

GHI-6-3

40, 1961

IN THE PRIVY COUNCIL

No. 25 of 1959

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL

B E T W E E N :-

KWAME MENSAH otherwise
NANA AKWAMUHENE

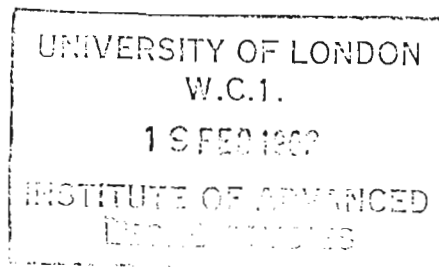
(Defendant) Appellant

- and -

KOJO ABROKWA and KWABENA
AKROMAH

(Plaintiffs) Respondents

RECORD OF PROCEEDINGS



63613

A.L. BRYDEN & WILLIAMS,
53, Victoria Street,
London, S.W.1.

Solicitors & Agents for Appellant.

IN THE PRIVY COUNCILNo.25 of 1959

ON APPEAL
FROM THE WEST AFRICAN COURT OF APPEAL

B E T W E E N:

KWAME MENSAAH otherwise
NANA AKWAMUHENE (Defendant) Appellant

- and -

KOJO ABROKWA and KWABENA
AKROMAH (Plaintiffs) Respondents

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL

No.25 of 1959

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL

B E T W E E N:-

KWAME MENSAH otherwise
NANA AKWAMUHENE

(Defendant) Appellant

- and -

KOJO ABROKWA and KWABENA
AKROMAH

(Plaintiffs) Respondents

10

RECORD OF PROCEEDINGS

No. 1.

SUMMONS.

CIVIL SUMMONS

No.133/54

IN THE KUMASI WEST DISTRICT NATIVE COURT
Kojo Abrokwa and Kwabena Akromah, Plaintiffs

- and -

Kwabena Frimpong & Others

Defendants

To - Kwabena Frimpong & Others.

In the
Kumasi West
District Court

No. 1.

Summons.

16th August,
1954.

20

You are hereby commanded to attend this Native Court at Teppa at 8 a.m. o'clock on the 24th day of August, 1954, to answer a suit by Plaintiffs against you.

30

(a) Plaintiffs' claim is against Defendants jointly and severally for a declaration of title and recovery of possession of one large cocoa farm situate, being, and lying at Manfo on a land known and called "Suponya" bounded on one side by Kwabena Appaw cocoa farm, on one side by Kwabena Akuowah cocoa farm, on one side by Manfo-Mpassasso pathway, and on one side by forest.

(b) Plaintiffs' further claim against Defendants jointly and severally is for £50 (Fifty pounds) damages for trespass committed by the Defendants to Plaintiffs' cocoa farm mentioned in claim "A" supra.

In the Kumasi West District Court.

No.1.

Summons.

16th August, 1954

- continued.

(c) For an injunction order restraining the Defendants their agents, workmen from alienating disposing, transferring, or in any way having anything to do with the property in dispute, and for this Honourable Court to appoint caretakers and workmen to work in the said cocoa farm and deposit two-thirds (2/3) share of the proceeds to this Honourable Court pending the final discharge of this action.

DATED at Teppa this 16th day of August, 1954. 10

Claim	-	£ 50. -. -. .
Fees	-	3. -. -. .
Service	-	3. -. .
Mileage	-	1.11. 6.
		<u>£ 54.14. 6.</u>

(Mkd.) Nana Kofi Forfie.
PRESIDENT OF NATIVE COURT.

W/W to signature or mark:

(Sgd.) St. A. Abiaw
REGISTRAR, NATIVE COURT.

20

TAKE NOTICE - That if you do not attend the Native Court may give judgment in your absence.

No.2.

Court Notes recording Pleas.

3rd September, 1954.

No. 2.

COURT NOTES RECORDING PLEAS.

In the Kumasi West District Court held at Teppa on Friday the 3rd day of September, 1954, before -

Nana Kofi Forfie,	President
Nana Kwame Awuah II,	Member.
Mr. J. Ben Amuah,	Member.

30

Kojo Abrokwa & Another

v.

Kwabena Frimpong & Others.

Parties: Parties present.

Plea: All Defendants not liable.

By Court to Defendants -

Have you any objection to the making of the injunction order as prayed for by the Plaintiffs?

In the Kumasi West District Court.

By 3rd Defendant -

Yes because I have been in possession of the disputed farm for fourteen years. The claim is against us for trespass; and in law an injunction order cannot be made in cases where trespass is alleged.

No.2.
Court Notes recording Pleas.
3rd September, 1954.
- continued.

10 Court to Plaintiffs -

Is it correct that 3rd Defendant has been in possession of the farm for fourteen years?

By 1st Plaintiff -

Yes.

By Court -

Injunction order not reasonable. Application refused. Hearing to proceed on agreement of parties.

No. 3.

Plaintiffs' Evidence.

20

KOJO ABROKWA

1st PLAINTIFF, s.a.r.b. -

No.3.
Kojo Abrokwa.
3rd September, 1954.
Examination-in-chief.

30

I am Kojo Abrokwa, a farmer and living at Manfo village. I am giving evidence on my own behalf and that of 2nd Plaintiff. About 15 years ago, 2nd Plaintiff and I obtained a loan of £2 (two pounds) from 1st Defendant with interest of £2.11/-. (Two pounds eleven shillings). We prepared a mortgage to the effect that if we defaulted repayment within a year, he should seek an order of Court to sell the disputed farm by Fi: Fa: This was what we instructed the letter-writer to do but on the contrary, he wrote the mortgage to the effect that if we defaulted repayment within the prescribed time, 1st Defendant should give us a notice to sell the disputed farm by auction. Before the time of repay the debt, 1st Defendant

In the Kumasi West District Court.

Plaintiffs' Evidence.

No. 3.

Kojo Abrokwa.
3rd September, 1954.

Examination-in-chief
- continued.

caused the farm to be sold to 2nd Defendant by an auctioneer without notice to us and without an order of any Court. We contacted 1st Defendant about the illegal sale of the farm and although he refused to give us satisfactory explanation, we could not sue him because we were uncertain that the sale was illegal. Later, I learnt that 2nd Defendant had sold it to 3rd Defendant. Recently 3rd Defendant presided over a case in the Asantehene's Court "A2" involving a case similar to the one at issue here. The Court ordered that the Defendant in that case was liable because the disputed farm was sold without first giving notice to the Mortgagor.

10

I hereby tender in evidence the judgment in that case, delivered by 3rd Defendant. I was enlightened by this judgment to sue for recovery of the disputed farm on the grounds that it was sold by 1st Defendant without notice to us and without first seeking for order of foreclosure from Court.

20

By 1st Defendant -

I have no objection to the acceptance of this judgment in evidence.

By 3rd Defendant -

On behalf of myself and 2nd Defendant I object to the acceptance of this judgment in evidence on the ground that (1) Kwabena Owusu v. Kwabena Frimpong & Or. is not similar to the case here. In that case, the sale of the property was suspended as a result of an action instituted by the Plaintiff and the Defendant for an order that the interest on the loan be reduced. That judgment was based on the fact that no notice was given to the Mortgagor before the sale. In the present case, notice was given by 1st Defendant to Plaintiffs before the sale.

30

By Court -

The judgment in case Kwabena Wusu v. Kwabena Frimpong & Or. tendered by 1st Plaintiff is accepted in evidence and marked Exhibit "A".

"A"

40

Cross-examination.

Cross-examined by 1st Defendant -

I cannot say whether you sent the attachment notice per one Kojo Mensah. I did not receive it.

No auctioneer posted a notice of sale. You gave me 13/- being balance of the proceeds but I did not accept it because if the disputed property had been sold by auctioneer, it was for the auctioneer to give me the balance and further that I should have been notified according to the terms of the mortgage.

In the Kumasi West District Court.

Plaintiffs' Evidence.

Cross-examined by 2nd Defendant -

No. 3.

Kojo Abrokwa.
3rd September, 1954.

Cross-Examination
- continued.

10

If the auctioneer posted any notice, I did not see it. After you had bought the farm, in dispute you did not propose to sell it to me.

20

The farm in dispute was sold by 1st Defendant to 2nd Defendant about 14 years ago. No notice was posted at Manfo and no such notice was served on me through 2nd Defendant. I do not know whether it is a law that an aggrieved mortgagor has to sue to redeem his property within a fortnight from time of sale. I do not know whether the next proper time to sue is two years from date of sale. I have not travelled since the sale of the farm in dispute. I have not given any receipt to 1st Defendant for any balance of the proceeds of the sale. I have not seen any of your Defendants travel since the sale. At the time of sale, the yearly proceeds were seven loads of 60 lbs. cocoa. At the time of sale, it was not a deserted farm.

Cross-examined by Court -

30

From the time of the mortgage to the time of sale, I was in possession of the disputed farm.

Court order of foreclosure was not sought for by 1st Defendant before he caused the farm to be sold. I do not know for how much the farm was sold. I was to pluck the cocoa and use the proceeds to repay the debt. 1st Defendant was not in control of the farm from the time of the mortgage to the time of the sale. I was not notified before sale.

In the Kumasi
West District
Court.

No. 4.

KWABENA FRIMPONG

Defendants'
Evidence.

1st DEFENDANT, s.o.b.

No. 4.
Kwabena Frimpong.
3rd September,
1954.
Examination-
in-chief.

I am Kwabena Frimpong, a carpenter and living at Kumasi. About fourteen years ago, the disputed farm was mortgaged to me by Plaintiffs for £4 (Four pounds) odd. They defaulted repayment and I sent to them per one Jojo Mensah (deceased) a notice of sale in accordance with the terms of the mortgage. A month later, I instructed an auctioneer to effect sale of the disputed farm to 2nd Defendant who in turn sold it to 3rd Defendant. There was a balance of 13/- which the Plaintiffs refused on the ground that the sale was illegal.

10

Cross-
Examination.

Cross-examined by 1st Plaintiff -

After the sale, you told me that you did not receive the required notice but I did not mind it because the farm had already been sold. From the time of the mortgage to the sale, you were in control of the disputed farm.

20

Cross-examined by Court -

The disputed farm was yielding but I could not know how many loads because I was not in control of it. Plaintiffs were in control of it from the time of the mortgage to the sale. I did not seek for Court order of foreclosure before I caused the farm to be sold.

No. 5.

Akwasi Badu.
3rd September,
1954.

No. 5.

AKWASI BADU

2nd DEFENDANT, s.a.r.b.

Examination-
in-chief.

I am Akwasi Badu, Abontendomhene of Dwaaho village. About fourteen years ago, 3rd Defendant took me to 1st Plaintiff's house where he gave him (1st Plaintiff) a letter in an envelope which 3rd Defendant said was a notice from 1st Defendant. The letter was not read in my presence. Two weeks after this, an auctioneer came to Dwaaho and I saw

30

him post a notice on a tree in the street. Another two weeks after the notice, the auctioneer sold the farm to me for £12 (Twelve pounds) and I later re-sold it to 3rd Defendant for the same £12.

Cross-examined by 1st Plaintiff -

3rd Defendant gave you a letter from 1st Defendant. I did not know the contents.

Cross-examined by Court -

10 I obtained documents on the sale from the Auctioneer. I have given them to 3rd Defendant.

No. 6.

KWAME MENSAH

3rd DEFENDANT, s.a.r.b.

20 I am Kwame Mensah and my Stool name is Nana Kwame Agyei Twum II, Akwamuhene of Kumasi. I live at Kumasi. In 1939, Plaintiffs mortgaged the disputed farm to 1st Defendant for £4.11/-. (Four pounds and eleven shillings). They violated the terms of the mortgage as to repayment of the debt and 1st Defendant sent a notice per me to 1st Plaintiff. I served it on him in the presence of 2nd Defendant. I was the only driver, driving a lorry to Manfo from Kumasi at that time. Two weeks after this, I conveyed an auctioneer to Manfo where he posted an auction notice on a tree in the street when 2nd Defendant was present. I hereby tender in evidence, copy of the notice I sent to 1st Plaintiff from 1st Defendant.

A notice marked by 1st Defendant and addressed to 1st Defendant dated March 4, 1940, tendered by 3rd Defendant read, accepted and marked Exhibit "B".

Two weeks after the attachment, the farm in dispute was sold by the auctioneer to 2nd Defendant for £12.10/-. (Twelve pounds ten shillings), receipt of which I hereby tender in evidence.

A receipt for £12.10/-. (Twelve pounds ten

In the Kumasi West District Court.

Defendants' Evidence.

No. 5.

Akwasi Badu.
3rd September, 1954.

Examination-in-chief
- continued.

Cross-Examination.

No. 6.

Kwame Mensah.
3rd September, 1954.

Examination-in-chief.

"B".

In the Kumasi
West District
Court.

Defendants'
Evidence.

No. 6.

Kwame Mensah.
3rd September,
1954.

Examination-
in-chief
- continued.

"C" shillings) signed by one Amoah, an auctioneer, and given 2nd Defendant tendered by 3rd Defendant, accepted and marked Exhibit "C". A copy of account sales showing the sale of the disputed farm, tendered by 3rd Defendant, read, accepted and marked Exhibit "D". A deed of mortgage executed between Plaintiffs on one side and 1st Defendant on the other, tendered by 3rd Defendant read accepted and marked Exhibit "E".

"F" A deed of conveyance of a cocoa farm to 3rd Defendant by 2nd Defendant tendered by 3rd Defendant, read accepted and marked Exhibit "F". All these Exhibits, except "F" were given to me by 2nd Defendant when he sold the disputed farm to me for £15 (Fifteen pounds). I hereby tender in evidence the receipt for £15 (Fifteen pounds) I paid for the disputed farm. 10

"G". A receipt for £15 (Fifteen pounds) marked by 1st Defendant and given to 3rd Defendant, read, accepted and marked Exhibit "G". I have been in possession of the disputed farm for fourteen years and have improved it. The forest bounding the disputed farm was sold to me by 1st Plaintiff for £7 (Seven pounds) after I had bought the disputed farm. I have grown cocoa in the place I bought for £7. The cocoa in the new farm is not old enough to yield. Defendants have not travelled to any place and they have been at Manfo for the whole fourteen years, however, they did not disturb my possession of the farm in dispute. The sale conducted by the auctioneer at the request of 1st Defendant is valid in law and in native custom. The fact that the auctioneer was not sued jointly with us renders this suit invalid in law. 20 30

Note -

No questions by Plaintiffs and Court.

9.

No. 7.

KOJO ANANE

1st WITNESS FOR 3rd DEFENDANT, s.a.r.b.

I am Kojo Anane, a farmer and living at Dwaaho. I am a brother to 3rd Defendant. I have been the caretaker of the disputed farm for fourteen years. There was a forest boarding the disputed farm. That forest was sold to 3rd Defendant by 1st Plaintiff for £7.

10 Cross-examined by 3rd Defendant -

The disputed farm did not yield cocoa when I was taking over. The trees were too young to yield.

No. 8.

NANA KWASI WIAFE II.

2nd WITNESS FOR 3rd DEFENDANT, s.a.r.b.

20 I am Nana Kwasi Wiafe II, Odikro of Dwaaho, I live at Dwaaho. About fourteen years ago, I was the Headman of the young men of Dwaaho who played "Konkoma" dance. 3rd Defendant's 1st witness was the caretaker to help him weed the undergrowth of the disputed farm.

Note -

No questions by the parties and Court.

By Court -

Case adjourned until the 10th September, 1954.

Nana Kofi Forfie,
P.

30 Recorder & W/to mark
St. A. Abiaw
Registrar - 3/9/54.

In the Kumasi
West District
Court.

Defendants'
Evidence.

No. 7.

Kojo Anane.
3rd September,
1954.
Examination-
in-chief.
Cross-
Examination.

No. 8.

Nana Kwasi
Wiafe II.
3rd September,
1954.
Examination-
in-chief.

In the Kumasi
West District
Court.

No. 9.

SUBMISSIONS BY THE 3rd DEFENDANT.

No. 9.

In the Kumasi West District Court held at Teppa on
Friday the 10th day of September, 1954, before -

Submissions
by the 3rd
Defendant.
10th September,
1954.

Nana Kofi Forfie, President
Nana Kwame Awuah II, Member.
Mr. J. Ben Amuah, Member.

Kojo Abrokwa & Others

v.

Kwabena Frimpong & Others

10

Parties present in person.

Submission by the 3rd Defendant -

In view of the fact that the Statement of
Claim does not show which of the Plaintiffs owns
the disputed farm, the case of the Plaintiff is
not such as can be entertained by this Court. It
was because of their having parted with the farm
in dispute for fourteen years that they were un-
able to show which of them owns it. The Plaintiffs
could not produce any personal evidence to support
their case that the disputed farm was not sold, not
to mention the fact that they did not have any
documentary evidence to that effect. Exhibit "A"
is a judgment delivered by the Asantehene's Court
"A2". It is not a case law because it is not from
the Privy Council. In native customary law and
English law, the evidence of a single person is
not enough to warrant him judgment. The onus of
proof as to whether the 1st Defendant did not give
the Plaintiffs notice before the sale and whether
he did not seek an order of foreclosure from Court
before the sale, lies on the Plaintiffs. The
Plaintiffs contended that they had no money to sue
hence they did not bring this action in time. They
have cultivated about six farms each since I bought
the disputed farm. If they had no money, how did
they cultivate those farms? I submit in the cir-
cumstances, that we Defendants are not liable to
the Plaintiffs' claim.

20

30

No. 10.

OPINIONS OF COURT MEMBERS AND JUDGMENT.VIEWS OF COURT MEMBERSBy Mr. J. Ben Amuah -

This action was brought to Court by the Plaintiffs as against the Defendants to recover a cocoa farm lying at "Asupongya" on Manfo Stool land. They contended that the farm in dispute was unlawfully sold by the first Defendant to the second Defendant who in turn re-sold it unlawfully to the 3rd Defendant. They further contended that the sale was unlawful because it was done without notice and without an order of foreclosure from Court. During the course of the proceedings, it was proved that the Plaintiff mortgaged the disputed farm to 1st Defendant for £4.11/-. The mortgage was dated on the 11th March, 1939. From the start of the proceedings, it was found that the determination of the suit involved English Law. Section 7 ss.(1) of Cap.80 says that any issue involving English Law is not within the jurisdiction of this Court. The same Section provides that if the parties agree, the Court has jurisdiction. In the case at issue, the parties agreed that it be determined by this Court. 3rd Defendant tendered in evidence Exhibit "B" by way of proving that notice was given the Plaintiffs before the sale. This Exhibit although was accepted by Court is not proof that notice was served on the Plaintiff by 1st Defendant. The 1st Defendant on whom the whole defence lies could not prove that the original of Exhibit "B" was served on the Plaintiffs before the sale. No exhibit was tendered by the Defendants to prove that attachment notice was served on the Plaintiffs to comply with the Law of Auction Sale. In my view, no notice was served on the Plaintiffs as provided by Exhibit "E". Coming to the sale without Court order of foreclosure, I refer to pages 66 and 67 of 1 W.A.C.A. where mortgages have been said to be of two kinds, namely, mortgage according to native custom and mortgage according to English Custom. Mortgage according to native custom is where the control of the property mortgaged is given to the mortgagee and can be sold without order of foreclosure from Court and mortgage according to English Custom is where the property remains in the control of the mortgagor and cannot

In the Kumasi
West District
Court.

No.10.

Opinions of
Court Members
and Judgment.10th September,
1954.

No. 11.

PRELIMINARY GROUNDS OF APPEAL

In the Asantehene's "A2" Native Appeal Court,
Manhyia, Kumasi.

In the
Asantehene's
"A2" Native
Appeal Court,
Kumasi.

No.11.

In the Matter of -

- 1. Kojo Abrokwah
- 2. Kwabena Akromah, all of
Manfo/Ahafo, Plaintiffs-Respondents

Preliminary
Grounds of
Appeal.

21st September,
1954.

v.

- 10 1. Kwabena Frimpong of Bantama
- 2. Kwasi Badu of Juaho
- 3. Kwame Mensah alias Nana Akwamuhene
of Kumasi, Defendants-Appellants.

The 2nd and 3rd Defendants-Appellants
preliminary grounds of appeal.

- 1. The Judgment of the Court below is erroneous in law and it must be set aside.
- 20 2. The Judgment of the Court below is against the weight of evidence; in that the Plaintiffs-Respondents herein on whom the onus of proof laid failed outright to establish their case beyond every reasonable doubt and did fail absolutely to call a single person witness in support of their case or claim whereas there is overwhelming and corroborative evidence on record adduced by the Defendants-Appellants herein and their witnesses to the hilt that the disputed farm was lawfully sold and purchased by the 2nd Defendant-Appellant herein who transferred his interest and title thereof to the 3rd Defendant-Appellant herein as supported by the overwhelming documentary evidence on record. It therefore follows in effect that the whole judgment of the Court below should be declared a nullity in favour of the Defendants-Appellants herein with costs throughout in the interest of justice.
- 30

DATED at Kumasi this 21st day of September, 1954.

40 Kwame Mensah alias Akwamuhene,
3rd DEFENDANT-APPELLANT herein
for and on behalf of the 2nd
DEFENDANT-APPELLANT herein.

The Registrar,
Asantehene's "A2" Native Appeal Court,
Manhyia Kumasi.

In the
Asantehene's
"A2" Native
Appeal Court,
Kumasi.

No. 12.

COURT NOTES IMPOSING INJUNCTION.

In the Asantehene's "A2" Court held at Kumasi
on Monday 27th September, 1954, before -

Nana Kofi Adonten II, Adontenhene
Nana Kwasi Bugyeo II, Asamanghene
Mr. O.S. Agyeman, Member.

No.12.
Court Notes
imposing
Injunction.

27th September,
1954.

1. Kojo Abrokwah
2. Kwabena Akromah, Plaintiffs-Respondents

v.

10

1. Kwabena Frimpong
2. Akwasi Badu
3. Kwame Mensah alias
Nana Akwamuhene, Defendants-Appellants

2nd and 3rd Appellants present in person.

1st Appellant absent but represented by 2nd and 3rd
Appellants as 1st Appellant is in ill-health.

Plaintiffs-Respondents absent but service of the
application for interim injunction order served on
them by this Court's bailiff.

20

By Court -

Let the application for an interim injunction
order be heard the absence of Respondents notwith-
standing.

Application for interim injunction order be-
fore Court and read.

By Court -

Let the application for interim injunction
order be granted and let the Odikro of Manfo be
appointed the official receiver to deposit two-
thirds of the proceeds of the cocoa farm in dispute
into this Court after paying one-third of the
proceeds to the caretakers of the cocoa farm
appointed by Respondents and who have worked on
the farm during the current cocoa season.

30

Let Respondents appoint one person as a rep-
resentative to watch the interest of Respondents
in respect of the cocoa farm until final disposal
of the appeal.

Appeal set down for hearing on 27th October, 1954.

Let copies of this Order be forwarded to Respondents and the Odikro of Manfo to comply with. Let 10 bags of cocoa plucked and sold by Respondents be deposited in this Court by 11th October, 1954.

10

Kofi Adonten II
ADONTENHENE
PRES.

his
x
mark

Recorder & W/ mark:
Enoch A. Kyerematen
Registrar - 27.9.54.

In the
Asantehene's
"A2" Native
Appeal Court,
Kumasi.

No.12.

Court Notes
imposing
Injunction.

27th September,
1954
- continued.

No. 13.

COURT NOTES OF HEARING

In the Asantehene's "A2" Court held at Kumasi on Tuesday 19th April, 1955, before -

Nana Kofi Poku II, Oyokohene
Nana Kwasi Brentuo IV, Manwerehene
Mr. Kwasi Agyarko, Member.

20

1. Kojo Abrokwah
2. Kwabena Akromah, Plaintiffs-Respondents

v.

1. Kwabena Frimpong
2. Akwasi Badu
3. Kwame Mensah alias
Nana Akwamuhene, Defendants-Appellants

3rd Appellant and Respondents present in person.

1st and 2nd Appellants absent.

30

Plaintiffs-Respondents' Affidavit in opposition to Defendants-Appellants motion supported by Affidavit read.

By Court -

In view of the fact that Plaintiffs-Respondents knew very well that this appeal was properly before this Court when an application for an interim injunction order was made by this Court on 27th October, 1954 they (Respondents) did appeal against the

No.13.

Court Notes of
Hearing.

19th April 1955.

In the
Asantehene's
"A2" Native
Appeal Court,
Kumasi.

No.13.

Court Notes
of Hearing.
19th April,
1955
- continued.

order to the Land Court and the interlocutory appeal has since failed, Respondents' contention in paragraph 4 to 8 of their Affidavit is therefore unfounded.

Defendants-Appellants' motion for the enforcement of the interim injunction order of this Court made on 27th October, 1954, is accordingly upheld.

Let the amount of £184.18.8. which is the two-thirds share of the proceeds of the cocoa farm in dispute which is in the hands of Plaintiffs-Respondents as stated in paragraph 6 of Defendants-Appellants' Affidavit and unchallenged in Plaintiffs-Respondents' Affidavit be deposited by Plaintiffs-Respondents into this Court's Treasury by Tuesday 26th April, 1955.

10

Hearing of Appeal to proceed.

Grounds of Appeal before Court and read.

No reply in writing filed by Plaintiffs-Respondents.

By 1st Plaintiff-Respondent -

I request adjournment to enable me and 2nd Plaintiff-Respondent to obtain a copy of the appeal record in order to reply in writing to Defendants-Appellants grounds of appeal.

20

By Court -

Let hearing of appeal proceed as it is a deliberate attempt by Plaintiffs-Respondents to delay prosecution of justice in view of the fact that an adjournment was given on 13th April, 1955, to Plaintiffs-Respondents to file their reply to Defendants-Appellants' grounds of appeal.

30

Submissions by 3rd Defendant-Appellant -

I respectfully submit that apart from the fact that we (Defendants-Appellants) made a sound defence and supported our defence with the evidence of witnesses and documents it will be recalled from the appeal record before this Court that when I made my statement in chief the Plaintiffs-Respondents who had the opportunity to do so could not destroy my statement by cross-examining me. The conduct of Plaintiffs-Respondents in this respect is admission of my case for the defence.

40

Also the conduct of 1st Plaintiff-Respondent

in alienating the forest adjoining the cocoa farm in dispute to me (3rd Defendant-Appellant) by sale for £7 as admitted by him (1st Respondent) on record is conclusive that Respondents were satisfied with the sale of the property in dispute by public auction some 15 years ago.

In the Asantehene's "A2" Native Appeal Court, Kumasi.

No.13.

Court Notes of Hearing.
19th April, 1955
- continued.

Submissions by Plaintiffs-Respondents -

Nil.

No. 14.

No.14.

10

OPINIONS OF THE COURT AND JUDGMENT

Opinions of the Court and Judgment.

VIEWS OF MEMBERS OF THE COURT -

19th April, 1955.

By Mr. Kwasi Agyarko (Member) -

Kwasi Agyarko.

This is an appeal from the decision of the Kumasi West District Court "B" to this Native Appeal Court.

20

After careful study of the appeal record and the grounds of appeal and submissions by Defendants-Appellants I am of the considered opinion that the Court below misdirected itself on the issues of the claim before it and consequently gave erroneous decision which must be reversed.

30

It is clear from the appeal record that Plaintiffs-Respondents' claim is for recovery of possession of the cocoa farm in dispute which was pledged by them (Respondents) to 1st Defendant-Appellant for a loan (see Exhibit "E") and which pledge-property in default of the payment by them (Respondents) of the pledge-money was attached and sold at a public auction some 15 years ago at the instance of 1st Defendant-Appellant and purchased by 2nd Defendant-Appellant who was declared the highest bidder (see Exhibits "C" and "D") and who in turn transferred it by a deed of sale (see Exhibits "F" and "G") to 3rd Defendant-Appellant.

Now from their statement-in-chief it is evident that Plaintiffs-Respondents based their claim solely on a point of irregularity in the conduct of the

In the
Asantehene's
"A2" Native
Appeal Court,
Kumasi.

No.14.

Opinions of
the Court and
Judgment.

19th April, 1955.

Kwasi Agyarko
- continued.

sale of the property in dispute in that 1st Defendant-Appellant did not serve a notice to dispose of the pledged property at a public auction in satisfaction of the pledge-money as stipulated in the deed of pledge (Exhibit "E"). But Plaintiffs-Respondents on whom the burden of proof laid to substantiate their contention that 1st Defendant-Appellant did not comply with the terms of the deed of pledge (Exhibit "E") and therefore the sale by auction of the property in dispute was irregular did not adjoin the auctioneer who conducted the sale to this suit nor did they (Respondents) adduce any evidence either by witnesses or by documents in support of their (Respondents) allegations except a copy of a judgment (Exhibit "A") in a case which was adjudicated upon by this Native Appeal Court with 3rd Defendant-Appellant in whose possession the property in dispute is at present sitting as one of the three panel members of the Court and which decision claimed by them (Respondents) to be analogous to the issues of their claim and prompted the institution of this action. 10

In presenting their case Plaintiffs-Respondents stated categorically that after the sale of the property in dispute at a public auction they (Respondents) protested to 1st Defendant-Appellant against the conduct of the sale on the grounds of irregularity but that they did not take any legal steps to set aside the sale. Granting that it was true as I consider it was not that Plaintiffs-Respondents did take 1st Defendant-Appellant to task as regards the alleged irregularity in the conduct of the auction sale the duty devolved on them (Respondents) to have called accredited witnesses to give evidence of fact to support their (Respondents) allegation that 1st Defendant-Appellant was called to task before them (witnesses). The absence of such vital evidence in my opinion destroys the very foundation of Plaintiffs-Respondents' claim which it is clear beyond any reasonable doubt is hinged on mere allegations which are untenable in law to establish a claim. 30

Now the facts having been admitted on record by Plaintiffs-Respondents that they were present during the period of the attachment and at the material time of the sale of the property in dispute some 15 years ago and that they (Respondents) 40

did not register any legal objection to the conduct of the auction sale within the time limit allowed under Rules 31 and 32 of Order No.44 (Schedule 3) of Cap.4 of the Gold Coast Ordinance I am of the considered opinion that the lapse of 15 years clearly constitutes an estoppel to their (Respondents') claim.

10 I am all the more strengthened in my views on the principles of estoppel as the dominating and therefore the deciding factor in this case since the property in dispute has for so many years past been alienated by the auction purchaser (2nd Defendant-Appellant) to a purchaser (3rd Defendant-Appellant) for value without notice. The claim of Plaintiffs-Respondents according to its wording is for recovery of possession of the property in dispute on the grounds of alleged irregularity in the conduct of the auction sale but I fail to see what justifiable claim Plaintiffs-Respondents have
20 against 3rd Defendant-Appellant in whose possession the property in dispute has been for so many years and who was not connected with the auction sale which they (Respondents) are seeking to set aside by order of Court.

30 Now touching on Exhibit "A" which prompted Plaintiffs-Respondents to institute this action the points need not be over-emphasized that apart from the fact that that judgment of a Native Appeal Court has not been accepted by the Supreme Court of the Gold Coast as a test case and therefore not appropriately citable it is also clear that the circumstances under which that judgment was given have no analogy to the issues of this claim.

40 In law the weakness of defence does not establish the claim of a Plaintiff and Plaintiffs-Respondents on whom the onus of proof laid having failed to support their claim with any acceptable evidence of any sort I strongly opine that no case was presented by them (Respondents) to have warranted the Court below calling on Defendants-Appellants to answer. But Defendants-Appellants rather gave straight forward and exhaustive details of the events culminating to the alienation of the property in dispute and supported their defence with the evidence of witnesses and documentary proofs. The frivolous contention of Plaintiffs-Respondents that no notice was served on them by 1st Defendant-Appellant under the terms of the deed of pledge

In the Asantehene's "A2" Native Appeal Court, Kumasi.

No.14.

Opinions of the Court and Judgment.
19th April, 1955

Kwasi Agyarko
- continued.

In the
Asantehene's
"A2" Native
Appeal Court,
Kumasi.

(Exhibit "E") was exposed by Defendants-Appellants tendering in evidence a copy of the notice (Exhibit "B") which was duly accepted without challenge as to its genuineness by either Plaintiffs-Respondents or the Court below in cross-examination.

No.14.

Opinions of
the Court and
Judgment.

19th April, 1955

Kwasi Agyarko
- continued.

Now the view held by the Court below in its summing up that 1st Defendant-Appellant did not seek an order of a Court for the foreclosure of the deed of pledge (Exhibit "E") before causing the pledge property to be sold by public auction and therefore the sale was illegal is considered preposterous in view of the cogent fact that Plaintiffs-Respondents did not base their contention for the nullification of the auction sale on the ground of the absence of such foreclosure order. It is abundantly clear from paragraph 2 of the pledge (Exhibit "E") which was accepted by the Court below to constitute a British mortgage that 1st Defendant-Appellant was not bound to seek a foreclosure order before the sale of the property in dispute by public auction but the Court below allowed itself to be influenced by this issue which was not on record before it and therefore arrived at an erroneous decision. 10 20

Furthermore the conduct of Plaintiffs-Respondents in transferring their interest in the forest adjoining the cocoa farm in dispute to 3rd Defendant-Appellant for £7 (seven pounds) after it had been transferred by a deed of sale by 2nd Defendant-Appellant to him (3rd Appellant) is an acquiescence on their (Respondents) part that they were satisfied with the sale of the cocoa farm in dispute by public auction and that they had no claim to recovery of possession from 3rd Defendant-Appellant who purchased it for value without notice from 2nd Defendant-Appellant who was the original purchaser at the auction sale. 30

I am therefore satisfied on all fours that the appeal which is properly set out must succeed.

Manwerekene.

BY MANWEREKENE (Member) -

40

I agree with the views expressed by Mr. Kwasi Agyarko.

Oyokohene.

BY OYOKOHENE (President) -

I also agree with the views expressed by Mr. Kwasi Agyarko.

JUDGMENT -

In view of the unanimous views expressed by the Members of the Court the appeal is allowed with costs to be taxed for Defendants-Appellants and 3rd Defendant-Appellant is by this decision declared the lawful owner of the property in dispute.

Kofi Poku II
OYOKOHEHE
PRES.

his
x
mark.

10 Recorder & W/Mark:
Enoch A. Kyerematen
REGISTRAR - 19/4/55.

In the
Asantehene's
"A2" Native
Appeal Court,
Kumasi.

No.14.

Opinions of
the Court and
Judgment.

19th April, 1955
- continued.

No. 15.

PRELIMINARY GROUNDS OF APPEAL

IN THE SUPREME COURT OF THE GOLD COAST
LAND COURT

KUMASI - ASHANTI

In the
Land Court

No.15.

Preliminary
Grounds of
Appeal.

23rd April, 1955.

In the Matter of -

20 1. Kojo Abrokwah
2. Kwabena Akromah, Plaintiffs-Respondents
-Appellants.

v.

1. Kwabena Frimpong
2. Kwasi Badu of Ahafo Manfo
3. Kwame Mensah alias Nana Akwamuhene
of Kumasi, Defendants-Appellants
-Respondents

APPELLANTS PRELIMINARY GROUNDS OF APPEAL

30 Ground 1 - That the decision of the Court below was otherwise erroneous and very most partial.

Ground 2 - That the judgment was against the weight of evidence.

Ground 3 - That the above-named case commenced its

No. 16.

ADDITIONAL GROUNDS OF APPEAL

(Title similar to No.15)

ADDITIONAL GROUNDS OF APPEAL

TAKE NOTICE that at the hearing of this appeal the Appellants will ask leave to argue the following grounds in addition to those already filed.

- 10
7. The Asantehene's Court "A2" misdirected themselves on the effect of Exhibit "E" a mere Promissory Note which conveyed no legal estate in the land.
 8. The Asantehene's Court "A2" misdirected itself in holding that a pledge of land can dispose of the legal estate in the land without first getting an order of Court to sell.
 9. The Asantehene's Court "A2" was wrong in setting aside findings of fact made by the trial Court.

20 DATED at La Chambers, Accra, this 23rd day of June, 1955.

N. A. Ollennu
SOLICITOR FOR PLAINTIFFS-
RESPONDENTS-APPELLANTS.

The Registrar,
Land Court,
Kumasi.

And to the above-named Defendants-Respondents-
Kumasi.

In the
Land Court

No.16.

Additional
Grounds of
Appeal.

23rd June 1955.

In the
Land Court

No. 17.

ARGUMENTS OF COUNSEL

Arguments
of Counsel.
15th July,
1955.

In the Supreme Court of the Gold Coast, Ashanti,
at the Land Court held at Kumasi on Friday the
15th day of July, 1955, before Quashie-Idun, J.

sic. Kojo Abrokwa & Another Respondents

v.

sic. Kwabena Frimpong & Others Appellants

Appeal against decision of Asantehene's "A2" Court.
Ollennu for Appellants.
Prempeh for Respondents.

10

By Court -

Respondents called upon to support the Judgment.

Prempeh agrees the document under which
property was sold is not a Deed of Mortgage but
submits that the documents give possession by sale.

The Plaintiff stood by and allowed the property
to be sold.

Mr. Ollennu -

20

Laches only applies where there is knowledge
of your right and sit by. Kwadjjo v. Cudjoe 1929-31
Divisional Court Reports page 21. Refers to Delor
v. Norli, W.A.C.A. 9th April, 1952.

Prempeh submits that if the Plaintiff has any
right it is for damages against 1st Defendant. No
claim can be maintained against 3rd Defendant.

No. 18.

No. 18.

Judgment.

JUDGMENT

15th July,
1955.

The facts in this case are not disputed. The
Plaintiffs mortgaged their property to the 1st
Defendant under a document which was admitted in
evidence as Exhibit "E". Although that document
gave the 1st Defendant power to sell the property
in default of payment of the loan, it is in law

30

an equitable mortgage which entitles the 1st Defendant to exercise the power of sale after obtaining an order of the Court, (see Asafu Adjei v. Chief Yaw Dabanka, 1 W.A.C.A. page 63).

The 1st Defendant sold the property without obtaining an order from the Court.

10 It is contended on behalf of the Respondent that the Plaintiff was guilty of laches. I do not agree. The Plaintiff sued for a declaration of title and for recovery of possession. The trial Native Court gave judgment for Plaintiffs. On appeal the Asantehene's "A2" Court allowed the appeal and reversed the judgment. The law is clear on the point as to whether an equitable mortgagee can sell the property without first obtaining an order of the Court, even if the document under which he sells gives the equitable mortgagee such power.

20 I think the judgment in Delor v. Foli, W.A.C.A. 9th April, 1952 has already dealt with the issue.

In my view the Native Appeal Court was wrong in reversing the judgment of the trial Native Court.

The appeal is allowed. The judgment of the Asantehene's "A2" Court is set aside and that of the trial Native Court restored. Costs for Appellants assessed at £15.9.6d. Appellants to have costs in the Asantehene's "A2" Court.

S.O. Quashie-Idun,
J.

In the
Land Court

No.18.

Judgment.

15th July,
1955

- continued.

30

No. 19.

NOTICE AND GROUNDS OF APPEAL

IN THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION - VICTORIABORG - ACCRA.

1. Kojo Abrokwa,
2. Kwabena Akromah, Plaintiffs-Respondents-
Appellants-Respondents

v.

1. Kwabena Frimpong
2. Kwasi Badu
40 3. Kwame Mensah alias
Akwamuhene, Defendants-Appellants-
Respondents-Appellants.

In the
West African
Court of Appeal

No.19.

Notice and
Grounds of
Appeal.

19th July, 1955.

TAKE NOTICE that the 2nd and 3rd Defendants-

In the
West African
Court of Appeal

No.19.

Notice and
Grounds of
Appeal.

19th July, 1955
- continued.

Appellants herein being dissatisfied with the whole Judgment of the Land Court, Kumasi, presided over by His Lordship Justice S.O. Quashie-Idun dated the 15th July, 1955, as stated in paragraph 2 - doth hereby appeal to the West African Court of Appeal upon the grounds set out in paragraph 3 and will at the hearing of the appeal seek the relief set out in paragraph 4.

And the Appellants further state that the names and addresses of the persons directly affected by the appeal are those set out in paragraph 5.

10

2. The whole Judgment of the Land Court, Kumasi.

3. Grounds of Appeal -

(a) That it is evident from the proceedings that the Respondents were satisfied with the sale of the disputed farm - because the Respondents who were in possession of the said farm during the period of the mortgage - themselves gave up and put the 2nd Defendant in possession thereof when the said farm was sold.

20

(b) That it is abundantly clear from the proceedings that the Respondents were satisfied with the sale of the disputed farm because after the sale thereof, and after the 2nd Defendant had to the Respondents' knowledge transferred his (2nd Defendant's) rights to the 3rd Defendant herein, the Respondents themselves further sold a portion of forest land adjoining this disputed farm to the 3rd Defendant - in order to enable the 3rd Defendant to extend his farm thereon.

30

(c) That since the Respondents voluntarily gave up possession of the disputed farm to the 2nd Defendant and sold the adjoining portion of forest to the 3rd Defendant, and since the Respondents admit that for fourteen (14) years they stood by and watched the 3rd Defendant spend money to improve the value of the said farm - it is contended that the Respondents are guilty of laches and are estopped from laying any claim now to this farm.

40

(d) That the Judgment is against the weight of the evidence.

4. The 2nd and 3rd Defendants-Appellants seek

that the whole judgment of the Land Court be reversed in their favour.

5. The persons directly affected by the appeal are:

- 1. Kojo Abrokwah
- 2. Kwabena Akromah
both of Manfo-Ahafo,
Goaso District of Ashanti.

DATED at Kumasi this 19th day of July, 1955.

Henry K. Prempeh
SOLICITOR FOR 2nd & 3rd
DEFENDANTS-APPELLANTS.

The Registrar,
West African Court of Appeal,
Accra.

And copies to:

The Plaintiffs-Respondents herein.

No. 20.

SUPPLEMENTARY GROUNDS OF APPEAL.

IN THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION - VICTORIABORG - ACCRA

Civil Appeal
No.

- 1. Kojo Abrokwa and
- 2. Kwabena Akromah, Plaintiffs-Respondents-
Appellants-Respondents.

v.

- 1. Kwabena Frimpong
- 2. Kwasi Badu and
- 3. Kwame Mensah alias
Nana Akwamuhene of
Kumasi. Defendants-Appellants-
Respondents-Appellants.

NOTICE OF INTENTION TO ARGUE ADDITIONAL OR
SUPPLEMENTARY GROUNDS OF APPEAL -
Rule 12(5) W.A.C.A. Rules, 1950.

PLEASE TAKE NOTICE that at the hearing of the

In the
West African
Court of Appeal

No.19.

Notice and
Grounds of
Appeal.

19th July, 1955
- continued.

No.20.

Supplementary
Grounds of
Appeal.

7th April, 1956.

In the
West African
Court of Appeal

No.20.

Supplementary
Grounds of
Appeal.

7th April, 1956
- continued.

appeal, the Appellants will ask Leave to argue the following Ground of Appeal, namely -

The transaction between the parties contained in or evidenced by the document Exhibit "E" was one governed by English Law (Not Native Customary Law of pledge) and the parties must be deemed to have agreed that their obligations thereunder was to be governed by English Law - Wherefore, the Native Court had no jurisdiction over the Suit -

10

(vide Asafu-Adjei v. Chief Yaw Dabanka, 1 W.A.C.A. p.63 and Section 7(1) Cap.80).

DATED at Azinyo Chambers, Accra, this 7th day of April, 1956.

(Sgd.) Henry Prempeh
SOLICITOR FOR DEFENDANTS-APPELLANTS.

TO THE REGISTRAR,
WEST AFRICAN COURT OF APPEAL,
VICTORIABORG, ACCRA

and

TO KOJO ABROKWA & KWABENA AKROMAH
THEIR SOLICITOR OR AGENT.

20

No.21.

Court Notes
of Argument.

9th April, 1956.

No. 21.

COURT NOTES OF ARGUMENTS

9th April, 1956.

In the West African Court of Appeal
Gold Coast Session

Coram Coussey, P., Korsah and Baker, JJ.A.

Kwasi Badu &c.

v.

Kojo Abrokwaah & Another

30

Prempeh for Appellants.

Ollennu for Respondents.

Prempeh applies leave to argue additional ground of appeal filed 9.4.56.

Leave granted.

Prempeh for Appellants --
Additional Ground -

If it is contended that this was an equitable Mortgage, then the parties agreed to be regulated by English law and the action should not have been instituted in the Native Court in the first instance. The ground was not taken earlier, but it goes to jurisdiction.

In the
 West African
 Court of Appeal

No.21.

Court Notes
 of Argument.

9th April, 1956
 - continued.

10 Moses Asafu Adjei v. Chief Dabanka 1 W.A.C.A. p.63.
 Section 7 Cap. 99.

We point out that claim is for declaration of title &c. and that the Native Court therefore had jurisdiction - In any event the Defendant waived the question of jurisdiction as it was not raised at first instance nor on appeal.

We refer to p.69 Woodroffes Procedure in India.

Prempeh refers to Gyamfi v. Kofi Nyame & Others.
 W.A.C.A. 15th June 1950.

The deed was an equitable mortgage in English form.

20 Ruling -- Although it is urged that the Agreement
 Exhibit A is an equitable mortgage, as to which we
 express no opinion at this stage, there was nothing
 before the Court of first instance from which it
 appeared that the parties expressly or by implica-
 tion agreed that they should be regulated by some
 law other than Native Customary law - This point
 was not raised at the trial or on first appeal and
 in our opinion it is one of those cases where the
 Defendant by submitting to jurisdiction of the
 30 Native Court forcing issue and going to trial on
 the merits has waived any objection thereto.

Prempeh -
Ground (b)

Native Appeal Court gave a reasoned Judgment
 which should not have been reversed by the Land
 Court.

40 Conceding an Equitable mortgage, there should have
 been a foreclosure action before sale. Even if
 sale irregular, Plaintiffs were estopped on ground
 which the Land Court did not deal with.

By inference Land Court held this was an equitable
 mortgage.

In the
West African
Court of Appeal.

No.21.

Court Notes
of Argument.

9th April, 1956
- continued.

Plaintiff was in possession of the farm until sale p. 5 line 29.

After sale, Plaintiff gave up possession although they said sale is irregular.

3rd Defendant in possession for 14 years - but Plaintiff says he knew sale was illegal. Saw 3rd Defendant improving farm p. 8 line 22 3rd Defendant had improved farm.

After sale, Plaintiff sold the adjoining forest land to 3rd Defendant, (although he did not take balance of purchase price from the auctioneer). 10

Assuming sale was irregular there has been complete acquiescence - Plaintiff sat by for 14 years leading 3rd Respondent to believe that Respondent had title. Judgment is that Plaintiff should take whole farm.

Court refers to Willmot v. Barber 10 Ch. Div. 96.

Ollennu -

Sale is not irregular. It is illegal, no title passed. 20

Exhibit "E" is not an equitable mortgage - a mere promissory note. No legal estate which 1st Defendant could convey to 3rd Respondent.

As to acquiescence, no evidence that 3rd Defendant spent money to improve land. Cocoa was planted before sale of land.

No improvement by Respondent.

Court refers to T. Ababio v. Chief Ebiassah Nov. - Dec. W.A.C.A. 1946 p. 74.

No.22.

Judgment.

9th April 1956.

No. 22.

JUDGMENT

30

In our opinion this appeal fails.

The Plaintiff pledged his land and the transaction was evidenced by a document which the Defendants-Appellants contend was an equitable mortgage. We are satisfied that it was not an equitable mortgage, there being no deposit of title deed, and it was not a legal mortgage. It follows that the property

was not vested in the pledgee so that he could exercise a power of sale, and transfer title ultimately to the 3rd Respondent without an order of the Court for sale or on Judgment which admittedly was not obtained.

10 In the circumstances, the doctrine of acquiescence is irrelevant to the issue. The Native trial Court was therefore right in decreeing that the Plaintiffs-Respondents should redeem the pledge for the sums decreed.

It is alleged that the 1st Respondent has purchased from the Plaintiff forest land adjoining the area pledged. This has not been proved, but if it is correct as to which we make no pronouncement we desire to make it clear that the Judgment of the Native trial Court relates only to the property in the Writ of Summons described.

The appeal is dismissed with costs £15.0.0.

20 (Sgd.) J.Henley Coussey,
P.

(Sgd.) K.A. Korsah,
J.A.

(Sgd.) Francis H.Baker,
J.A.

No. 23.

NOTICE OF MOTION FOR FINAL LEAVE TO APPEAL
TO HER MAJESTY IN COUNCIL

IN THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION - VICTORIABORG - ACCRA

30 1. Kojo Abrokwaah
2. Kwabena Akromah
Both of Manfo-Ashanti.
Plaintiffs-Respondents-
Appellants-Respondents.

v.

40 1. Kwabena Frimpong - Non Appellant
2. Kwasi Badu - Non Appellant
3. Kwame Mensah alias
Nana Akwamuhene, Defendant-Appellant-
Respondent-Appellant.

In the
West African
Court of Appeal

No.22.

Judgment.

9th April 1956

- continued.

No.23.

Notice of Motion
for Final Leave
to Appeal to
Her Majesty in
Council.

15th October,
1956.

In the
West African
Court of Appeal.

No.23.

Notice of Motion
for Final Leave
to Appeal to
Her Majesty in
Council.

15th October,
1956
- continued.

MOTION ON NOTICE

MOTION ON NOTICE by HENRY KWASI PREMPEH Counsel for the 3rd Defendant-Appellant herein for an Order for Final Leave to Appeal herein And for any further or other Order or Orders as to this Court may seem fit.

Court to be moved on Monday the 12th day of November, 1956, at 8.30 o'clock in the forenoon or so soon thereafter as Counsel for the Defendant-Appellant can be heard.

10

DATED at Aboadie Chambers Kumasi this 15th October, 1956.

(Sgd.) Henry Prempeh,
SOLICITOR FOR 3rd DEFENDANT-
APPELLANT.

THE REGISTRAR,
WEST AFRICAN COURT OF APPEAL
ACCRA,

and

COPY TO KOJO ABROKWAH AND KWABENA AKROMAH
PLAINTIFFS-RESPONDENTS BOTH OF MANFO-ASHANTI.

20

CERTIFICATE OF SERVICE

UPON the 7th day of November, 1956, at 3.35 p.m. and 4.50 p.m. copies of this Motion on Notice with the attached Affidavit were served by me on Kojo Abrokwaah and Kwabena Akromah the Plaintiffs-Respondents-Appellants-Respondents herein personally at Asuonyah and Manfo respectively.

(Sgd.) ? ?
Bailiff Grade II

30

8.11.56.

No.24.

Court Notes
granting Final
Leave to
Appeal to Her
Majesty in
Council.

19th November,
1956.

No. 24.

COURT NOTES GRANTING FINAL LEAVE TO APPEAL
TO HER MAJESTY IN COUNCIL

19th November, 1956.

In the West African Court of Appeal
Gold Coast Session:

Coram Coussey, P., Korsah, C.J., and Verity, Ag.J.A.
Civil Motion No.74/56.

Kojo Abrokwa &c.

v.

Kwabena Frimpong & Others

Motion on Notice by 3rd Defendant-Appellant
for final leave to appeal to the Privy Council.

Mr. Prempeh moves. All conditions observed and
Plaintiff-Respondent has been served with notice
of the application.

By Court -

10

Final leave as prayed.

Costs in cause £15.15/-.

(Sgd.) J. Henley Coussey,
P.

In the
West African
Court of Appeal

No.24.

Court Notes
granting Final
Leave to
Appeal to Her
Majesty in
Council.

19th November,
1956

- continued.

E X H I B I T SAppellant's Exhibits"E" - SECURITY FROM RESPONDENTS TO KWABENA FRIMPONG

"E"

WHEREAS WE the undermarked Kojo Abrokwa and Kwabena Akromah all of Manfro in the Kumasi District have this 11th day of March, 1939 received sic. the sum of Four__eleven shilling (£4.11/-) from Kwabena Frimpong of Abrepo village as loan in consideration for which We Hereby pledge the under-mentioned One (1) Cocoa farm to the said Kwabena 10 Frimpong as security against the said loan.

Security from Respondents to Kwabena Frimpong 11th March 1939.

1. We do hereby faithfully promise to pay the said sum of four__eleven shillings (£4.11/-) on or before the 30th day of November, 1939. sic.

2. Provided always and it is hereby agreed and declared that in default or failure to pay the said sum aforesaid on or before the time specified above it shall be lawful for the said Kwabena Frimpong to forfeit or sell and dispose of the cocoa farm hereunder described and deposited as security 20 either by Private or Public Auction after two (2) weeks Notice to us and if the amount realised at such sale shall not cover the said sum of four pounds eleven shillings (£4.11/-) it shall be lawful for the said Kwabena Frimpong to call on us for whatever balance that may be found due (deducting all expenses attendant to the sale).

3. We further agree to have no claim against the said Kwabena Frimpong should he exercise the Power hereinbefore contained in paragraph (2) above 30 mentioned.

4. Provided always and it is hereby agreed and declared that the Power of forfeiture and sale hereinbefore contained shall not be exercised unless and until default shall have been made in payment of the said sum of Four pounds eleven shillings (£4.11/-) on or before the time above specified.

5. In case of failure to pay the above mentioned sum of Four pounds eleven shillings (£4.11/-) at 40 the time specified, the said Kwabena Frimpong has the discretion to grant extension of time upon accepting any interest that may be due on the principal sum and upon payment of consideration.

In default of your so doing, I shall be compelled to exercise the Power of Sale vested in me by virtue of the sale Legal Deed of Document and sell all or any portion or portions of the premises sic. and hereditious therein pledged.

Yours truly,

(Marked) Kwabena Frimpong.

W/W to mark:

Kwaku Mensah

10 Lic. No.15314/40/K.

Kejetia Street Ksi.

Fee 3/- for 3 copies.

Appellant's Exhibits

"B"

Letter from Kwabena Frimpong to Respondents.

4th March 1940
- continued.

"C" - RECEIPT FOR PURCHASE MONEY.

Kwabena Frimpong & Kojo Abrokwa
and Kwabena Akromah

19th April, 1940.

"C"

Receipt for purchase money.

19th April, 1940.

20 RECEIVED from Kwasi Badu the sum of Twelve pounds ten shillings and nil pence being full settlement of one cocoa farm bought by Public Auction at Manfu in the above case.

(Sgd.) ? ? ?

LICENSED AUCTIONEER.

£12.10/-

Appellant's
Exhibits

"D"

Auctioneer's
Account of Sale.
20th April 1940.

"D" - AUCTIONEER'S ACCOUNT OF SALE

Account Sales of Property sold by Public Auction at Manfu in the District of Kumasi (Ashanti) in the Gold Coast Colony, on the 10th day of April, 1940, under Deed of Power of Mortgage dated the 11th day of March, 1939 in the suit of Kwabena Frimpong and Kojo Abrokwa and Kwabena Akromah.

Date of Sale	Quantity	Description of Property	Name of Purchaser	Amount Realized	
29/3/40	One	Cocoa Farm at Marfu	Kwasi Badu	£ 12.10. 0.	10
Auctioneer's Commission					
7% on £12.10.0. ...				17. 6d.	
Mileage from Kumasi to Marfu - 64 miles @ 1/- per mile on 29/3/40 and 19/4/40 Total 128 miles				£6. 8. 0d.	
				<u>7. 5. 6.</u>	
Net proceeds of sale				£ 5. 4. 6.	

I hereby declare that the above statement of sale is true and correct to the best of my knowledge and belief.

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Sworn at Kumasi this 20th day of April, 1940.

(Sgd.) ? ? ?

LICENSED AUCTIONEER.

Before me:

(Sgd.) ? ? ?

COMMISSIONER FOR OATHS.

Respondent's
Exhibit
"A"

Judgment of
Asantehene's
Court "A2" in
Kwabena Wusu
v. Kwabena
Frimpong and
Another.

22nd July 1954.

"A" - JUDGMENT OF ASANTEHENE'S COURT "A2" in
KWABENA WUSU v. KWABENA FRIMPONG & ANOTHER

Tendered by 1st Plaintiff, read, accepted
and marked Exhibit "A"

In the Asantehene's "A2" Court held
at Kumasi on Thursday 22nd July,
1954, before -

Nana Agyei Twum II, Akwamuhene
Nana Kwasi Brentuo IV., Manwerehene
Mr. G.K. Owusu, Member.

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Both parties present in person.

Views of the members of the Court -

By Mr. G.K. Owusu (Member) -

This is an appeal against the decision of the Kumasi Municipal Court "B1" to this Native Appeal Court. After careful scrutiny of the appeal record and the grounds of appeal and replies thereto I am of the opinion that the decision of the Court below is sound and should not be disturbed. It is clear on record that in consideration of a loan £50 plus £10 interest Plaintiff-Respondent and 2nd Defendant-Appellant entered into a legal mortgage (Exhibit "D") in which Respondent mortgaged the cocoa farm in dispute to 2nd Appellant. That after 2nd Appellant had given a month's notice (Exhibit "K") to Respondent of his (2nd Appellant's) intention to attach and sell the cocoa farms in dispute in satisfaction of the loan Respondent instituted civil action against 2nd Appellant in the District Magistrate's Court, Kumasi, in respect of the ex-orbitance of the interest paid by him (Respondent) which was being charged by 2nd Appellant at compound interest rate and a consent judgment was given by the trial District Magistrate for 2nd Appellant for £30.10/- instead of the £60 embodied in the mortgage. That not long after the entering of the consent judgment Respondent went to 2nd Appellant to pay the judgment debt of £30.10/- but 2nd Appellant refused to accept same on the grounds that he (2nd Appellant) had already caused the property in dispute to be sold at public auction under the terms of the mortgage and the property had since been sold and purchased by 1st Appellant who was the highest bidder. That being aggrieved

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by this conduct of 2nd Appellant this action was instituted by Respondent against Appellants for recovery of his cocoa farm in dispute. Now glean-
 ing from the appeal record it is abundantly clear that by both Respondent and 2nd Respondent consent-
 ing to the judgment of the District Magistrate's Court whereby the mortgage money of £60 was reduced to £30.10/-. it followed that 2nd Appellant was
 10 bound in law to claim recovery of the consent judgment debt of £30.10/-. by a legal process through the District Magistrate's Court which gave the judgment. If even 2nd Appellant sought to press recovery of the debt through the Deed of Mortgage after the consent judgment had been given by the District Magistrate's Court the legal process which 2nd Appellant was bound to have adopted was to have given a fresh one month's notice in writing of his (2nd Appellant's) intention to at-
 20 tach and sell the mortgaged property to Respondent. This vital legal process 2nd Appellant failed to pursue and this is tantamount to an irregularity which in itself is sufficient to deal a technical knock-out punch to the attachment and sale of the property in dispute. Furthermore it is clear from the face of the fresh attachment notice (Exhibit "J") which was filed by 2nd Appellant after the consent judgment of the District Magistrate's Court that there were irregularities committed by the Auctioneer which also contribute to the nullity of
 30 the attachment and sale of the property in dispute. The point need not be stressed that the attachment notice (Exhibit "L") originally advertised the property in dispute for sale at public auction on 11th September, 1940, but this date was subsequently altered to 24th September, 1940, without being initialled. Now in accordance with regulations governing the attachment and sale of property by public auction it is binding in law on an Auctioneer to prepare and file a fresh attachment notice
 40 allowing the appropriate period of the notice to elapse before the sale takes place if and when the original date fixed for the sale is postponed for any reason. But it is clear in this case that this authorized procedure was not adopted by the Auctioneer as the date fixed for the auction sale was only altered initialled on the face of the attachment notice (Exhibit "L"). This irregularity also added to render the attachment and sale of the property in dispute null and void as there is no
 50 evidence on record to prove that the proper and

Respondent's
Exhibit
 "A"

Judgment of Asantehene's Court "A2" in Kwabena Wusu v. Kwabena Frimpong and Another.

22nd July 1954
 - continued.

Respondent's
Exhibit
"A"

Judgment of
Asantehene's
Court "A2" in
Kwabena Wusu
v. Kwabena
Frimpong and
Another.
22nd July 1954
- continued.

legal procedure was adopted by auctioneer. In view of the foregoing reasons I am satisfied on all fours that the decision of the Court below is sound and should not be disturbed.

By Manwerehene (Member) -

I associate myself with the views expressed by Mr. G.K. Owusu that the decision of the Court below is sound and must be upheld and add that if 2nd Appellant had given due notice of his (2nd Appellant's) intention to attach and sell the property in dispute to Respondent after the consent judgment had been entered for him (2nd Appellant) I am convinced that the unpleasant sale of the property at public auction should not have taken place.

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By Akwamuhene (President) -

I also associate myself with the views expressed by Mr. G.K. Owusu and the Manwerehene that the decision of the Court below is sound and should not be disturbed and add that there are two major principles on which the issues of a suit is determined which are points of law and points of fact. After careful study of the appeal record it becomes evident that the issues of this case are based on points of law and the pertinent points of law having been propounded by the Court of first instance this Native Appeal Court in its appellate jurisdiction has no power to interfere with the decision. The appeal which lacks substance must therefore fail.

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JUDGMENT -

In view of the unanimous views expressed by the members of the Court the appeal is dismissed with costs to be taxed for Defendants-Appellants to pay to Plaintiff-Respondent.

K.A. Twum II,
Akwamuhene President.

Recorder & W/Signature:
Enoch A. Kyerematen,
Registrar.
22.7.54.