Appeal No. 25 *of* 1959

Kwame Mensah otherwise Nana Akwamuhene – – – *Appellant*

v.

Kojo Abrokwa and another – – – – – – *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JULY, 1961

Present at the Hearing
LORD HODSON
LORD GUEST
MR. L. M. D. DE SILVA
[*Delivered by* MR. L. M. D. DE SILVA]

The respondents instituted this action in the Kumasi West District Court against the appellant and two others for a declaration of title to and recovery of possession of a cocoa farm at Manfo in Ghana. That Court entered judgment for the respondents. On appeal the Asantehene's " A2 " Native Appeal Court set aside the judgment and dismissed the action. On an appeal from the judgment of the Native Appeal Court the Land Court restored the judgment of the Kumasi West District Court. On a further appeal to the West African Court of Appeal the judgment of the Land Court was affirmed. The present appeal is from the judgment of the West African Court of Appeal.

This case was decided by each of the Courts in Africa on the basis that the English law was applicable to the questions which arose. Counsel for the appellants sought to raise on this appeal certain points of customary law which he submitted was applicable. These points were not raised in the Courts in Africa and are not even mentioned in the " case for the appellant " filed in the proceedings before the Board. Their Lordships were not prepared to entertain them. They had not had the assistance of the views upon them of the Courts which have dealt with the case up to now.

On the 11th March, 1939, the respondents received a loan from one Kwabena Frimpong, the 1st defendant in the action (not an appellant in this appeal) and in respect thereof executed a document in the latter's favour in the following terms:

> " WHEREAS WE the undermarked Kojo Abrokwa and Kwabena Akromah all of Manfro in the Kumasi District have this 11th day of March, 1939, received the sum of Four——— (sic) eleven shilling (£4:11:0) from Kwabena Frimpong of Abrepo village as loan in consideration for which We Hereby pledge the undermentioned One (1) Cocoa Farm to the said Kwabena Frimpong as security against the said loan.
>
> 1. We do hereby faithfully promise to pay the said sum of four——— eleven shillings (£4:11:0) on or before the 30th day of November, 1939.
>
> 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 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 (£4:11:0) 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 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: 11:0) on or before the time above specified.

5. In case of failure to pay the above mentioned sum of Four pounds eleven shillings (£4:11:0) at 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."

The case for the appellant is that the respondents failed to make due repayment of the loan and that therefore the property was duly sold by auction by Kwabena Frimpong (1st defendant but not an appellant) in terms of the document set out in the previous paragraph and bought by one Akwasi Badu (the 2nd defendant, not an appellant) and that Akwasi Badu in turn sold the property to Kwame Mensah 3rd defendant who is the present appellant. On these alleged facts the appellant says he is the lawful owner of the property. The appellant also says that the respondents stood by for a long period without disputing the validity of the sale, that he must be held to have acquiesced in it and cannot now dispute it.

The respondent was not represented at the hearing of this appeal. It is necessary for their Lordships to examine whether the sale passed title and also the plea of acquiescence.

The validity of the sale was challenged in the Courts in Africa on more than one ground. Their Lordships find it necessary to examine here only one ground because on an examination of that ground they have formed the view that no title passed upon the sale. Counsel for the appellant was constrained to admit that, whatever may be the proper description in law of the transaction effected by the document set out above, there could be no effective sale if the notice stipulated by it was not given. There was an issue between the parties as to whether or not such notice had been given. The evidence given involved a direct conflict between the respondents (1st respondent alone gave evidence) who said they had not been given notice and the evidence of witnesses called by the appellant and of the appellant himself to the effect that it had. The trial Court which saw and heard the witnesses held that no notice had been given. It quite rightly rejected the argument that the acceptance in evidence of a copy of an alleged notice was " proof that the notice was served " and found that there was no proof that it had been served. Their Lordships have examined the evidence upon which it was sought to establish that notice had been served and have no hesitation in coming to the conclusion that the view of the trial Court was correct. Some adverse comment was made by the Native Appeal Court but their Lordships do not think this comment affords good reason for disturbing the view of the Native Court. The Land Court and the West African Court of Appeal while upholding the respondents' claim said nothing upon the point.

Upon the conclusion arrived at by their Lordships in the previous paragraph no title passed on the sale. An argument which found favour with the Native Appeal Court (but not adopted by the Land Court or the West African Court of Appeal) was that the failure to give notice was an " irregularity " with regard to which the respondent had to take certain prescribed steps before he could challenge the sale. This argument is unsound. The giving of notice was an essential step and failure to give notice rendered the sale a nullity.

Their Lordships will next examine the question of acquiescence. The appellant has been in possession for a long period without legal proceedings being taken against him. This fact is no doubt relevant but not conclusive. It is common ground that no law of limitation is applicable in the territory concerned.

The appellant's argument that there was acquiescence is based on an assumption of facts which in their Lordships' opinion have not been established. It is said that the respondents stood by for a long period without disputing the appellant's right to the land and allowed him to effect improvements in the belief that he was the true owner.

In the first place the first respondent (who alone gave evidence on behalf of the respondents) stated in evidence that after the sale he raised questions about its validity with the first defendant (not an appellant) and the first defendant in evidence admitted that the first respondent told him he had not received " the required notice ". It does not appear from the evidence that the fact of this incident became known to the other defendants although it is not improbable that it did. But it eliminates the possibility of suggesting that the respondents were guilty of any fraud or that they deliberately kept quiet so as to give the defendants the impression that all was well in order to see what they could get by doing so.

Next it is to be observed that neither the third defendant nor the second defendant said that the respondents had stood silently by without raising any questions. This is the least they should have done if they wish to assert that the respondents had stood by silently. The appellant did say that " they (meaning the respondents) did not disturb my possession of the farm ". This refers to some sort of physical disturbance. The absence of such disturbance is not sufficient to establish a case for the appellant on the facts. It is true that the respondents themselves did not say affirmatively in evidence that they had raised questions with the defendants and had not stood silently by. But it is clear that in the trial court no question of acquiescence or resembling acquiescence was raised. The respondents could not be expected in these circumstances to do otherwise than they did.

It is usual and proper practice for a defendant to put his case to the plaintiff in cross-examination. No question was asked of the first respondent (who alone gave evidence for the respondents) suggesting the respondents had stood by. In a proceeding in a Native Court too much importance cannot be attached to the failure to observe a point of practice. But apart from any technical consideration of proper practice it would have been reasonable in this case for the appellant to have done so if he wished to establish upon the facts that the respondents stood by.

It is urged for the appellant that the respondents voluntarily gave up possession. There is no evidence of this. They were in possession till after the sale. It is stated in the case for the appellant that " there is no direct evidence of precisely how or when the plaintiffs gave up possession of the farm to the purchaser ". That statement is correct and it cannot be said that the respondents (plaintiffs) voluntarily gave up possession.

Their Lordships do not find it necessary to discuss certain submissions of law made by the appellant on the question of acquiescence because on the views expressed by them in the immediately preceding paragraphs they are of opinion that the facts upon which those submissions would be relevant have not been established.

For the reasons which they have given their Lordships will report to the President of Ghana as their opinion that this appeal ought to be dismissed and that no order as to the costs of this appeal ought to be made, as the respondents were not represented at the hearing of the appeal.

(83304) Wt. 8233/71 100 8/61 Hw.

In the Privy Council

KWAME MENSAH
OTHERWISE NANA AKWAMUHENE

v.

KOJO ABROKWA AND ANOTHER

DELIVERED BY MR. DE SILVA

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