Privy Council Appeal No. 5 of 1953

Nana Kwei Gyarku III, Odikro of Ayinasu - - - *Appellant*

v.

Joseph Sam Brew and another - - - - - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH NOVEMBER, 1956.

Present at the Hearing:

LORD OAKSEY.
LORD COHEN.
LORD KEITH OF AVONHOLM.
MR. L. M. D. DE SILVA

[*Delivered by* LORD KEITH OF AVONHOLM]

This appeal is not concerned with merits but only with matters of procedure. The facts must be recapitulated at a little length.

On 28th July, 1947, the Native Court B of Ayan Denchira and Breman Esiam, Cape Coast District, Western Province, Gold Coast Colony, gave judgment for £50 damages to the then plaintiff Odikro Kojo Esiam for interference by the defendants with certain land rights. The Board will hereafter refer to this plaintiff as the plaintiff or deceased plaintiff.

The Native Appeal Court of Ayan-Na-Breman Confederacy granted leave to appeal against this judgment and, after some intermediate procedure, on 27th April, 1948, commenced hearing of the appeal in the absence of the plaintiff. Their Lordships are satisfied that this was in accordance with regulation 127 of the Native Courts (Colony) Procedure Regulations, 1945, which enables the Native Appeal Court, if a respondent fails to appear, to hear the appeal ex parte.

On 3rd May, 1948, the Native Appeal Court reversed the judgment appealed against holding in effect that the plaintiff had failed to prove his title to the land in question and that the land belonged to defendant Joseph Sam Brew.

On 27th May, 1948, the plaintiff applied to the Native Appeal Court, by motion on notice, to discharge this decision and to fix a date for rehearing of the appeal in terms of section 51 of the Native Courts (Colony) Ordinance No. 22 of 1944. It will be convenient at this point to set out this section. It is as follows:

> 51. No appeal shall lie from the decision of any Native Court in any suit or matter where the defendant or respondent has not appeared, but in every such case the Native Court shall satisfy itself that a copy of the decision has been served on the defendant, or respondent, and any defendant or respondent aggrieved by any such decision may, not later than one month after the date of the service

on him of the copy of the decision, apply to the Native Court which gave or made the decision to reverse vary or discharge it, and where the Court refuses so to reverse vary or discharge the decision upon such application, an appeal shall lie in like manner as an appeal from any other decision of a Native Court.

On 28th June, 1948, the Native Appeal Court considered the application in the presence of the plaintiff and one of the defendants and after hearing them granted the application and fixed the rehearing for 27th July, 1948, " by fresh panel." The total membership of the Native Appeal Court was 20 and a fresh panel their Lordships understand to mean that some members at least of the reconstituted court were to be different from the panel that sat on the previous hearing of the appeal.

On 23rd July, 1948, the plaintiff died.

On 26th July, 1948, the defendants filed an ex parte motion for an Order under regulation 40 of the Native Courts Regulations to discharge the Order of 28th June, as not being in compliance with section 51 of the Ordinance, in respect that the application of the plaintiff, of 27th May, to set aside the decision of the Native Appeal Court should have been heard by the same panel that made that decision. The following day, the 27th of July, the Native Appeal Court upheld this contention, discharged the Order of 28th June, restored the plaintiff's motion of 27th May and fixed the hearing for 14th September, 1948. There is nothing to suggest that defendants knew at this date that the plaintiff had died four days earlier and the Court, it may be assumed, was ignorant of that fact.

On 23rd August, 1948, two motions on notice, supported by affidavits, were forwarded to the Native Appeal Court. on behalf of Abusuapenin Kweku Abaka (hereinafter referred to as Abaka) who was the temporary administrator of the estate of the deceased plaintiff. These motions were (1) to substitute Abaka in place of the deceased plaintiff as respondent in the appeal; and (2) for an order discharging the Order of 27th July referring the matter of the rehearing to the original panel of judges and in effect to restore the Order of 28th June, 1948. These motions are both marked, " Court to be moved on Tuesday the 14th day of September, 1948, at 9 of the clock in the forenoon or so soon thereafter as the applicant can be heard."

On 14th September, 1948, the Court met to review " in accordance with order made on the 27th day of July, 1948." That meant to consider the deceased plaintiff's motion of 27th May to discharge the original decision of the Native Appeal Court and to rehear the appeal. Their Lordships note that the panel which sat on this date was the same panel that heard the appeal on the 27th and 28th April, 1948. The minute of proceedings notes that no one was present representing the plaintiff-respondent. Both defendants were present. The Court adjourned proceedings to 2 p.m. " to give chance to a representative of respondent to appear in Court." At 2 o'clock no appearance of a representative had been made and the Court adjourned the hearing till 18th September and ordered " hearing notice to be served on plaintiff-respondent to appear on that date."

On 18th September the Native Appeal Court (with the same panel) resumed proceedings. A bailiff, being sworn, stated that he had been given a hearing notice to serve on Abaka " regarding motion paper he filed in the Appeal Court." The sworn statement proceeds:—

> " When I reached Beseasi I went to one Arku's house where I was informed Abaka lives. I did not meet Abaka in the house and one Badu late Kojo Esiam's nephew informed me that Abaka had gone to Sefwi early in the morning of that day. I returned to Esiam. On the next day I heard that Abaka had not gone to anywhere but was at Beseasi, I therefore returned to Beseasi on that day also which was the 15th September, 1948, but I did not find him, and I returned and informed the Registrar."

The minute of proceedings then sets out the two motions of Abaka dated 23rd August and the motion of the deceased plaintiff dated 27th May and refers to the respective supporting affidavits. It then records as part of the Court's judgment that the hearing on the deceased plaintiff's motion had been, by the Order of 27th July, 1948, appointed to be heard on 14th September, 1948, " of which notices were given to both defendants-appellants and the relatives of the plaintiff-respondent, Odikro Kojo Esiam (deceased) who were then present in the Court." The Record then proceeds as follows:—

> " Consequently, one Kweku Abaka, alleged to be a relative of late *Odikro's* Kojo Esiam applied to this Court for orders as stated in motions 1 and 2, and were fixed for hearing on the same date 14th September, 1948.
>
> On the hearing day this party did not appear and the Court therefore adjourned the case to Saturday the 18th September, 1948, with a view to effect the service of the hearing notice on the said Kweku Abakah.
>
> The Bailiff of this Court made two attempts to effect service, but on each occasion Kweku Abaka could not be found.
>
> The Court under these circumstances finds it expedient to strike out *this* above motions without costs, and therefore the judgment delivered by this Court on the 3rd May, 1948, still holds good and firm."

Their Lordships would here observe that it is clear that the Native Appeal Court knew at latest on 14th September, and probably from 26th August when Abaka's motions of 23rd August were filed, that the original plaintiff had died. They also accept the statement which is recorded by the Court that the order of 27th July fixing the date of hearing for 14th September was notified to relatives of the deceased plaintiff who were then present in Court. It is also clear that as early as 23rd August Abaka knew of the Order of 27th July and date of hearing, for this appears from his notice of motion, dated 23rd August, with supporting affidavit, seeking to set aside the Order of 27th July, to be moved on 14th September.

By Order No. 129 of 1948, designated Native Courts (Colony) (Constitution of Native Courts) (Variation) (No. 2) Order, 1948, dated 30th August, 1948, the Native Appeal Court of Ayan-Na-Breman was abolished. No other Native Appeal Court was substituted in its place. This Order was gazetted on 2nd October, 1948, from which date it took effect.

Further procedure in this case may be briefly stated.

On 29th March, 1949, the Magistrates' Court at Cape Coast on its own motion ordered that the hearing of the case be stopped before any Native Court and reported its pendency and circumstances to the Land Judge for directions. This procedure was taken under section 54 of the Native Courts (Colony) Ordinance No. 22 of 1944 but it is not clear to their Lordships' Board what moved the Magistrates' Court to make the order. The Board assume that it was connected with the disappearance of the Native Appeal Court.

On 2nd May, 1949, the Land Judge (Lingley, J.) directed the cause to be transferred to the Lands Division of the Supreme Court which was done.

On 10th August, 1949, Abaka moved to be substituted for the deceased plaintiff.

On 25th August, 1949, the defendants moved for discharge of the Order of 2nd May transferring the cause to the Land Court, on the ground, stated in the supporting affidavit, that there were no pending proceedings before the Native Appeal Court which could be the subject of transfer.

On 17th September, 1949, Mr. Justice Lingley held that he had no power to hear the appeal and dismissed it with costs.

On 29th September Mr. Justice Lingley granted Abaka special leave to appeal to the West African Court of Appeal.

On 21st December, 1951, the West African Court of Appeal dismissed the appeal. Their ground of judgment was that once the Native Appeal Court had dismissed the appeal it was functus officio and that there was nothing "pending" which was capable of being transferred to the Land Court for adjudication.

Final leave to appeal to the Privy Council was granted by the West African Court of Appeal on 26th June, 1952. After the appeal was taken the present appellant was, by Order in Council dated 21st June, 1955, substituted in place of the deceased plaintiff. Their Lordships note that down to this date all proceedings since his death have been conducted without any substitution taking place.

From the resumé of the steps of procedure in the Courts below it might seem that a number of things were done which in other systems of law and procedure would be regarded as irregularities or even nullities. But their Lordships are here concerned with a native court acting under special ordinances and regulations and in conditions which cannot be exactly paralleled in systems with a long established legal practice and tradition. The appellant's attack was centred largely on the order made ex parte of 27th July, 1948. It was said first that this was a nullity because the plaintiff was dead; second that it was contrary to regulation 37 of the Native Courts Procedure Regulations, 1945, which directs that motions shall be heard only after notice of motion has been served on the other parties likely to be affected; third that in any event there was no ground for reversing the order of 28th June, 1948. Their Lordships would observe that at no stage of the proceedings before the Native Appeal Court was any point made that the plaintiff had died. When Abaka appears on the scene he challenges the order solely on its merits. The deceased plaintiff, it would appear, sued not as an individual, but as head of a family claiming interest in the land in question.

On the second and third points, the ex parte motion was for an Order under regulation 40 of the Native Courts Procedure Regulations which provides:

> A Native Court may in its discretion make any order within its powers and jurisdiction which it considers necessary for doing justice whether such order has been asked for by the party entitled to the benefit of the order or not, but in a civil cause judgment (save as to costs) shall not be given for a greater sum of money than that claimed in the particulars in the summons.

What seems clear is that rightly or wrongly the defendants thought that a mistake had been made by the Order of 28th June, 1948, in fixing the rehearing before a fresh panel. The Court presumably thought that its Order may have been wrong and accordingly discharged the Order of 28th June and restored the Motion of 27th May, which left it open to the parties to argue the question afresh. This in fact was what Abaka proposed to do by his motion to discharge the Order of 27th July and again fix the hearing before a fresh panel. Their Lordships are not concerned to enter into the merits of this dispute. Much might be said for the view that one panel or division of an appeal court should not be asked to reverse what another panel or division of the same court had done and that a rehearing should take place, if possible, before the same panel that took the first hearing.

In their Lordships' view, however, the challenge of the regularity of the Native Appeal Court's actions on 27th July does not really affect the material question for decision, viz., whether there were proceedings pending in the Native Appeal Court after 18th September, 1948. All irregularities, if any, were ignored by the parties from 27th July onwards. Substitution of Abaka was asked for but never made and everyone proceeded as if he had been substituted. The Order of 28th June was discharged after the death of the original plaintiff which left matters to be argued afresh including the question whether the Order of 28th June should be restored, appointing the rehearing to take place before a fresh panel. When the case came before the Native Appeal Court on the 14th and 18th

September all matters were open including the rehearing of the appeal. But Abaka failed to appear and the Court reaffirmed the judgment of 3rd May, 1948. In the circumstances their Lordships fail to see that any injustice was done. If there were thought to be any fundamental nullities or irregularities it was always open to Abaka or some other substituted representative of the deceased plaintiff to have appealed to the Land Court.

To come then to the material question, their Lordships' Board have come to the view that in this case there was nothing pending in the Native Appeal Court after it gave its decision of 18th September, 1948. It was submitted that Abaka having been absent was entitled under section 51 of the Native Courts (Colony) Ordinance of 1944, to apply for a further hearing. Their Lordships are unable to put such a construction on the section. One application had been made for a rehearing and that was in accordance with the section. When the case came on for the rehearing, Abaka, the chosen representative of the deceased plaintiff, failed to appear. Their Lordships are unable to take the view that by absenting himself from the second hearing a respondent is entitled to have a third hearing, and so on *ad infinitum*. Nor are their Lordships able to hold that he was entitled to a further hearing *ex debito justitiae*. Their Lordships can find no reason in the Record why Abaka failed to appear; Regulation 127 of the Native Courts Procedure Regulations authorises the Native Appeal Court to proceed to hear an appeal *ex parte* if the respondent fails to appear. Reference was made by counsel for the appellant to the case of *Renner* v. *Thensu and Others*, 1930, 1 W.A.C.A. 77, and to the judgment of Jessel, M.R., in *Fordham* v. *Clagett*, 20 Ch. D. 653, as throwing light on what is meant by "pending", but, for the reasons given, these cases, in their Lordships' opinion, do not apply to the circumstances of this case.

Their Lordships will accordingly humbly advise Her Majesty to dismiss this appeal. The appellant must pay the costs.

(39858) Wt. 8069—3 110 12/56 D.L.

In the Privy Council

NANA KWEI GYARKU III, ODIKRO
OF AYINASU

v.

JOSEPH SAM BREW AND ANOTHER

DELIVERED BY

LORD KEITH OF AVONHOLM

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