Appeal No. 25 of 1960

R. B. Wuta-Ofei – – – – – – – – *Appellant*

v.

Mabel Danquah – – – – – – – – *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF PRIVY COUNCIL, DELIVERED THE 24TH JULY, 1961.

Present at the Hearing:

LORD TUCKER.

LORD HODSON.

LORD GUEST.

[*Delivered by* LORD GUEST]

The plaintiff-respondent brought a suit on 10th April, 1948, in the Ga Native Court claiming to be the owner of a piece of land at Christiansborg, Accra, which she alleged was granted to her by the Stool of Osu (Christiansborg) in 1939 in accordance with native custom, the gift being later confirmed and evidenced by an Indenture, dated 31st December, 1945, and registered in the Deeds Registry. She alleged that the defendant-appellant had trespassed on her land by building a block wall round the land and she claimed a declaration of title to the land, £50 damages for trespass and interim injunction against further trespass. The cause was later transferred from the Native Court to the Supreme Court. After pleadings had been ordered by Van Lare J. the plaintiff expanded her civil summons and claimed recovery of possession, mesne profits and a perpetual injunction. The defendant in his statement of defence pleaded that the plaintiff had no title to the land because five years before the plaintiff's alleged grant the Osu Stool had granted the land to him and that he could not be ejected from the land. During the course of the hearing the defendant was allowed to add a new paragraph to his defence based on Ordinance No. 44 of 1940 entitled Accra Town (Lands) Ordinance, Cap. 87. This aspect of the defence will be more fully referred to later.

After evidence before the trial Judge, Van Lare J. on 2nd September, 1955, gave judgment for the plaintiff. An appeal was taken to the West African Court of Appeal and the Court on 29th November, 1956, made an order setting aside the judgment of the Supreme Court granting the plaintiff a declaration of title. As to the substantive relief, that is for trespass, the appeal was dismissed.

The appeal to the Board is therefore solely related to the question of trespass upon which it was submitted that the West African Court of Appeal came to a wrong decision. There is no cross appeal and the respondent did not challenge their decision in regard to title.

The history of this piece of land is that in March, 1939 the Osu Stool made an oral grant of the land in dispute to the respondent and duly confirmed it by instrument. But it was the oral grant according to Van Lare J. which was decisive and the respondent therefore became owner and entitled to possession of the land as at that date. The plot was demarcated and the respondent caused pillars with her initials " M.D." on each pillar to be placed on the four corners of the plot. The site was looked after by the respondent's mother,

but there is no evidence of the land being put to any use at that time. On 26th October, 1940, the Accra Town (Lands) Ordinance (No. 44 of 1940) Cap. 87 was passed under which certain areas of land including the land in dispute vested in the Chief Secretary in trust for His Majesty.

Section 2 is in the following terms:

> " 2. (1) The lands described and delineated in the indentures mentioned and described in the First and Second Schedules hereto which lands are also specified in the Third Schedule hereto shall, subject to the reservations described in the Fourth Schedule hereto, forthwith by virtue of this section become and be vested absolutely and indefeasibly in the Chief Secretary for the time being in trust for Her Majesty, free from all competing rights, titles, interests, trusts, claims, liens, demands and restrictions of all kinds whatsoever.
>
> (2) When in the opinion of the Governor there is no longer any need for any particular part of such lands to remain so vested in the Chief Secretary the Governor may by Order published in the Gazette direct that any particular part of such lands shall cease to be so vested either forthwith or from a date to be fixed by such Order, and thereupon such particular part of such lands shall be held and enjoyed as though the same had never been assured by indenture to the Governor of the Gold Coast or vested under the provisions of this Ordinance in the Chief Secretary for the time being in trust for Her Majesty."

Section 5 provides as follows:

> " 5. (1) Any person who claims that he had any right, title or interest to or in such lands or any part of them before they vested in the Chief Secretary under the provisions of section 2(1) shall lodge a claim in writing with the Commissioner of Lands within three months of the date of the notice mentioned in section 4.
>
> (2) Such claim shall specify the area and boundaries of the land claimed and the particulars and evidence of the right, title or interest claimed therein and, in the case of any person other than a person who has executed an indenture mentioned in the First or Second Schedule hereto, the compensation claimed in respect thereof.
>
> (3) Such claim shall be accompanied by any deeds or other documentary evidence relating to the title to the land claimed.
>
> (4) No claim shall be entertained unless the same is made in accordance with the provisions of this section, and any right, title or interest in respect of which no claim has been made within three months of the date of the notice mentioned in section 4 shall be deemed to have determined."

Thereafter in terms of the Ordinance the title to the land was in the Chief Secretary. But notwithstanding this Ordinance the respondent had her original gift confirmed by an Indenture, dated 31st December, 1945, and registered in the Accra Deeds Registry. Among the recitals to this deed is contained this clause: "Whereas the said grantee" (the respondent) "entered into and has been in possession of the said piece of land ever since."

The next step was taken sometime in 1948 when the appellant started to build on the land. The respondent thereupon gave instructions to her solicitor to write to the appellant which he did on 15th March, 1948, stating her title to the land and complaining of the appellant's trespass. Despite her protests the appellant continued his building and the building has now been completed and is valued by the defendant at £7,700.

In the meantime by deed of release and covenant dated 6th February, 1948, between Osu Stool and the Governor of the Gold Coast Colony the Government contracted to make an Order for release of land including the land in dispute. But the formal divestment order under section 2(2) of the Ordinance was not made until 5th May, 1956, when the case was before the West African Court of Appeal. The respondent's title to the land has thus revived, but because the divestment order was not made until after the suit had been

commenced and judgment given the respondent did not challenge the decision of the West African Court of Appeal that she is not entitled in this process to a declaration of title.

In order to maintain an action for trespass the respondent must have been in possession at the date of the appellant's entry on the land in 1948. This is very largely a question of fact upon which the Board do not have the benefit of much evidence. Nor do they have the assistance of the Courts below. The reason is that at the stage when evidence was being led and the appeal being heard parties and the Court were concentrating on the question of title and the question of possession was not closely examined.

The appellant maintained that there was not sufficient evidence to establish that the respondent was in possession at the critical period. It was argued, first, that assuming she was in possession before 26th October, 1940 the date of the Ordinance, her possession was determined either under section 2(1) or section 5(4) of the Ordinance. So far as section 2(1) is concerned, this no doubt determined her right to possession, but did not affect the factual aspect of possession. In other words, if the respondent was in actual possession of the land as at 26th October, 1940, the section did not change that state of facts. So far as section 5(4) is concerned, their Lordships adopt the reasoning of Verity, Acting Judge of Appeal of the West African Court of Appeal when he held that the determination of rights under that section only affected rights which might entitle a person to a claim for compensation against the Chief Secretary. It is accordingly irrelevant to consider this subsection in an issue between competing claimants to possession of the land.

Their Lordships now turn to the central issue in the case whether the respondent has proved that she was in possession in 1948. The appellant argued that the respondent would require to have taken some active step to reassert her possession after 1940. This was said to follow from the decision in *Brown* v. *Notley* [1848] 3 Ex. 219. At page 222 Parke B. said:—

> " The question is, whether, after his interest ceased, he could be presumed to be in possession. Now, if he continued in possession after that time, he would be a wrong doer; and therefore he must be presumed not to have continued in possession, unless an intention to the contrary be clearly shewn. If he had kept his cattle on the close, or the gate locked with a key, which he kept, the case might have been different. But though there was nothing to indicate the giving up possession, there was no evidence of an intention to remain after the term ended, so that the possession was in a neutral state. He must, therefore, be considered to have been out of possession; if not, the consequence would be, that he would be liable to an action of trespass, or to an action on the implied contract to deliver up possession at the end of the term. Unless some act be done indicating an intention to the contrary, possession ceases as soon as the interest."

Their Lordships do not consider that in order to establish possession it is necessary for a claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated there is little which can be done on the land to indicate possession. Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances the slightest amount of possession would be sufficient. In *Bristow* v. *Cormican* [1878] 3 A.C. 641 at page 657 Lord Hatherley said:—

> " There can be no doubt whatever that mere possession is sufficient, against a person invading that possession without himself having any title whatever—as a mere stranger; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser."

There is no evidence that the respondent ever abandoned her possession which in virtue of her grant in 1939 she obtained. Therefore, if there is evidence after 1940 of an intention to retain possession, that would in their Lordships' view be sufficient to entitle her to maintain an action for trespass. It was said that her conduct was neutral. Their Lordships do not agree. It is true there is no evidence when the pillars were erected. But if they were erected after 1940, that would be a definite act indicating possession. Even if erected before 1940, their continuance is some evidence of the respondent's state of mind as affecting possession. In the Indenture of 1945 which was registered the respondent declared that she had entered into possession of the land and been in possession ever since. The only reasonable inference from her evidence is that up to 1948 the date of the appellant's entry on the land she deputed her mother to look after the plot and that she was keeping watch on the land to see that no one intruded. At any rate, when she did notice the appellant's blocks on the land she took prompt action to warn the appellant off the land.

The evidence is exiguous, but in their Lordships' opinion it is sufficient to satisfy the test and is adequate proof of the respondent's intention to continue her possession after 1940 and establishes that when the appellant entered the land in 1948, she was in possession. She is therefore entitled to maintain an action for trespass. Their Lordships consider that the order of the West African Court of Appeal is well founded, but for different reasons from those advanced by Verity Ag. J.A.

Their Lordships will therefore 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.

(83231) Wt. 8233/71 100 8/61 Hw.

In the Privy Council

R. B. WUTA-OFEI

v.

MABEL DANQUAH

DELIVERED BY

LORD GUEST

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