NII AMON KOTEI v. ASERE STOOL

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 | Stool land | Proof of paramount title | Nature of usufructuary right in possession.

CASE SUMMARY

The plaintiff-appellant as head of the Nikoi Olai family claimed certain land, hereinafter called the Mukose land, as part of the ancestral property of his family. In 1947, members of the Abbetsewe family, who, qua family had no rights in the land whatsoever, purported to sell the Mukose land to a Lebanese trader by deeds of conveyance which were consented to by the Asere Mantse, whereupon on the 20th April, 1948, the head of the Nikoi Olai family brought a successful action before Jackson, J. against the members of the Abbetsewe family claiming damages for trespass and an injunction restraining them from selling the land. In his judgment, Jackson J. also condemned the Asere Mantse (who was joined as defendant by the learned judge's direction) for consenting to the sale of the land, but he made it clear in his judgment that he regarded the Nikoi Olai family as subjects of the Asere stool and refused to grant declaration that the Mukose land was the ancestral land of that family. He based this finding on evidence that the Asere stool had placed headmen on the land, that these headmen permitted strangers to farm on that land and collected tolls from them which the headmen paid over to the Asere Mantse. He limited the rights of the Nikoi Olai family by declaring that "as subjects of the Asere stool they possess rights of farming in the area, subject only to such rights as may have been granted to strangers for farming by the Asere Mantse or are possessed by other subjects of the Asere stool".

The plaintiff's appeal to the West African Court of Appeal was dismissed with costs, but, in the opinion of the Board, that court made two errors of reasoning (which were admitted by counsel for the Asere stool), in view of which it could not be said that there were two concurrent findings that the Mukose lands were Asere stool land

The plaintiff relied before the Privy Council on an earlier decision of Jackson, J. between his family and the Asere stool which decided their rival claims for

compensation following compulsory acquisition of part of the same land for a wireless station. Since the plaintiff's family were found to be in possession as owners of seven-eights of the land, and the Asere Mantse was granted compensation for only the remaining one-eighth, it was contended that this amounted to a res judicata that the Nikoi Olai family were absolute owners of the Mukose lands.

The issues for determination by the Privy Council therefore, were (1) whether the Asere stool had paramount title to the Mukose lands, and (2) if it did, what was the nature of the estate or interest, if any, of the Nikoi Olai family in the said lands.

Held:

(1) The Asere stool had paramount title to the Mukose lands. In the wireless station case Jackson, J. had found that although the Nikoi Olai family were owners in possession of seven-eighths of the land, their rights were subject to the paramount title of the Asere stool. Further, in the present case the evidence given of the payment of tolls to the Asere stool and the recognition of headmen in the villages is sufficient proof of the paramount title;

(2) on the evidence the Nikoi Olai family had a usufructuary interest in the land subject to the paramount title of the Asere stool, because

(i) the Nikoi Olai family were the original founders of the village of Mukose, the land was occupied for many years by members of that family, and farms have been maintained by descendants of the old settlers; and

(ii) the Nikoi Olai family have successfully asserted their estate in the land in other litigation and it cannot be said that they have ever abandoned their rights.

(3) customary law in Ghana is developing so rapidly that it is wrong to limit the rights of the plaintiffs as Jackson, J. did. A usufructuary right in possession is now an estate or interest in the land which the subject can alienate, use and deal with as his own, so long as he does not prejudice the rights of the paramount stool to its customary services.

Judgment of the West African Court of Appeal varied.

NATURE OF PROCEEDINGS

APPEAL (No. 31 of 1959) from a judgment of the West African Court of Appeal (Foster-Sutton, P., Coussey and Hearne, JJ.A.) delivered on the 4th March, 1955 (unreported) affirming the judgment of Jackson, J. delivered in the Land Court on the 22nd November, 1951, wherein he refused a declaration sought by the plaintiff that certain land was the ancestral property of his family. The facts, which are set out in the headnote are taken from the judgment of the Privy Council.

JUDGMENT OF LORD DENNING

He reviewed the facts and earlier proceedings set out in headnote, and continued:] The first point to be considered is whether the Nikoi Olai family are entitled to these 900 acres of land as their ancestral property or whether it is Asere stool land. Upon this point the Nikoi Olai family relied greatly upon an earlier case decided in 1948 by the same judge, Jackson, J. It was a case where a piece of land was required for a wireless station. It was part of these Mukose lands. The government had acquired it. The compensation had been assessed by Korsah, J. But the question was: to whom was the compensation payable? The rival claimants were the Nikoi Olai family and the Asere Mantse. Jackson, J. held that the Nikoi Olai family were the parties in possession of seven-eighths of the area as the owners thereof and, as such, were entitled to receive compensation for seven-eights of the area of the land; but that in respect of the remaining one-eighth the Asere Mantse was entitled to receive compensation for that portion. The Nikoi Olai family asserted before their Lordships that this amounted to a res judicata adjudging that they were the absolute owners of the Mukose lands as their family lands free from any rights of the Asere stool. Their Lordships cannot so regard it. Although Jackson, J. found that the Nikoi Olai family were owners in possession of seven-eighths he also found that their rights were subject to the paramount title of the Asere stool; and on that account the Nikoi Okai family had no "right to alienate without the consent of the paramount stool".

In the present case Jackson, J. came to a similar conclusion. He held that the Mukose lands were Asere stool lands. He based this finding on evidence that the Asere stool had placed headmen on the land; that these headmen permitted strangers to farm upon that land and collected tolls from them; and the headmen paid these tolls over to the Asere Mantse. Their Lordships have examined this evidence and are of opinion that it supports the judge's finding that "the tolls collected were paid by the collector to the Asere Mantse". It was said by Mr. Davies that, even if this were so, it does not warrant the inference that it was Asere stool land. The tolls were only paid by strangers and they may have been paid, not for the use of the land itself, but as a recognition of the political jurisdiction of the Asere Mantse. Their Lordships cannot accept this view. It seems clear upon the evidence that these strangers paid the tolls for the use of the land.

The West African Court of Appeal affirmed the decision of Jackson, J. but their Lordships feel bound to notice that they seem to have made two slips in their reasoning. They seem to have been under the impression that the compensation was awarded according to the rights of the parties in the whole land, that is, as to seven-eighths to the Nikoi Olai family for their possessory right to the whole, and as to one-eight to the Asere stool for their right to manage and control the land and receive tolls. But Mr. Dingle Foot felt bound to concede that the compensation was not divided on that basis. Nor indeed could it be. The only persons entitled to compensation were "the parties in possession of such lands as being the owners thereof". It was therefore a necessary finding by Jackson, J. in the wireless case that the Nikoi Olai family were entitled in possession as being the owners of seven-eighths of the land. There was another error made by the West African Court of Appeal. They relied on the evidence of one Djani Kofi in an earlier case, which had been specifically excluded. And Mr. Dingle Foot felt obliged to admit this. In view of these errors made by the West African Court of Appeal, it cannot be said that there are two concurrent findings that these lands were Asere stool lands.

In these circumstances it is open to their Lordships to consider the evidence adduced before Jackson, J. in the present case; and they find there was sufficient evidence on which he was entitled to find, as he did, that the Mukose lands were Asere stool lands, in this respect, that the Asere stool had a paramount title. The payment of tolls to the Asere stool and the recognition of headmen in the villages is sufficient proof of such a paramount title in the stool. Nevertheless there was a great deal of evidence to show that, subject to the paramount title of the Asere stool, the Nikoi Olai family had an estate or interest in the Mukose lands. The crucial findings on this point are these:

(i) The Nikoi Olai family were the original founders of the village of Mukose: and the land in issue was occupied very many years ago by members of the Nikoi family. Much of it has been used exclusively by members of that family (hence the seven-eighths area for which they obtained compensation for the wireless station). But some of it has been used by strangers by the permission of the headmen and in respect of land so occupied by strangers, tolls have been paid to the Asere stool (hence the one-eighth area for which the Asese stool received compensation). It is true that the village of Mukose was abandoned in 1926 but farms have been maintained by the descendants of the old settlers. "I am satisfied", said Jackson, J. in the wireless case, "that the Nikoi Olai family formerly occupied the major portion of the land . . . and have since their first settlement . . . enjoyed all the rights of owners in possession",

The Nikoi Olai family have asserted their estate or interest in the land successfully, not only in the claim for compensation, but also in the proceedings against the Abbetsewe family. Furthermore, the head of the family gave evidence that he inspected the land from time to time and asserted their title against anyone who was there. "I used to go and inspect the land and if I saw anyone there, I asked him how he got there".

(iii) In the light of this evidence, it cannot be said that the Nikoi Olai family have abandoned their rights. It is true that the village of Mukose was abandoned and fell into ruin but there is nothing to warrant the suggestion that the family ceased to have anything to do with the land such as to warrant the inference of abandonment. Indeed, they have vigilantly upheld their rights.

What was the nature of this estate or interest in the land? There was no evidence on this point. Jackson, J. seems to have thought it was a right of farming with no right to alienate except with the consent of the paramount stool. Hence his declaration that "as subjects of the Asere stool they possess rights of farming in the area". In this he no doubt had in mind the evidence which he had heard earlier in 1951 in cases about the Kokomlemle lands. But their Lordships would point our that the findings in the Kokomlemle cases depended entirely on the evidence in those cases: and must not be taken to be determinations of law which are of general application. Their Lordships have been referred to a series of decisions in the Land Court in recent years, affirmed on occasions by the Court of Appeal, from which it appears that the usufructuary right of a subject of the stool is not a mere right of farming with no right to alienate. Native law or custom in Ghana has progressed so far as to transform the usufructuary right,

once it has been reduced into possession, into an estate or interest in the land which the subject can use and deal with as his own, so long as he does not prejudice the right of the paramount stool to its customary services. He can alienate it to a fellow-subject without obtaining the consent of the paramount stool: for the fellow-subject will perform the customary services. He can alienate it to a stranger so long as proper provision is made for commuting the customary services. On this death it will descend to his family as family land except in so far as he has disposed of it by will, which in some circumstances he lawfully may do. The law on the subject is developing so rapidly that their Lordships think it wrong to limit the right of the plaintiffs in the way that Jackson, J. did.

Their Lordships will accordingly report to the President of Ghana that in their opinion the declaration made by Jackson, J. and affirmed by the West African Court of Appeal should be varied so as to grant to the plaintiffs a declaration that they possess such rights in the area edged in green, on the plan, exhibit 1, as are conferred by law on a subject of a stool who is in possession. But inasmuch as the plaintiffs have not succeeded in their claim to be absolute owners free of the Asere stool altogether, and thus have in part failed but in part succeeded, their Lordships will report to the President of Ghana that in their opinion no order should be made as to the costs of this appeal and that the order for costs made by the West African Court of Appeal should be set aside, leaving each party in that court also to pay his own costs.

COUNSEL

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