GHASSOUB AND GHASSOUB v. SASRAKU

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

24 TH JULY, 1961

CORAM: LORD DENNING, LORD MORRIS OF BORTH-Y-GEST AND THE RT. HON. MR. L. M. D. DE SILVA

Customary law | Whether stool land is saleable in Ashanti | Alleged sale of land by sub-stool | Whether with knowledge and consent of paramount stool.

Practice and procedure | Whether conclusion on point of customary law reached by both Land Court and Supreme Court can be challenged in Privy, Council | Whether issues not advanced in lower courts can be canvassed before Privy Council | Whether findings of lower courts on question of fact should be disturbed.

CASE SUMMARY

The plaintiff-respondent, a family—company, alleged that by customary law, a portion of stool land in Ashanti, of approximately eight square miles in area, was sold absolutely to the plaintiff family by the Chempaw stool and that such sale was with the knowledge and consent of the paramount stool of Kokofu. It was alleged that guaha had been performed and three documents, the earliest dated the 23rd December, 1927 were tendered as evidence of that fact.

In 1956, the defendants-appellants, who traded in partnership as Naja David Sawmill Co. entered upon the plaintiff's land to fell trees in pursuance of a timber felling agreement made between them and the Kokofu stool on the 30th October, 1953, whereupon the plaintiff family instituted these proceedings for, inter alia, declaration of title. Nana Osei Assibey III, representing the Kokofu stool was joined as co-defendant and in the result the main contestants were the plaintiff family and the co-defendant.

The main issues raised at the trial were whether stool land in Ashar is saleable at all, and if it is, whether the land in dispute had been sold to the plaintiff family with the knowledge and consent of the co-defendant, i.e. the paramount stool.

In the Land Court, Sarkodee-Adoo, J. found that the evidence overwhemingly supported the contention that land is saleable in Ashanti and that the plaintiff family was "in possession of the said land as owners thereof by right of purchase under an

absolute sale by guaha from the stool of Chempaw with the knowledge and consent of the Paramount Stool of the Kokofu state". This judgment was substantially affirmed by the Court of Appeal.

Before the Privy Council it was contended on behalf of the appellants that it was not proved that the land was sold with the knowledge and consent of the paramount stool, and, even if it was, the sale was invalid because it offended against the provisions of the Concessions Ordinance in force at the date of the sale.

Held.

(1) it is unnecessary to express any view in regard to the interpretation or applicability of the Concessions Ordinance as it would be inappropriate at this stage to deal with issues not previously advanced and in regard to which the Board does not have the benefit of the opinions of the Land Court and the Court of Appeal;

(2) the evidence showed that the plaintiff company had been in undisturbed possession for over twenty years, that they had kept the boundaries cut and the boundary marks clear, and that they had paid neither tribute, rent nor tolls. It was also known that the former Omanhene of Kokofu and the Odikro of Chempaw had collaborated in selling lands. The findings of the Land Court and the Court of Appeal that the sale was with the knowledge and consent of the paramount stool were in these circumstances reasonable and permissible and should not be disturbed.

Judgment of the Court of Appeal affirmed.

NATURE OF PROCEEDINGS

APPEAL (No. 38 of 1960) from a judgment of the Court of Appeal (van Lare, Ag. C.J., Granville Sharp, J.A. and Ollennu, J.) delivered on the 12th January, 1959, (reported sub nom. Sasraku v. David at [1959] G.L.R.7) affirming the judgment of Sarkodee-Adoo, J. in the Land Court, Kumasi delivered on the 17th December, 1957 in an action for inter alia, declaration of title to land.

JUDGMENT OF LORD MORRIS OF BORTH-Y-GEST

Lord Morris of Borth-y-Gest delivered the judgment of their Lordships. This case concerns certain lands approximately eight square miles in area which formed part of a much larger area of land in Chempaw. The original plaintiff in the action sued as the head and representative of a family company of Teshie people (hereinafter called the plaintiff family company) and claimed that his family company had become the owners of the lands (the eight square miles) in or about the year 1925. The original plaintiff died in the course of the proceedings and the respondent was substituted in his place. The respondent representing the plaintiff family company claimed that the lands (consisting of three adjoining pieces of land) were sold by the stool of Chempaw. The stool of Chempaw is a sub-stool to the Paramount Stool of Kokofu. Kokofu is within what was, prior to 1957, the colony of Ashanti. The respondent (representing the plaintiff company) further claimed that the sale had been with the

knowledge and consent of the Paramount Stool of Kokofu and that his family company had been in possession ever since they had purchased.

At the time when the plaintiff family company claimed to have purchased the lands, the Omanhene of Kokofu was Nana Kofi Adu. But in the year 1951 he was destooled for selling lands. His successor, who was enstooled the same year, was Nana Osei Assibey III. He gave evidence at the trial and said that at the time of his enstoolment he was told that three pieces of land at Chempaw had been sold. He had sent for the family company: they attended and told him that they had bought the land by outright sale by guaha. In the course of his evidence while referring to the destoolment of Nana Kofi Adu he also said that "The Odikro of Chempaw was similarly destooled for selling stool lands in collaboration with Nana Kofi Adu."

The action arose out of certain events which took place early in 1956. A member of the plaintiff family company who was a headman of a village on the lands in question was working on his farm when he heard the noise of the felling of trees. He went to investigate and saw a caterpillar-machine. It had, he said, "cut a sway the right through from Chempaw over our boundary into our land". He said that they (the plaintiff family company) had kept the boundaries of their land cut. He saw a young man with an axe cutting a mahogany tree. Enquiries revealed that those who were engaged in the process of felling trees (certain persons trading in partnership as Naja David Sawmill Company) were doing so pursuant to rights which they claimed were given to them under a timber felling agreement made by them with Nana Osei Assibey III and his elders, representing the Kokofu State, on the 30th October, 1953. By that agreement the Sawmill Company were to be entitled upon stipulated terms to cut down certain prescribed numbers of trees of defined species during a certain period. The trees could be felled within the area of Chempaw lands. That was an area of approximately forty square miles which included the lands (approximately eight square miles in area) which the plaintiff family company claimed that they had. acquired in or about the year 1925. Not unnaturally the plaintiff family company through their head and representative brought proceedings to protect what they alleged were their rights. They claimed an injunction to prevent the Sawmill Company from trespassing on their lands. The Sawmill Company were not in a position either to admit or to deny that the plaintiff family had acquired the lands which they claimed but put them to strict proof that the land which they claimed was sold to them with the knowledge and approval of the stool of Kokofu. As the Sawmill Company could only rely upon the rights given to them by their agreement of the 30th October, 1953, the reasonable course was followed of joining Nana Osei Assibey III (representing the stool of Kokofu) as a co-defendant. In the result the main contestants were the plaintiff and the co-defendant.

The claim which was presented by the plaintiff was that "by native custom evidenced by documents dated the 23rd of December 1927, 4th day of August 1934, and 12th day of April 1935 respectively" the lands were sold absolutely to the plaintiff family by the stool of Chempaw and that such sale was with the knowledge and consent of the Paramount Stool of Kokofu. In addition to the claim for an injunction the plaintiff claimed a declaration of his title to the ownership of the lands. It was said that the sale had been by the native custom of guaha performed between the plaintiff and the representatives of the stool of Chempaw and that the plaintiff's title depended upon

that native custom. The three documents above referred to were not relied upon save as constituting evidence that the native custom of guaha had been performed. The case proceeded on the assumption made by all concerned (but now said by the respondent to have been erroneously made) that the documents could not in any further way be relied upon because of the provisions of the Concessions Ordinance. (Mr. Franklin now submits that the Concessions Ordinance1 did not apply and was not in force in Ashanti at the relevant time and he further submits that the relevant Ashanti Ordinances2 should not be so construed as to be applicable to the three documents.)

The claim of the plaintiff was that from at least the dates of the above mentioned documents his family had been in possession of the lands and that such possession had been adverse to any stool claims: that the plaintiff had established sixteen villages on the land and had cut and kept cut the boundaries of the land and that no Chempaw or Kokofu man had lived on the land for twenty years or more before 1956.

The co-defendant raised a number of issues in his defence. Prominent amongst them was the following:

"The co-defendant says that the existing custom prevailing in Ashanti and which also prevails at Kokofu is that stool lands are not sold, and that no portion of the Kokofu stool land has ever been sold by the Kokofu stool to anyone,"

When the co-defendant was giving evidence he said that his defence to the action was two-fold: (1) the land is not saleable in Ashanti and (2) that the land in question was sold to the plaintiff's family by the Odikro of Chempaw without the knowledge or consent of the then Omanhene of Kokofu, Nana Kofi Adu. He regarded the first of those as the more important.

A consideration of the proceedings in the Supreme Court and in the Court of Appeal leads to the conclusion that the issue which was regarded as of major consequence was the issue as to whether the lands in question had been saleable at all. The issue as to knowledge and consent appears to have commanded a subordinate measure of attention. The fact that it was known, as testified by the co-defendant, that both the former Odikro of Chempaw and the former Omanhene of Kokofu had been-respectively destooled because they had collaborate in selling stool lands may have made it difficult to challenge any evidence (the on us for giving which was on the plaintiff) tending to prove that the alleged sales were with the knowledge and consent of the former Omanhene of Kokofu.

Evidence was given at the hearing of the action that the ceremony of guaha had been performed but this evidence did not include any positive evidence that any representative of the paramount stool was present. The co-defendant maintained that the land in question was not saleable. He said that the plaintiff's family company had never paid any tribute or rent and that though during the years after his enstoolment he had sent for them they had refused to come to terms with him.

The action in the Supreme Court (Land Court) was heard by Sarkodee-Adoo, J. He considered that the evidence overwhelmingly supported the contention that land was saleable in Ashanti. He said:

"I find that the plaintiff's company is in possession of the said land as owners thereof by right of purchase under an absolute sale by guaha from the stool of Chempaw with the knowledge and consent of the Paramount Stool of the Kokofu State".

He held that the plaintiff was entitled to a declaration of title and to an injunction. The co-defendant had counterclaimed for a declaration of title, for recovery of possession and for damages for trespass. The counterclaim was dismissed. The defendants and the co-defendant appealed to the Court of Appeal (van Lare, Ag. C.J., Granville Sharp, J.A. and Ollennu, J.) who subject to certain observations as to the nature of the plaintiff's rights in regard to the land and subject to a revision of the order for costs, dismissed the appeal. Summarising the main issues Granville Sharp, J.A. said in his judgment:

It could not be questioned on the evidence that the three purported sales relied upon by the plaintiff had in fact taken place and it was not seriously disputed that guaha had been performed on each occasion. The evidence upon these matters was all one way. There remained only the issues as to whether land in Ashanti was alienable by sale and if so, whether the sales here in question were carried out without the knowledge and consent of the co-defendant the paramount stool over the vendor stool, the Chempaw."3

He said that though there had been ten grounds of appeal they had not all been argued and that the arguments presented raised the three main themes: — (a) that the sales by custom of guaha were not proved, (b) that it was not proved that the sales were made with the knowledge and consent of the paramount stool, the co-defendant, and (c) that sale of land in Ashanti is no possible under native custom. The Court of Appeal rejected all these contentions. In the course of his judgment (with which van Lare, A.g. C.J. and Ollennu, J. agreed) Granville Sharp, J.A. said:

"There was evidence that the Omanhene had in fact assented to other sales of lands in the locality and it was proved that certain destoolment charges against him to which he made no answer, included complaints in respect of such sales. Two important facts emerged in the course of the evidence. In relation to the first and the third sales, the documents are witnessed by the linguist to the Omanhene of Kokofu which signature is binding on the Omanhene, and it would be unlikely that he could have been in ignorance of the intervening sale, though no signature affecting him appears on the relevant document. The three sales were of contiguous parcels of land comprising in all an area of some eight (8) square miles.

These portions had, at the date of the objection raised by the later occupant of the stool, been occupied by the plaintiff family company for periods varying between 20 and 30 years. The whole area had been clearly demarcated and the boundary cuts and marks had, it appears, been meticulously kept and cleared. Even if it could not be said, as I hold it could, that on this evidence the learned judge was correct in finding knowledge and consent on the part of the Kokofu stool, the facts clearly

constitute proof of such laches and acquiescence on the part of the stool as would render it inequitable to interfere with the plaintiff in occupancy of the land, and still less so if it should be in the interest of the Sawmill Company whose felling agreement is in the most general terms and would seem to grant them carte blanche to wander over the whole length and breadth of the Kokofu stool lands and fell wherever they encountered fellable timber, this to the extent of thousands of trees."4

The Court of Appeal appear to have been in error in thinking that the third document was witnessed by the linguist to the Omanhene of Kokofu (though the first seems to have been) and Mr. Franklin for the respondent did not desire to support any contention that if the signature of such linguist appears on the first of the documents the knowledge and consent of the Omanhene ought from such circumstance to be inferred.

Before their Lordships' Board it was recognised by the appellants that both the Land Court and the Court of Appeal had decided that land in Ashanti was alienable and it was not sought to challenge such conclusion. In his careful argument on behalf of the appellants Mr. Jayawardena submitted firstly that it had not been proved that any of the sales were made with the knowledge and consent of the Paramount Stool of Kokofu and secondly that even if they were, they were invalid because they offended against the provisions of the Concessions Ordinance which was in force at the date of the sales by guaha. In regard to the latter submission their Lordships observe that it was not advanced either in the Land Court or in the Court of Appeal and that it finds no place in the grounds of appeal contained in the notice of appeal to the Court of Appeal. It follows that the judgments contained neither mention of the submission nor any observations in regard to it. Mr. Franklin while urging that the submission was misconceived was content that it should be advanced. He was the more content because he sought in turn to contend that the declaration of title pronounced in his client's favour ought not to bear the limitations referred to in the judgment of Granville Sharp, J.A. in the Court of Appeal. He sought so to contend on the basis that the three documents above referred to possessed more than evidentiary value and that it was only because of a mistake as to which was the relevant Concessions Ordinance that it had been assumed that the documents were themselves valueless save as evidence of the performance of guaha. It is to be observed, however, that the respondent had not sought any leave to appeal or to cross-appeal against the judgment of the Court of Appeal.

Their Lordships do not consider that it would be appropriate at this stage of the litigation to embark upon new enquiries or to deal with issues not previously advanced and in regard to which their Lordships do not have the benefit of the opinions of the Land Court or the Court of Appeal. Accordingly their Lordships find it unnecessary to express any view in regard to the interpretation or the applicability of the Concessions Ordinance to which both learned counsel referred.

Mr. Jayawardena's submission that it was not proved that the sales to the plaintiff family company had been with the knowledge and consent of the Paramount Stool of Kokofu merits careful consideration. Mr. Franklin submitted the contrary. He contended in the alternative that if such knowledge and consent had been lacking the result would have been that the sales were voidable but not void and he contended

that they had not been avoided. He further contended that in any event the appellant Nana Osei Assibey III was "estopped by laches amounting to acquiescence".

The fact that at the trial the issue that was regarded as of dominant consequence was the issue as to whether land in Ashanti was saleable may well have induced a certain economy in the measure of the attention devoted to the evidence establishing the knowledge and consent of the Paramount Stool. Their Lordships have, however, come to the conclusion that it has not been shown that the findings of the Land Court and the Court of Appeal ought to be disturbed. Before any dispute arose the lands in question had been occupied by the plaintiff family company for periods of between twenty and thirty years. After the purchase by the plaintiff family company no Kokofu man had claimed the lands. According to the evidence the plaintiff family company had kept the boundaries of the land cut, They had kept boundary marks clear. They had not paid any tribute. They had not paid rents or tolls. It was known that the former Omanhene had in fact assented to other sales of land. Indeed it was known that he and the Odikro of Chempaw had collaborated in selling lands. By reason of these various circumstances it was reasonable and permissible for the courts to infer and to arrive at the conclusion that there had been knowledge in the consent by the Paramount Stool. Having reached this conclusion their Lordships find it unnecessary to express any views in regard to the alternative contentions advanced by the respondent.

DECISION

Their Lordships will therefore report to the President of Ghana as their opinion that the appeal should be dismissed and that the appellants should pay the costs.

COUNSEL

W. JAYAWARDENA AND MISS D. PHILLIPS FOR THE APPELLANTS.

H. V. A .FRANKLIN AND T. O. KELLOCK FOR THE DEFENDANT.