Privy Council Appeal No. 48 of 1925.

Kojo Pon - - - - - - - - - *Appellant*

v.

Atta Fua - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE GOLD COAST COLONY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH MAY, 1927.

Present at the Hearing:

VISCOUNT HALDANE.
LORD SHAW.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* VISCOUNT HALDANE.]

In this case their Lordships have the difficulty, which imposes the necessity of great caution, that the appeal comes here *ex parte*. Consequently they felt it right to look very minutely at what has been said and at the particular rules that concern it; nevertheless, on those rules and on what has transpired, they think that there is sufficient before them to enable them to deal with the case at once.

The appeal is brought from a judgment of the Supreme Court of the Gold Coast Colony, which had to entertain an appeal from the judgment of Sir Philip Crampton Smyly, the Chief Justice. Sir Philip Crampton Smyly had non-suited the plaintiff in an action on the ground of want of jurisdiction, and the appeal really involved the whole merits. It raised an elaborate question as to the title to native lands. When the present appellant proposed to appeal to the Supreme Court of the Gold Coast he had, of course, to conform with what the Rules of Court required, and he applied for and obtained from the Divisional Court conditional leave to appeal against the judgment of the Chief Justice, subject

to certain conditions being fulfilled within one month of the date of his application. Among these conditions was this, that £100 was to be paid into Court to await any order as to costs that might be awarded to the respondent by the Appeal Court in the case of his success, or a bond was to be entered into with two sureties to be justified in the sum of £50 each. It was on the 7th July, 1922, that that order was made, and the appellant proceeded to enter into the bond prescribed by the order. There is no doubt, their Lordships think, that it was quite in accordance with the rules to prescribe this. The Rules of Court are enlightened and comprehensive and they give practically all the powers that the Courts here have. Under Order V of the First Schedule to the Rules there is a direction that

> " the Court may in all causes and matters make any order which it considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."

Then there is a series of further rules contained in Order XI, which are, again, very comprehensive.

> " When by the rules of the Schedules of this Ordinance any act may be done by any party in a suit, such act may be done either by the party in person, or by his solicitor or agent, if it can be legally done by an agent."

Under Order LIII of Schedule 2, the appellant has to give security for costs of an appeal; but that obligation is imposed only in very general terms. There are specific directions as to the powers of the Appeal Court to require security for costs, and then, generally, that they may make any order necessary for determining the real question in controversy in the appeal, and that there is full jurisdiction over the whole suit as if the same had been instituted and prosecuted in the Appeal Court as a Court of first instance, with power to give any judgment and make any order which ought to have been made, and to make such further order as the case may require.

That being the law and the plaintiff having been ordered to give security for the costs of his appeal, the plaintiff proceeded to enter into the bond which he was directed to execute. He was represented through the proceedings by Kwabena Asiama, and Kwabena Asiama, who conducted the proceedings for him, executed the bond. When the bond was dated the 10th July, 1922, it provided security for the costs of the appeal to the respondent if they were given to the respondent, and then it was executed by Kwabena and two sureties in the presence of Mr. White, the Chief Registrar to the Court, and it purported to be executed by Kwabena as the representative of Kojo Pon. That was as long ago as 10th July, 1922, and, whether or not the parties knew about it, the Court must be taken to have known that their Registrar had accepted the security.

The case came on by degrees, and finally it was reached for hearing by the Court of Appeal in April, 1924, and it was

heard and judgment was delivered by Mr. Justice Michelin, Mr. Justice Hall and Mr. Justice Gardiner Smith upon the 10th April, 1924. These learned Judges accepted a point which their Lordships think they ought not to have accepted. It was argued by counsel for the respondent, by way of preliminary objection, that the conditions of appeal had not been fulfilled, inasmuch as the bond for the costs of the appeal was not signed by the appellant, but by Kwabena, purporting to act as his representative. It was argued that the Court having granted only conditional leave to appeal, it was incumbent on the plaintiff himself to execute the bond, and Kwabena could not execute the bond, unless he had first obtained an order from the Court authorising him to do so. The learned Judges held that, as regards the bond to be entered into with two sureties to be justified in the sum of £50 each, no proof had been given of the authority of Kwabena to execute on behalf of the appellant; the authority of Kwabena ought to be strictly proved; and the bond must, therefore, be taken to have been invalid and that the defect was fatal to the appeal.

Their Lordships wish to say that in cases coming before them from the Dominions of the Crown, their first consideration always is to secure, if possible, that substantial justice is done. That may not always be possible. There may be conditions in the local law or in the rules which preclude the possibility of getting round technical obstacles and doing complete justice. But they think that in the case of the rules of procedure in the Gold Coast Colony there are no such obstacles. The Court was invested with the widest powers, and it might have adjourned the hearing of the appeal until a proper bond was executed, or it might have said that an affidavit was sufficient; and that was the more incumbent on the Court because its own Registrar had accepted the bond executed by Kwabena on behalf of the appellant.

Under these conditions their Lordships think that to refuse to hear the appeal merely on the ground of what might have been a mere technicality about the bond was to fail to do justice as between the parties, and they are of opinion that the case must be remitted to the Court below to deal with it again, hear it, and, if necessary, get some formal proof of Kwabena's authority; but, as at present advised, their Lordships do not think that necessary inasmuch as Kwabena's authority was accepted by the Registrar, and inasmuch as he had acted right through, and nobody till the other day ever challenged his authority. However that may be dealt with by the Court below, if they think it necessary to deal with it at all. For the present it is enough to say that the case must go back and be heard out.

Then comes the question of what to do with the costs of this appeal. It has only been *ex parte* before the Board, and it may be that the appeal will not be fruitful; it may so turn out.

Their Lordships therefore think that the right course will be that the appellant's costs should be included in any costs he may recover in the Court below. If he recovers no costs in the Court below, he will not get any costs of this appeal, but he will not have to pay any costs. On the other hand, if he succeeds, he will get these costs. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

KOJO PON

v.

ATTA FUA.

DELIVERED BY VISCOUNT HALDANE.

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