Privy Council Appeal No. 90 of 1936

Arthur Hansen Hammond - - - - - - - *Appellant*

v.

John Henrick Walmbeck Randolph and another - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JULY, 1939

Present at the Hearing:

LORD THANKERTON
LORD FAIRFIELD
LORD SALVESEN

[*Delivered by* LORD SALVESEN]

This is an appeal from a judgment of the West African Court of Appeal, dated 21st December, 1935, which reversed a judgment dated 13th July, 1935, of Sir G. C. Deane, Chief Justice of the Supreme Court of the Gold Coast, sitting as the Divisional Court of such Supreme Court for the Eastern Province of the Gold Coast Colony. The said judgment was in favour of the plaintiff appellant and held that he was the person entitled to sue as head of the Kreshie family, and that the joint property, more particularly described in the writ of summons and known as St. Janet's Harbour, High Street, Accra, in the Gold Coast Colony, was the family property of the Kreshie family, and that the title to St. Janet's Harbour was in the plaintiff as head of the Kreshie family.

The plaint which in the original form claimed possession of the said property was subsequently amended and was limited to a claim for a declaration of title in the plaintiff to the property as head of the Kreshie family and it was this claim that the Chief Justice, G. C. Deane, gave effect to in the concluding words of his judgment:—"I think the plaintiff, as head of the Kreshie family is entitled to the declaration asked for and I give judgment for him on that point against the defendant Randolph with costs."

On appeal this judgment was reversed and the plaintiff's claim was dismissed. The reason for the decision was that the Appeal Court held that the property in question was not the property of the Kreshie family but was self-acquired by the ancestor of the respondent, J. H. W. Randolph, who thereby acquired the property as a fee simple proprietor with full right of disposal.

Various subsidiary matters were dealt with in the judgment of the Trial Judge which were not raised in the Court of Appeal and which it is therefore not necessary for their Lordships to consider, and the sole issue that was presented for their decision was whether the property known as St. Janet's Harbour was property which had passed by inheritance from Kreshie to the members of her family or had been acquired as a separate estate by the female ancestor of the respondent. The learned Trial Judge held on the evidence that, apart from two small properties with which their Lordships will afterwards deal, the property known as St. Janet's Harbour was gifted to Kreshie by her husband. His reasons for arriving at this decision, which was on a question of fact, were fully stated and it is not necessary to consider these in detail as their Lordships are in entire agreement with them.

In dealing with the question whether there had been a subsequent partition of the property so that that part of it known as St. Janet's Harbour was separated from the family property and became the absolute property of one branch of the family, regard must be had to the peculiar character of the tenure of land in West Africa as described by Rayner C.J. in the report on land tenure in West Africa which that learned Judge made in 1898, and which received the approval of their Lordships of the Privy Council in the case of *Amodu Tijani* v. *The Secretary, Southern Nigeria,* reported in [1921] 2 A.C. at p. 399. The passage is in these terms:—

> "The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of this coast, and wherever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas. But the native idea still has a firm hold on the people, and in most cases, even in Lagos, land is held by the family. This is so even in cases of land purporting to be held under Crown grants and English conveyances. The original grantee may have held as an individual owner, but on his death all his family claim an interest, which is always recognised, and thus the land becomes again family land. My experience in Lagos leads me to the conclusion that except where land has been bought by the present owner there are very few natives who are individual owners of land."

To this passage may be added that as stated in the Fanti Customary Laws edited by Mr. Sarbah:—

"The first important rule which one has to learn and ever bear in mind when dealing with matters of succession is that the right of inheritance is only through the female, and pedigree is traced through the female line and that only.*

There is no such thing as succession, in the proper English meaning, in a family owning ancestral property. The whole family, consisting of males and females, constitutes a sort of corporation; some of the members being coparceners, i.e., persons entitled to a portion of the property on partition (cutting Ekar), and others who are dependents, and are entitled to reside in the dwelling house for life, such as sons and daughters, subject to good conduct and not disputing right of the family. Partition being extremely rare, the idea of heirship scarcely presents itself to the mind of any member of the family. The members are entitled to reside in the ancestral house, and to enjoy that amount of affluence and consideration which springs from their belonging to a family possessed of greater or less wealth."

These being the principles which their Lordships have to apply in the present case, it is necessary now to consider the facts as they have been established in the evidence. On Kreshie's death she was succeeded by two daughters, Janet Plange, who married C. A. Randolph, the grandfather of the respondent and Na Momo, who married W. Q. Papafio. The issue of the latter marriage was three sons and one daughter, from whom the present appellant is descended. Janet Plange as the senior daughter became the head of the family and held that position until 1895 when she died, whereupon Na Momo, her younger sister, became head of the family. On her death in 1910 the respondents' father was appointed the head of the family and held that position until 1933 when he died at the advanced age of 88. His son, as regards succession to the landed property, is, therefore, not a member of the Kreshie family but of his own mother's family who was also named Janet Plange. On the other hand the plaintiff being descended from the only female offspring of Na Momo is now head of the Kreshie family and entitled to vindicate the family property and to administer the same.

It is not disputed that both Janet Plange and Na Momo erected buildings upon the family land: Momo built Momo Hall and Janet Plange built on St. Janet's Harbour. In accordance with native law, Janet being the head of the family was entitled to lease the property and she exercised that power. In order to obtain money to build upon it, she borrowed from a certain J. J. Fischer on 3rd November, 1875, a sum of £510 7s. 2d. with which the building of suitable premises was proceeded with. In the certificate of survey, the land is described as the property of Miss Janet Plange, but no significance attaches to this as it cannot reasonably be doubted that it was inherited by her from her mother Kreshie, and as the senior female child had, on Kreshie's death, become head of the family. There is no suggestion that there were other lands except that parcel on which Na Momo also built which became known as Momo Hall. The money obtained from Fischer was called up and Janet Plange thereupon borrowed from William Papafio, the

* Abbacan v. Bubuwooni, 1 F.L.R. 213; Parker v. Mensah, 1 F.L.R. 204; Holdbrook v. Atta, 1 F.L.R. 211.

husband of Momo, a sum of £697 18s. 8d. to secure which a mortgage was granted on 13th July, 1877. This mortgage bears to have been granted by Janet Plange, Momo Papafio and Phillip Carl Randolph and Alice Randolph, the children of Janet Plange. As the Court of Appeal has pointed out, there is an error in the Trial Judge's description of this document, in so far as it appears to have inadvertently described Phillip Carl Randolph and Alice Randolph as the children of Momo Papafio. But the fact remains that Momo Papafio was a party to this document which without her consent would not have been binding on the family, and their Lordships are of opinion that it has not been established that there was any other reason why she should have been made a party to the mortgage, although it was natural enough from the mortgagees' point of view that the children of Janet Plange to whom the loan was made should be parties to it along with their mother.

The next important document is dated 12th November, 1913, and is a reconveyance from E. W. Papafio and Botchway, to Phillip Carl Randolph of the property of St. Janet's Harbour on repayment of the loan obtained from Papafio. E. W. Papafio and Botchway were executors of the former's father, the mortgagee, and therefore in right of the mortgage in question, but it is to be noted that the conveyance is made to Phillip Carl Randolph in his capacity as native administrator of the estate of his mother, although he is in the document elsewhere described as " the son and heir of the said Janet Plange and joint proprietor of the said house ". As Janet Plange had inherited the property from her mother Kreshie, it is difficult to understand this description except on the footing that it was the first step in an attempt on the part of P. C. Randolph to obtain for himself and his descendants what he knew to be a part of the family estate.

Eleven years later P. C. Randolph appears to have realised that this reconveyance did not serve his purpose, and on the 19th July, 1924, his law agent, Mr. J. T. Coussey, on his behalf, claimed that the conveyance should have been to himself and not in the representative capacity expressed in the deed. We have not got the reply, if any, which was sent to Mr. Coussey, but the recipient wrote to his brother a letter dated 21st January, 1924, in which he stated what in their Lordships' view was the true position, namely, that when Janet Plange died, Momo succeeded to the property according to native law and custom and that on her death the property, being of the female side, the plaintiff's mother became the successor to the family property. P. C. Randolph, however, persisted in his application and succeeded on the 30th July, 1927, in obtaining the " rectification " that he desired by two documents, one being a reconveyance of the property to the mortgagees on the condition that they should reconvey the mortgaged property to him as the sole mortgagor, and the other by which the mortgagees gave to P. C. Randolph the whole property as the sole and bona fide owner in possession, or otherwise, as a freehold property with an absolute right to devise.

The Trial Judge disposed of these documents on which, as he says, the defendant's case ultimately rests, by saying . . . "if we put aside entirely all questions as to the propriety of a trustee of an estate acquiring the estate for himself as was sought to be done here, the fact remains that a stranger mortgagee or his representatives could not by conveying property mortgaged to them in a particular way affect the character of that property and however it was conveyed to P. C. Randolph he would still in my opinion hold the property as a trustee." Nothing, therefore, that he did in dealing with the property afterwards in the various leases which were granted of the estate in question can have any effect in altering the succession of what was family property and which is now vested in the plaintiff who succeeds his mother as head of the family.

While this disposes of the claim with regard to the greater part of the property known as St. Janet's Harbour, the same considerations do not necessarily apply to two additional parcels of land which were acquired by P. C. Randolph on the 9th June, 1910, and which now form part of the whole parcel described as St. Janet's Harbour. These parcels, however, were not conveyed to P. C. Randolph as his personal property but as acting for and on behalf of the estate of Janet Plange, and they were to be held to the use of "the purchaser, his successors and people forever". The inference is obvious that they were acquired out of Janet Plange's estate and not from the money of P. C. Randolph, and were intended to be family property. On her death intestate they would pass with the rest of the family property through the female line. It may be added that, subsequent to their acquisition, these two parcels were always treated along with the original property as forming the property of St. Janet's Harbour.

The anxiety of P. C. Randolph to secure this property for his own children may be explained by the great rise in its value which has taken place since the Kreshie family came into existence. In September, 1885, the house that then stood upon the property was yielding a rent of £2 monthly and a small shop below it 15s. per month. In the following year it was let to Messrs. Taylor Laughland & Company at £60 per annum and after various other leases had been entered into it was finally demised for a term of 99 years at a rent of £200 per annum. As P. C. Randolph was the head of the family it was apparently within his power as administrator to grant these leases. The immediate cause of the action taken by the plaintiff was a proposal by the two respondents to accept from the lessees £1,000 in full discharge of ten years' rent, or one-half of the amount payable under the lease in question. Had this been carried out the respondents would have deprived the plaintiff of the right to recover the rents for ten years, the right to which had by this time become vested in him as the head of the family. This action on the part of the respondents which was not

denied, compelled the plaintiff to establish his rights by the present suit.

The Court of Appeal have attached great importance to the fact that some of the deeds on which the respondents founded their claim were signed by him as a witness. Such signature, however, does not imply consent or knowledge of the contents and it was only after the plaintiff became himself head of the family on the death of P. C. Randolph that he could effectively represent the family in the preservation of the family estates.

In the result their Lordships are of opinion that the judgment of the Appeal Court should be reversed with costs and the judgment of the Trial Judge be restored and they will humbly advise His Majesty accordingly. The respondents will pay the costs of the appeal.

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In the Privy Council

ARTHUR HANSEN HAMMOND

v.

JOHN HENRICK WALMBECK
RANDOLPH AND ANOTHER

DELIVERED BY LORD SALVESEN

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