Privy Council Appeal No. 10 *of* 1938

Adabla (substituted for Afianu, deceased) on behalf of himself and all other members of the Anyigbe Tribe - - *Appellant*

v.

Gbevlo Agama and others - - - - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH MAY, 1939

Present at the Hearing:

LORD RUSSELL OF KILLOWEN
LORD ROMER
SIR GEORGE RANKIN

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This appeal is brought from a judgment of the West African Court of Appeal (Gold Coast Session) allowing the appeal of the respondents from a judgment of the Provincial Commissioner's Court (Eastern Province) of the Gold Coast in favour of the plaintiff in the proceedings. That judgment had reversed a judgment of the High Native Tribunal of Ada given in favour of the respondents. The appellant has been substituted in the course of the proceedings for the original plaintiff who had died.

The litigation is between representatives of two tribes, viz., the Anyigbe tribe and the Fieve tribe, and relates to the ownership of land. The representatives of the Anyigbe tribe are the appellants before the Board; but their Lordships are not, on this appeal, in any way concerned with the merits of the dispute between the litigants. The appeal relates to the questions whether in the circumstances of the case the judgment of the Provincial Commissioner's Court was pronounced without jurisdiction, and if so whether the Court of Appeal (in its discretion) could and should have heard and determined the appeal therefrom.

The answer to these questions depends primarily upon the true construction and effect of the Native Administration Ordinance (No. 18 of 1927) and the Native Administration Amendment Ordinance, 1935 (No. 18 of 1935).

The relevant sections of the first-named Ordinance are sections 75, 76 and 77, which provide:—

> 75. In any suit or matter relating to the ownership, possession, or occupation of any land an appeal shall lie from the decision of the Paramount Chief's Tribunal to the Provincial Commissioner's Court.
>
> 76. No appeal shall lie under section 73, section 74, or section 75 unless the party appealing shall give notice of appeal within the proper periods hereinafter in this section prescribed, reckoning from the date of the decision appealed against, namely:—
>
> (1) From a Divisional Chief's Tribunal to a Paramount Chief's Tribunal, within two months;
>
> (2) From a Paramount Chief's Tribunal to the District Commissioner's Court, within four months;
>
> (3) From a Paramount Chief's Tribunal to the Provincial Commissioner's Court, within six months.
>
> 77.—(1) A party desiring to appeal from a Paramount Chief's Tribunal shall first obtain the leave of such Tribunal so to do; provided that, if the said Tribunal shall have refused such leave, the Provincial Commissioner's Court or the District Commissioner's Court may nevertheless grant leave to appeal.
>
> (2) Leave to appeal from a Paramount Chief's Tribunal shall not be granted unless and until the appellant shall either have paid the costs in such Tribunal or shall have deposited therein or in the Court to which the appeal is being taken a sum of money sufficient to satisfy such costs; and such Court shall not grant a stay of execution with respect to the said costs.

The Amendment Ordinance contains a section No. 13 which runs thus:—

> 13. Sub-section (2) of section 77 of the Native Administration Ordinance shall be amended by adding at the end thereof the following proviso:—
>
> "Provided that notwithstanding anything in this section contained the West African Court of Appeal may in its discretion, for the purpose of doing substantial justice between the parties, hear and determine any appeal brought before it on such terms and conditions as it may deem just.".

The facts relevant to the present appeal may now be shortly stated.

After the judgment of the High Native Tribunal (which is a Paramount Chief's Tribunal) and within the six months required by section 76 (3) an order was made (dated the 16th April, 1929) by the Provincial Commissioner's Court granting to the plaintiff leave to appeal from the decision of the Paramount Chief's Tribunal on certain conditions. The conditions were duly complied with, and on the 15th May, 1929, the conditional leave was made final. There is at present no material available to show that any application for leave to appeal had been made to the Paramount Chief's Tribunal, or that if made it had been refused. On the one hand their Lordships were told by counsel for the appellant that the affidavit which was filed in support of the application leading up to the order of the 16th April, 1929, and which was not printed in the record before the Board, had been read by him, and that it contained no reference to any application to the Paramount Chief's Tribunal for leave to appeal. On the other hand their Lordships find

it difficult to believe that the Commissioner would act under section 77 (1) without being satisfied that the conditions precedent to his being competent to make any order thereunder which are therein specified had been complied with.

However that may be, the plaintiff's appeal was subsequently heard and adjudicated upon in the Provincial Commissioner's Court, with results favourable to the plaintiff. The defendants thereupon appealed to the West African Court of Appeal. The appeal came on for hearing before Sir Donald Kingdon, C.J. (Nigeria), Sir Philip Bertie Petrides, C.J. (Gold Coast) and Arthur Webber, C.J. (Sierra Leone), on the 28th April, 1936. Counsel for the defendants contended (amongst other grounds of appeal) that the Provincial Commissioner had no jurisdiction to grant leave to appeal and that consequently his judgment on the hearing of the appeal was without jurisdiction. Counsel for the plaintiffs asked that enquiry be made. The case was accordingly adjourned for a report from the Provincial Commissioner upon two points, viz., (1) whether there were any proceedings in the Native Tribunal by way of application filed for appeal between the date of the original judgment and the date of the order of the Provincial Commissioner's Court giving conditional leave to appeal; and (2) the delay which had apparently occurred in the case. The report of the Commissioner gave an explanation of the delay, but gave no information on the first point.

The adjourned hearing of the defendants' appeal took place on the 16th November, 1936, when the matter was again adjourned in order to get a reply on the first point from the Commissioner. At the further hearing on the 3rd December, 1936, a telegram from the Commissioner was read which stated—"No record can be traced in Ada Manche's Tribunal [i.e., the Native Tribunal in question] of any proceedings by way of application for leave to appeal between 18th January, 1929, and 16th April, 1929." Counsel for the plaintiff desired to read a letter written by direction of the Paramount Chief (who he said was illiterate) indicating that leave must have been granted: but the Court refused to look at it.

Judgment was reserved and was delivered on the 9th December, 1936.

The Chief Justice of the Supreme Court of Sierra Leone was of opinion that the proviso introduced by the Ordinance No. 18 of 1935 qualified only the second subsection of section 77 of the Ordinance No. 18 of 1927, and that since no record could be traced in the Paramount Chief's Tribunal of any application for leave to appeal, the proceedings before the Provincial Commissioner's Court amounted to a nullity. But he was also of opinion that, assuming that the proviso applied also to the first subsection of section 77, the case was not one for exercising the discretion conferred by the proviso, because the granting of leave by the Paramount Chief's Tribunal was discretionary and might or might not be granted, and in his (the Chief Justice's) view, "an appeal

should not be entertained when this essential step has been omitted". The Chief Justice of the Supreme Court of Nigeria concurred in that judgment. The Chief Justice of the Gold Coast concurred with that part of the judgment which dealt with the exercise of discretion under the proviso, but dissented from the construction of section 13 of the Ordinance No. 18 of 1935. He was of opinion that the proviso qualified both subsections of section 77, feeling unable to depart from the ordinary meaning of the word "section" in the proviso.

In the result an order was made allowing the defendants' appeal, setting aside the judgment of the Provincial Commissioner's Court and restoring the judgment of the High Native Tribunal.

The appellant now asks His Majesty in Council to discharge that order and to remit the matter for reconsideration by the West African Court of Appeal on the grounds (1) that the majority misconstrued the proviso in question, (2) that the Court had jurisdiction in the proper exercise of its discretion to hear and determine the defendants' appeal notwithstanding that the provisions of section 77 (1) had not been complied with, (3) that in their hypothetical use of their discretion as stated in the judgments the Judges had proceeded on wrong grounds, and (4) that in any event the Court should have presumed that everything had been duly performed and that the Provincial Commissioner's Order of the 16th April, 1929, had been lawfully made unless and until it had been affirmatively proved that the conditions precedent to the existence of his jurisdiction had not been fulfilled.

The defendants did not appear before their Lordships' Board, so their Lordships did not have the advantage of hearing the questions argued adversely to the appellant; nevertheless they feel no doubt that the matter should not rest where it is.

In their opinion the construction of section 13 of the Ordinance No. 18 of 1935 is from its language reasonably plain. The word "section" admits of no doubt, it does not in its natural signification mean "sub-section", and it certainly cannot mean it in a section which itself uses both words in its opening line. The only possible ground for suggesting the contrary (for the marginal note must be disregarded) is that section 13 enacts that "subsection (2) . . . shall be amended"; but the word "amended" in that context need mean no more than "altered", and is not inconsistent with the alteration introduced into that subsection operating as a qualification of the whole section. Their Lordships agree with the opinion of the Chief Justice of the Gold Coast.

The Court of Appeal had accordingly jurisdiction to hear and determine the appeal on its merits if in its discretion it thought proper to do so. The Judges have intimated that, upon the hypothesis of jurisdiction, they would not exercise

their discretion in favour of hearing the appeal. To that extent they have hypothetically used their discretion; but they have also stated the grounds upon which they would in this case exercise their discretion in the particular way indicated. They say that since the granting of leave under section 77 (1) is discretionary in the Paramount Chief's Tribunal and might be refused there, an appeal should not be entertained (i.e., the discretion given by the proviso should never be exercised) in cases where the essential step of applying to that Tribunal has been omitted. This view, however, would reduce the operation of the proviso on section 77 (1), to which *ex hypothesi* it applies, to a nullity. Their Lordships are accordingly of opinion that the Court of Appeal has, in the present case, exercised the discretion conferred upon it on wrong grounds.

Their Lordships do not feel able in the present case to act upon the presumption that leave to appeal was asked for and was refused by the Paramount Chief's Tribunal; the fact that the affidavit above mentioned is silent upon the point is an important fact in this connection. On the other hand, it may be doubtful whether the absence of a record on the files of the Tribunal is necessarily conclusive. That is a question which can best be answered by those who are familiar with the degree of care and accuracy with which such records and files are kept. It is, however, a matter into which further enquiry might well be made, and upon which any communication authorised by the Paramount Chief would be of value.

In the result their Lordships are of opinion that the order appealed from should be discharged and the appeal remitted for rehearing to the West African Court of Appeal. Their Lordships will humbly advise His Majesty accordingly.

On such rehearing, if and when satisfied that the provisions of section 77 (1) have not been observed, the discretion conferred by the proviso in question should be exercised after a consideration of the relevant facts subsequent to the original judgment including, their Lordships would suggest, the question whether the omission to apply to the Paramount Chief's Tribunal for leave to appeal, was deliberate or accidental or the result of a *bona fide* mistake. If the Court decides to exercise the discretion in favour of hearing the appeal, it will do so on such terms and conditions as it may deem just.

The respondents must pay the costs of this appeal.

(17286—3A) Wt. 8675—41 110 5/39 P. St. G. 338

ADABLA (SUBSTITUTED FOR AFIANU, DECEASED) ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF THE ANYIGBE TRIBE

v.

GBEVLO AGAMA AND OTHERS

DELIVERED BY LORD RUSSELL OF KILLOWEN

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