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36, 1961

IN THE PRIVY COUNCIL

No.24 of 1960

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION

B E T W E E N:

SUB-CHIEF KATABOA of
Apesokubi (substituted
for NANA KWASI ADU)
(deceased) Defendant-Appellant

- and -

SUB-CHIEF OSEI BONSU III
Plaintiff-Respondent

RECORD OF PROCEEDINGS

UNIVERSITY OF LONDON
W.C.1.
16 FEB 1962
INSTITUTE OF ADVANCED
LEGAL STUDIES

63561

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Solicitors for the Respondent.

ON APPEAL
FROM THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION

BETWEEN:- SUB-CHIEF KATABOA of Apesokubi
(Substituted for NANA KWASI ADU)
(Deceased) Defendant-Appellant

- and -

SUB-CHIEF OSEI BONSU III Plaintiff-Respondent

RECORD OF PROCEEDINGS
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E X H I B I T S

(Note: There are two Exhibits each marked "E". That relating to the Prohibition proceedings has been split up into its separate items which, if reproduced, have been interspersed in order of date among the other Exhibits. There is a further Exhibit "K" relating to the Prohibition proceedings subsequent to those in Exhibit "E" which has also been split up into its separate items which have been similarly interspersed).

Mark	Description of Document	Date	Page
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"E"	Minutes of Meeting of the Benkum Division Council held at Buem	24th July 1942	73
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"F"	Letter from the District Commissioner Kpandu to the Sub-Divisional Chief of Buem - Asatu	20th August 1943	75
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	<u>Defendant's Exhibit</u>		
"H"	Decision of the Borada Native Tribunal in Nana Kwasi Adu vs. Nana Yaw Nyako & Others	13th May 1948	80
"J"	Judgment of the Land Court, Accra in Kataboa v. Nyako II & Others	20th November 1950	82
	<u>Plaintiff's Exhibit</u>		
"K"	Further Proceedings in Prohibition:- Ruling of Divisional Court	29th February 1952	91

Mark	Description of Document	Date	Page
"K" (Contd.)	<u>Plaintiff's Exhibit</u>		
	Notice of Appeal from refusal to grant prohibition	6th March 1952	93
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"L"	Judgment of the West African Court of Appeal	13th March 1953	95
"M"	Judgment of the Borada Native Tribunal in Sub-Chief Osei Bonsu of Asatu vs. Sub-Chief Kwasi Adu of Apesokubi	3rd March 1931	64
"N"	Plan	15th June 1932 (Separate document)	

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Objection to Panel Members raised by Plaintiff-Respondent	26th October 1953
Court Notes	26th October 1953
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Plaintiff-Respondent's Letter to Native Appeal Court	9th November 1953
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Description of Document	Date
<u>IN THE SUPREME COURT</u>	
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Court Notes of Judgment	13th February 1956
Notice of Intention to Appeal to Privy Council	27th February 1956
Application for Conditional Leave to Appeal to Privy Council	27th February 1956
Affidavit of Nana F.D.Kataboa in support of Motion	28th February 1956
Court Notes granting Conditional Leave to Appeal to Privy Council	5th April 1956
Notice of Appeal to Privy Council	20th June 1956
Affidavit of Nana Kataboa in support of Application	4th July 1956
<u>EXHIBITS</u>	
"E" (Part) Affidavit in support of Motion for Prohibition	13th July 1951
Proceedings in Prohibition	22nd October and 26th November 1951
"K" (Part) Notice of Motion for special leave to appeal from refusal of Prohibition	(29th) February 1952
Affidavit in support	1st March 1952
Refusal of leave to appeal	5th March 1952
Exhibit 1 - Judgment of Native Court (reproduced as Exhibit M)	3rd March 1931
Exhibit 2 - Grant of leave to appeal (reproduced as Exhibit "B")	26th May 1937

1.

IN THE PRIVY COUNCIL

No.24 of 1960

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL

GOLD COAST SESSION

BETWEEN:- SUB-CHIEF KATABOA of
Apesokubi (substituted
for MANA KWASI ADU) Defendant-Appellant

- and -

SUB-CHIEF OSEI BONSU III
Plaintiff-Respondent

10

RECORD OF PROCEEDINGS

In the Native
Akan Court "B"

No. 1.

CIVIL SUMMONS

No. 1.

BUEM NATIVE AUTHORITY

Civil Summons.

IN THE NATIVE AKAN COURT "B" OF KADJEBI,
SOUTHERN SECTION OF TOGOLAND
UNDER BRITISH MANDATE.

15th April,
1953.

No.49/53.

CIVIL SUMMONS

20

{ SUB-CHIEF OSEI BONSU of Asato as Represent-
{ ing the Stool and people of Asato Plaintiff

- and -

{ SUB-CHIEF KWASI ADU (deceased) substituted
{ by Sub-Chief Kataboa of Apesokubi as
{ Representing the Stool and people of
{ (Apesokubi) Defendant

TO: Sub-Chief Katoboa of Apesokubi.

You are hereby commanded to attend this Native
Akan Court "B" at Kadjebi, at 8.30 a.m. o'clock on
the 19th day of May, 1953 to answer a suit by
Plaintiff against you.

30

The Plaintiff Claims :-

In a Suit entitled Sub-Chief Osei Bonsu of
Asato (Plaintiff) vs. Sub-Chief Kwasi Adu of

In the Native
Akan Court "B"

No. 1.

Civil Summons.

15th April,
1953

- continued.

Apesokubi (Defendant) the Native Tribunal of the Omanhene of Buem sitting at Borada, gave judgment for the Plaintiff herein against the immediate predecessor of the Defendant on the Stool of Apesokubi, for all that piece or parcel of land subsequently surveyed and shown edged in Pink colour in Plan dated 15th June, 1932, and signed by E.S. Anoff, Licensed Surveyor of Nsawam, in the following terms:-

"Apessokubi Chief is guilty. The Land properly belongs to Asatu. The proper boundary fixed in this Judgment is the top of Oprana Hill from River Asuokoko Southward to Stream Mutabe and down to an Ntome tree and the Road cleaning heap on Asatu-Apessokubi Road".

10

The Judgment dated 3rd March, 1931, was the subject of an Appeal to the Provincial Commissioner of the Eastern Province, and finally to the West African Court of Appeal which latter Court on the 20th day of April, 1937, confirmed the Judgment of the Native Tribunal.

20

After the Judgment referred to, the Defendant and his subjects unlawfully entered upon the said parcel of Land and cultivated and made farms and villages upon portions of the said Land with full knowledge of the Judgment.

The Plaintiff therefore claims Recovery of possession of all portions of the Land wrongly occupied by the Defendant or any of his subjects according to the Boundary defined in the Judgment of the Native Tribunal of the Omanhene of Buem referred to herein.

30

DATED at Kadjebi this 15th day of April, 1953.

Claim:	(Recovery of Possession of Land)	
Fees:	£ 2. -. -. .
Service & Mileage	<u>13. 6</u>
		<u>£ 2.13. 6</u>

(Sgd.) ? ?

President, Native Court.

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

40

3.

No. 2.

COURT NOTES OF ADJOURNMENT

In the Akan Native Court "B" held at Kadjebi on Tuesday the 19th day of May, 1953 before Nana Ya Kako III, President with the following members:- Mankrado Kwame Nimo of Kadjebi Mankrado N.Y. Afrim of Ahamansu Okyeame Kwadjo Gyapong of Kadjebi Kwabena Kantanko Worawora.

Suit No.49/53 (Kadjebi)

10 Sub-Chief Osei Bonsu of Asato as representing the Stool and people of Asato

Plaintiff

vs.

Sub-Chief Kwasi Adu (deceased) substituted by Sub-Chief Kataboa of Apesokubi as representing the Stool and people of Apesokubi

Defendant

(Sets out claim as in Civil Summons)

20 PARTIES:- Plaintiff present. Defendant absent. He sent a letter dated 13th May, 1953 asking the Court to grant him an adjournment for one month for he was on trek. Application granted. Case therefore adjourned to 23/6/53. Defendant to pay and adjournment fee of 5/-. Hearing Notice to be issued to Defendant.

sic.

(Sgd.) V.K. Duedu,
Recorder, Registrar.

No. 3.

APPLICATION TO DISMISS SUIT.

30 Filed: 19/6/53.

IN THE BUEM AKAN NATIVE COURT "B"
KADJEBI. A.D. 1953.

Suit No.49/53

SUB-CHIEF OSEI BONSU of Asato

Plaintiff

v.

SUB-CHIEF KATABOA of Apesokubi

Defendant

In the Native
Akan Court "B"

No. 2.

Court Notes of
Adjournment.

19th May, 1953.

No. 3.

Application to
dismiss Suit.

24th May, 1953.

In the Native
Akan Court "B"

No. 3.

Application to
dismiss Suit.
24th May, 1953
- continued.

APPLICATION FOR AN ORDER TO DISMISS ACTION HEREIN.

TAKE NOTICE that this Court will be moved by NANA KATABOA, Sub-Chief of Apesokubi and the Defendant herein on Tuesday the 23rd day of June, 1953 or so soon thereafter as the Defendant may be heard for an Order to dismiss the Action herein upon the grounds set out in the accompanying Affidavit AND/OR for any such further Orders as to the Court may seem fit.

DATED AT APESOKUBI this 24th day of May, 1954. 10
(Sgd.) Nana/F.D. Kataboah 1.
DEFENDANT.

THE REGISTRAR,
BUEM AKAN NATIVE COURT "B",
KADJEBI.

- and -

To SUB-CHIEF OSEI BONSU,
of Asatu.

No. 4.

Affidavit in
Support of an
Application to
dismiss Suit.
26th May, 1953.

No. 4.

AFFIDAVIT IN SUPPORT OF AN APPLICATION TO DISMISS 20
SUIT.

Filed 19/6/53.

IN THE BUEM AKAN NATIVE COURT "B" KADJEBI
A.D. 1953.

Suit No.49/53

SUB-CHIEF OSEI BONSU of Asato Plaintiff

vs.

SUB-CHIEF KATABOA of Apesokubi Defendant

APPLICATION FOR AN ORDER TO DISMISS ACTION HEREIN.

AFFIDAVIT OF FRANCIS DENTE KATABOA IN 30
SUPPORT THEREOF

I, FRANCIS DENTE KATABOA, SUB-CHIEF OF APESOKUBI
make Oath and say:-

1. I am the Defendant herein.
2. The history of the above-named case is briefly

summarised in the judgment of J. Miller, Esquire Provincial Commissioner, dated the 10th September, 1946 a copy of which is exhibited herewith and marked "A".

In the Native
Akan Court "B"

No. 4.

Affidavit in
Support of an
Application to
dismiss Suit.

26th May, 1953

- continued.

- 10 3. I also exhibit herewith a copy of the proceedings relating to the grant of Leave to appeal to the Buem State Council and marked "B" and a copy of the Notice to the Buem State Council whereby the parties agreed to withdraw the Appeal for settlement and marked "C".
4. I further exhibit herewith marked "D" a copy of the Agreement of the 12th July, 1939 referred to in the judgment of J. Miller, Esquire, aforesaid (i.e. Exhibit "A").
- 20 5. I also exhibit marked "E" a copy of the proceedings of a meeting held at Nsuta in Buem, when the parties hereto finally settled the issue concerning the boundary between them. The boundary has still to be demarcated in terms of the decision of the meeting.
6. I further exhibit two letters dated 20th August, 1943 and 4th September, 1953 respectively written by the District Commissioner addressed to the Plaintiff showing how the Plaintiff has done his best to frustrate all efforts at implementing the Agreement for settlement by arbitration marked "E" & "G" respectively.
- 30 7. In 1947 the Plaintiff and his people caused a boundary to be demarcated between the parties which resulted in an action being taken by me to set aside the said boundary and exhibit herewith the judgments of the Native Court of the Buem State and of the Land Court respectively in that action marked "H" & "J" respectively.
- 40 8. It will be seen readily from the premises that the judgments of the first trial Court confirmed by the judgment of the West African Court of Appeal is now of no effect, and cannot be relied on by the Plaintiff in the prosecution of any rights that that judgment conferred on him.
9. The dispute having been submitted to arbitration there is only one thing left for the parties to do namely, to take appropriate action for the implementation of the Agreement to settle by Arbitration and get the boundary

? F.

In the Native
Akan Court "B"

demarcated; or the parties may, if it is possible to do so, get the Appeal reinstated and heard.

No. 4.
Affidavit in
Support of an
Application to
dismiss Suit.
26th May, 1953
- continued.

10. The Plaintiff is therefore not entitled to bring this action, and I make this Affidavit in support of my application for an Order to dismiss the Suit.

SWORN at Accra this)
26th day of May, 1953) (Sgd.) Nana F.D. Kataboa.

Before me,
(Sgd.) G. Ohene Glover
Commissioner for Oaths.

10

No. 5.

No. 5.

COURT NOTES

Court Notes.

23rd June, 1953.

In the Akan Native Court "B" held at Kadjebi on Tuesday the 23rd day of June, 1953, before Mankrado Yao Afrim, Ag. President with the following members:- Mankrado Kwame Nimo of Kadjebi Okyeame Kwadjo Gyapong of Kadjebi.

Sub-Chief Osei Bonsu of Asato as representing the Stool and people of Asato

Plaintiff

20

versus

Sub-Chief Kwasi Adu (deceased) substituted by Sub-Chief Kataboa of Apesokubi as representing the Stool and people of Apesokubi

Defendant

Resumed from page 265 of Record No.5. At this stage Defendant filled the following Motion.

30

Motion.

Take notice that this Court will be moved by Nana Kataboa Sub-Chief of Apesokubi and the Defendant herein on Tuesday the 23rd day of June, 1953 or so soon thereafter as the Defendant may be heard for and order to dismiss the Action herein upon the grounds set out in the accompanying Affidavit and/or for any such further order or orders as to the Court may seem fit.

Motion filed on 19/6/53.
Affidavit in support also filed on 19/6/53.

Parties:- Both parties present in person. Plaintiff intimated that he was only served with copies of the motion and Affidavit on the previous date to the Return date and therefore the case should be adjourned to enable him to reply. Case therefore adjourned to the 30th instant at 8.30 a.m.

(Sgd.) V.K. Duedu,
RECORDER
REGISTRAR.

In the Native
Akan Court "B"

No. 5.

Court Notes.
23rd June, 1953
- continued.

10

No. 6.

COURT NOTES OF ADJOURNMENT

In the Akan Native Court "B" held at Kadjebi on Tuesday the 30th day of June, 1953 before Mankrado Yao Afrim, Ag. President with the following members:- Mankrado Kwame Nimo of Kadjebi Kwabena Kantanko of Worawora.

Sub-Chief Osei Bonsu of Asato as
representing the Stool and people
of Asato

Plaintiff

vrs.

Sub-Chief Kwasi Adu (deceased)
substituted by Sub-Chief Kataboa of
Apesokubi as representing the Stool
and people of Apesokubi

Defendant

Parties:- Defendant present. Plaintiff absent. He submitted an application to the Court asking for adjournment to one month with the explanation that he became feverish only this morning and has left for a place for treatment.

Application granted as prayed by Plaintiff. Case therefore adjourned to 28th July, 1953 at 8.30 a.m.

(Sgd.) V.K. Duedu
RECORDER,
REGISTRAR.

No. 6.

Court Notes of
Adjournment.
30th June, 1953.

20

30

In the Native
Akan Court "B"

No. 7.

COURT NOTES

No. 7.
Court Notes.
28th July, 1953.

In the Akan Native Court "B" held at Kadjebi on Tuesday the 28th day of July, 1953 before Nana Yao Kako III, President with the following members:-
Okyeame Kwadjo Gyapong of Kadjebi
Mankrado N.Y. Afrim of Ahamansu
Mankrado Kwame Nimo of Kadjebi
Kwabena Kantanko of Worawora.

Sub-Chief Osei Bonsu of Asato as
representing the Stool and people
of Asato

10

Plaintiff

vrs.

Sub-Chief Kwasi Adu (deceased)
substituted by Sub-Chief Kataboa of
Apesokubi as representing the Stool
and people of Apesokubi

Defendant

Parties:- Both present, but the Defendant rose an objection to the sitting of one Kwabena Kantanko of Worawora to sit on the case as a panel member because he was having farms on the disputed area where Plaintiff claims to be in possession.

20

Note:- At this stage the Court found that it was not forming a quorum to hear and determine the action. Therefore the Court at its own motion adjourned hearing of the case to next Tuesday 4th August, 1953 at 8.30 a.m. prompt. Parties to keep date open and put in punctual attendance.

(Sgd.) V.K. Duedu,
RECORDER, REGISTRAR.

30

No. 8.
Proceedings.
4th August,
1953.

No. 8.

PROCEEDINGS

In the Akan Native Court "B" held at Kadjebi on Tuesday the 4th day of August, 1953 before Nana Yao Kako III, President with the following members:-
J.W.B. Donkor of Ahamansu
Mankrado N.Y. Afrim of Ahamansu.

(Title as No. 2)

Parties:- Both present.

Note:-

At this stage the Mover's Affidavit and copies of his Exhibits read and interpreted to the Court.

Plaintiff-Deponent's also filed Affidavit in opposition on 24/7/53.

Plaintiff-Deponent's Affidavit also read to Court.

By Court to Mover:-

In the Native
Akan Court "B"

No. 8.

Proceedings.

4th August,
1953

- continued.

- 10 Q. Have you something to say in addition to your Affidavit?
- A. Yes. The fact was that when the then Native Tribunal of Omanhene of Borada gave judgment against me, being that the ordinance was not made to create a state Council, my predecessor Nana Kwasi Adu made an appeal to the W.A.C.A. where they reversed the whole judgment and re-referred it to the Buem State Council. The Plaintiff Opposer had frequently made the Court to adjourn the case on several occasions until we were called upon by some arbitrators of Worawora and other persons whom later went and demarcated a Boundary without informing my predecessor. This was done and on the 20th day of June, 1947 the trial Court dismissed the action taken by my predecessor Nana Kwasi Adu. I also refer to the Land Appeal No.42/1950 a judgment in case of Nana Kataboa ll, Chief of Apesokubi Plaintiff-Appellant vs: Nana Yao Nyako II Ohene of Worawora and 5 others, page 4 line 3 which reads as follows:- Where the appeal was pending for final disposal of the case they are merely stating their opinion that the proper and only way of settling this dispute is for the original parties to have recourse to further litigation in the appropriate tribunal, because as far as settlement by arbitration is concerned, the matter has reached a hopeless deadlock in the absence of any real desire by the parties to abide by this method of settling their differences. That also seems to be sound, since, if regrettably, the parties cannot even now agree to abide to the decision of a person or persons to be appointed by them to demarcate the boundary which course however seems still to be open to them because of this I pleading for the cause at issue to be dismissed on a question Res judicata.
- 20
- 30
- 40

In the Native
Akan Court "B"

No. 8.

Proceedings.

4th August,
1953

- continued.

Examined by Court:-

- Q. How long since the arbitrators met at Worawora for the settlement and demarcation of the disputed boundary between you and Plaintiff:
- A. It will be about 14 years ago.
- Q. What was the objection taken by you when the Chief of Worawora headed a body of arbitrators who went and demarcated a boundary in the disputed area without you?
- A. I took action against them seeking the order of the Tribunal to set aside their award taken which entitled them to enter into the land and demarcated a boundary. This was accordingly declared as null and void. 10
- Q. Do you mean to say that upon the various judgments tendered in as Exhibits, hence you wish this action to be dismissed on a question of Res judica?
- sic. A. Yes, because then the cause was on appeal with the Buem State Council, we entered into an agreement, and in that agreement a withdrawal Note was submitted before the withdrawal took effect, we based on the various Court that the dispute had been for trial namely: The Borada Tribunal of the Omanhene; The C.E.P's Court, W.A.C.A. and the writ of possession which was ordered for cancellation. 20
- Q. After you have agreed upon the settlement of the arbitration and withdrew the cause from the Court, which arbitration eventually went and demarcated a boundary without you and therefore you resort for an action against the arbitrators, do you still rely on the question of the arbitrators award to demarcate the boundary? 30
- A. Yes, I am still depending on the withdrawal of the case for the arbitrators to demarcate the boundary.
- Q. Since the arbitrators went contrary against you and therefore you instituted an action against them have you ever been to the arbitrators to complete their work entrusted to them? 40
- A. No.
- sic. Q. Do you not remember you rose an objection to the arbitrators' award when they tried to demarcate a boundary between you in the disputed area?
- A. Yes.

- Q. Why then not approaching the arbitrators to go and demarcate the boundary between you as their first attempt failed because of your objection raised?
- A. It was not left for me alone to appeal for it, but that should have been done by both of us.
- Q. Who is keeping the agreement Note which you entered into?
- 10 A. It was made and delivered to the State Council to strike out the action.
- Q. Did you seek an order of the Court to nullify the arbitrators' award or to stop the arbitrators from carrying out the duty entrusted to them?
- A. It was only the arbitrators' award I sought the order of the Court to cancel.
- Q. It appears that when you took the action against the arbitrators for demarcation the boundary without you, the trial Court or tribunal of
- 20 Borada Buem ordered that both parties may send back the action to the Buem State Appeal Court. What was your next step taken?
- A. In that I appealed to the Land's Court against the decision.
- Q. Do you take the decision of the arbitrators to be a wrong procedure?
- A. Yes, because during which time, some of the
- 30 members who held the arbitration died before the boundary was demarcated with some new members who did not sit in the arbitration, and this was also not reported to me before they entered into the Land and demarcated the boundary with the consent of the Plaintiff hence the action before the Native Tribunal for an order to nullify the award and the Boundary demarcated by the arbitrators.
- Q. According to you, you have stated that you are still having confidence and reliance on the arbitrators at Worawora to demarcate the boundary between you and the Plaintiff; why did you not persuade them to demarcate the boundary and you still continuing the action withdrawn from Court by sending it to various Courts?
- 40 A. It was the Plaintiff who started and I followed him suit.

In the Native
Akan Court "B"

No. 8.

Proceedings.

4th August,
1953

- continued.

In the Native
Akan Court "B"

No. 8.

Proceedings.

4th August,
1953

- continued.

Note:-

At this juncture it was almost getting dusk and therefore the Court at its own motion adjourned the hearing of this case to the 8th instant at 8.30 a.m. prompt. Parties to keep date open and put in punctual attendance.

(Sgd.) Nana Yao Kako III
President.

(Sgd.) V.K. Duedu,
Recorder, Registrar.

10

15th August,
1953.

Parties:- Both present.

Note:-

At this stage the Plaintiff filed copy of Power of Attorney dated 15/3/53 authorising the one Mr. Norbert Kofi Nyame to represent him and to stand in his behalf and deal with the case as above, until it is finally disposed of owing to the fact that he was not well in health to face the cause personally.

By Court to Mover:-

20

Q. Have you any objection to Plaintiff authorising the said Norbert Kofi Nyame to stand in his behalf?

A. No, I have no objection to it.

At this juncture the Court accepted the power of Attorney submitted by the Plaintiff. The said Norbert Kofi Nyame to act in the Plaintiff's behalf.

By Court to Mover:-

Q. Have you something more to say again in addition to your previous explanations and your Affidavit?

30

A. Yes. The judgment of the Provincial Commissioner's Court, Eastern Province held at Kpandu on Tuesday the 10th day of September, 1949, before His Worship John E. Miller Esqr., Deputy Commissioner, Eastern Province, had also been tendered as Exhibit as attached to my Affidavit, marked Exhibit "A".

Exhibit "A".

Note:-

At this juncture, the said Judgment had been read and explained to the Court, and accepted as already marked Exhibit "A".

40

By Court:-In the Native
Akan Court "B".

No. 8.

Proceedings.

15th August,
1953.

- continued.

- Q. After you had gone in terms to settle the case in an arbitration, did any of you send this action back to any Court of Justice?
- A. Yes it was the Plaintiff who sent the case to Court in the year 1946 and he failed. He further sent the case to the Court in 1951 and he lost in that action also.
- 10 Q. Was it after the nullification of the arbitrators' award? A. Yes.
- Q. Was it sent to the Court because the Plaintiff did not satisfy with the nullification of the arbitrators' award?
- A. It was a writ of possession he applied and that was turned down.
- Q. When did he send back the case to Court after you went in agreement to arbitrate the case?
- A. It was 8 years after before the Plaintiff sent the case to Court in the year 1945.
- 20 Q. What was the arbitrators' award?
- A. The arbitrators went and viewed the Land, on the 1st day but they were disturbed by rain.
- Q. Did they continue on the following day?
- A. No, it was not done before the Plaintiff applied for writ of possession which was overthrown in the Native Tribunal of the Omanhene at Borada. Because the arbitrators just sat in the house and wrote to us their opinion hence I rose objection to it.
- 30 Q. Do you not rely on the decision of the Native Tribunal of Omanhene of Buem, held on the 13th day of May, 1948, which requested both of you to send the case to the Buem State Council in the absence of the Award of the arbitration in case Nana Kwasi Adu vs: Nana Nyarko and 5 others?
- A. Yes, that order was standing, but it was left for both of us to write to cancel the withdrawal note before the cause could proceed.

40 By Court to Opposer:-

- Q. Have you anything to say more in addition to your Affidavit?
- A. One Norbert Kofi Nyame who represented the Plaintiff opposer states:- The Defendant's Affidavit paragraph 2 which he tendered into

In the Native
Akan Court "B".

No. 8.

Proceedings.

15th August,
1953

- continued.

Exhibit "F"

Exhibit "G"

evidence do not exist. In accordance with the Native Tribunal of Omanhene's judgment in case of Nana Kwasi Adu vs: Nana Yao Nyarko and 5 others dated 13th May, 1948, it would be seen that the arbitrators' award and the demarcation of the boundary in the disputed area, which appears on Exhibit "J" in page 3 and the subsequent pages the arbitrators' award as nullified could not be recalled for to demarcate the boundary by a body of arbitration than to proceed on with the case as it's now on, I further stress on the Defendant's own Exhibit "F" which was in respect of a letter written by the then D.C. of Kpandu in the person of Mr. T.A. Mead, letter No.1219/82A/20 dated 20/8/43, which speaks about the failure of the attempt made by the Benkum Divisional Council and failed owing to the disagreement of the parties to the dispute. I am further directing the attention of the Court to the Defendant's own Exhibit "G" written by the D.C. Kpandu, letter No.1282/82A/1921 informing the Divisional Sub-Chief of Asato, the Plaintiff herein his intention to withdraw the amount of £20 in deposit against the demarcation of the land which proved a failure. There had been no Judgment from the various Courts nullifying the Judgment of the Native Tribunal of Omanhene of Buem Borada dated the 3rd March, 1931 to warrant the cancellation of the present suit as an Order sought for by the Defendant. The said judgment of the Omanhene of Buem was confirmed by the West African Court of Appeal, and it is still have an existence which eventually authorising me to claim possession to the defined boundary in that judgment. The Defendant could not produce before this Court any evidence to support his Affidavit that the said Omanhene's judgment had been nullified.

Examined by Court:

- Q. After you withdrew the action from the Appeal before the Buem State Council Appeal Court, did Defendant ever institute any other action against you? A. No.
- Q. After the arbitrators award had been nullified have you ever gone contrary against the Defendant? A. No.
- Q. Do you really rely that the judgment of Omanhene

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of Buem Borada still stands and having effect in this case? A. Yes.

In the Native Akan Court "B".

No. 8.

Proceedings.

15th August, 1953

- continued.

Q. Since you obtained the judgment from the Omanhene's Tribunal of Borada were you found liable to the Defendant's appealing to any other Court?

A. No. Hence I stated that my judgment obtained in 1931 still has effect to exist.

Q. What was your aim in which you based your claim for the possession of the disputed area?

10 A. It was the judgment of the Omanhene of Buem-Borada which I had depended and instituted this action for ownership and recovery of possession to the disputed area.

Q. Do you not remember that after you obtained a judgment from the Omanhene's Tribunal of Buem Borada, you had sent this very case to the C.E.P's. Court and then to W.A.C.A.?

A. Yes, I wrongly sent the action therefore before it was reversed.

20 Q. Did you obtain a confirmation to your judgment of Omanhene of Buem Borada when it was sent to the C.E.P's Court?

A. No it was not the main action's appeal I made to the C.E.P's. Court but it was a writ of possession case that was dealt with before the C.E.P's Court.

Q. Do you mean to tell the Court that possession had not been determined in this case before?

30 A. It was a matter of writ of possession which was taken by me and it was turned down because actual possession case had not been determined.

Q. Who was the occupant of the disputed area since this action arose?

A. Defendant and his subjects are occupying part of the land and my subjects and I are also occupying the rest.

Q. Did you receive any letter from the arbitrators informing you that they had withdrawn from continuing the arbitration of the boundary?

40 A. Yes, I have a letter which was written by the arbitrators dated 25th November, 1950, signed by Nana Yaw Nyarko, and addressed to the Defendant and myself, informing both of us to take up the matter in any Court. And I tender same into evidence. Accepted by Court and marked Exhibit "E" by W.A.C.A. at page 25 of its record. I further exhibit the judgment of the Supreme

Exhibit "E".

In the Native
Akan Court "B".

No. 8.

Proceedings.

15th August,
1953

- continued.

Court of the Gold Coast Eastern Judicial Division held at Victoriaborg, Accra, on Friday, the 29th day of February, 1952 before Acolatse, Acting Judge wherein he made a ruling in the application for prohibiting the execution of the writ of Possession taken by me. The Judgment had been read to the Court, accepted and marked Exhibit "K" at page 37 of W.A.C.A. proceedings. I have another judgment to tender into evidence. That is the Civil Appeal No. 29/52 dated at Accra, 13th March, 1953, a Judgment to prohibit the execution of the writ of possession taken by me. In that judgment although I was prohibited to enforce my writ of possession, but the chance is still opened for me to claim possession according to original judgment of the then Native Tribunal of Oman-hene which there had been no order for nullification of the said judgment, I still hold it firm to continue with this action.

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Exhibit "L"

The judgment has been read to the Court accepted and marked Exhibit "L".

At this stage it was almost dusk, and therefore the Court at its motion adjourned the hearing to 29th instant at 8.30 a.m. Parties to keep the date open and put in punctual attendance.

(Sgd.) Nana Yaw Kako III
PRESIDENT.

(Sgd.) V.K. Duedu
RECORDER
REGISTRAR.

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2nd September,
1953.

Parties:- Both present.

By Opposer:- N.K. Nyame, the Plaintiff's representative continued and said the writ of Possession taken by me in the year 1945, was a motion before the C.E.P. and it was against me. It was the Borada Tribunal which ruled in their judgment in case of Nana Kwasi Adu and Nana Yao Nyarko and others to send the case to the State Council. It would be seen from the judgment of W.A.C.A. dated 13th March, 1953, sitting by Windsor Aubrey, J. and other assessors that in page 2 paragraph 4. There it was said that it is to be noted that in the writ of summons there was no claim for possession and the judgment in declaratory only - it describes a boundary. And in the same page it was said that "Here there was no decree for land but

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only a decree of declaration of title consequently a writ of possession did not lie."

In the Native Akan Court "B".

Note:-

After having studied Mover's and Opposer's motion and Affidavits the Court orders that parties to give statement under Regulation 17 of Regulations No. 23 of 1949 to enable it to give a fair judgment.

No. 8.
Proceedings.
2nd September,
1953
- continued.

STATEMENT OF PLAINTIFF:-

10 Norbert Kofi Nyame, s.a.r.b. and states:-

I am a trader. I live at Asato (Plaintiff's representative). In the year 1931, the Defendant trespassed into my land for which I obtained a judgment from the Omanhene's Tribunal of Porada in that same year, and which judgment I have a copy tendering into evidence. The judgment had been read and interpreted to the Court, accepted and marked as Exhibit "M" alias Exhibit "I" by Divisional Court on 26/2/52. I further exhibit a judgment obtained from the W.A.C.A. dated 20th April, 1937 by Donald Kingdom and other assessors which Civil Appeal confirmed my aforesaid judgment of the Tribunal of Omanhene of Buem Borada dated 3rd March, 1931. This judgment was obtained from the most Supreme Court of the Gold Coast, and its Appeal only goes to the Privy Council, but there had been no Privy Council's judgment which had been obtained by the Defendant to warrant my not taking this action for recovery of and possession of the land as defined in the judgment of the Omanhene of Buem. From the Defendant's Affidavit and his Exhibit "B" tendered by him in support of his motion it will be seen clearly that it was remarked by the State Council's Note upon granting the Appeal as reversed from W.A.C.A. that:- "From this judgment both parties appealed to the W.A.C.A. which decided that it had no jurisdiction to hear the Appeal on the grounds no fully set out in its judgment. The case was just referred to the State Council which came to power to determine the Appeals from the lower courts or Tribunals. In conclusion, I tender into evidence a Plan covering the disputed area of the land, which defined the boundaries as entered in the Omanhene's judgment of 3rd March, 1931. The Plan was prepared by a Licensed Surveyor Mr. E.S. Annorff of Nsawam dated 15th June, 1932.

Exhibit "M"

sic.

It was shown clearly on the plan that all the

In the Native
Akan Court "B".

No. 8.

Proceedings.

2nd September,
1953

- continued.

edges painted with red colour was the boundary described by me and that all that was shown as Yellow was the description of the boundary and marks of the Defendant. According to the description of the plan, it means we have no land at all. Because the Defendant stated clearly that he was only having a boundary with Worawora people Guaman, Kadjebi and then the Dodis. But this was found to be a false statement hence the Tribunal of the Omanhene entered judgment in my favour and in it the boundary was defined. And upon the strength of the Omanhene's judgment I have instituted this action claiming title to possess the land as defined in my previous judgment dated 3rd March, 1931.

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The Plan had been studied by Court and accepted and marked Exhibit "N". The reason why I have instituted this action was that after I obtained the judgment from Borada Tribunal, the Defendant and his men trespassed on the land hence I brought this action for recovery of possession. During which time this judgment went in my favour, the ordinance which was having in force as Cap.90 did not permit such grants of possession, hence I did not ask for. But the present ordinance allows a chance for such possession to be put into claim hence my action. It is really a fact that trespass on anybody's land was out of the Native Custom and also against equity of law hence I am claiming ownership and recovery of the land. The present action before this Court had never been sent to any of the Courts where I had litigated with the Defendant to open chance for him to convince this Court that it had already been adjudicated for a plea on question of res judicata.

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Questions by Defendant:- No questions.

Questions by Court:- No questions.

Defendant's Statement:-

I have nothing to say again in regard to making a statement apart from the explanation given in support of my motion.

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Note:-

At this stage the members retired on consultation, returned and delivered the following judgment -

JUDGMENTJUDGMENT:-

No. 9.

Judgment.

2nd September,
1953.

In this case, the Plaintiff claims from the Defendant as follows:- In a suit entitled Sub-Chief Osei Bonse of Asato (Plaintiff) vs: Sub-Chief Kwasi Adu of Apesokubi (Defendant) the Native Tribunal of the Omanhene of Buem sitting at Borada, gave judgment for the Plaintiff herein against the immediate predecessor of the Defendant on the Stool of Apesokubi for all that piece or parcel of land subsequently surveyed and shown edged in Pink colour in Plan dated 15th June, 1932 and signed by E.S. Anoff, Licensed Surveyor of Nsawam, in the following terms:-

"Apesokubi Chief is guilty. The land properly belongs to Asato. The proper boundary fixed in this judgment is the top of Oprana Hill from River Asuokoko Southward to stream Mu-tabe and down to an Ntome tree and the Road cleaning heap on Asato-Apesokubi Road".

The judgment dated 3rd March, 1931, was the subject of an Appeal to the Provincial Commissioner of the Eastern Province and finally to the West African Court of Appeal which latter Court on the 20th day of April, 1937 confirmed the judgment of the Native Tribunal.

After the judgment referred to, the Defendant and his subjects unlawfully entered upon the said parcel of land and cultivated and made farms and villages upon portions of the said land with full knowledge of the judgment. The Plaintiff therefore claims recovery of possession of all portion of the land wrongly occupied by the Defendant or any of his subjects according to the boundary defined in the judgment of the Native Tribunal of the Omanhene of Buem referred to herein.

While the suit was depending for hearing the Defendant also filed the following Motion:-

Application for an Order to dismiss

Action herein

TAKE NOTICE that this Court will be moved by Nana Kataboa Sub-Chief of Apesokubi the Defendant herein on Tuesday the 23rd day of June 1953 or so soon thereafter as the Defendant may be heard for

In the Native
Akan Court "B".

No. 9.

Judgment.

2nd September,
1953

- continued.

an order to dismiss the Action herein upon the grounds set out in the accompanying Affidavit and/or for any such further order or orders as to the Court may seem fit.

After having studied and heard the Mover's and Opposer's Motion and Affidavits respectively the Court orders that parties to give statement under regulation 17 of Regulation No.23 of 1949 to enable it to give a fair judgment.

Plaintiff is the occupant of the Stool of Ohene of Asato and therefore the person representing Asato Stool Lands. Defendant also is the occupant of the Ohene of Apesokubi and therefore the person representing Apesokubi Stool lands. Defendant succeeded one Nana Kwasi Adu. From the facts obtained from the Exhibits produced and tendered in evidence by the parties during the life-time of the said Nana Kwasi Adu as the Ohene of Apesokubi, Plaintiff instituted the following action him sometime in the year 1931 at the then Tribunal of Omanhene of Buem:- 10

Claims:- "For having stated you have no boundary with me on the disputed land but with Dodi, place where marked by a German Official at Owukukuamba and with Ahamansu at Tentianyoy, to know my historical origin why I have no land there"

2. "That we both (with the Defendant) pay fees to the Omanhene due to the setting of the first boundary twenty years ago now you claim the boundary to be renewed why my amount not refunded". 30

After an exhaustive hearing the Tribunal entered the following judgment against the Ohene of Apesokubi on the 3rd March, 1931:-

"Apesokubi Chief is guilty.

"The land properly belongs to Asato.

"The proper boundary fixed in this judgment is

"the top of Oprana Hill from River Asuokoko

"southward to stream Mutabe and down to an 40

"Ntome tree and the Road cleaning heap on

"Asato-Apesokubi Road".

The above judgment became the subject of an appeal to the Court of the Provincial Commissioner without the State Council, the then appropriate Native Court of Appeal having jurisdiction over

land causes and as a result of lack of jurisdiction the W.A.C.A. nullified the judgment of the Provincial Commissioner on the 20th April, 1937, and restored the judgment of the Omanhene's Tribunal. The Ohene of Apesokubi then came back to the State Council and applied for leave to appeal from the judgment of the Omanhene's Tribunal. He was definitely out of time but while no decision had been given to the application, the parties agreed to have the matter settled by a body which classified itself as a committee, and at the absence of the Defendant's predecessor, this Committee gave ex-parte decision against him on the 20th June, 1947. The award of the Committee was set aside by the Omanhene's Tribunal in an action instituted by the Defendant's predecessor in that behalf on the 13th May, 1948. This decision was subsequently confirmed by the Land Court on the 20th November, 1950 after Defendant had been substituted.

Dwelling on the judgment of the Omanhene's Tribunal on the 3rd March, 1931 and confirmed by the W.A.C.A. on the 20th April, 1937, Plaintiff applied to the Omanhene's Tribunal now Native Court for a writ of Possession. This was granted and executed on the 5th May, 1952.

It must be noted that the judgment of the Omanhene's Tribunal on the 3rd March, 1931, was delivered under the procedure of the old Native Administration Ordinance Cap.90. Under this Ordinance there was no provision empowering Native Tribunals to issue orders putting the "decreeholder" in possession of the land after judgment as it is now provided by Regulation 108 of Regulations No.23 made under the Native Courts (Togoland under United Kingdom Trusteeship) Ordinance No.8 of 1949.

The Defendant therefore applied to the Supreme Court for an order to prohibit or set aside the execution of the writ. The application was entertained by reason that the Regulation quoted herein should be followed. The area over which arose this dispute lies within the explicit jurisdiction of this Native Court.

The evidence adduced before the Court coupled with the Exhibits, and Plan tendered in evidence by the parties have been carefully studied.

The Plan describes the boundary of the area in dispute. The boundary laid by the Omanhene's

In the Native
Akan Court "B".

No. 9.

Judgment.

2nd September,
1953

- continued.

In the Native
Akan Court "B".

No. 9.

Judgment.

2nd September,
1953

- continued.

Tribunal is from the top of the Oprana Hill from River Asuokoko Southward to stream Motabe and down to an Ntome tree and the road cleaning heap on Asato-Apesokubi Road. According to this boundary, the Plaintiff's land is on the East and Defendant's on the West but his subjects have crossed the boundary and made farms on Plaintiff's land on the East. The Court finds that the judgment of the Omanhene's Tribunal which set out this boundary, and upon which this action has been instituted has not been nullified by any Court. In view of this fact, the Court sees no reason why it should decline from making the order sought for by the Plaintiff. Judgment is therefore for Plaintiff with costs against the Defendant.

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ORDER:-

The Court orders that by virtue of the judgment of the Omanhene's Tribunal dated 3rd March, 1931 and confirmed by the West African Court of Appeal on the 20th April, 1937, Plaintiff has been declared the "Decree Holder" of the area in dispute and should therefore by virtue of this order take possession thereof.

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(Sgd.) Nana Yao Kako III
PRESIDENT.

(Sgd.) V.K. Duedu,
Recorder, Registrar.

In the Native
Appeal Court.

No. 10.

PRELIMINARY GROUNDS OF APPEAL.

No.10.

Preliminary
Grounds of
Appeal.

18th September,
1953.

IN THE NATIVE COURT OF APPEAL, BUEM STATE, BORADA 30

SUB-CHIEF OSEI BONSU OF ASATO Plaintiff-Respondent

vs:

NANA KWESI ADU (Deceased)
substituted by SUB-CHIEF KATABOA
OF APESOKUBI, Defendant-Appellant

PRELIMINARY GROUNDS OF APPEAL HEREIN

1. The Judgment by the Native Court below is inequitable and the Order made thereunder is irregular.
2. The Judgment is baseless, against law and

should not stay to interfere with justice that the case deserves.

DATED at Apesokubi this 18th day of September, 1953.

(Sgd.) Nana F.D. Kataboah,
DEFENDANT-APPELLANT.

TO THE REGISTRAR,
NATIVE COURT OF APPEAL,
BUEM STATE - BORADA

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and

SUB-CHIEF OSEI BONSU
PLAINTIFF-RESPONDENT OF ASATO,
ASATO.

In the Native
Appeal Court.

No.10.

Preliminary
Grounds of
Appeal.

18th September,
1953

- continued.

No. 11.

ADDITIONAL GROUNDS OF APPEAL

IN THE NATIVE COURT OF APPEAL, BUEM STATE, BORADA

SUB-CHIEF OSEI BONSU of Asato as
Representing the Stool and
People of Asato,

Plaintiff-Respondent

vs:

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SUB-CHIEF KWASI ADU (Deceased)
substituted by Sub-Chief Kataboah
of Apesokubi as Representing the
Stool and people of Apesokubi Defendant-Appellant

No.11.

Additional
Grounds of
Appeal.

17th October,
1953.

ADDITIONAL GROUNDS OF APPEAL

TAKE NOTICE that at the hearing of the above-named Appeal leave of the Court will be obtained to argue the following Additional Grounds of Appeal:

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3. The Trial Native Court was wrong in giving judgment on the merits of the Plaintiff's claims when what was before them was an application by Motion for an Order to dismiss the Plaintiff's Claim upon grounds set out in the Appellant's Affidavit in support of the application aforesaid.

4. The Trial Native Court was wrong in giving Judgment on the merits of the Plaintiff's

In the Native
Appeal Court.

No.11.

Additional
Grounds of
Appeal.

17th October,
1953

- continued.

claim when there was no hearing of the Plaintiff's claim as is provided by Sections 20, 21 and 22 of the Native Courts (Southern Section of Togoland under British Mandate) Procedure Regulation, 1949.

5. As the trial Native Court by its judgment did not give a decision on the Application before the Court the case should be sent back to it to deal with the Appellant's Application.

6. In so far as the Judgment of the Native Trial Court may be taken to mean a decision on the Appellant's Application by Motion for an Order to dismiss the Plaintiff's action the same was wrong because :-

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(1) It was against the weight of evidence.

(2) It was wrong in law in that by reason of the facts disclosed in the Appellant's Affidavit the judgment of the Omanhene of Buem's Tribunal dated the 3rd March, 1931 had ceased to regulate the rights of the parties in respect of the land in dispute.

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DATED at Apesokubi the 17th day of October, 1953.

(Sgd.) Nana F.D. Kataboa,
APPELLANT.

THE REGISTRAR,
NATIVE APPEAL COURT, BUEM STATE,
BORADA,

and

TO SUB-CHIEF OSEI BONSU
of Asato.

30

No.12.

Reply opposing
Grounds of
Appeal.

22nd October,
1953.

No. 12.

REPLY OPPOSING GROUNDS OF APPEAL
IN THE NATIVE COURT OF APPEAL, BORADA - BUEM.

(Title as No.11)

OPPOSITION GROUNDS OF APPEAL

1. That Ground one of the Appellant's preliminary grounds of is frivolous because, it does not explain:-

- (a) Why the judgment of the Court below was inequitable;
- (b) Why the order made thereunder was also irregular.

In the Native
Appeal Court.

No.12.

2. That Ground two is also frivolous because the Appellant was unable to explain why a judgment in which facts about the matter at issue have been set out was baseless.

Reply opposing
Grounds of
Appeal.

22nd October,
1953

- continued.

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3. That Grounds 3 and 4 of the additional grounds are palpably frivolous in that, the claim of the Plaintiff-Respondent and Appellant's plea by motion for dismissal were before the Court below. Appellant made his plea under Regulation 17 of the Procedure Regulations of 1949 and when the Court found that the plea had not been made out as is specified in Regulation 18, the hearing of the Respondent's claim continued by order of the Court (See Note at page 16 of the Appeal Record) After Respondent's statement, Appellant also dwelt upon the explanations he made from pages 9 and 12 of the Appeal Record. In this circumstance, the authorities quoted by him were overlooked and therefore the judgment of the Court below was sound because it based upon the facts adduced and documents tendered by the parties.

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4. Regarding Ground 5, since the Court below correctly decided the issues before it under Regulation 18 without any technical error, this ground should not be countenanced.

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5. Ground 6 - 1 and 2 are obviously frivolous because inasmuch as the judgment of the Omanhene's Tribunal dated 3rd March, 1931 had never been set aside by any Court and upon which the Court below based its judgment, it was the only weighty evidence in the case.

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6. That having been declared the "Decree Holder" of the area in dispute by the judgment of the Omanhene's Tribunal dated 3rd March, 1931 confirmed by the W.A.C.A. on the 20th April, 1937, and dwelling also upon the judgment of the W.A.C.A. dated 13th March, 1953, the Plaintiff-Respondent sued for possession and the order has been legally made by the Court below in consonance with the Judgments referred to herein. The Appeal Native Court would therefore

In the Native Appeal Court.

materially commit an error if it diverts from it.

No.12.

DATED at Asato this 22nd day of October, 1953.

Reply opposing Grounds of Appeal.

(Mkd.) Nana Osei Bonsu III
Asato Hene
Plaintiff-Respondent.

22nd October, 1953
- continued.

W/to mark:-
N.K. Nyame.
Gratis.

To the Registrar, Native Court of Appeal, Borada, And to the within-named Appellant Sub-Chief Kataboa of Apesokubi.

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No.13.

No. 13.

Court Notes of Hearing.

COURT NOTES OF HEARING

10th November, 1953.

IN THE BUEM NATIVE APPEAL COURT, HELD AT BORADA, ON TUESDAY, THE 10th DAY OF NOVEMBER, 1953, BEFORE DAVID K. DARKO, ACTING PRESIDENT WITH THE FOLLOWING MEMBERS:-

Alex K. Boampong
Petrol Kwami.

APPEAL CASE No.4/53.

SUB-CHIEF OSEI BONSU III
OF ASATO,

Plaintiff-Respondent

versus

NANA KWASI ADU (DECEASED)
Substituted by SUB-CHIEF
KATABOA OF APESOKUBI

Defendant-Appellant

Resumed from 10/11/53 (page 33 of this book)
Appeal from the Akan Native Court "B" Kadjebi.

PARTIES:- Both parties present.

Note:-

The Record of Appeal from the Akan Native Court "B" the grounds of appeal filed by the Appellant and the Opposition to grounds of appeal filed by the Respondent have been read to the Members and parties herein by the Registrar accordingly.

BY COURT TO APPELLANT:-

Q. Have you any submission to give in addition to your grounds of Appeal?

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- 10 A. What I have to say is that if there is a case before a Court and a motion has been made by one of the parties in respect of the case, the Motion should be heard first and decision given by the Court before the Court could know whether or not the case should be heard by it. If you look in the proceedings you will see that I have not given my plea because it was only the motion that I sent to the Court that was entertained by it. You will also see in the proceedings that I did not ask the Plaintiff-Respondent any question and he did not ask me any. It was the Motion that the Court heard first that was why I did not ask the Respondent any question and he did not ask me any. The Lower Court did make any order as to continue with the case at issue when hearing the Motion.
- 20 Q. Do you mean to say that it was the Motion that was heard by the Lower Court? A. Yes.
- Q. Are you appealing against the Motion now?
A. Yes.
- Q. Was it because of the hearing of this Motion hence you did not subpoena any witness?
A. Yes. At this stage, I do not want my witness to speak on my behalf again.

BY COURT TO RESPONDENT:-

- 30 Q. Have you any submission to give in addition to your Opposition to the Grounds of Appeal?
A. Yes. That is what the Appellant said that he was not allowed to give his plea was not true. He has been allowed to do so under Regulation 17. If any action has been taken against any one and he has made a Motion that the matter is res judicata and therefore it should be cancelled then it means that he has given his plea already hence such Motion to the Court. The Lower Court has not misdirected itself as yet because of Regulation 18. So if the Lower Court has continued with the hearing of the case after a plea of Res judicata has been given by the Appellant then it is no wrong procedure of the Lower Court in any way. From page of the proceedings, the Lower Court made a Note as follows:- "After having studied the Mover's and Opposer's Motion and Affidavits the Court orders that parties to give statement under Regulation 17 of Regulations No.23 of 1949, to
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In the Native
Appeal Court.

No.13.

Court Notes
of Hearing.

10th November,
1953

- continued.

In the Native
Appeal Court.

No.13.

Court Notes
of Hearing.

10th November,
1953

- continued.

enable it to give a fair judgment," is no wrong procedure of the Lower Court because it has delivered an Order that the case should be heard by it. After this Order of the Lower Court was delivered the Appellant was present when I was sworn to give my statement and I did accordingly. After my statement, see page where Defendant's statement was recorded. There the Appellant said that "I have nothing to say again in regard to making a statement apart from the explanation given in support of my Motion." 10

If the Appellant said the foregoing and he says now that he has not given statement then he is wrong. After the hearing of the Motion, the Lower Court asked him if he has something to say again, there he said "yes" and said all what he knows about the Motion. There the Appellant explained all about the dismissal of the case by the Lower Court. From there he spoke about the Motion in page of the proceedings. The Motion and the real case was heard and determined by the Lower Court on the same day. If Court has ordered that we shall give our statements then it shows that the Motion has been completed before. If the Appellant said in his grounds of appeal that the judgment of the Omanhene's Tribunal dated 3/3/31 has ceased to regulate by reason of his Affidavit, and he does not prove this with any judgment to conceal it, then he is wrong to say so. The procedure adopted by the Lower Court in the hearing of the Motion in respect of this case and the real case is not wrong in law equity and good conscience. He did not sue any witness to prove his case during the hearing of the case before the Akan Native Court. In respect of a Writ of Possession to be issued unless a party has obtained a judgment before that could be issued. 20 30

- Q. Have you sued witnesses to prove this case for you before the Lower Court? 40
- A. I did not sue any witness other than the judgment of the Omanhene's Tribunal dated 3/3/31 which I tendered in evidence in support of my case. At this stage, I do want my witnesses to speak on my behalf again.

BY COURT TO APPELLANT:-

- Q. Were you sworn to before you gave your statement in the Lower Court?

A. No, because it was the Motion that the Lower Court heard hence the reason why I was not asked to swear before giving my statements.

In the Native Appeal Court.

The Members retired into consultation and returned to give the following Order:-

No.13.

Court Notes of Hearing.

10th November, 1953

- continued.

No. 14.

No.14.

ORDER.

Order.

10th November, 1953.

COURT ORDER:-

10 This is a Civil Appeal from the Akan Native Court "B" Kadjebi, which delivered its judgment on the 2nd of September, 1953, at Kadjebi, against the Appellant and in favour of the Respondent herein of the following Claim:-

20 "In a Suit entitled Sub-Chief Osei Bonsu of Asato (Plaintiff) vs. Sub-Chief Kwasi Adu of Apesokubi (Defendant) the Native Tribunal of the Omanhene of Buem sitting at Borada, gave judgment for the Plaintiff herein against the immediate predecessor of the Defendant on the Stool of Apesokubi, for all that piece or parcel of Land subsequently surveyed and shown edged in Pink colour in Plan dated 15th June, 1952, and signed by E.S. Anoff, Licensed Surveyor of Nsawam, in following terms:-

"Apesokubi Chief is guilty. The land properly belongs to Asato. The proper boundary fixed in this Judgment is the top of Oprana Hill from River Asuokoko Southward to stream Mutabe and down to an Ntome tree and the Road cleaning heap on Asato - Apesokubi Road.

30 The Judgment dated 3rd March, 1931 was the subject of an Appeal to the Provincial Commissioner of the Eastern Province and finally to the West African Court of Appeal which latter Court on the 20th day of April, 1937, confirmed the Judgment of the Native Tribunal. After the Judgment referred to, the Defendant and his subjects unlawfully entered upon the said parcel of Land cultivated and made farms and villages upon portions of the said Land with full knowledge of the Judgment. The Plaintiff therefore claims Recovery of Possession

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In the Native
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1953

- continued.

of all portions of the land wrongly occupied by the Defendant or any of his subjects according to the Boundary defined in the Judgment of the Native Tribunal of the Omanhene of Buem referred to herein."

The Appeal Record of Proceedings from the Lower Court, the Grounds of Appeal filed by the Respondent have been carefully read and studied by this Court.

After careful scrutiny of the contentions of both parties herein, this Court has observed that unfortunately the proceedings of the Lower Court are badly recorded in that it is irregular and in many cases against the Court's Proceedings, because, the hearing of the Motions in respect of this case and the hearing of the real case of the above claim were mixed up by the Lower Court in the proceedings before this Court. That the decisions of the Motions and the Judgment of the real case were not given by the Lower Court separately. 10 20

That in the proceedings from the Lower Court it was also observed by this Court that the Representative of the Respondent was sworn to before he gave his statements but the Appellant was not sworn to before he gave his short statements. That in accordance with Regulation 15 of Regulations No.23 of 1949, no plea was even recorded by the Lower Court in its proceedings of the case.

In view of these irregularities, this Court hereby declare the whole proceedings of this case a nullity and hereby ordered that in order that both the Appellant and Respondent may be justly treated by this Court, this case is hereby remitted to the Akan Native Court "B" Kadjebi, for re-hearing de novo, and that the said Akan Native Court "B" shall:- 30

(a) Hear and determine the Motion in respect of this case separately;

(b) Hear and determine the real case of the above claim in accordance with the Courts Procedure separately. 40

The hearing of the Motions and the case should be conducted by the Lower Court within the period of one month from the date of this Order and free of further fees. Costs of this Appeal to be borne by each party his own.

Copy of this Order to be served on the Lower Court for information and necessary action.

(Mkd.) David K. Darko,
Acting President,
Buem Native Appeal Court.

W/to mark --

(Sgd.) G.K. Apreko,
Registrar, B.N.A.C.
10/11/53.

In the Native Appeal Court.

No.14.

Order.

10th November,
1953

- continued.

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No. 15.

GROUNDS OF APPEAL.

IN THE SUPREME COURT OF THE GOLD COAST
EASTERN JUDICIAL DIVISION
LAND COURT - ACCRA.

In the Supreme Court

No.15.

Grounds of Appeal.

25th November,
1953.

SUB-CHIEF OSEI BONSU III
of Asato Plaintiff-Respondent-Appellant

versus

NANA KWASI ADU (Deceased)
substituted by SUB-CHIEF
KATABOA of Apesokubi,
Defendant-Appellant-Respondent

20

GROUNDS OF APPEAL

1. There were factually and legally, no irregularities about the trial of the suit by the Lower Court (Akan Native Court "B" - Kadjebi) or, if there were, which is denied, they were not sufficiently grave or fatal as to operate to vitiate or render null and void the trial and Judgment of the Lower Court And it is submitted therefore, that the Native Appeal Court were wrong in their decision that "in view of these irregularities this Court hereby declared the whole proceedings of this case a nullity."

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2. The Native Appeal Court's view and/or complaint against the Lower Court that "it is irregular and against the Court's procedure that the hearing of the Motion in respect of the case and the hearing of real case of the above claim were mixed up by the Lower Court" - has no sound or valid justification, because, the Motion by the Defendant

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In the
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No.15.

Grounds of
Appeal.

25th November,
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- continued.

before the Lower Court to dismiss the suit, in effect put forward the Defendant's defence to the Plaintiff's claim, or at any rate, raised for determination, the same question or issue which was pending for determination on the substantive claim, whether or not the claim can be maintained at all in view of what the Defendant contends was "an agreement to withdraw the dispute for settlement by Arbitration."

In the circumstances, the substantive claim and the Motion were so inseparable, that both had necessarily to be dealt with together and at the same time, and the Lower Court were right in considering not only the Affidavit and explanatory statements made on them, as well as the formal evidence which the Lower Court eventually ordered should be given before they came to their final decision on the whole matter.

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3. As to a Plea not having been formally entered in accordance with Reg.15 of Regulations No.23/49 the filing by the Defendant of a formal Motion to dismiss the Suit dispensed with any necessity to enter a plea of Not Liable - because that Plea was apparent on the face of the Motion paper and the supporting Affidavit both of which were on record before the Lower Court.

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4. As to Defendant's representative not having been sworn - no valid objection can be taken to that, since after the Lower Court's decision to take formal evidence as follows:-
"Note - After having studied Mover's and Opposer's Motion and Affidavits, the Court orders parties to give statements under Reg.17 of Regulations 23/49 to enable it to give a fair judgment."

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The Defendant-Respondent, when it came to his turn to give evidence, said -

"I have nothing to say again in regard to making a statement, apart from the explanation given in support of my Motion."

The Defendant-Respondent having declined to give evidence, could naturally not be sworn.

40

5. The Native Appeal Court's decision setting aside the decision or Judgment of the Lower Court was manifestly against the weight of the evidence and not warranted.

DATED AT AZINYO CHAMBERS, ACCRA, THIS 25th

NOVEMBER, 1953.

(Sgd.) K. Adumua Bossman,
SOLICITOR FOR PLAINTIFF-
RESPONDENT-APPELLANT.

TO THE REGISTRAR,
LAND COURT, ACCRA,

and

TO SUB-CHIEF KATABOA
OF APESOKUBI.

In the
Supreme Court

No.15.

Grounds of
Appeal.

25th November,
1953

- continued.

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No. 16.

COURT NOTES OF COUNSEL'S ARGUMENTS.

15th April, 1954.

In the Land Court of the Supreme Court of the Gold Coast, Eastern Judicial Division, held at Victoria-borg, Accra, on Thursday the 15th day of April, 1954 before Sir Mark Wilson, Kt., Chief Justice.

LA.No.94/1953.

SUB-CHIEF OSEI BONSU III

v.

SUB-CHIEF KATABOA.

No.16.

Court Notes
of Counsel's
Arguments.

15th April,
1954.

20

OLLENNU:-

Appeal from Native Appeal Court of Buem dated 10/11/53 setting aside the judgment of the Akan Native Court "B" at Kadjebi in our favour.

When the case came before the Native Court the Defendant pleaded under Reg.17 of Regulations No.23 of 49 that the matter was res judicata - Defendant had filed a motion asking the Court to dismiss the action as res judicata.

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Motion (see p.6 of record) and Affidavit in support.

Native Court then considered this plea, see page 9 of record. Only heard the statements of both parties after reading their affidavits and then decided to take evidence, still in pursuance of the hearing of the Defendant's motion about res judicata.

In the
Supreme Court

No.16.

Court Notes
of Counsel's
Arguments.

15th April,
1954

- continued.

Plaintiff first gave evidence at pages 15-16 Notice Court Note at pages 15-16. Then Plaintiff gave his evidence on oath and tendered the judgment of the Omanhene's Tribunal in 1931 and the W.A.C.A. judgment which restored the judgment of the Tribunal which had (without jurisdiction as W.A.C.A. held) been upset by the Provincial Commissioner's Court. (See pages 78-80 of record). While the appeal against the restored judgment was pending in the Buem State Council certain people suggested an arbitrating "committee" to settle the parties differences. Defendant then discontinued his appeal in the State Council. This was in 1939 but nothing happened until 1949 when a sort of reconstitution of the first committee with additions of personnel to replace head members set out to arbitrate. But the Defendants brought an action to stop them but lost the suit and then lost their appeal against the Native Court's judgment.

10

Then in 1952 we (Plaintiffs) applied for a writ of possession under the 1931 judgment. Defendant applied for a writ of prohibition against the Plaintiffs. The matter went to W.A.C.A. which held that as the 1931 judgment had given a declaration of title only to Plaintiff, but no decree for recovery of possession the Native Court could not give a writ of possession and therefore the Defendant was given his writ of prohibition - so the Plaintiffs had then to file this suit for recovery of possession of their land on which the Defendant had trespassed. Having had all these papers and judgments etc., before them the Native Court gave judgment (see page 19 onwards to page 22). The effect of the judgment was that the boundary between the two parties had been irrecoverably settled by the judgment of 1931, as it had never been nullified by any Court.

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(Court): But the proceedings before the Court were merely on a motion to dismiss the Plaintiff's suit on certain grounds set forth in his affidavit. In effect these seem to be that the 1931 judgment was no longer of any effect because of a subsequent agreement of the parties to go to arbitration or negotiation and because (as alleged) a settlement had been arrived at at a meeting between the parties at Nsuta (Buem) some time before 1943 (Akufo Addo - we say on 24/7/42) which had wiped out the 1931 proceedings and any right accrued

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under them and substituted a "settlement" and that it only remained to demarcate the boundary between the parties under this settlement.

In the
Supreme Court

No.16.

Court Notes
of Counsel's
Arguments.

15th April,
1954

- continued.

Ollennu:-

10 It is necessary to look at page 9 of the proceedings in before the trial Court on the Defendant's motion. - Reads Defendant's (mover's) statement at page 9. He seems to have relied on the judgment of this Land Court in LA. No.42/1950 (See pp. 83-84 of record) "This is a very tangled skein indeed still open to them."

The effect of this judgment is that the lower Court's judgment was upheld and that judgment had decided that the arbitration was null and void and that both parties were left with the Omanhene's Tribunal judgment of 1931 which had never been set aside. Trial Court judgment at page 22 (last paragraph).

20 The effect of that decision was that the trial Court held that they could not dismiss the Plaintiff's suit on the grounds raised by the Defendant i.e. the alleged arbitration which he had set up. But they went further and said that the logical result of their decision was to leave subsisting and valid the 1931 judgment and Plaintiff's rights thereunder and they said in effect that was the end of the matter and that on that the Plaintiff without further hearing of the case was entitled
30 to an order for possession of the land in dispute.

(Court:-

The Respondents in this case say that that was improper; that it was going beyond what they were entitled to do on the hearing of the motion).

40 The hearing of the motion was, I submit, treated by the trial Court as the hearing of the action. They first heard the parties' arguments on the motion at pages 9 to 16. Then comes the Court's Note. That amounted to saying that having heard the arguments on the question of res judicata they would reserve the point and go on to hear the evidence of the parties in effect was the hearing of the suit. The Plaintiff's evidence was then taken. He relied on his own evidence only and the documents in the case (previous judgments, etc.) and called no witness. He was submitted to Cross-

In the
Supreme Court

No.16.

Court Notes
of Counsel's
Arguments.

15th April,
1954

- continued.

examination by Defendant (no questions) and by the Court.

The Defendant was then called upon for his defence. He then made a very significant statement (quotes). He had nothing more to put forward. He relied and opted to rely on what he had said in support of his motion. He thus separated this part of the case (what we say was the trial of the action) from the earlier hearing of the motion.

The Native Appeal Court also appreciated this decision. The effect of their decision (reads at p.30 ... "After careful scrutiny by the Lower Court separately") was that both the motion and the "real case" had been heard, but that the trial Court erred in not giving separate decisions. They therefore set aside the judgment of the Lower Court. That was wrong. It was perfectly competent for them to do this. It was a logical consequence of their decision refusing the Defendant's motion to dismiss the case to go on to give judgment for the Plaintiff under the 1931 judgment. I ask that the judgment of the trial Court to be restored.

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20

AKUFO ADDO:-

The judgment in L.A. No.42/1950 contained a good deal of obiter. The essential part of the judgment was that the alleged demarcation which had been made by persons not authorised to do so was null and void. As regards the proceedings for the writ of prohibition we went on two grounds:

30

(i) that present appellant was not entitled to ask for a writ of possession under the 1931 judgment because there was a subsequent agreed settlement as to boundaries between the parties under the 1942 arbitration and

(ii) that the 1931 judgment had made no order for recovery of possession but only gave appellant a declaration of title.

The proceedings in the trial Court were primarily a motion to dismiss the suit. If that motion was refused or dismissed there were still defences that could be raised to the Plaintiff's action for possession. He might have said that he had no farms on the land at all. If that were proved it would be a good defence to the action for possession because no order for possession could be executed against one who was not in possession. His

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tenants might if the case went against Defendant, attorn to the Plaintiff as their landlord and under native customary law they could not be ejected from their farms. So Defendant might have applied to have his subjects who had farms on the land to be joined.

In the
Supreme Court

No.16.

Court Notes
of Counsel's
Arguments.

15th April,
1954

- continued.

10 Regulations 17 and 18 of Regulations No.23/1949; Regulation 18 was not complied with in that no plea was taken in accordance with Regulation 15. The trial Court began under Regulation 17 to hear the motion. They ought to have given their decision on the motion and then called upon the Defendant to plead under Regulation 15. They neglected to do this.

(Court: What about the last six words of Regulation 18?

20 My point is, as the Court's Note at p.32 says, that in taking the statement of the Plaintiff on oath at pages 15-16 they were still proceeding under Regulation 17. They actually say so. They may have considered it necessary to take a statement on oath, although they had already heard arguments of both parties.

30 When a preliminary point is reserved in a Court and the Court goes on to hear the evidence on the merits it says so explicitly. That was not done here - Exhibit "D" (p.71) is the mutual agreement of both parties to discontinue the dispute between them and to refer the matter to a Committee. It was not a withdrawal of an appeal by one party.

Then there is Exhibit "E" at page 74 (a) which sets out the agreement between the parties on 24/7/42. This was a definite agreement between the parties to demarcate a boundary and the means of doing so was set out. It was the intention of the Defendant to file a counter claim asking the Native Court to implement this agreement of 1942 (Exhibit "E").

40 The Native Court should have investigated all these matters - was this agreement of 1942 valid or invalid? Was there any other defence to be raised? Defendant was never given an opportunity to raise his defences in the real case. The Native Appeal Court was perfectly correct in sending the case back for trial de novo.

In the
Supreme Court

No.16.

Court Notes
of Counsel's
Arguments.

15th April,
1954

- continued.

Defendant's intention is to ask for the im-
plementation of the 1942 agreement to arbitrate.

OLLENNU:-

The mere mention of Regulation 17 in the
Court's note is quite immaterial because it is
under Regulation 18 that they were acting at that
stage. It was open to the Defendant to make his
defence and put it fully before the Court when he
was called upon after Plaintiff had given his evi-
dence. He threw away his opportunity.

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As regards the so-called agreement to submit
to arbitration it was not a proper arbitration
agreement.

(Court: Both Exhibit "D" (at p.71) and Exhibit
"E" (at p. 74(a) and (b) seem to show an agree-
ment to abide by the decision of the three chiefs)

It was only if the boundary was cut in a certain
way that they would agree (reads).

Judgment in L.A.42/1950 at pp. 82-84.

That judgment dealt with the findings of the
Native Court and confirmed them.

20

There was no evidence that Defendant's sub-
jects had attorned tenants to the Plaintiff
at all. So that argument was irrelevant.

I submit that the Native Court judgment was
arrived at in proper form and should be restored.

(Sgd.) Mark Wilson, C.J.

C.A.V.

15.4.54.

No.17.

Court Notes
of Judgment.

22nd April,
1954.

No. 17.

COURT NOTES OF JUDGMENT

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In the Land Court of the Supreme Court of the Gold
Coast. Eastern Judicial Division, held at
Victoriaborg, Accra on Thursday the 22nd day of
April, 1954, before Sir Mark Wilson, Kt. Chief
Justice.

L.A.No.94/1953

Bonsu III v. Kataboa

Mrs. Forster (for Ollennu) for Appellant.
Annan (for Akufo Addo) for Respondent.

Judgment delivered. Judgment of the Native Appeal Court set aside and judgment of the trial Native Court restored with costs to the Appellant assessed at £31.0.0. (thirty-one pounds) including Counsel's fee of ten (10) guineas.

(Sgd.) Mark Wilson,
C.J.
22.4.54.

In the
Supreme Court

No.17.

Court Notes
of Judgment.
22nd April 1954
- continued.

No. 18.

JUDGMENT

No.18.

Judgment.

22nd April 1954.

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22nd April, 1954.

In the Supreme Court of the Gold Coast, Eastern Judicial Division (Lands Division) held at Victoriaborg, Accra, on Thursday the 22nd day of April, 1954, before Sir Mark Wilson, Kt., Chief Justice.

Land Appeal No.94/1953

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Sub-Chief Osei Bonsu III
of Asato

Plaintiff-Respondent-
Appellant.

vs.

Nana Kwasi Adu (Deceased)
substituted by Sub-Chief
Kataboa of Apesokubi

Defendant-Appellant-
Respondent.

JUDGMENT:-

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This is an appeal by the original Plaintiff from a decision of the Buem Native Appeal Court dated 10th November, 1953 which set aside a judgment of the Akan Native Court "B" at Kadjebi dated 2nd September, 1953 in favour of the Plaintiff on the grounds that the conduct of the case and the procedure followed at the trial had been so irregular in several respects as to amount to a failure of justice to the Defendant.

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The present case is the latest instalment in a series of lawsuits arising out of a land dispute which has apparently been going on for over forty

In the
Supreme Court

No.18.

Judgment.

22nd April,
1954

- continued.

years between the Asato and the Apesokubi stools as to the ownership of a piece of stool land on their borders. This land was the subject of a suit for declaration of title in the Native Tribunal of the Omanhene of Buem which on 3rd March, 1931 gave a decision in favour of the present Plaintiff. It has been held by the West African Court of Appeal in subsequent litigation (see judgment dated 13th March, 1953 in W.A.C.A. Civil Appeal No.29/52) that this judgment of 3rd March, 1931 was merely declaratory of the Plaintiff's title and did not give him a decree for possession of the land, such decree not having been asked for in the summons which instituted the proceedings. For that reason the Defendant (after he had carried the matter to West African Court of Appeal) was successful on an application for a writ of prohibition to prohibit the execution of a writ of possession which the Plaintiff had obtained from the Native Court of Buem-Borada on 28th April, 1951. 10

Subsequently the Plaintiff took out a civil summons in the Akan Native Court "B" dated 15th April, 1953 which, after reciting the existence of the judgment of the Omanhene's Tribunal dated 3rd March, 1931 referred to above, stated that the Defendant and his subjects subsequent to that judgment had unlawfully entered upon and cultivated portions of the land to which Plaintiff had been given title and prayed for an order for possession of the land in question. 20

The hearing of the suit was fixed for 19th May, 1953 but at the request of the Defendant it was adjourned to 23rd June, 1953 and on 19th June, 1953 the Defendant filed a motion supported by Affidavit praying for the dismissal of the Plaintiff's suit on the grounds, as it seems, that the judgment of 3rd March, 1931 was no longer effective. The Plaintiff's rights under it had, the Affidavit alleged, been extinguished by the subsequent agreement of the parties "to discontinue the land dispute" (which had then, according to a document headed "Terms of Settlement" dated 12th July, 1939 - Exhibit "D", been going on for thirty years) and to submit the question of the demarcation of the boundary between the lands of the two stools to the arbitration of a "committee" composed of the elders of Worawora, Tapa, Apesokubi and Asato and to abide by their decision. The Affidavit further stated that certain action taken and an award made under this arbitration agreement 30 40 50

in 1947 had been set aside by the Native Tribunal of Buem-Borada (see Judgment - Exhibit "H" - dated 13th May, 1948) on the ground that it had been arrived at by the arbitrators in the absence of the present Defendant and this decision had been upheld by this Court on appeal (see judgment dated 20th November, 1950 in L.A. No.42/1950 - Exhibit "J").

In the
Supreme Court

No.18.

Judgment.

22nd April,
1954

- continued.

10 This motion of the Defendant to dismiss the Plaintiff's case was set down for hearing on 23rd June, 1953, but owing to adjournments for various reasons the hearing did not begin until 4th August, 1953. It continued at intervals until judgment was given on 2nd September, 1953 in favour of the Plaintiff with costs. He was given an order for possession of the land in dispute, which was described as lying to the east of the boundary line fixed and described by the Omanhene's Tribunal in the judgment of 3rd March, 1931, which judgment
20 trial Court held to be still subsisting and effective, it not having been nullified by any superior Court. Against that decision the Defendant appeal to the Buem Native Appeal Court which allowed the appeal and remitted the case to the trial Court for re-hearing de novo on the grounds (i) that the original proceedings had been irregular in that the hearing of the motion and the trial of what they called "the real case" had been mixed up and no separate decisions given as required by Regulation 18 of the Regulations (No.23 of 1949) governing
30 procedure in the Native Courts of Southern Togoland; (ii) that no plea was ever taken from the Defendant as to his liability under the claim and recorded in the Record Book as required by Regulation 15; and (iii) that no sworn evidence was taken from Defendant before the decision was given.

40 The original Plaintiff has appealed to this Court against that decision to remit the case to the trial Court. The appeal has been fully argued before me and after having given considerable thought to the matter I have come to the following conclusions -

The Plaintiff's suit was brought in order to bring to an end the inconclusive series of legal proceedings by way of suit and so-called arbitration which began in 1931 and has gone on now for over twenty years. It was a step which followed logically from the decision of the West African Court of Appeal to grant a writ of prohibition;

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Supreme Court

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- continued.

for that Court had held that though Plaintiff had obtained a declaration of title to this land in 1931 it had not been accompanied by a decree for possession. The natural course then was for the Plaintiff to seek such a decree. When Plaintiff instituted this suit for that purpose the Defendant adopted the extraordinary expedient of filing a motion supported by Affidavit praying the Court to dismiss the Plaintiff's claim on the grounds that the judgment of 3rd March, 1931 cited in the Plaintiff's claim had ceased to be effective and that the only remedy left to the Plaintiff was to proceed with the so-called arbitration based on the agreement of 12th July, 1939.

10

There is no justification in the Native Court (Southern Togoland) Procedure Regulations, 1949 (No.23 of 1949) for the procedure which the Defendant adopted. The correct procedure is laid down in Regulation 17, i.e., that after he has been asked to plead under Regulation 15 the Defendant may raise a plea to the jurisdiction, etc., for that reason I am of opinion that the Defendant, having himself side tracked the Regulations, cannot be heard to deny that he was asked to plead under Regulation 15. In effect his filing of the motion as mentioned was obviously taken by the Court as a denial of liability. It could mean nothing else and it stated very fully why the Defendant denied the Plaintiff's right to a decree for possession. It cannot in those circumstances be said that anybody was in any doubt when the hearing began on 4th August, 1953 as to what the Defendant's answer to the claim was.

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The hearing proceeded on that basis and the Court proceeded, in the words of Regulation 18, to consider whether the plea made by the Defendant had been made out. It heard the statements of both parties in great detail. (It is to be noted that there is nothing in the Regulations to require the parties to be sworn at this stage and they were not). The Court then noted that it had studied the mover's and opposer's motion and affidavits and decided to order that the parties should "give statement under Regulation 17 of Regulations No.23 of 1949 to enable it (the Court) to give a fair judgment."

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The reference to Regulation 17 in the above passage is meaningless, for the making of a statement is not referred to in Regulation 17 at all. After full consideration I have come to the

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In the
Supreme Court

No.18.

Judgment.

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1954

- continued.

10 conclusion, largely from studying the proceedings which actually followed this interim decision of the Court, that what they meant to do was to order, in the words of the last clause of Regulation 18, that the hearing of the suit should continue. It is true that at that stage they had not recorded their decision on the preliminary point raised by the Defendant, but a perusal of the judgment will show that they considered and dealt with that point and came to a definite decision on it which is recorded in the judgment.

20 The Plaintiff at any rate was then put on his oath and gave evidence at considerable length which was clearly directed to the general proof of his claim. The Defendant was given an opportunity to cross-examine him but did not ask any questions. The Defendant then stated in answer to the Court that he did not wish to say anything more but relied on the statement he had already made. He did not make this answer on oath but I have no doubt that if he had wished to give a further statement he would have been put on his oath as the Plaintiff was. A party cannot be compelled to give evidence and the Defendant opted not to do so in this case, according to my reading of the record.

30 The Court then having retired for consultation delivered their judgment in favour of the Plaintiff and gave him decree for possession of the land based on the boundary fixed in the judgment of 3rd March, 1931, which they found to be still in full force and effect contrary to the submission of the Defendant in his Affidavit.

40 I have considered whether any irregularities of procedure which may have occurred at the trial constituted a failure of justice to the Defendant. I cannot see that they did. He was allowed to put his case very fully before the Court and the questions put to him by the Court (as also to the Plaintiff) show that they fully appreciated the grounds of his opposition to the Plaintiff's claim. It was suggested by Counsel that the Defendant might have put forward other grounds of opposition to the Plaintiff's claim if a decision to refuse his application for the dismissal of the Plaintiff's suit had been given separately and he had then been allowed to argue what the Native Appeal Court called "the real case." But, having regard to the nature of the Plaintiff's suit, I cannot see what was left for argument once the trial Court had decided that the judgment of 3rd March, 1931

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In the
Supreme Court

No.18.

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22nd April,
1954

- continued.

still stood effective and had not been nullified by any superior Court. Counsel for the Defendant (Respondent) said that other defences were open to the Defendant - that he was not in possession of the land at all or that he might wish his stool subjects who had farms on the land to be joined as Defendants. But the Defendant did not cross-examine the Plaintiff when the latter in the course of his evidence (at page 18) stated that "the Defendant and his men trespassed on the land, hence I brought this action for recovery of possession." 10
And if his subjects are in possession of the land and claim to be lawfully there it would seem that their remedy lies under Regulation 109 of Regulations No.23 of 1949 if the Plaintiff wins this case. Their position and rights are in fact amply protected by native customary law. In a case of this kind the West African Court of Appeal has held, adopting the statement of the native customary law on the subject given by the trial Native Court, that a person who has obtained a declaration of title and an order for possession of land cannot arbitrarily oust those tenants already settled on the land, that his proper and only remedy is to notify the former tenants on the land to come before him to arrange tenancy agreements. If they refuse or fail to appear he may sue them in a Court of competent jurisdiction to show cause why they are farming on his land but refuse to enter into a tenancy agreement with him (Kweku Nsemfoo v. Nana Gyebi Ababio II - W.A.C.A. written judgments - 28th January, 1947 to 24th February, 1947 at p.42) 20 30

There is one other aspect of the matter which should be touched on. I have already mentioned the irregular manner in which the Defendant brought his application to dismiss the suit before the Court. But I should also like to say that it is not clear to me how this application can be properly said to have been brought under Regulation 17. It was clearly not a plea that the Court had no jurisdiction in the matter, nor was it a submission that the claim disclosed no cause of action. And it can surely not be suggested that it was a plea that the subject matter of the suit had already been adjudicated upon. The only previous decisions on the subject matter were the judgment of 3rd March, 1931, which the Defendant would not wish to plead as it was adverse to him, and the so-called arbitration award of 20th June, 1947 which was set aside on the Defendant's own application by the judgment in L.A.No.42/1950, confirming 40 50

the decision of the Native Court. There was no suggestion that any of the other attempts at arbitration had resulted in any award.

This strengthens the view I formed during the hearing that in fact the proceedings in the Native Court were in reality not the hearing of a motion under Regulation 17 but the trial of the suit and that the submissions in Defendant's Affidavit were really his plea denying liability on the Plaintiff's claim and putting forward the defence that the judgment of 3rd March, 1931 had been extinguished by agreements to arbitrate. It is necessary therefore to consider these so-called agreements to arbitrate.

The Respondent seemed in his Affidavit to be basing himself on the agreement of 12th July, 1939 to discontinue the litigation and let the matter be settled by the arbitration of the Committee of elders. It is clear that the early proceedings of this Committee proved abortive, as a passing reference in the document Exhibit "E" dated 24th July, 1942 put in by the Defendant shows. Its later effort to fix the boundary in 1947 was rendered equally abortive, as already mentioned above, by the Defendant's action and this particular body of arbitrators seems, judging by the letter dated 25th November, 1950 addressed to the parties (also marked Exhibit "E") to have thrown up the sponge and resigned from their position as arbitrators. Counsel for the Respondent, however, during his argument seemed now to be pinning his faith to the other alleged agreement for arbitration which is mentioned in the "Minutes of a Meeting of the Benkum Division Council held on 24th July, 1942" (Exhibit "E") already referred to above. But it is clear from the District Commissioner's letter dated 20th August, 1943 that this attempt also came to nothing and that these so-called arbitrators also ceased to exercise their functions. It is abundantly clear that as far as arbitration is concerned the parties were never willing to abide by the result unless it favoured them. Indeed the terms of the agreements suggest strongly that their agreement to arbitrate was conditional on the arbitration being done in a particular way. It seems highly doubtful therefore that any solution of the problem in this way is or ever was possible.

There remains the original judgment of 3rd March, 1931 which, as the trial Court found, was never abrogated or set aside by any competent

In the
Supreme Court

No.18.

Judgment.

22nd April,
1954

- continued.

In the
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- continued.

Court. Nor does it seem to me that the rights accruing under it were extinguished by the terms of the agreement of the 12th July, 1939, which was in my opinion an agreement only to discontinue the appeal then pending before the Buem State Council. Even if it were held to be an agreement not to enforce the judgment (which in any event only gave the Plaintiff a declaration of title to the land in dispute without an order for possession) in consideration of an attempt to settle the matter by arbitration, the Plaintiff could not possibly be bound indefinitely by that agreement if and when arbitration proved abortive.

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Summing up my view of this case: it seems to me that the Plaintiff's present suit was justified by the failure of all previous efforts to determine the rights of the parties conclusively and was a logical outcome of their previous attempt to obtain a writ of possession based on the judgment of 3rd March, 1931, which was frustrated by the writ of prohibition subsequently obtained by the Defendant. The Defendant's answer to the Plaintiff's present claim for an order for recovery of possession of the land in dispute was in effect that Plaintiff was not entitled to rely on the declaration of title he had obtained in the 1931 suit because subsequently in 1939 he had abandoned any rights he had obtained under that judgment and had agreed to abide by the decision of an arbitrating body of elders. This reply, contained in the Defendant's Affidavit of 26th May, 1953 was in effect the Defendant's plea to the Plaintiff's claim; to make it the support for a motion to dismiss the Plaintiff's suit was not in accordance with the procedure laid down in Regulation 17 of the Regulations No.23 of 1949, for it was not a motion of the nature contemplated in Regulation 17. For that reason no weight need be placed on such failure of the trial Court to follow the procedure laid down in Regulations 17 and 18 as occurred. There was in any event no failure of justice to the Defendant involved in the method of procedure adopted by the trial Court. That Court gave the Defendant every reasonable opportunity to put forward fully any defences to the Plaintiff's claim which he had and if he failed to take advantage of this it was his own fault. In fact it does not seem, having regard to the nature of the Plaintiff's action, that he had any other defences available. As regards the assertion that the Plaintiff could no

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longer rely on the declaration of title given to
 him by the judgment of 3rd March, 1931, I see no
 good ground for this submission. That judgment
 has never been reversed or set aside by any com-
 petent Court. There is nothing that I can see in
 any agreement made by the Plaintiff of which evi-
 dence appears on the record to justify the view
 that he abandoned his rights under the 1931 judg-
 ment. Such an abandonment of rights judicially
 won should not be implied without clear evidence.
 The 1939 agreement which was arrived at on the
 urging of third parties, was (as I read it) an
 agreement to discontinue the long standing land
 dispute between the parties on the basis that the
 boundary between the Asatos and the Apesokubis
 "should remain as traditionally known" and that
 the "Committee" of elders would carry out a "pre-
 liminary investigation as to the extension of the
 traditional boundary right across the forest, if
 any." That is pretty vague. There is not a
 word in it about the Plaintiff abandoning his
 rights under the 1931 judgment and the only prac-
 tical action that seems to have resulted from it
 was that the parties gave notice to the Buem State
 Council (which was the equivalent at that time of
 the present Native Appeal Court) to discontinue
 the appeal said to be then pending in the State
 Council. Thereafter such efforts as the "Commit-
 tee" made to carry out their arbitratory functions
 proved abortive and by their letter sent to the
 parties in November, 1950 they plainly divested
 themselves of their functions and left the parties
 to proceed with their litigation, if they so de-
 sired. The other attempt at arbitration, on the
 praiseworthy initiative of the District Commis-
 sioner in 1942, had proved equally unsuccessful
 and that ad hoc body of arbitrators seems on the
 face of the documentary evidence to have also been
 paid off and dissolved and no more is heard of it
 in the ten or twelve years that has since elapsed.
 In those circumstances I am entirely unable to
 concur in the view of Counsel for the Defendant
 (Respondent) that recourse to arbitration is the
 only remedy now open to the Plaintiff and that he
 has lost his rights under the 1931 judgment. The
 logical result of accepting that submission would
 be that all the Defendant would have to do to re-
 tain perpetual possession of the land in dispute
 which Plaintiff claims he has unlawfully occupied
 would be to do, as somebody has undoubtedly been
 doing for about fifteen years, namely, to take

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 1954

- continued.

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- continued.

evasive action on the rare occasions when the cumbersome arbitrating body could be brought to move in the matter, if in fact it ever could. Finally, I do not see anything unjust or improper in the method and procedure of the trial, nor do I see any good reason, having regard to all the circumstances of the case for interfering with the decision of the trial Court or (as the Native Appeal Court did) for referring the case back to the trial Court for a rehearing de novo.

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I accordingly set aside the judgment of the Native Appeal Court and restore the judgment of the trial Court. The Appellant will have the costs of this appeal assessed at £31.0.0. (Thirty one pounds) including ten (10) guineas for Counsel's fee.

(Sgd.) Mark Wilson,
CHIEF JUSTICE.

Counsel:

Mrs.Forster (for Ollenna) for Plaintiff-
Respondent-Appellant.

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Mr.Nii Odoi Annan (for Akufo Addo) for
Defendant-Appellant-Respondent.

In the West
African Court
of Appeal.

No.19.

Notice and
Grounds of
Appeal.

27th April,
1954.

No. 19.

NOTICE AND GROUNDS OF APPEAL

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

A.D. 1954.

NOTICE OF APPEAL (Rule 12)

SUB-CHIEF OSEI BONSU of Asato

Appellant

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vs:

SUB-CHIEF KATABOA of Apesokubi

Respondent

TAKE NOTICE that the Respondent herein dissatisfied with the decision of the Land Court, Accra, in the Judgment of Sir Mark Wilson, C.J., dated 22nd day of April, 1954 does 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.

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AND THE APPELLANT further states that the names and addresses of the person directly affected by the appeal are those set out in paragraph 5.

2. The appeal is against the whole of the decision.

3. GROUNDS OF APPEAL:

The Learned Chief Justice was wrong in reversing the decision of the Native Appeal Court and restoring the decision of the Trial Native Court, because,

(a) The judgment of the trial Native Court was wrong in law in that the Native Court failed to consider the preliminary objection raised by the Appellant in the form of a Motion to dismiss the suit.

(b) The Trial Native Court having indicated clearly that they were proceeding under the provisions of Regulation 17 of Order No.23 of 1949 must be held to have treated the proceedings before them as falling under that Regulation and the Learned Chief Justice's decision that the Trial Native Court heard the substantive claim is wrong.

(c) The judgment of the trial Native Court did not consider the points raised by the Appellant in his motion to dismiss the suit which were, inter alia,

(1) That the matters in dispute between the parties had been the subject of an Agreement between them.

(2) That the said Agreement precluded the Respondent from basing his rights on the judgment of 1931.

(d) The Learned Chief Justice's view that as settlement by arbitration had broken down the Respondent was entitled to fall back on the rights conferred on him by the judgment of 1931 was wrong, because either party had the right to enforce the agreement to settle the dispute by Arbitration.

(e) The judgments of the Learned Chief Justice and the Trial Native Court were against the weight of evidence.

In the West African Court of Appeal.

No.19.

Notice and Grounds of Appeal.

27th April, 1954

- continued.

In the West African Court of Appeal.

No.19.
Notice and Grounds of Appeal.
27th April, 1954
- continued.

4. Relief Sought:
That the decision of the Land Court, Accra be set aside and that of the Native Appeal Court restored.

5. Person directly affected by the appeal:
Nana Osei Bonsu
Sub-Chief of Asato
Asato.

DATED at Kwakwaduam Chambers, Accra, this 27th day of April, 1954.

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(Sgd.) E. Akufo Addo,
SOLICITOR FOR RESPONDENT-APPELLANT.

No.20.
Affidavit of Appellant, as to Value of Land in dispute.
27th April, 1954.

No. 20.
AFFIDAVIT OF APPELLANT AS TO VALUE OF LAND IN DISPUTE.

IN THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION, VICTORIABORG, ACCRA
A.D. 1954

SUB-CHIEF OSEI BONSU of Asato Appellant 20

vs:

SUB-CHIEF KATABOA of Apesokubi Respondent

RE VALUE OF LAND IN DISPUTE.

AFFIDAVIT OF NANA KATABOA.

I, FRANCIS DENTE KATABOA, Chief of Apesokubi make Oath and say:-

1. That the land the subject-matter of this Appeal comprises an area of approximately 40 square miles.
2. That of the area of land stated above about 24 square miles consist of Forest land and the remaining 16 square miles consist of Cocoa Farms. 30
3. That the whole of the land is worth more than £10,000 (Ten thousand pounds).

(Sgd.) Nana F.D.Kataboa

SWORN this 27th day)
of April, 1954)

Before me,
(Sgd.) E. Ohene Glover
Commissioner for Oaths.

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No. 21.

COURT NOTES OF ARGUMENTS OF COUNSEL

In the West African Court of Appeal,
Gold Coast Session:

Coram Coussey, P., Korsah and Jibowu, JJ.A.
25/55.

Nana Kwasi Adu &c.

vs:

Sub-Chief Osei Bonsu III.

10 Akufo Addo for Appellant.
Ollennu for Respondent.

Akufo Addo -

Land dispute between two Stools.

History of dispute.

At a certain stage in July 1939 parties agreed to withdraw case from State Council of Buem to have it settled by arbitration. Written terms of Agreement drawn up.

20 In 1954 Respondent brought action based on Judgment of Borada Native Court against Appellant claiming recovery of possession based on declaration of ownership in the Judgment of 1931.

Appellant contended that the 1931 Judgment was of no effect and applied that action be dismissed by Native Court. The Native Court held that the 1931 Judgment was still effective and granted a writ of possession.

30 Appeal to Native Appeal Court which held that proceedings were irregular in that only a motion was before the Court and not the substantive suit upon which Judgment could be delivered.

The Land Court reversed Native Appeal Court and restored Judgment of trial Native Court for recovery of possession by Respondent.

40 After the Agreement for Arbitration of 1939 Respondent moved the D.C's Court, Kpandu for a Writ of Possession - He so ordered on 5/10/45. On appeal the Provincial Commissioner set aside the Writ on ground that Judgment of 1931 was not then enforceable owing to the Agreement to arbitrate.

See p.78 Judgment Exhibit "A".

In the West
African Court
of Appeal.

No.21.

Court Notes of
Arguments of
Counsel.

18th January,
1956.

In the West
African Court
of Appeal.

No.21.

Court Notes of
Arguments of
Counsel.

18th January,
1956

- continued.

Notwithstanding Provincial Commissioner's Judgment, Respondent applied and a Writ of Possession issued - The Respondent then moved the Land Court for prohibition. Prohibition was refused (p. 93 record).

The Ruling of the Land Court was reversed by the West African Court of Appeal and issue of Writ of Prohibition was ordered.

After this decision the Respondent instituted the present proceedings in Akan Court "B" of Kad-jebi for Recovery of Possession. 10

The arbitrators first purported to act in 1947 when award made settling boundary between parties. Present Appellant objected to award as exparte himself and because some of arbitrators were not duly appointed - Sued Arbitrators instead of Respondent, but Native Court held that the Award was not binding.

pp.82 & 80 Exhibits J & H.

After the abortive award of 1947, the arbitrators wrote to the Court that they could not function further Judgment of C.J. now appealed from proceeds on 2 main grounds - 20

(1) That 1939 Agreement did not constitute Agreement to arbitrate, but was at best an agreement to negotiate a settlement. He applied strict principles of English law as to Arbitration.

(2) That even if it were an Agreement to arbitrate, the history of the controversy showed that Arbitration was abortive and Respondent was therefore entitled have recourse to 1931 Judgment. 30

(3) That the procedure adopted by the Native Court on the Motion was not unjust to the Appellant.

It is not disputed that in 1937 the Judgment of 1931 of the Buem State Council was subsisting. Leave to appeal was granted Appellant by extension of time on 26 May 1937.

While that appeal was pending, Agreement for arbitration was come to by parties on 12th July, 1939 (p. 71) Refers to Judgment of Provincial Commissioner, 10th September 1949 (p.78) where as in this case, the first award proved abortive, the parties should have appointed new Arbitrators under the Agreement. The failure to make an Award 40

sic.1946

did not in itself revive the 1931 Judgment.

Woolley v. Kelley

107 English Reps.27.

Here the award was no award because it was made without hearing the Appellant. Parties under Agreement should therefore have appointed new Arbitrators.

10 Where parties agree to refer to arbitration a dispute pending in Court, it is a question of the intention of the parties whether they intend to take whole matter from Court.

Harries v. Thomas

150 Eng. Reps. 656

Here, the Respondent agreed to abandon any rights acquired under the 1931 Judgment - And to abide by the award of the Committee appointed as to what the agreed traditional boundary is. The only matter in difference was the boundary between the parties.

20 Judgment of Abinger L.J. at p.659 supra.

Adjourned 19th January.

(Intd.) J.H.C.

19th January, 1956.

19th January,
1956.

Akufc Addo resumed -

Refers to Kukurka Yardom v. K. Mintah -

F.C. 26-29 p.76.

30 The only award under the 1939 Agreement was the one made ex parte and which the Appellant had set aside. That was in effect no award so it cannot be said to be an abortive award. It was void ab initio. This award was made on 20th June 1947 - Between the date of Agreement (1939) and that abortive award, there had been a consent of the parties before the State Council of the Benkum Division in July 1942, that 3 Chiefs should demarcate the boundary. Nothing came of this submission.

40 The parties then resorted to the 1939 Agreement. A boundary was cut by the Arbitrators ex parte on 20th June 1947. That award was set aside on 13th May 1948 (Exhibit "H" p. 80).

Submits that parties by entering into a second submission for arbitration by the 3 Chiefs,

In the West
African Court
of Appeal.

No.21.

Court Notes of
Arguments of
Counsel.

18th January,
1956

- continued.

In the West
African Court
of Appeal.

No.21.

Court Notes of
Arguments of
Counsel.

19th January,
1956

- continued.

did not abandon the first submission. Could call that into effect if the second submission to arbitration failed. By the action to set aside which was against the Arbitration the position of the Arbitration qua Arbitration was recognised by the present Appellant who sued them. I admit the present Respondent was not a party to that suit.

Judgment of Native Court appealed from (p. 19) Native Court was influenced by the view that no appeal was pending when the parties went to arbitration because Appellant was out of time - when Agreement made in 1939 Appellant had already obtained leave on 26th May 1937.

10

Criticises Judgment of C.J. (p. 39)

Not necessary to specifically mention in Agreement that parties abandoned rights under 1931 Judgment, if it can be inferred from Agreement and from conduct of parties.

Both parties signed the Notice of discontinuance.

I agree that Appellants have been in possession of land throughout these abortive arbitrations.

20

Grounds (a) and (b) -

No decision was given on Appellant's motion before Native Court. It was an Interlocutory Application permitted by Part 6 of Native Court Regulation. The motion should have been ruled upon before the suit was entered upon. Throughout Appellant thought his motion was being dealt with and he therefore offered no evidence in answer to the Plaintiff's suit.

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Asong Kwasi v. Larbi

1953 A.C.164.

Ollennu contra -

Agreement to arbitrate (p.71) should be read with Exhibit 1. Judgment of 3rd March 1931.

Respondent had maintained that he and Appellant were neighbouring land owners and that ancient boundary existed.

Appellant said he had no boundary with Respondent.

Native Court in its Judgment found that the boundary set up by Respondent was the true and ancient boundary between the parties. Agreement to go to arbitration amounted only to abandonment of the appeal.

40

Paragraph 2 of the Agreement - refers to the traditional boundary. Respondent was not going back on Judgment. Appellant was conceding that that sic. was the traditional boundary and if the was discontinued, there would be demarcation by arbitrators so that parties would know their rights. Nothing happened until May 1942 when D.C. referred to position and certain Chiefs offered to demarcate boundaries.

In the West African Court of Appeal.

No.21.

Court Notes of Arguments of Counsel.

19th January, 1956

- continued.

10 P. 73- a new agreement to arbitrate. A boundary line commenced by the Omanhene was to be continued straight without prejudice -

Submissions became abortive - penalty ignored. Exhibits "F" and "G".

20 Then certain persons purporting to act under 1939 Agreement cut a boundary. Appellant took action against these persons on ground that boundary was cut ex parte and that those persons acted without authority (p.82) - See Judgment in Land Appeal 42/1950 - and see p.84 - abortive award.

Judgment of 1931 still subsisting. Respondent entitled to sue upon it.

Here the Arbitrators did not discharge themselves. The parties vacated the agreement to arbitrate.

30 If the arbitrators discharge themselves, the parties would have agreed upon new arbitrators, but clear that parties unwilling to appoint new arbitrators, therefore agreement to arbitrate was at an end.

That parties discharged Arbitrators is to be inferred from whole course of conduct. If not so Appellant would have requested appointment of other arbitrators.

Note the subsequent suits by the parties.

The extension of time to Appellant to appeal from the original Judgment of 1931 was granted, after the appeal Court had confirmed the original Judgment - see p.67.

40 As to procedure -

Native Court guided by Regulation and customary procedure. Sec.23 Native Courts (S.Togoland) Ordinance p.59 Ordinance 1949.

Where Defendant had filed motion to dismiss suit, his motion was the plea - not necessary to call upon him to plead again.

In the West African Court of Appeal.

No.21.

Court Notes of Arguments of Counsel.

19th January, 1956
- continued.

After hearing motion fully, Native Court decided to hear case. Entitled to do so. To show Native Court was not at new stage dealing with motion, Plaintiff-Respondent upon whom burden lay as his claim was called upon to give evidence clear that substantive case was then being dealt with. No irregularity. No injustice to Appellant.

Akufo Addo in reply -

As to grounds upon which the Appellant rejected the Arbitration as stated in Judgment of C.J. at p.82 it is not clear where he got particulars from that Appellant claimed arbitrators had no authority - Respondent attended when demarcation was made in 1947 without Appellant.

10

True Exhibit "J" p.82 where the passage appears that Defendant arbitrators were not authorised, was tendered by present Appellant, but I do not find authority for that statement. Fact remains arbitrators purported to act under 1939 agreement. Appellant did not question their authority but that he was not present at demarcation.

20

By Appeal Court Judgment 20 April 1937, the Judgment of March 1931 of Native Court was not confirmed on the merits and then Appellant obtained leave by extension of time to appeal.

C. A. V.

(Intd.) J.H.C.

No.22.

Judgment.

13th February, 1956.

No. 22.

JUDGMENT.

IN THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION

30

Coram - Coussey, P.
Korsah, J.A.
Jibowu, Ag. J.A.

Civil Appeal No.25/55.

13th February, 1956.

Sub-Chief Osei Bonsu III of Asato
as representing the Stool and
people of Asato,

Plaintiff-Respondent-
Appellant-Respondent.

vs:

Mana Kwasi Adu (Deceased) substituted
 by Sub-Chief Katabca of Apesokubi as
 representing the Stool and people of
 Apesokubi, Defendant-Appellant-
 Respondent-Appellant

In the West
 African Court
 of Appeal.

No.22.

Judgment.

13th February,
 1956

- continued.

J U D G M E N T

10 COUSSEY, P.: It is unnecessary to recapitulate
 the history of this litigation over the past forty
 and more years. It is set out in more than one
 judgment of the Courts and very fully in the judg-
 ment of the learned Chief Justice the subject of
 this appeal, which reversed the judgment of the
 Buem Native Appeal Court and restored that of the
 trial Native Court, the Akan Native Court "B" at
 Kadjebi.

20 The questions for determination are whether
 under the provisions of an Agreement for settlement
 dated 12th July 1939 whereby the Appellant the
 Ohene of Apesokubi and the Respondent the Ohene of
 Asato appointed a Committee, a fluctuating body to
 "carry out the preliminary investigation as to the
 "extension of the traditional boundary right across
 "the forest, if any," so bound the parties that
 upon a failure over a period of more than 13 years
 to have the boundary demarcated by the Committee
 or any other body the parties were still bound to
 seek a demarcation as provided for in the Agreement
 referred to, to the exclusion of any right of re-
 30 course to the Courts in relation to the dispute be-
 tween them.

40 The Native Court "B", the court of first in-
 stance, supported by the Land Court on second
 appeal held that the Plaintiff-Respondent could,
 in the circumstances, have recourse to the Court
 and granted him an order for recovery of possession
 of the land which had been in dispute in proceed-
 ings between the parties. The Native Court of
 Appeal held, and this is the second question for
 decision in this appeal, that the procedure of the
 trial Native Court was so irregular that in award-
 ing the Plaintiff-Respondent recovery of possession
 of the land the defence of the Defendant now ap-
 pealing was never heard on the merits and that
 there was therefore an adjudication in the Plain-
 tiff-Respondent's favour without regard to the
 case of the Defendant-Appellant.

The original dispute seems to have arisen

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1956

- continued.

sometime before the year 1931 by an assertion by the Chief of Apesokubi whose lands lie to the west, that the Chief of Asato had no stool land, but that the lands of Apesokubi, the area of which is shown on the plan subsequently made, and thereon edged yellow, is bounded with lands of the Woraworas, the Guamans, the Kadjebis and the Dodis (reading from south to north of the plan), the effect of which claim, if it were true, was that the Plaintiff's Stool did not own even the land on which their principal village of Asato stands. There followed an action for a declaration of title by Sub-Chief Osei Bonsu of Asato against Sub-Chief Kwasi Adu of Apesokubi in the Native Tribunal of the Omanhene of Buem which declared and adjudged on the 3rd March 1931 that the boundary between the Asatos and the Apesokubis was that contended for by the Asatos namely along the crest of the Oprana hill from the river Asuokoko southward along the crest of the Oprana range, past the source of the Mmotable stream, thence across the road from Asato village to Apesokubi village. It will be observed that this boundary is an outstanding natural feature and the effect of the judgment was that the Apesokubis had no land to the east of the Oprana range. 10

After eight years of litigation in regard to the land in various courts and while an appeal on the part of the Apesokubis was pending in the Buem State Council the parties came to written terms of settlement on the 12th July 1939 in three paragraphs, as follows:- 30

- (1) The Ohene of Apesokubi and the Ohene of Asato agreed to discontinue the land dispute, and each party should bear his own costs incurred during the 30 years controversy.
- (2) The Ohene of Apesokubi and the Ohene of Asato acting each on behalf of his respective elders and councillors agreed to abide by the decision of the councillors Worawora, Tapa, Apesokubi and Asato that the boundary should remain as traditionally known. 40
- (3) The Committee as appointed by the both parties will carry out the preliminary investigation as to the extension of the traditional boundary right across the forest, if any.

A Notice of discontinuance of the pending matter was sent by both parties to the Buem State

Council in pursuance of paragraph 1 of the terms of settlement.

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African Court
of Appeal.

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1956

- continued.

10 The question whether the Plaintiff-Respondent is irrevocably bound under the terms of settlement to seek a demarcation of the boundary by the Committee named involves the further contention of the Defendant-Appellant that the Respondent has by the Agreement for demarcation of the boundary abandoned his rights under the declaratory judgment of the 3rd March 1931 and put his title to the land again in issue under the terms of settlement referred to. As I understand the contention of the Appellant on this point it is that as for a number of years after his declaratory judgment, the Respondent could not gain possession of the land or the whole of it within the boundary declared by the Omanhene's tribunal, he agreed, by the terms of settlement, not only to have the boundary demarcated in situ but to submit to the arbitration and award of the Committee the extent of land to which his stool was entitled as owner and the demarcation of the boundary of the land so awarded.

20

To answer this question it is necessary to bear in mind that before the litigation of 1931, the Defendant-Appellant's contention was that there was no boundary whatever between him and the Respondent's stool for the simple reason that the Asatos had no land whatever in the vicinity.

30 But paragraph 2 of the settlement clearly implies that the Councillors of Worawora, Tapa and of the two contesting stools had already decided that the boundary should remain as traditionally known and the Ohenes of Apesokubi and Asato by the written document signified their agreement to be bound by that decision of the Councillors. I am unable to read into paragraph 2 of the settlement any further submission to arbitration involving an award as to a fresh boundary. The boundary traditionally known can only in my opinion refer to the boundary proved by the Respondent and declared in his favour by the Omanhene's tribunal for the Appellant did not in the course of the litigation before the written settlement allege or set up any other boundary.

40

Efforts by one body or another to demarcate a boundary between 12th July 1939 and 25th November, 1950 proved abortive but meanwhile the Appellant and his subjects remained in possession of parts

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- continued.

of the land within the Asato boundary as declared by the tribunal in the judgment of 3rd March, 1931.

An action which was brought by the Defendant-Appellant Nana Kwasi Adu against six persons who, on 20th June 1947, went into the land and demarcated the ancient boundary as laid down by the Councillors (see paragraph 2 of the settlement) was upheld by the Native Tribunal on the ground that the Defendants, the demarcators, acted in the absence of the Appellant. Although the Native tribunal held that the purported demarcation was, on this ground, null and void, the present Appellant appealed from that decision to the Land Court because the tribunal had further held that the Appellant's cause of action, if any, was against the Ohene of Asato and not against the Committee or Referees, who appointment he had himself been a party to.

10

When his appeal was in course of time dismissed in the Land Court, the head of the Committee wrote letters dated 25th November 1950 to both parties advising that "as the settlement had proved failure you are at liberty to proceed with your case in Court."

20

As a different demarcating group who had been appointed on 24th July 1942 in the Benkum Division Council had also failed to cut the boundary the advice in the letters referred to appears to have been practical in itself. But the contention of Mr. Akufo Addo, Counsel for the Defendant-Appellant is that on failure of one set of arbitration demarcators, referees or whatever they may be called the parties were bound to continue to appoint new persons until a body was found finally able to carry out the work.

30

I am as unable to accept this proposition, as was the learned Judge of Appeal. The very object in my view of appointing a Committee of persons to demarcate the boundary was to quieten in the least time possible a dispute that had continued to the advantage of the Apesokubi's who had persisted in their occupation of the land without title. The Respondent's rights under the judgment of 31st March, which is not specifically referred to were not in my opinion in any wise impaired by the 1939 Agreement and, having regard to the events above set forth, to the lapse of time and the breakdown of the machinery for demarcation, the Plaintiff-Respondent was, in my view, entitled to have recourse to the Court for an order for possession of

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the land of which he had been declared the owner by the 1931 judgment. To accede to the Appellant's submission would mean that so long as there were disagreement between the parties as to the composition of the Committee of demarcation, there could be no demarcation.

In the West
African Court
of Appeal.

No.22.

Judgment.

13th February,
1956

- continued.

10

As to the second question, the learned Chief Justice on appeal held that there were no irregularities in the procedure adopted by the Native Court of which the Appellant could legitimately complain as amounting to a failure of justice - with this conclusion I respectfully agree. It would be superfluous to review again the relevant procedural regulations under the Native Courts Ordinance but it should be borne in mind that section 23 recognises the existence of a code of procedure in accordance with native customary law.

20

The Defendant-Appellant's motion in the Native Court which was expressed to be an application to dismiss the action was in effect an application to stay the proceedings on the ground that the 1931 judgment, upon which the Plaintiff's action for recovery of possession was based, was of no effect by reason of an agreement to go to arbitration. It was a contention that the jurisdiction of the Native Court was ousted by agreement.

30

After the mover and opposer had been fully heard on the motion the Court ordered the parties to make their statements. The Plaintiff-Respondent upon who was the burden to prove his claim was then sworn and gave evidence. The Defendant-Appellant declined to cross examine him and he declined to make a statement and rested upon the explanations he had given in support of his application to dismiss the action.

40

In my opinion the order of the Native Court to hear evidence at the conclusion of the motion was a sufficient intimation to the Defendant-Appellant that the Court had declined to dismiss the action on his application and that the substantive action was then being proceeded with. I have no doubt that the Defendant-Appellant perfectly understood the position at that stage. The Court was fully aware of his defence. He elected not to give evidence or make a statement in defence to the suit; but apart from the plea to jurisdiction on the grounds he had already fully canvassed on his motion I fail to see how he could resist the Plaintiff-Respondent's claim for possession or how

In the West
African Court
of Appeal.

No.22.

Judgment.

13th February,
1956

- continued.

he was prejudiced by a procedure which, shorn of technicalities, was perfectly straightforward to a litigant in a Native Court. He could not re-open the issue as to title. Early in its judgment of 2nd September 1953 the Native Court set out the Defendant-Appellant's motion to dismiss the action thus showing that it had not been overlooked. It then set out its order for the hearing to proceed and proceeded to consider the Plaintiff's claim for possession and concluded as follows: "The Court finds that the judgment of the Omanhene's tribunal which set out this boundary, and upon which this action has been instituted has not been nullified by any Court."

10

Apart therefore from the refusal of the trial Court at the conclusion of the motion to dismiss the suit, there is in the passage set out above a rejection of the Defendant-Respondent's contention that the action was not maintainable.

I can find no reason to interfere with the judgment appealed from and I would therefore dismiss this appeal with costs for the Plaintiff-Respondent which are allowed at £36.15.6.

20

(Sgd.) J.Henley Coussey,
P.

KORSAH, J.A.: I concur.

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

JIBOWU, AG. J.A.: I concur.

(Sgd.) Jibowu, Ag. J.A.

Akufo Addo for the Appellant.

Ollennu for the Respondent.

30

No.23.

Application for
Final Leave to
Appeal to Her
Majesty in
Council.

3rd July, 1956.

No. 23.

APPLICATION FOR FINAL LEAVE TO APPEAL TO
HER MAJESTY IN COUNCIL.

In the West African Court of Appeal,
Gold Coast Session - Before a Single
Judge, Victoriaborg, Accra - A.D.1956.

Sub-Chief Osei Bonsu III
of Asato

Plaintiff-Respondent-
Appellant-Respondent

versus

Nana Kwasi Adu (Deceased)
Sub-Chief Kataboa of Apesokubi
(Substituted)

Defendant-Appellant-
Respondent-Appellant

40

APPLICATION FOR AN ORDER FOR FINAL LEAVE TO
PRIVY COUNCIL

In the West
African Court
of Appeal.

No.23.

Application for
Final Leave to
Appeal to Her
Majesty in
Council.

3rd July, 1956
- continued.

10 TAKE NOTICE that this Court will be moved by
Edward Akufo Addo Esquire of Counsel for the Ap-
pellant herein and on his behalf on Monday the 8th
day of October, 1956 at 9 of the clock in the
forenoon or so soon thereafter as Counsel may be
heard for an Order for Final Leave to Appeal to
the Privy Council from the judgment of this Court
delivered on the 13th February, 1956 AND/OR for
any such further Order or Orders as to the Court
may seem fit.

DATED at Kwakwaduam Chambers, Accra, this 3rd day
of July, 1956.

(Sgd.) E. Akufo Addo
SOLICITOR FOR THE APPELLANT.

THE REGISTRAR,
WEST AFRICAN COURT OF APPEAL,
ACCRA

20 AND TO

NANA OSEI BONSU III of Asato
The Respondent herein.

No. 24.

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

No.24.

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

In the West African Court of Appeal
Gold Coast Session:

Coram Korsah, C.J., sitting as a Single Judge of
Appeal.

8th October,
1956.

30 Civil Motion No.48/56.

Sub-Chief Osei Bonsu III, &c.

v.

Nana Kwasi Adu, etc. &c.

Motion for final leave to appeal to Privy Council.

C.A. Owusu for the Applicant.

Lassey for the Respondent.

Owusu - Moves -

Final leave granted as prayed.

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

Exhibits

E X H I B I T S

Plaintiff's
Exhibit

"M" - JUDGMENT OF BORADA NATIVE TRIBUNAL IN
SUB-CHIEF OSEI BONSU OF ASATU vs. SUB-CHIEF
KWASI ADU OF APESOKUBI.

"M".

Judgment of
Borada Native
Tribunal in
Sub-Chief Osei
Bonsu of Asatu
vs. Sub-Chief
Kwasi Adu of
Apesokubi.
3rd March,
1931.

EXHIBIT "I"

Tendered in evidence by parties admitted and
marked Exhibit "I" in re Prohibition.

(Sgd.) ???
Court Clerk
26/2/52.

10

Tendered in evidence by Plaintiff admitted and
marked Exhibit "M" in case Sub-Chief Osei Bonsu
vs. Sub-Chief Kataboa, alias "I".

(Sgd.) V.K. Duedu
Registrar,
2/9/53.

In the Native Tribunal of Borada, Br. Togoland,
held by Nana Akpandja II., Omanhene of Buem and
Elders 21st day of February, 1931.

Between:- SUB-CHIEF OSEI BONSU OF ASATU, Plaintiff
and
SUB-CHIEF KWASI ADU OF
APESOKUBI Defendant

20

J U D G M E N T

In this case Chief Osei of Asatu claim to
know the reason why Apesokubi Chief states he have
no stool land but he rather have boundary with
Dodis.

The Chief of Asatu in his statement shows his
boundary from Worawora and Guaman boundaries on
the top of Oprano mountain and that from a heap
being road cleaning limit Asatu-Apresso road straight
to a stream by name Mutabe from where the stream
is the boundary to the top of the Oprana Mountain
to the end of the mountain in Asuokoko river to
the end of the mountain the place known as a Owu-
kukuaba.

30

In support of his case he called five witness-
es. The first witness evidence that in support
of the Plaintiff's statement that Worawora people
fought Appesokubis and they have to run away from

40

their first place of abode. It is clear that by that time their fetish was kept in Asatu stool land.

His second witness only talk about how Omanhene of Buem set boundary first between the two persons.

The third witness YAWO KOKO of Worawora evidence that Apessokubi and Asatu get boundary at Owukukuamba where Oprana Hill end in river Asuokoko. Asatu claim is correct by this evidence.

10 The fourth witness is an ex-linguist to Nana Akpandja I and II; that the land had been sold first by Asatu to a German man which shows the land property belongs to Asatu.

The fifth witness was called by both parties is the Odikro of Kajebi. He said Asatu have the land in dispute. Apesokubis are people Ewi, they one only village.

20 Elder Charles representing the Ohene of Guamang said Asatu have a ruin village at Tentianyo, and if the evidence is not believed. He further said he knew one ruin village of Apesokubis, by this Apesokubis claim of a land belongs to seventy-seven villages and towns, is not correct claim.

The last evidence is that of Kwasi Nyako he only dictated what he was told, he do not know the land. I being the Omanhene of Buem, know one only village of Apessokubi; their claim of a land of seventy-seven villages and towns as he said in his statement, is not correct claim.

30 It is also clear that this fetish of Apesokubi was kept in Asatu stool land during the time Worawora fought and sack them, Buem custom allowed safing of fetishes in another man's land property.

Apessokubi Chief is guilty, the land property belongs to Asatu. The proper boundary fixed in this judgment is the top of Oprana Hill from river Asuikoko southward stream Mutabe and down the stream to an "Ntombe tree", and the road cleaning heap Asatu-Apesokubi road.

40 Apesokubi is to pay the whole costs of the case, also trespass the oaths sworn in this Tribunal.

It is known to the Tribunal that Asatu directed the Reserve Officer in cutting line through this disputed land, as the land is theirs and know it proper land already viewed in the year 1927.

DATED AT BORADA THE 3rd DAY OF MARCH, 1931.

Witness to mark:-

(Sgd.) SETI KWABENA OSIBAN

NATIVE TRIBUNAL REGISTRAR.

Exhibits

Plaintiff's
Exhibit

III

Judgment of
Borada Native
Tribunal in
Sub-Chief Osei
Bonsu of Asatu
vs. Sub-Chief
Kwasi Adu of
Apesokubi.

3rd March,
1931

- continued.

Exhibits
 Plaintiff's
 Exhibit.

 "E" (part)
 Judgment of
 West African
 Court of Appeal.
 20th April,
 1937.

"E" (Part) - JUDGMENT OF WEST AFRICAN COURT OF
APPEAL.

In the West African Court of Appeal, Gold Coast
 Session, held at Victoriaborg, Accra, on Tuesday
 the 20th day of April, 1937 before Their Honours
 Sir Donald Kingdon, C.J., Nigeria (President) Sir
 Philip Bertie Petrides, C.J., Gold Coast, and Sir
 Arthur Frederick Clarence Webber, C.J., Sierra
 Leone.

5/37

Civil Appeal. 10

Sub-Chief Osei Bonsu,

Plaintiff-Respondent-
 Appellant.

vs:

Sub-Chief Kwasi Adu,

Defendant-Appellant-
 Appellant.

Cross Appeals from judgment of the Provincial
 Commissioner, Eastern Province.
 F. Dove (with him Awere) for Kwasi Adu Sawyerr
 for Bonsu.

x x x x

JUDGMENT:-

This was a suit about the ownership of land
 heard in the Native Tribunal of Borada presided
 over by the Paramount Chief of Buem, which gave
 judgment for the Plaintiff in March, 1931. The
 Defendant commenced appeal proceedings. At that
 time the appeal lay to "The District Commission-
 er's Court when formed by the Commissioner of the
 Eastern Province of the Colony" (see Section 9(1)
 inserted by Ordinance No.1 of 1929 in the Adminis-
 tration Ordinance (Cap.1). The appeal proceedings
 dragged on until on the 28th July, 1933 when they
 were withdrawn owing to an irregularity, which had
 presumably been caused by confusion between the
 Provincial Commissioner's Court on the one hand
 and the District Commissioner's Court presided
 over by the Provincial Commissioner on the other.

20

30

On withdrawal the appeal, of course, ceased
 to be pending. But in the same application the
 Defendant obtained fresh conditional leave to ap-
 peal to the Provincial Commissioner's Court. This
 was the fatal mistake because in the meantime
 fresh legislation had been enacted and come into
 operation viz:- The Native Administration (South-
 ern Section Ordinance, 1932) Section 59 and Orders
 Nos.2 and 3 of 1933. The effect of this legisla-
 tion was to create the Buem State Council as the

40

proper Appellate Court; though leave to appeal out of time would have had to have been obtained under Section 60 of the Ordinance.

It follows that the second appeal proceedings to the Provincial Commissioner's Court were misconceived and that that Court had no jurisdiction to hear the appeal.

10

Its judgment is therefore declared a nullity and the judgment of the Native Tribunal is restored.

The Plaintiff is awarded his taxed costs before the Provincial Commissioner's Court up to the time of the first sitting of that Court on the appeal when he might have taken this point. Each party will bear his own costs of all subsequent proceedings both in the Provincial Commissioner's Court and in this Court.

(Sgd.) Donald Kingdon,
President.

20 I concur: (Sgd.) P.B. Petrides,
Chief Justice,
Gold Coast.

I concur: (Sgd.) A. Webber,
Chief Justice,
Sierra Leone.

20th April, 1937.

This is the Exhibit marked "A" referred to in the Affidavit of Patrick Kwasi Owusu sworn to before me this 2nd day of August, 1951.

30 (Sgd.) K. Ohene Glover,
COMMISSIONER FOR OATHS.

"B" - COURT NOTES OF LEAVE TO APPEAL -
BUEM STATE COUNCIL

EXHIBIT "B"

In the Court of Appeal - Buem State Council held at Borada on Wednesday the 26th day of May, 1937.

Before:- Nana Akpandja II
Ohene of Buem - President
Nana Apew IV
Benkumhene of Buem - Member
Nana Salo Kofi II
Bowirihene of Buem - "
Nana Akuamoah IV
Nifahene of Buem - "

40

Exhibits
Plaintiff's
Exhibit.

"E" (part)

Judgment of
West African
Court of Appeal.

20th April,
1937.

- continued.

Defendant's
Exhibit.

"B"

Court Notes of
Leave to Appeal
Buem State
Council.

26th May, 1937.

Exhibits
 Defendant's
 Exhibit.

Before:- Nana Brantua II
 (Contd.) Adontenhene of Buem -- Member
 Nana E.O. Adibo
 Akpafuhene of Buem -- "

"B"

Motion No.6/1937.

Court Notes of
 Leave to Appeal
 Buem State
 Council.

Sub-Chief Osei Bonsu Plaintiff-Respondent
 vs:
 Sub-Chief Kwasi Adu Defendant-Appellant

26th May, 1937
 - continued.

Motion ex-parte by Sub-Chief Kwasi Adu - Defendant-Appellant herein praying for special Conditional Leave to Appeal the Judgment delivered against him by the Tribunal of Omanhene of Buem sitting at Borada on or about the 3rd day of March, 1931 to the Court of Appeal of the Buem State Council.

10

Application filed - 20/5/1937
 Application or Written Motion read.

BY COUNCIL:-

Upon the application of Appellant the Defendant commenced the Appeal proceedings when the judgment of the Tribunal of Omanhene was delivered in March, 1931. At that time there was no State Council as sitting now as Court of Appeal, because the Ordinance creating a State Council for Buem had not then been passed and the appeal was taken to the Court of the Provincial Commissioner which did not dispose of the appeal until the 3rd of October, 1936.

20

From this judgment both parties appealed to the West African Court of Appeal which decided that it had no jurisdiction to hear the appeal on the grounds no fully set out in its judgment, certified copy of which Appellant attaches to his application to explain the situation that there has been no delay in the matter on the part of the Defendant-Appellant in starting properly with the Appeal.

30

The judgment of the West African Court of Appeal is that, the appeal as made by the Defendant to the Court of the Commissioner - Eastern Province dragged on until on the 28th July, 1935 and they were withdrawn owing to an irregularity which had presumably been caused by confusion between the Provincial Commissioner's Court on the one hand and the District Commissioner's Court presided over by the Provincial Commissioner on the other

40

hand. After the appeal has been ceased as caused by the confusion by the two Courts aforesaid the appeal was accepted on the former application of the Defendant by the Court, of the Provincial Commissioner, which was a fatal mistake because in the meantime Fresh Legislation had been enacted and come into operation viz:-

Exhibits
Defendant's
Exhibit.

"B"

Court Notes of
Leave to Appeal
Buem State
Council.

26th May, 1937
- continued.

10 The Native Administration (Southern Section) Ordinance, 1932 Section 59 and Order Nos.2 and 3 of 1933; the effect of which was to create the State Council for Buem as the proper Appellate Court, which although leave to appeal was out of time would have granted the appeal under section 60 of the Ordinance.

20 Upon this judgment this Court Appeal can obviously see that the previous proceedings of Appeal by the Appellant was a misreception by the Court of Provincial Commissioner and that the appeal might have carried on successfully had no confusion been caused between the Court of the Provincial Commissioner on the one hand and the Court of the District Commissioner on the other.

There is therefore reasonable grounds upon which leave to appeal should be granted. This Council therefore elects to extend time under section 60 of the Native Administration (Southern Section) Ordinance of 1932 and grants Leave to Appeal on the following conditions:-

- 30
1. Appellant to Deposit £5 against expenses of the appeal.
 2. To notify Respondent and all parties directly affected by the appeal.
 3. To obtain certified true copy of proceedings and judgment of the Tribunal below and file in the Court of Appeal.
 4. To carry out above conditions within 30 days from date.

Members:- (Mkd.) Nana Akpandja II
Omanhene of Buem.

40 (Sgd.) Nana Apew IV
Benkumhene of Buem.

(Sgd.) Nana Y.A. Brantuo II
Adonhene of Buem.

W/mark & Record:
(Sgd.) G.K. Agyare,
Registrar, B.S. Council.

Exhibits
 Defendant's
 Exhibit.

"B"

Court Notes of
 Leave to Appeal
 Buem State
 Council.

26th May, 1937
 - continued.

W/mark (Sgd.) Chr. J. Mamfe,
 Registrar, Bowiri.

This is the Exhibit marked "B" referred to in
 the Affidavit of Nana F.D. Kataboa:

Sworn before me this)
 26th day of May, 1953)
 (Sgd.) ?? Glover,
 Commissioner for Oaths.

"C"

Notice of
 Discontinuance.
 12th July,
 1939.

"C" - NOTICE OF DISCONTINUANCE

IN THE SUPREME COURT OF THE GOLD COAST COLONY
 EASTERN PROVINCE
 THE BUEM STATE COUNCIL, BORADA

10

Between:- Nana Kwasi Adu Defendant-Appellant
 and
 Nana Osei Bonsu Plaintiff-Respondent

APESOKUBI vs: ASATO LAND BOUNDARY DISPUTE.

IT IS AGREED together by the above-mentioned
 parties viz: Nana Kwasi Adu of Apesokubi and Nana
 Osei Bonsu of Asato with our undersigned Elders
 upon the valuable advice of our Nkwantahene and
 the youngmen of our respective towns Apesokubi and
 Asato to discontinue the above-named suit pending
 in your Court.

20

Elders of Apesokubi:-

Nkwantahene:	Kwaku Dente	his x mark
Asafohene:	Adom	his x mark
Okyeame:	Kwadwo Budu	his x mark
	Nana Kwasi Adu	his x mark
	The Ohene of Apesokubi.	

Elders of Asato:

Amankrado: Yaw Ampem

his
x
mark

Exhibits
Defendant's
Exhibit.

Nana Osei Bonsu
The Ohene of Asato.

his
x
mark

"C"
Notice of
Discontinuance.

Asafohene:- Kwaku Aduam (his x mark)

(Sgd.) H. Asiedu (Linguist)
W/W/to mark. (Sgd.) S.K. Boadi.
Lic. S.W.No.13805/39.
Fee of Charge.

12th July,
1939
- continued.

10 DATED at Worawora this 12th day of July, 1939.

This is the Exhibit marked "C" referred to in the Affidavit of Nana F.D. Kataboa sworn before me this 26th day of May, 1953.

(Sgd.) ?? Glover,
Commissioner for Oaths.

"D" - TERMS OF SETTLEMENT

EXHIBIT "D"

APESOKUBI AND ASATO LAND BOUNDARY DISPUTE.

"D"
Terms of
Settlement.
12th July, 1939.

20 Term of Settlement arrived at on Wednesday the 12th day of July, 1939.

Whereas there is dispute between the Sub-Division of Apesokubi and the Sub-Division of Asato in the Buem District, British Togoland, as the boundary between them.

And whereas this dispute has been in the Omanhene's Court, in the District Commissioner's Court of Kpandu, in the Court of the Commissioner of the Eastern Province, in the West African Court of Appeal and back to the Court of Buem State Council.

30 And whereas it is desirable to effect an amicable settlement between the two said parties so that peace and prosperity may result to the mutual benefit of both parties and their subjects.

Now it is agreed as follows:-

1. The Ohene of Apesokubi and the Ohene of Asato agreed to discontinue the land dispute, and each party should bear his own costs incurred during the 30 years controversy.

Exhibits
Defendant's
Exhibit.

"C"

Notice of
Discontinuance.
12th July, 1959
- continued.

2. The Ohene of Apesokubi and the Ohene of Asato acting each and on behalf of his respect Elder's and Councillors agree to abide by the decision of the Councillors Worawora, Tapa, Apesokubi and Asato that the boundary should remain as traditionally known.

3. The Committee as appointed by the both parties will carry out the preliminary investigation as to the extension of the traditional boundary right cross the forest if any.

10

THIS DOCUMENT was executed by the parties after the contents have been read over and interpreted in the Twi language by Mr. Seth D. Opoku of Worawora to the Assembly of the representatives of Worawora, Tapa, Apesokubi and Asato, they seemed perfectly to understand and approved of the provisions thereof and the principal parties thereto signified their said approval in the customary manner by providing one (1) bottle wine and one (1) life sheep.

20

DATED AT WORAWORA BUEM, THIS 12th JULY, 1939

Witnesses: Nana Kwasi Adu his
Ohene of Apesokubi x
Left Thumb print. mark

Nana Osei Bonsu his
x
mark.

Witnesses: Kwaku Peute his
x
mark

30

Asafohene Adom his
x
mark
his
Okyeame Budu x
mark

Representing Apesokubi: Witnesses :-
Amankrado Yaw Ampem his
x
mark

40

his
Kwaku Aduam x
mark
his
T.K. Asiedu x
mark

Representing Asato Buem.

Exhibits
Defendant's
Exhibit.
"E"
Minutes of
Meeting of the
Benkum Division
Council, held
at Buem.
24th July, 1942
- continued.

The meeting declared open at about 10 a.m.

Three important items of agenda were discussed-

1. The proper running of the Benkum Division Tribunal.
2. Land Boundary dispute between Asato and Apesokubi.

x x x x

ITEM No.2.

The D.C. spoke lengthy about this item, as a sic. source of serious troubles draining the two sub-divisions of Asato and Apesokubi into poverty, and this boundary question of a very long standing should come to an end at once. The D.C. advised the Council to adopt one of the following two suggestions to bring boundary matter to an end: 10

- (a) Either the disputed area should be left as a Communal land for both Asatos and Apesokubis, to use it in common between themselves for cultivation and in case of disposing part or a portion of both Sub-Division proceeds equally among themselves. 20
- (b) Or to cut a boundary between them to define each chief's land.

This last item had the longest debate, which tends unlikely to have a good result, but the D.C. took much patience, and wasted long hours to see that a proper agreement is arrived at by all means. After all the D.C. was able to get both Asatos and Apesokubis to agree upon the second suggestion i.e. a boundary should be cut between them, both Asatos and Apesokubis agreed that the other Council members i.e. Benkumhene, Nsutahene and Kadjebihene, who are neither party to their disputed should cut their land boundary. Both parties agreed that a line started by the Omanhene sometime ago was agreed by them to a certain point, where they disagreed when the land boundary was being bent or cut a curve; and that if the line will be cut straight ahead without a curve or a bent in favour of other party the settling of this boundary question will be successful. The other members agreed to undertake the work, and that they will cut a boundary line between Asatos and Apesokubis without prejudice. The D.C. agreed that he will be present himself, and will find a Surveyor also to assist. This having come to a better conclusion, the D.C. suggested that £20 should be deposited by 40

Exhibits
Defendant's
Exhibit.

"B"

Minutes of
Meeting of the
Benkum Division
Council, held
at Buem.

24th July, 1942
- continued.

10 each i.e. £40 in all by Asatos and Apesokubis as expenses to cut their lines and he spoke that if, there comes any opposition from either party, and the line is successfully cut, and the dispute considered ended he will return £15 to each party, i.e. the cutting will cost them £5 each or £10 for both, and £15 or £30 returned to them. But in case the whole members are in the bush, and a party cause confusion so that the work could not be done, and the chiefs had to return the whole £40 will be forfeited to the Chiefs. The D.C. spoke that he want no pay or allowance or any allowance himself out of the £40 as he is paid by Government and he only wishes to suffer troubles to see that the Division is at peace, and this long standing boundary dispute is settled.

One month was given that the deposits are paid to the D.C. Kpandu, when a date will be fixed to go into the land.

20 At this time the meeting came to a close at about 5 p.m. adjourned to Friday 31st July, 1942 at Nsuta.

(Sgd.) Nana Appew IV.
Presiding Member.

(Sgd.) R. Oyurodu
Registrar.

This is the Exhibit marked "B" referred to in the Affidavit of Nana F.D. Kataboa sworn before me this 26th day of May, 1953.

30 (Sgd.) ?? Glover,
COMMISSIONER FOR OATHS.

"F" - LETTER FROM THE DISTRICT COMMISSIONER,
KPANDU TO THE SUB-DIVISIONAL CHIEF OF BUEM-ASATU

No.1219/82A/20.

District Commissioner's Office,
Kpandu.
20th August, 1943.

Plaintiff's
Exhibit.

"F"

Letter from
The District
Commissioner
Kpandu to the
Sub-divisional
Chief of Buem-
Asatu.

20th August,
1943.

My Good Friend,

40 I am informed that the attempt of the Benkum-
hene and his Sub-divisional chiefs of Kadjebi and
Nsuta to demarcate a boundary between Asatu and
Apesokubi has failed owing to objections raised by
both parties to the line which the arbitrators de-
cided to cut.

Exhibits
Plaintiff's
Exhibit.

"F"

Letter from
The District
Commissioner
Kpandu to the
Sub-divisional
Chief of Buem-
Asatu.

20th August,
1943
- continued.

2. You will recollect that the Divisional Council held at Nsuta both you and Apesokubi agreed that any party objecting to the arbitrators' decision or interfering in any way with their operations on the land should forfeit a deposit of £20 which the parties were then called upon to make and which they subsequently made.

3. I should like within 10 days of today's date whether you have any good reason why the deposit of £20 made by you should not now be forfeited according to the verbal agreement made at Nsuta.

10

I am,
Your Good Friend,
(Sgd.) T.A. Mead,
DISTRICT COMMISSIONER.

The Sub-Divisional
Chief of Buem-Asatu,
Buem Asatu.

This is the Exhibit marked "F" referred to in the Affidavit of Nana F.D. Kataboa sworn before me this 26th day of May, 1953.

20

(Sgd.) ?? Glover,
COMMISSIONER FOR OATHS.

"G"

Letter from the
District
Commissioner,
Kpandu to the
Divisional Sub-
Chief of Asatu.

4th September,
1943.

"G" - LETTER FROM THE DISTRICT COMMISSIONER,
KPANDU TO THE DIVISIONAL SUB-CHIEF OF ASATU.

Eastern Province.

1282/82A/1921.

District Commissioner's Office,
Kpandu.
4th September, 1943.

My Good Friend,

30

I refer to my letter 1219/82A/1920 of August 20th, 1943. I observe that you have been unable to suggest any reason why your deposit of £20 should not now be forfeited.

2. I therefore give you notice that I intend to withdraw the £20 deposited by me on your behalf in Government Treasury and to hand it to the BEN-JUMHENE of Buem to dispose of as he considers best.

I am,
Your Good Friend,
(Sgd.) T.A. Mead,
DISTRICT COMMISSIONER.

40

The Divisional Sub-Chief of Asatu,
Buem Asatu.

This is the Exhibit marked "G" referred to in the Affidavit of Hana F.D. Kataboa sworn before me this 26th day of May, 1953.

(Sgd.) ?? Glover,
COMMISSIONER FOR OATHS.

Exhibits

Plaintiff's
Exhibit.

"G"

Letter from the District Commissioner, Kpandu to the Divisional Sub-Chief of Asatu.

4th September, 1943

- continued.

"K" (Part) - JUDGMENT OF MAGISTRATE'S COURT

EXHIBIT "6"

10 Tendered in evidence by Respondent admitted and marked Exhibit "6" in re Prohibition etc.,

(Sgd.) J.C. Armah,
Court Clerk,
27/2/52.

"K" (Part)

Judgment of Magistrate's Court.

5th October, 1945.

IN THE MAGISTRATE'S COURT OF THE GOLD COAST
EASTERN PROVINCE, KPANDU

IN THE MATTER OF SUB-CHIEF OSEI BONSU Plaintiff

Vs:

SUB-CHIEF KWASI ADU Defendant

20 This was a suit about the ownership of land heard by the Native Tribunal of Borada presided over by the Paramount Chief of Buem State which gave judgment for the Plaintiff in March, 1931.

30 The case went on appeal to the Provincial Commissioner's Court where in a lengthy judgment a new boundary was made between the Asatus and the Apesokubis. The appeal succeeded in so much as by the judgment of the Provincial Commissioner's Court the Appellant has not lost so much land as they would have done by the Omanhene of Buem's judgment. Taxed costs was however awarded against the Apesokubis (Appellant).

The Apesokubis, still dissatisfied, subsequently appealed the case to the West African Court of Appeal, where on the 20th day of April, 1937 the judgment of the Provincial Commissioner's

Exhibits
Plaintiff's
Exhibit.

"K" (Part)

Judgment of
Magistrate's
Court.

5th October,
1945

- continued.

Court was declared a nullity and the judgment of the Native Tribunal restored.

The Plaintiff now applies for a writ of Possession to be issued by this Court as the Native Tribunal has no authority to issue a writ of Possession.

The final judgment as stated above was given by the West African Court of Appeal in April, 1937, and is in favour of the Plaintiff. I am satisfied that the Defendant would not abide by the judgment of the West African Court of Appeal and allow the Plaintiff free access to the land awarded to the Plaintiff.

10

Writ of Possession to issue.

DATED AT KPANDU this 5th day of October, 1945.

(Sgd.) R. J. Moxon
MAGISTRATE.

"A"

Judgment of
Provincial
Commissioner's
Court.

10th September,
1946.

"A" - JUDGMENT OF PROVINCIAL COMMISSIONER'S COURT.

EXHIBIT "A"

Tendered by Plaintiff in suit Osei Bonsu
vs: Kwasi Adu accepted and marked Exhibit "A".

20

(Sgd.) V.K. Duedu,
Registrar,
15/8/53.

10.9.46.

In the Provincial Commissioner's Court, Eastern Province held at Kpandu on Tuesday the 10th day of September, 1949, before His Worship John E. Miller, Esq., Deputy Commissioner Eastern Province.

Sub-Chief Osei Bonsu - Plaintiff-Respondent

30

v.

Sub-Chief Kwasi Adu - Defendant-Appellant

JUDGMENT:-

This is an appeal against a decision of the Magistrate's Court at Kpandu, in a Motion on behalf of the Defendant Nana Kwasi Adu, Sub-Chief of Apesokubi, praying for an Order of the Court to rescind an Order for the issue of a Writ of Possession made on 5th October, 1945, by the said Magistrate.

The history of the case is briefly as follows:-

The suit originated in the Native Tribunal of Borada and judgment was given in March, 1931 for the Plaintiff.

The case went on appeal to the C.E.P's Court, thence to the W.A.C.A. (P.28) where the Provincial Commissioner's judgment was declared a nullity and the judgment of the Native Tribunal restored, i.e. judgment in favour of the Plaintiff.

Exhibits

Plaintiff's Exhibit.

"A"

Judgment of Provincial Commissioner's Court.

10th September, 1946

- continued.

10 The Defendant then, owing to the enactment of new legislation, attempted to appeal to the Buem State Council but after several adjournments both parties to the dispute agreed to withdraw the action from the State Council and submit it for settlement by arbitration. This agreement was reduced to writing in a document dated 12th July, 1939 (P.41) of appeal record) and was signed by both parties in the presence of witnesses. The same day the Buem State Council was informed of the withdrawal (P.43) and this was acknowledged by a letter from the State Secretary dated 15th July, 1939 (P.44). On this withdrawal the appeal, of course, ceased to exist and in my opinion the intention of the parties to the agreement was that all litigation between them on the land under dispute should also cease vide paragraph 1 of the Agreement (P.41).

30 Whether or not the arbitrators ever carried out the duties imposed upon them in this case is immaterial to the point at issue, the fact remains that both Plaintiff the sub-chief Osei Bonsu and the defendant Sub-Chief Kwasi Adu had taken their dispute by natural consent away from the Courts and relied on the Judgment of the arbitrators.

sic.

On the 5th day of October, 1945, the Magistrate at Kpandu stated in his judgment:

40 "The final judgment as stated above was given by the W.A.C.A. in April, 1937 and is in favour of the Plaintiffs. I am satisfied that the Defendant would not abide by the judgment of the W.A.C.A. and allow the Plaintiff free access to the land awarded to the Plaintiff."

As far as that goes the Magistrate was apparently correct, but as the case had by that time been withdrawn by the parties to the dispute from the Courts, the Magistrate had, in my opinion, no right to uphold the judgment of the Borada Tribunal which had been rendered null and void by the act

Exhibits
Plaintiff's
Exhibit.

"A"

Judgment of
Provincial
Commissioner's
Court.

10th September,
1946
- continued.

of discontinuance (P.43) which closed the appeal to the Buem State Council, on this issue.

I therefore order that the decision of the Magistrate at Kpandu dated 5th day of October, 1945 in the case Sub-Chief Osei Bonsu versus Sub-Chief Kwasi Adu be reversed and the Writ of Possession therein ordering to is to be cancelled.

As to costs in this action I consider it only right and proper that in conformity with the agreement made between the parties on 12th July, 1939 (P.41) that "each party" should bear his own costs incurred during the 30 years controversy," both parties in this action should also bear their own costs, and I order accordingly.

10

(Sgd.) John E. Miller,
DEPUTY COMMISSIONER, E.P.

Certified True Copy
(Sgd.) J.E.O. Otchere,
Registrar, C.E.P's Court.

This is the Exhibit marked "A" referred to in the Affidavit of Nana F.D. Kataboa Sworn before me this 26th day of May, 1953.

20

(Sgd.) ?? (Glover),
Commissioner for Oaths.

Defendant's
Exhibit

"H"

Decision of the
Baroda Native
Tribunal in
Nana Kwasi Adu
v. Nana Yao
Nyako & Others.
13th May, 1948.

"H" - DECISION OF THE BORADA NATIVE TRIBUNAL
IN NANA KWASI ADU v. NANA YAO NYAKO & OTHERS

IN THE NATIVE TRIBUNAL OF THE OMANIENE OF BUEM,
HELD AT BORADA ON THURSDAY, the 13th DAY OF MAY,
1948 BEFORE NANA ABO - ACTING PRESIDING MEMBER,
with following Members :-

30

Nana Amoyaw of Borada
Nana John K. Amanie of Borada
S.Y. Owusu of Borada
G. Bevelebele of Borada
Ben Atta of Borada.

NANA KWASI ADU OF APESOKUBI Plaintiff

vs:

NANA YAO NYAKO AND 5 OTHERS Defendants

x x x x

DECISION:

In this suit in which the action was instituted at the Nifa Tribunal and was transferred to

40

10 this Tribunal by the D.C., Kpandu, for hearing and determination, the Plaintiff is seeking for an order of the Tribunal to set aside the award delivered by the Defendants on the 20th June, 1947 setting a boundary between Apesokubis and Asatos in a boundary dispute between Nana Kwasi Adu as representing Apesokubi stool lands vs: Nana Osei Bonsu as representing Asatu Stool lands. It appears that there was a boundary dispute between the parties named herein, depending at the State Council on appeal lodged by Nana Kwasi Adu. As time went on Nana Kwasi Adu and Nana Osei Bonsu jointly moved the case from the State Council to the Defendants to settle in arbitration and lay the ancient boundary between them. After reviewing the matter, the Defendants went into the land and demarcated a boundary in the disputed area for the parties as laid down in the Award in the absence of Nana Kwasi Adu. He then took objection and instituted the action.

20 Having examined the present case with the most meticulous care, this Tribunal finds that Plaintiff and Defendants have all acted wrongly. The Defendants should have laid the boundary in presence of the two contending parties. Plaintiff also has no right to sue the Defendants whom he has duly appointed as Referees in his case. He can abide by the Award or reject it since under Section 63 of the N.A.O. Cap.90, Arbitration Award is neither enforceable nor binding. The delivery of the Award and the institution of the action in this respect are all frivolous. The action is therefore dismissed.

30

The award also has no binding on the Plaintiff. Nana Kwasi Adu and Osei Bonsu should go back to the State Council where the appeal was pending for final disposal of the case. Plaintiff and Defendants in this case to bear their own costs.

(Mkd.) Nana Abo
ACTING PRESIDING MEMBER.

40 We concur:-
(Mkd.) Nana Amoyaw
(Mkd.) Nana John K. Amanie
(Sgd.) S.Y. Owusu
(Mkd.) G. Bevelebele
(Mkd.) Ben Atta.

Recorder:-
(Sgd.) S.D. Amoah,
Registrar.

This is the Exhibit marked "H" referred to in the Affidavit of Nana F.D. Kataboa sworn before me this 26th day of May, 1953.

50 (Sgd.) ?? Glover
COMMISSIONER FOR OATHS.

Exhibits
Defendant's
Exhibit.

"H"

Decision of the
Baroda Native
Tribunal in
Nana Kwasi Adu
v. Nana Yao
Nyako & Others.
13th May, 1948
- continued.

Exhibits
Defendant's
Exhibit.

"J"

Judgment of
Land Court,
Accra in Kataboa
v. Nyako II
and Others.
20th November,
1950.

"J" - JUDGMENT OF LAND COURT, ACCRA IN
KATABOIA v. NYAKO II and OTHERS

20th November, 1950.

In the Supreme Court of the Gold Coast, Eastern
Judicial Division (Land Division) held at Victori-
aborg, Accra on Monday the 20th day of November,
1950 before Sir Mark Wilson, Kt. Chief Justice.

Land Appeal No.42/1950.

Nana Kataboia II, Chief of
Apesokubi

Plaintiff-Appellant

10

v:

1. Nana Yao Nyako II, Ohene of Worawora
2. Nana Ampem Dako of Tapa-Amanya
Representative of the Amayahene,
3. Jonas Kwabena Odampa of Worawora,
4. Kwaku Beng of Asato,
5. Amankrado Kwame Tia of Worawora,
6. J.E.Otu of Tapa, Defendants-Respondents

JUDGMENT:-

This is an appeal from the decision of the
Native Tribunal of the Omanhene of Buem heard by
this Court by virtue of the provisions of Section
53(2) of Ordinance No.8 of 1949.

20

The suit was brought by one of the parties
concerned in a stool boundary dispute between the
Apesokubis and the Asatos against six persons who
had purported to act as arbitrators and in that
capacity had demarcated a boundary between the
lands of the two committees. The Plaintiff claimed
to set aside that demarcation on the ground that
it was made in his absence, that the Defendants
had no proper authority to act and that there were
certain irregularities in connection with the per-
sonnel of the arbitration body.

30

The trial Court held that the purported de-
marcation was null and void, as it was improperly
carried out, having been done in the absence of
the Plaintiff; but it also held that Plaintiff had
no cause of action against the Defendants, who had
been appointed to act as arbitrators as long ago
as 1939. (It may be mentioned by way of explana-
tion that the dispute had been going on for about
30 years before that and had been the subject of
litigation pending in the State Council of Buem in
1939 when the agreement to submit the matter to
arbitration was made, having been referred back to
that Tribunal by the West African Court of Appeal.

40

It is not at all certain that the Defendants had in fact been appointed to do the actual demarcation of the boundary.

The document of the 12th July, 1939 (Exhibit "F") seems to me to be primarily an agreement to discontinue the pending litigation on terms that each party should bear its own costs (paragraph 1) and the reason for this agreement is to be found in the succeeding paragraphs 2 and 3 which state that the parties had accepted the ruling of a sort of conciliation board called a "Society", formed by local elders, that the boundary between them should be "the traditional boundary" which was to be the subject of "preliminary investigation" by the Committee as appointed by both parties". It is not clear whether this Committee was composed of the same persons as had formed the conciliation board referred to above and its members are not specifically named in the document, but it would seem that certain persons, including at least some of the present Defendants, were appointed; but the work of demarcation was not immediately carried out. A different demarcation body seem to have been appointed in 1942 or 1943 on the advice of the District Commissioner and it actually got to work with the assistance of a surveyor. But disputes arose and the work of demarcation by this body was discontinued. The present Defendants apparently resumed their functions in 1947, after further litigation, though on what authority and at whose request is not clear. They appointed substitutes (without consulting the parties) for certain of their number who had died since 1939 and they actually demarcated a boundary, the one to which the Plaintiff-Appellant is objecting in the present suit.

This is a very tangled skein indeed. But I think the course which this Court must pursue is clear. It is to dismiss the appeal against the judgment of the trial Court, because that judgment in its essential features is one to which no exception can properly be taken. It set out that the so-called award of the 20th June, 1947, is null and void. Null and void it undoubtedly is, if only for the reason that its personnel had not been agreed to in its entirety by the two parties; but apart from that its authority is extremely doubtful in view of the events that had intervened since its appointment in 1939-40. The trial Court's judgment also sets out that the Plaintiff had no cause of

Exhibits
Defendant's
Exhibit.

"J".

Judgment of
Land Court,
Accra in Kataboa
v. Nyako II
and others.

20th November,
1950

- continued.

Exhibits
Defendant's
Exhibit.

"J".

Judgment of
Land Court,
Accra in Kataboa
v. Nyako II
and Others.

20th November,
1950

- continued.

action against the Defendants. I consider that also to be a correct finding. In my opinion if he felt that the alleged award had any effect at all and wished to have it set aside the Plaintiff should have sued the other party to the original dispute, who presumably was the only person likely to benefit by or to act to his detriment in respect of the subject of the award. The Defendants were not personally interested in the boundary dispute, so far as we know. Finally, when the judgment says in its last sentence that the two original parties to the dispute "Should go back to the State Council, where the appeal was pending, for final disposal of the case" they are merely stating their opinion that the proper and only way of settling this dispute is for the original parties to have recourse to further litigation in the appropriate tribunal, because as far as settlement by arbitration is concerned the matter has reached a hopeless deadlock, in the absence of any real desire by the parties to abide by this method of settling their differences.

10

20

That also seems to be sound sense, if, regretably the parties cannot, even now, agree to abide by the decision of a person or persons to be appointed by them to demarcate the boundary, which course however seems still to be open to them.

I accordingly dismiss the appeal. The Defendants-Respondents were made to abide their own costs in the trial Court but as they have been wrongly brought to this Court they are entitled to their costs here which are assessed at £12.6.0d. including eight (8) guineas for Counsel's fees.

30

(Sgd.) Mark Wilson,
CHIEF JUSTICE.
20th NOVEMBER, 1950.

Counsel:-

Hon. Akufo Addo for Appellant.

Mr. Koi Larbi for Respondents.

This is the Exhibit marked and referred to in the Affidavit of Nana F.D. Katabca sworn before me this 26th day of May, 1953.

40

(Sgd.) ?? Glover,
COMMISSIONER FOR OATHS.

"E" (Part) - LETTER FROM NANA YAW NYAKO II to
NANA OSEI BONSU and NANA KATABOA.

Exhibits
Plaintiff's
Exhibit.

OHENE'S OFFICE,
WORAWORA.
25th November, 1950.

"E" (Part)

My Good Friend,

SUB-CHIEF OSEI BONSU OF ASATO Plaintiff

Letter from
Nana Yaw Nyako
II to Nana Osei
Bonsu and Nana
Kataboa.

versus

SUB-CHIEF KWASI ADU (Deceased)
10 SUB-CHIEF F.D.KATABOA (Substituted) Defendant

25th November,
1950.

I am directed by the Omanyofekuw to inform
you that the above boundary demarcation case heard
and determined by us under the terms of an agree-
ment made by parties herein before us on the 12th
July, 1939, which after our award been given re-
sulted an action against us by the Defendant here-
in the case had been ended at Land Court, Accra,
and as the settlement proved failure, you are at
liberty to proceed with your case in Court.

20

I have the honour to be,
Sir,
Yours truly,

(Mkd.) Nana Yaw Nyako II
ARBITER.

W/W to mark:
(Sgd.) Adu Sei,
Stool Clerk.

To Nana Osei Bonsu,
Asato-hene,
30 Asato.

Nana F.D. Kataboa,
Apesokubihene,
Apesolubi.

This is the Exhibit marked "E" referred to in
the Affidavit of Patrick Kwasi Owusu sworn to before
me this 6th day of July, 1951.

(Sgd.) R.A. Quarshie,
COMMISSIONER FOR OATHS.

Exhibits
Plaintiff's
Exhibit.

"K" (Part)
Writ of
Possession.
28th April,
1951.

"K" (Part) - WRIT OF POSSESSION

EXHIBIT "5"

Tendered in evidence by consent admitted and
marked Exhibit "5" in re Prohibition etc.

(Sgd.) J.C. Arnah
Court Clerk.
26/2/52.

WRIT OF POSSESSION

IN THE NATIVE COURT OF OMANHERE OF BUEM STATE,
BORADA EASTERN PROVINCE.

10

No.1/51.

BETWEEN: SUB-CHIEF OSEI BONSU OF ASATU Plaintiff

- and -

SUB-CHIEF KWASI ADU (Substituted
by SUB-CHIEF F.D.KATABOA I) Defendant

To the Sheriff:-

Whereas lately, by the judgment of the said
Court Native Tribunal now Native Court Borada Buem
State, confirmed by W.A.C.A., Sub-Chief Kwasi Adu
was ordered to deliver to Sub-Chief Osei Bonsu of
Asatu Possession of all that:-

20

BOUNDARIES: Possession of all that piece or parcel
of land awarded to the Plaintiff by
the judgment of the Native Tribunal
now Court of Borada and confirmed by
West African Court of Appeal. The
Boundary between the Asatus and the
Apesokubis is given in the judgment of
the Native Tribunal now Court of Bor-
ada viz:-

30

"The proper boundary fixed in this
Judgment is the top of Oprana Hill
from River Asuokoko Southward to the
stream Mutabe and down the stream to
an Ntombe tree and the road cleaning
heap Asatu-Apesokubi road".

You are therefore commanded, in His Majesty's
name to cause the said Sub-Chief Osei Bonsu of As-
atu to have possession of the said land and
sic. promises with the appurtenances; and in what manner 40
you have executed this Writ, make appeal to the
Court immediately after the execution hereof, and
have you there then this writ.

DATED AT BORADA this 28th day of APRIL, 1951.

(Mkd.) John K.Amanie (his x mark)

W/to mark:
(Sgd.) ??

Signature of President.
N.C.

"E" (Part) - MOTION FOR PROHIBITION

IN THE SUPREME COURT OF THE GOLD COAST
EASTERN JUDICIAL DIVISION
DIVISIONAL COURT, ACCRA.
A.D.1951.

Exhibits
Plaintiff's
Exhibit.

"E" (Part)
Motion for
Prohibition.
10th July,
1951.

IN THE MATTER OF SUB-CHIEF OSEI BONSU OF ASATU
versus

SUB-CHIEF KWASI ADU (Deceased)
SUB-CHIEF F.D.KATABOA (Substituted)

10

and

IN THE MATTER OF THE ISSUE OF A WRIT OF POSSESSION
HEREIN

and

IN THE MATTER OF APPLICATION BY NANA KATABOA
FOR AN ORDER OF PROHIBITION HEREIN.

20

TAKE NOTICE that this Court will be moved by
AKUFO ADDO, ESQUIRE, of Counsel for NANA KATABOA
and on his behalf on Monday the 22nd day of Octo-
ber, 1951 for an Order of Prohibition directed to
Sub-Chief Osei Bonsu of Asatu and to the President
of the Native Court of the Buem State, Borada,
prohibiting them from executing a Writ of Posses-
sion herein pursuant to the leave of this Court
given on the 11th May 1951 AND/OR for any such
further Order or Orders as to the Court may seem
fit.

DATED AT KWAKWADUAM CHAMBER, ACCRA, this
10th day of JULY, 1951.

30

(Sgd.) Akufo Addo,
APPLICANT'S SOLICITOR.

THE REGISTRAR,
DIVISIONAL COURT,
ACCRA.

THE PRESIDENT,
NATIVE COURT OF BUEM,
BORADA

and

SUB-CHIEF OSEI BONSU, ASATU.

<u>Exhibits</u> Plaintiff's Exhibit	<u>"E" (Part) - COURT NOTES OF ARGUMENTS AND RULING ON MOTION FOR PROHIBITION</u>	
"E" (Part) Court Notes of Arguments and Ruling on Motion for Prohibition.	In the Supreme Court of the Gold Coast Eastern Judicial Division, held at Victoriaborg, Accra, on Tuesday the 26th day of February, 1952 before Acolatse, Ag. J. (Title as previously)	
26th, 27th and 29th February, 1952.	Claim: Motion on Notice for an order for Prohibition.	
26th February, 1952.	By Court:- Akufo-Addo, Counsel for Defendant- Applicant. Koi Larbi, Counsel for Plaintiff- Respondent.	10
	A. Addo:- Moves in terms of the Motion and Affi- davit.	
	Plaintiff-Respondent took out writ of Posses- sion from the Magistrate's Court constituted by the District Commissioner in 1945. Applicant op- posed the writ. Writ set aside by the Provincial Commissioner on 10.9.46 as shown by Exhibit "A". Judgment read. Counsel refers to W.A.C.A. Judg- ment between the parties dated 20.4.37 marked "A" filed by Respondent. The judgment restored the judgment of the Native Tribunal on technical grounds in favour of Respondent. Applicant obtained leave to appeal from the Tribunal judgment after W.A.C.A. decision.	20
	Native Tribunal of Borada's judgment dated 21.1.31 produced and read - marked Exhibit "1".	
	Proceedings in Buem State Council granting leave to appeal dated 26.5.37 on pages 19 and 20 tendered marked Exhibit "2". Appeal while pending parties agreed to discontinue and to settle the matter. Refers to page 21 marked Exhibit "3". Agreement dated 12.7.39 on file as "B".	30
	Refers to Notice of Discontinuance on page 22 and marked "4". Appeal before the Buem State Council discontinued on the strength of the settle- ment on 12.7.39.	
	Refers to Kuturka Yardon vs: Kurankyi Minta III - Full Court 1926-29.	40

Parties were entitled by consent to submit the matter to arbitration in spite of the judgment. Counsel submits parties are bound by the agreement of 12.7.39 and now it is up to parties to determine the traditional boundary. The present writ of possession was issued during last year based on the judgment of Borada Tribunal of Exhibit "1". No declaration or order of possession in judgment of the Native Tribunal of 21.2.31. Writ of Possession dated 28.4.51, in issue before the Court produced: marked "5".

Exhibits
Plaintiff's
Exhibit

"E" (Part)

Court Notes of Arguments and Ruling on Motion for Prohibition.

By Court - Adjourned 26.2.52 for further argument.

26th, 27th and 29th February, 1952.

(Sgd.) C.S. Acolatse,

Ag. J.

26th February, 1952

- continued.

27.2.52.

Koi Larbi for Respondent.

27th February, 1952.

Refers to Cap.90 of Native Authority Ordinance Vol.III at page 464 Section 7 in respect of jurisdiction.

20 Submits Magistrate had no jurisdiction to issue Writ of Possession. It was a matter for the Tribunal. P.C.Miller's ruling cancelling the writ dated 10.9.46 is a nullity. The Magistrate had no jurisdiction. The writ was issued by the Magistrate on 5.10.45. Tendered marked Exhibit "6" W.A.C.A. restored judgment of the Native Court and Respondent's application is based on the said judgment in this present matter before Court.

30 Submits Native Court judgment dated 21.2.31 still stands notwithstanding any agreement between the parties to the contrary. The agreement is merely an arrangement for arbitration.

Respondent's entitled to resort to enforce their legal rights under the Native Court judgment if the arbitration failed.

Counsel submits applicant cannot come to this Court for the Prohibition.

40 "Jennings law relating to Local Authority page 29 on Prohibition." "Prohibition lies as soon as the Court proceeds to apply a wrong principle of law as to its jurisdiction." Rex v. Kent Justices (1889) 24 O.B.D. 181.

Exhibits
Plaintiff's
Exhibit.

"E" (Part)
Court Notes of
Arguments and
Ruling on
Motion for
Prohibition.
26th, 27th and
29th February,
1952.
27th February,
1952
- continued.

Submits Prohibition does not lie in this case. Writ of Certiorari would be more appropriate. Prohibition is a judicial writ preventing inferior Court from usurping jurisdiction. 1924(1) K.B.D. L.R. page 1855 in Rex v. Electricity Commissioners. Refers to writ of Possession in Annual Volume of the Laws of Gold Coast 1949 Section 108 at page 200.

A. Addo:-

Application directed on Respondent and the President of the Native Court. Writ has not been executed, i.e. parties have not been put into possession. President of Native Court has not appeared in this matter and no Affidavit filed in answer to this application. 10

Refers to Section 80 of Cap.90 Magistrate's Court. 26.2.52.

No order for recovery of possession by the Native Court. It simply states the boundary of Plaintiff's land. Prohibition lies. 20

Native Court exceeding its jurisdiction (1) enforcing a judgment in favour of Respondent which he is not entitled in Equity to enforce (2) The Native Court are issuing this writ of possession when no such order was made in the judgment.

By Court:- Ruling reserved.

(Intd.) C.S.A.
Ag. J.

29th February,
1952.

29.2.52.

30

By Court:-

Ruling read. Writ of Prohibition not granted, costs for Plaintiff-Respondent assessed at 80 guineas inclusive of Counsel's costs.

(Intd.) C.S.A.
Ag. J.

"K" (Part) - RULING OF DIVISIONAL COURT, ACCRA,
ON APPLICATION FOR ORDER OF PROHIBITION.

29th February, 1952.

In the Supreme Court of the Gold Coast, Eastern
Judicial Division, held at Victoriaborg, Accra,
on Friday the 29th day of February, 1952 before
Acolatse, Ag.J.

Exhibits
Plaintiff's
Exhibit.

"K" (Part)
Ruling of
Divisional
Court, Accra,
on Application
for Order of
Prohibition.
29th February,
1952.

Miscellaneous Matters

10 IN THE MATTER OF SUB-CHIEF OSEI BONSU
of Asatu Plaintiff

versus

SUB-CHIEF KWASI ADU (Deceased)
SUB-CHIEF F.D.KATABOA (Substituted) Defendant

and

IN THE MATTER OF THE ISSUE OF A WRIT OF POSSESSION
HEREIN

and

20 IN THE MATTER OF AN APPLICATION BY NANA KATABOA
FOR LEAVE TO APPLY FOR AN ORDER OF PROHIBITION
TO PROHIBIT THE EXECUTION OF THE WRIT OF POSSES-
SION AFORESAID.

RULING:-

30 This is an application for an order of writ
of Prohibition to be directed to the Respondent
and the President of the Native Court of Buem
State, Borada prohibiting them for executing a
writ of Possession issued at the instance of Plain-
tiff-Respondent herein. The writ of Possession
was issued on 28.4.51. Leave for the application
for an order of the Prohibition was granted by the
Court on 11.5.51. The matter came up before me
for hearing on 26.2.52.

The writ of Possession in question was based
upon a judgment obtained by the Plaintiff-Respon-
dent against the Defendant-Applicant in the Native
Tribunal of the Buem State on 21.2.31 in a land
dispute between the parties.

40 The Defendant-Applicant herein appealed from
the judgment of the Provincial Commissioner's
Court and later the Provincial Commissioner's de-
cision was set aside and declared a nullity by
West African Court of Appeal on 20.4.37 whereby

Exhibits
Plaintiff's
Exhibit.

"K" (Part)

Ruling of
Divisional
Court, Accra,
on Application
for Order of
Prohibition.

29th February,
1952

- continued.

the judgment of the Native Court was restored in favour of Plaintiff in respect of the land in dispute.

The Defendant filed and obtained leave from the Native Court for a fresh appeal to the Buem State Council as a result of the judgment of the West African Court of Appeal. This appeal was never prosecuted by the applicant. An agreement for settlement was drawn up on 12.7.39 with a view to discontinue the dispute upon certain terms contained in the document. Notice of discontinuance was sent to the President of the Council with the agreement. The parties however were unable to carry out or execute the terms of the agreement on 12.7.39 owing to obstruction by one side or the other. It appeared that the settlement had reached a hopeless deadlock at this stage in the absence of any real desire by the parties of executing the method mentioned in the agreement of settling the dispute. The parties have now reached a deadlock as to the demarcation of the boundary between them.

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The Plaintiff in 1945 applied for and obtained a writ of possession from the Magistrate's Court constituted by the District Commissioner at Kpandu in 1945 but this was cancelled on appeal by the Provincial Commissioner on 10.9.46 by the Defendant.

Subsequent attempts were made to revive the efforts to settle and in 1950 all interested parties withdrew their help and advised the parties to go to the Court for their remedy. In consequence, Plaintiff-Respondent applied to the Native Court for a writ of possession on the judgment of 1931 against the Applicant.

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This application for Prohibition is the sequel to test the validity of the issue of the writ of Possession by the Native Court of Buem State. Counsel on both sides admitted before me that the Native Court in question has jurisdiction in all civil causes and Land causes and has the power to issue writ of possession to enforce its decree or judgment by virtue of the Ordinance No.8/1949. I think by Section 63 of the said Ordinance District Commissioners have no powers of exercise in respect of land causes.

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The question for me to decide is whether Prohibition lies in this matter to restrain the Native Court from executing the writ of Possession upon the Defendant in respect of the judgment in

Native Court? Has the agreement of 12.7.39 stopped the Native Court of its jurisdiction in land cases and the issue of an order to enforce its judgment?

Exhibits
Plaintiff's
Exhibit.

10 Upon hearing the arguments of Counsel at great length and on the review of the authorities cited I cannot but repeat that Prohibition goes to the root of jurisdiction and questions which are the proper subject of appeal cannot be dealt with by Prohibition unless "something has been done contrary to the laws of the land" "or so vicious as to violate some fundamental principles of Justice." It follows that if the application does not involve jurisdiction then the remedy is by appeal and that mere irregularities in procedure are no ground for Prohibition. "A mistaken exercise of the jurisdiction by the inferior Court is no reason for the Order."

"K" (Part)
Ruling of
Divisional
Court, Accra,
on Application
for Order of
Prohibition.
29th February,
1952
- continued.

20 I consider the argument in this line and the facts involved in this matter and I am of the opinion that the application should fail.

"K" (Part) - NOTICE OF APPEAL FROM REFUSAL TO GRANT PROHIBITION

IN THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION,
VICTORIABORG, ACCRA,
A.D.1952.

NOTICE OF APPEAL (RULE 12).

"K" (Part)
Notice of
Appeal from
Refusal to grant
Prohibition.
6th March, 1952.

30 IN THE MATTER OF SUB-CHIEF OSEI BONSU OF ASATU
versus
SUB-CHIEF KWASI ADU (Substituted)
and
IN THE MATTER OF ISSUE OF A WRIT OF POSSESSION
HEREIN
and
IN THE MATTER OF AN APPLICATION BY NANA KATABOA
AFORESAID FOR AN ORDER OF PROHIBITION TO PROHIBIT
THE EXECUTION OF THE WRIT OF POSSESSION AFORESAID.

40 TAKE NOTICE that the Applicant herein being dissatisfied with the decision of the Divisional Court Accra in the Ruling of Acolatse, Ag. J., dated the

Exhibits
Plaintiff's
Exhibit.

"K" (Part)

Notice of
Appeal from
Refusal to grant
Prohibition.

6th March, 1952
- continued.

29th day of February, 1952, refusing the Appellant's application for an order of Prohibition herein does 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 Appellant further states that the names and addresses of the persons directly affected by the appeal are those set out in paragraph 5.

2. THE Appeal is against the refusal to grant an Order of prohibition. 10

3. GROUNDS OF APPEAL: The refusal to grant the order for Prohibition was wrong, because,

(1) The Native Court that issued the Writ of Possession had no jurisdiction to do so in-as-much as the judgment sought to be executed by that Writ did not grant possession of land to the Respondent.

(2) The Native Court that issued the Writ was not seised of any suit between the parties herein and the Native Court had therefore no jurisdiction to issue a Writ of Execution. 20

(3) Having regard to the fact that the parties to the suit had by Agreement in writing agreed to withdraw the dispute from the Courts and to submit their differences to Arbitration the Native Court had no further jurisdiction in the matter and the issue of Writ of Execution by that Court was wrong in law.

RELIEF SOUGHT: That the refusal by Acolatse Ag.J., to grant an Order of Prohibition be declared wrong and that the Order be granted the Court or that the Learned Judge of the Court below be directed to grant the Order aforesaid. 30

Persons directly affected by the Appeal:

(1) Sub-Chief Osei Bonsu, Asato,
Togoland Under United
Kingdom Trusteeship

(2) The President,
Native Court of Buem State, Borada. 40

DATED AT KWAKWADUAM CHAMBERS, ACCRA, THIS 6th DAY OF MARCH, 1952.

(Sgd.) Akufo Addo
SOLICITOR FOR APPELLANT.

TO THE REGISTRAR,
DIVISIONAL COURT, ACCRA.

"L" - JUDGMENT OF THE WEST AFRICAN COURT OF APPEAL

WEST AFRICAN COURT OF APPEAL
 GENERAL SITTING HELD AT
 ACCRA, 13th MARCH, 1953.

Coram Foster-Sutton, P., Coussey, J.A. & Windsor-Aubrey, J.

Civil Appeal No.29/52.

IN THE MATTER OF SUB-CHIEF } Plaintiff-Respondent-
 OSEI BONSU of Asatu } Respondent.

v.

10 SUB-CHIEF KWASI ADU }
 (Deceased) }
 SUB-CHIEF F.D.KATABOA } Defendant-Appellant-
 (Substituted) } Appellant.

- and -

IN THE MATTER OF AN APPLICATION by NANA KATABOA for leave to apply for an Order of Prohibition to prohibit the execution of the Writ of Possession aforesaid.

J U D G M E N T

20 WINDSOR-AUBREY, J.: In this case the learned trial Judge refused to make absolute an Order nisi for a Writ of Prohibition issued at the instance of Chief Kataboa, then substituted Defendant, to prohibit the Plaintiff, Sub-Chief Osei Bonsu from issuing a Writ of Possession for the land the subject-matter of the action.

30 It is essential in the first place to examine the proceedings in the Native Court and to determine the issues before that Court and the judgment thereon.

The claim of the Plaintiff, Sub-Chief Osei Bonsu, is set out at page 15 of the record. The material part so far as this application is concerned, is set out in paragraph 1 of the Plaintiff's claim which reads as follows:-

40 "For having stated you have no boundary with
 "me on the disputed land but with Dodi place
 "where marked by a German Official at Owukuku-
 "amba and with Ahamansu at Tentianyo, to know
 "my historical origin why I have no land
 "there."

The judgment of the Native Court appears at pages

Exhibits

Plaintiff's
 Exhibit.

"L"

Judgment of the
 West African
 Court of Appeal.
 13th March,
 1953.

Exhibits
Plaintiff's
Exhibit.

"I"

Judgment of the
West African
Court of Appeal.

13th March,
1953
- continued.

45 to 46 of the record and the relevant part of the judgment appears to be the following passages -

"Apessokubi Chief is guilty, the land properly
"belongs to Asatu. The proper boundary fixed
"in this judgment is the top of Oprana Hill
"from river Asuokoko southward to stream Matabe
"and down the stream to an "Wtombe tree", and
"the road cleaning heap Asatu-Apessokubi road".

It is to be noted that in the writ of summons there was no claim for possession and the judgment is declaratory only - it describes a boundary and does not purport to define an area or to award any specific location to the Plaintiff. The Appellant's Counsel has admitted that the object of the litigation was to ascertain whether the tenants should pay tolls to the Plaintiff or to the Defendant. Possession was not claimed for the obvious reason that it was not sought, because the tenant occupiers had the right to possession.

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The claim was for a declaration of title and not only was the claim framed in that form but that was also the substance of the relief sought.

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In Gledhill v. Hunter, XIV Chancery Division p.492 it was held that an action to establish title to land, not claiming recovery of possession is not an action for recovery of land.

Under Order 43 Rule 1 of Schedule 3 to the Courts Ordinance a writ of Possession can only be issued where there is a decree for land.

Here there was no decree for land but only a decree of declaration of title consequently a writ of possession did not lie, and therefore the grant of a writ of possession was wrong and contrary to law.

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However, the Plaintiff-Respondent's Counsel argues that even assuming the Writ of Possession was wrongly issued the remedy of the Appellant lies by way of appeal.

Respondent's Counsel asserts that a Writ of Prohibition only lies where a Court has no jurisdiction at all and not where its jurisdiction has been wrongly exercised. He asserts that a Native Court, or any other Court, can in certain circumstances, issue a Writ of Possession. If therefore the Native Court has wrongly issued such writ, it has acted in excess of its jurisdiction and not because of lack of jurisdiction. In other words, he alleges that at the most, the Native Court

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misconceived or erroneously exercised its power to issue such writ, but that it has not exercised a power which it does not possess, if properly exercised. In support of this proposition he has cited the cases of Regina v. Justices of Kent, 24 Q.B.D., 1890 page 183, Rex v. Electricity Commissions, 1924, 1 K.B.D., page 171 at page 192. In Short and Mellor 2nd Edition at page 253 it is stated that the writ lies "Where the judge or the inferior Court has "wrongfully exercised jurisdiction." Again at page 255 the following proposition is set out:-

"If he (a Judge of an inferior Court) assumes "jurisdiction by a wrong decision on a point "of law the Court will interfere."

Having carefully considered the authorities cited on behalf of the Respondent and the passages quoted from Short and Mellor there does not appear to be any conflict or difficulty in the interpretation of the law. The effect seems to be that prohibition only lies where there is lack of jurisdiction, and such lack may arise from total absence of a power or by the exercise of a power not exercisable in the circumstances of the particular case under consideration. A Writ of Possession only lies where there has been a decree for land. In this case there was no decree for land consequently the Native Court had no jurisdiction to grant such writ, and the applicant-appellant was accordingly entitled to a Writ of Prohibition. The decision of the Divisional Court is set aside and reversed and the application for a Writ of Prohibition is made absolute.

The applicant is awarded the costs of this appeal.

(Sgd.) H.M.W. Aubrey,
JUDGE.

FOSTER-SUTTON, P. I concur.

COUSSEY, J.A. I concur.

Exhibits
Plaintiff's
Exhibit.

"L"

Judgment of the
West African
Court of Appeal.

13th March, 1953
- continued.