of Akloba, the land is under his control and administration.

By his formal claim the plaintiff sought a declaration of title to the land and " for that matter " the title of the Amandja clan. In the Ghana Court of Appeal his claim was upheld as for himself and on behalf of the clan.

The dispute concerning the ownership of the land has a long history.

In January, 1941, the defendant, in his capacity as subchief, issued an order forbidding cultivation sale or pledge of any portion of the land without his permission according to custom. The plaintiff refused to carry out the order as he claimed the land as his bona fide property. The defendant then claimed £50 damages from the plaintiff in the Provincial Commissioner's Court for entering the land cultivating it selling pledging and giving under "Abusa " and "Abunu " without his knowledge and consent as subchief of Akloba and overseer of the land. In the same proceedings the plaintiff counterclaimed on behalf of the Amandja family £50 damages from the defendant for issuing his order seeing that the land was property founded by his family's great grandfather over 100 years ago (naming the great grandfather and his successors) without interference by the Akloba Stool and that the family had over twelve villages on the land some of which were over fifty years old. The magistrate who heard the case dismissed the defendant's claim on the footing that disobedience of the order which the defendant had made would be a criminal offence and would not found any civil claim for damages. The

counterclaim was not mentioned in the judgment which was upheld in the Provincial Commissioner's Court, Eastern Province, on the 17th April, 1943. This judgment did not settle the dispute between the parties as to the ownership of the land.

The next step was taken in 1944, again by the defendant. He claimed damages from the plaintiff for trespass on the land, the acts complained of being making plans of the land and fixing on it cement pillars with his inscriptions thereon thereby falsely claiming it as his property without the knowledge and consent of the defendant. He also applied for and on the 26th July, 1944, obtained an interim injunction against the plaintiff ordering him to plant no more permanent crops on the land nor to make clearings for such purpose nor to cut down timber until the determination of the suit. The suit came before the magistrate on the 10th September, 1946. He viewed the land but did not conclude the case until the 26th November, 1948, when having again visited the land he gave judgment in favour of the plaintiff dismissing the defendant's claim for trespass and revoking the interim injunction previously made. There was no counterclaim and the substantial question arising on this appeal is whether the plaintiff is now entitled to a declaration of title to the land on the footing that his ownership was adjudicated upon by the magistrate who decided the trespass suit in his favour. It is necessary in order to ascertain whether the ownership of the land was decided as a separate issue to set out the material part of the magistrate's judgment. This reads as follows:—

> " The most significant features of the parole evidence led before the Court are firstly that the plaintiff in his cross-examination did not attempt to question the testimony of the 1st defendant's witness that that defendant has people, who pay rent to him, working on the land for him; that they had (in 1946) occupied the land for 15 years; that defendant had more than 14 villages on the land but that plaintiff has no farm and no village on it; secondly, that defendant's 4th witness states that defendant is the successor of the persons whom he has regarded as his landlords and to whom he had paid rent and that plaintiff has never claimed rent from him; thirdly, that defendant's 5th witness states that Evi Yiboe is his landlord and is the successor of the people whom he had (in 1946) for fifteen years regarded as his landlord and to whom he has paid rent and that plaintiff has never claimed rent from him.
>
> " When I visited the land on the 24th November, 1948, I was able to confirm that one of the farms made by defendant's 4th witness was situate within the land claimed by plaintiff and that it contained a permanent crop, namely mature cocoa which is in my opinion approximately 20 years old. It is admitted by plaintiff that the farm of defendant's 5th witness which is also situate within the land claimed by plaintiff contains cocoa of similar age and maturity. Finally defendant's 4th witness stated that he had for 7–8 years paid market tolls in respect of Sakada market to defendant, whose clan opened the market about 12 years ago. It is completely contrary to all my experience of customs in these parts that a person who had a valid claim to ownership of land should allow another person to grant permission to third parties to plant permanent crops or erect a market on such lands and to receive annual rents of market tolls from these third parties. Now although the cocoa trees must have been planted not later than the period 1928–30 the plaintiff did not initiate legal action against the defendant until 1941.
>
> " I can therefore only conclude that the land specified by plaintiff in his claim is not Akloba Stool land but belongs to the defendant either in his personal capacity or as head of his family or of the Amandja clan. "

In this extract it will be remembered that the position of the parties was reversed, the present plaintiff being defendant.

The decision of the magistrate given in 1944 was appealed by the defendant to the Land Court upon the grounds that the magistrate's decision was against the weight of the evidence and secondly was bad in law for vagueness and uncertainty.

The judge of the Land Court dismissed the appeal on the 19th May, 1950, and in so doing interpreted the magistrate's decision in their Lordships'

opinion correctly saying " He (the magistrate) found that the land did not belong to the plaintiff Stool but that it did belong to the defendant ". He continued " The magistrate's inability to say whether defendant held the land as his own property or as head of his family or clan may leave the defendant in an unsatisfactory position but this is no concern of the plaintiff ". Again in reading this extract it is to be noticed that the position of the parties is reversed.

In the West African Court of Appeal to which the defendant took the case the same result followed when on the 7th March, 1952, his appeal was dismissed and the magistrate's order confirmed but, since the plaintiff had not counter-claimed for a declaration of title, that paragraph of the magistrate's judgment which purported to declare that the land belonged to the plaintiff either in his personal capacity or as head of his family or of the Amandja clan was deleted.

In the Court of Appeal the case took a different course from that previously followed in that counsel for the defendant submitted that his client had at no time questioned the plaintiff's right to occupy the land. The plaintiff's counsel pointed out that this was a complete change of front and referred to the nature of the claim which was for trespass and to the injunction which the defendant had obtained. He did however in his turn submit that the real issue between the parties was " who is entitled to possession of the Stool ".

The Court of Appeal proceeded to deal with the case, as appears from the judgment of Foster-Sutton P. with whom the other members of the Court agreed, on the basis that the issue was as to possession not as to ownership. This judgment is strongly relied upon by the defendant since if the interpretation of the case adopted by the Court of Appeal in 1952 is correct the ownership as opposed to the possession of the land was never decided.

Having succeeded on his appeal but having no declaration of title the plaintiff instituted the present proceedings by a summons issued on the 10th January, 1956. He relied upon the finding of the magistrate in the trespass suit and the record of the appeals culminating in the decision of the West African Court of Appeal in 1952. He called no parole evidence. In the native Courts he lost, the view being taken that this was a new claim to be proved by fresh evidence. Judgment was given for the defendant after hearing the evidence called on his behalf. In the Land Court to which the plaintiff appealed judgment was delivered by Ollennu J. on the 22nd March, 1957. The learned judge dismissed the appeal. While recognizing that in a claim for trespass a plea of ownership by the defendant usually puts the title of the plaintiff in issue, he distinguished the 1944 case as one where the claim being by the head of a Stool against a subject " the ownership of the defendant in possession could only be the usufruct while absolute title may be vested in the Stool or family." He concluded that the issue as to whether the land is the plaintiff's absolute property in which the defendant's Stool or the Akloba community has no interest was not then in issue nor necessarily decided for the determination of the issue of trespass.

The plaintiff appealed to the Ghana Court of Appeal which reversed the decision of Ollennu J. Van Lare Ag.C.J. stated the issue, in their Lordships' opinion correctly, when he said " 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 ".

It is clear from the extracts set out above from the magistrate's judgment given in 1948 that this issue was truly decided as a necessary issue in favour of the present plaintiff. No question of any usufructuary right or other determinable interest arose and neither conceded that the other was the owner of the land so as to give rise to consideration of such a question.

It would appear as Adumua-Bossman J. pointed out in the Ghana Court of Appeal that the prominence given in the arguments and in the judgment of the West African Court of Appeal in 1952 to the question of occupation and user misled the learned judge of the Land Court into a misunderstanding of what had actually been decided by the magistrate.

There being no question in their Lordships' opinion that the issue of ownership was raised and decided in the earlier proceedings and that the appeal from the magistrate was dismissed finally in the West African appeal, the manner in which that Court dealt with the submissions of counsel and expressed itself in its judgment does not vitiate the proposition that the real issue has been finally adjudicated upon.

As Sir Robert Romer pointed out in *Shoe Machinery Co.* v. *Cutlan* [1896] 1 Ch. 667 at pp. 670, 671 in a passage cited by Van Lare Ag.C.J.

> " It is not necessary, in considering the question of res judicata, that there should be an express finding in terms, if, when you look at the judgment and examine the issues raised before the Court, you see that the point came to be decided as a separate issue for decision, and was decided between the parties."

Lord Romer in delivering the judgment of the Privy Council in *New Brunswick Rly. Co.* v. *British and French Trust Corporation Ltd.* [1939] A.C.1 at p. 43 said

> " It is no doubt true to say that whenever a question has in substance been decided, or has in substance formed the ratio of, or been fundamental to, the decision in an earlier action between the same parties, each party is estopped from litigating the same question thereafter."

The ownership of the land was decided in favour of the plaintiff and should have settled his title to the land. If he had counterclaimed he should have obtained a declaration of his title. Not having counterclaimed he was forced to get over his procedural difficulty by instituting fresh proceedings founded upon the judgment he had earlier obtained in order to obtain the relief which he seeks, that is to say a declaration of his title to the land. To this relief he is plainly entitled.

As to the form of the declaration comment on the uncertainty of the declaration sought was made by counsel for the defendant. Whether it should be in the form contained in the statement of claim or as put by Van Lare Ag.C.J. in his judgment or in some other form may require consideration by the appropriate Ghana Court but, as Smith J. pointed out, this is no concern of the defendant.

Their Lordships will accordingly report to the President of Ghana as their opinion that the appeal ought to be dismissed and that the appellant ought to pay the respondent's costs of the appeal.

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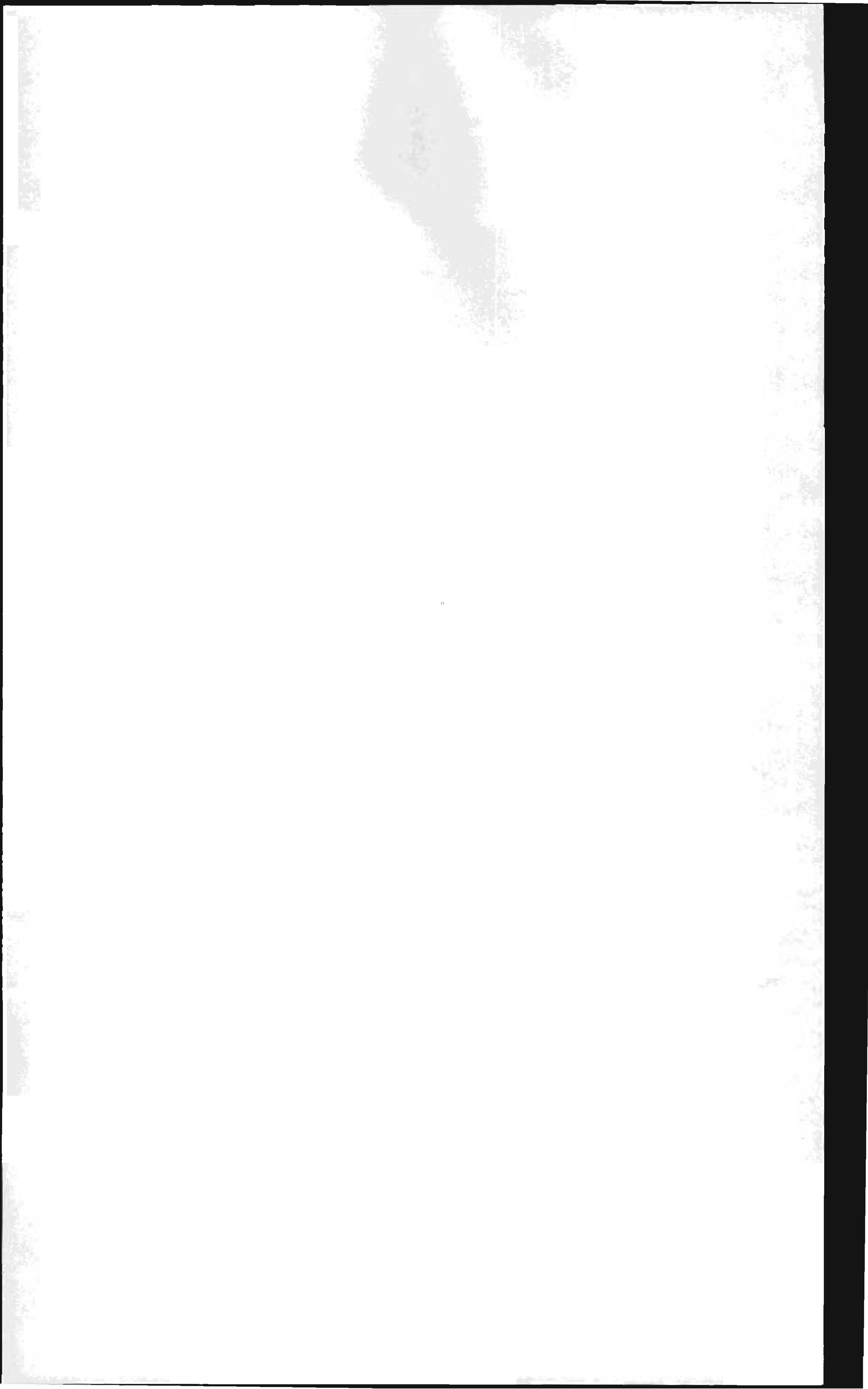

In the Privy Council

YAW DUEDU

v.

EVI YIBOE

DELIVERED BY
LORD HODSON

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HARROW
1961