23,1957

IN THE PRIVY COUNCIL No. 43 of 1953

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL,

(Gold Coast Session)

B E T W E E N :

NANA OFORI ATTA II Omanhene of Akyem Abuakwa and BAFUOR AMO ODIKRO of Muronam (Plaintiffs)

Appellants

10 - and -

1. NANA ABU BONSRA II as Adansahene and as representing the Stool of Adanse (substituted for Nana Bonsra Agyei (Defendant)

- and -

2. BANKA STOOL as represented by Brako Ababio II (Co-Defendant)

Respondents

CASE FOR THE APPELLANTS RECORD

20 1. This is an Appeal from a judgment of the West African Court of Appeal (Gold Coast Session) dated the 9th July, 1952, affirming a judgment of the Supreme Court of the Gold Coast in the Divisional Court for Ashanti held at Kumasi, dated the 12th November, 1949. P.35 P.25

2. The question raised by this appeal is whether the Appellants or either of them was estopped by reason of the proceedings referred to in the three next succeeding paragraphs from pursuing the pre-
30 sent suit which was for a declaration of title to a parcel of land situate on the right bank of the Anum river, and for consequential relief.

RECORD

P.43

3. On the 6th May, 1940, Chief Kwame Andoh and Opanyin Kofi Fofie of Muronam for and on behalf of the Stool of Muronam brought a suit in the Court of the Chief Commissioner for Ashanti, against Nana Kwakye Penkro, Bankahene, then at Kumasi, Ex-Chief Fosupem of Kade, then residing at Banka, and Ex-Chief Kofi Akyeampong of Kade, then residing at Banka, for (1) a declaration of title to land described in that Writ of Summons as all that piece or parcel of land situate at Muronam, and bounded on the North by the River Sepong, and land belonging to the Stool of Jumakyi, on the South by the River Prah and lands belonging to Amentia and Brenase Stools, on the East by Muronam Stool and the Anum Forest Reserve and on the West by the River Apaa and the Mem Bepo and land belonging to Bogyeseanwo Stool; (2) £100 damages from the Defendants for trespass committed on the said land; from the confluence of Sepong and Anum Rivers to land near Abama Stream and comprising land on the Bedabia stream, including the Nsuakote village; and (3) an injunction to restrain the Defendants their agents or servants from entering the said lands.

PP.58-63
P.63

4. After recording evidence oral and documentary on both sides including an Executive Decision (Exhibit "M") of February, 1907, setting out the boundaries of the Banka lands, put in by the Defendants, the Acting Assistant Chief Commissioner gave judgment for the Defendants. In the course of his judgment, in which he stated that Exhibit "M" decided the ownership of the land, he set out the arguments of the Plaintiffs' Counsel to the contrary, which were as follows:-

P.62 L.25 et seq

"Dr. Danquah for the Plaintiffs has submitted that if regard is to be had to this decision then it must be made clear that it was a judgment rising out a dispute and that there is no evidence that there was a dispute other than between Atokwai and Banka, that it was never intended by legislation that Government should take land from one stool and give it to another, and that the decision ought never to have been validated, and that the decision merely laid down the boundaries of the newly established Banka Division.

"As regards this point as to whether the boundaries were those of the Banka Division or the boundaries of Banka lands as stated in the Exhibit, it is to be noted that Amentia was present at the meeting of this boundary and that

RECORD

Amentia lands were not included inside the Banka lands although Amentia was part of the Government made Banka Division. It has been stated that formerly Amentia served Akim Oda while Banka and Muronam served Ocheresu under Akyem Abuakwa, so it is clear to me that Soden's boundary laid down the boundaries of the Banka stool lands which had formerly been under Ocheresu.

"In fact they could not have been Banka Divisional boundaries or Mentia land must have been included. This same view that the boundaries were land boundaries appears to have been held by the Courts of the District Commissioner, Obuasi, and the Provincial Commissioner in Exhibit "A" which found that the Adansi claim to land west of Anum was bound by the executive decision .....

"As regards Dr. Danquah's submission that this executive decision should never have been validated, the answer is to be found in section 4 of Cap.120 "a true copy of such entry in the boundary book shall be sufficient and conclusive evidence in all Courts and Native Tribunals that the executive decision was in fact given confirmed or approved by the Chief Commissioner." P.66 L.1.

The Commissioner concluded as follows:- P.63 L.14

"In Exhibit "M" no mention is made of Adansi, but Bogyisango which is mentioned is a sub-division of Adansi. I find there is no evidence on the Plaintiffs' side to justify the grant of the declaration of title which he seeks, but on the other hand that the question of the ownership of this land has already been decided by validated executive decision Exhibit "M". There will therefore be judgment for the Defendants with costs to be taxed."

5. From this judgment there was an appeal to the West African Court of Appeal (Gold Coast Session), and on the 29th day of May, 1941, the West African Court of Appeal (Kingdon, P., Petrides and Paul, JJ.A.) gave a joint judgment in the following terms:-

"It is sufficient for the purpose of deciding this Appeal to say that, after hearing exhaustive argument by Appellants' Counsel, we see no reason to differ from the finding of the Acting Assistant Chief Commissioner of Ashanti in the Court below 'there is no evidence on the

RECORD

Plaintiff's side to justify the grant of the declaration which he seeks'. But we think it necessary to add that we do not subscribe to his other finding that 'the question of the ownership of this land has already been decided by validated Executive Decision Exhibit "M"'."

P.1 6. On the 29th August, 1946 the Appellants brought

THE PRESENT SUIT

in the Supreme Court of the Gold Coast, (Divisional Court for Ashanti, holden at Kumasi) against Nana Bonsra Agyei, Adansehene Fomena-Ashanti. It was P.18,L.34 clear that the suit was brought against Nana Bonsra Agyei as Adansehene and as representing the Stool of Adanse, and on the 8th November, 1949 by Order of the Supreme Court the title of the Suit was amended accordingly. The Plaintiffs' claim was in the following terms:-

PP.1, 2. The claim of the Plaintiff Nana Ofori Atta II as Paramount Chief of Akim Abuakwa to whom Muronam Stool and Stool land are subject, and of the Plaintiff Bafuor Owusu Amo as Odikro of Muronam to whose Stool the Muronam Stool lands belong is for a declaration of their title to all that piece or parcel of land known as Nsuakote or Anungya situate on the right bank of the Anum River and bounded on the North by River Sepong and land belonging to the Stool of Jumakyi, on the South by River Prah and land belonging to Amentia and Brenase Stools, on the East by Muronam Stool land and the Anum River Forest Reserve and on the West by River Apaa and the Mem Bepo and land belonging to Bogyeseanwo Stool.

Also for an injunction restraining the Defendant his people and agents from entering upon the said land and interfering with the rights of the Plaintiffs and their people in any manner whatsoever.

P.3 7. In their Statement of Claim the Plaintiffs claimed that the lands in question had from time immemorial formed part of the Akim Abuakwa Stool lands, subject to the Stool of the Omanhene of Akim Abuakwa, and they had not at any time been attached to the Stool of the Adansehene; that prior to the year 1900 the River Prah, having been made the boundary between the Colony and Ashanti, Muronam and other Akim towns in the area became part of the Ashanti Protectorate, but were not included in the Ashanti Confederacy, and the Muronam

Stool and lands attached thereto remained subject to the Paramount Stool of the Omanhene of Akim Abuakwa; that from about 1942 to the date of the writ of summons, the Adanse Stool, by acts of trespass and intimidation had through its agents and servants sought to exercise rights of ownership over the lands in dispute; that an action for £1,000 damages had been commenced against the Adansehene in January, 1945, in the Chief Commissioner's Court of the Northern Territories, Tamale, the same being at that time a court of competent jurisdiction over the lands in question, but before that action could come on for trial, section 67 of Cap. 4 was amended, jurisdiction over such cases being then conferred on the Supreme Court. Wherefore, the Plaintiffs claimed a declaration of title to the lands described in the writ of summons and a perpetual injunction against the Defendant as representing the Stool of Adanse, restraining the occupant and subjects of the Adanse Stool from entering upon the said lands and interfering with the quiet enjoyment of the same by the Plaintiffs and their people, or from dealing with it in any manner whatsoever.

8. In his Defence the Defendant claimed that the lands in dispute were held in him as Stool lands in his capacity as Omanhene of the Stool of Adansi and were under the immediate custody of the Banka Stool represented by Brako Ababio as caretaker of the said lands for the Adansi Stool, and submitted that the Banka Stool should be a party to the action as a Co-Defendant. He pleaded that the Plaintiffs were estopped from claiming as against him the reliefs sought by reason of the proceedings and judgments in Paragraphs 4 and 5 above referred to, but in so pleading he erroneously set out the parcels claimed in that former suit in words identical with the words describing the parcels claimed in the writ of summons in the present suit. The remaining paragraphs of the Defence went to the merits, but in view of the course of the subsequent proceedings, it is not necessary to set them out here. P.4

9. The Appellants filed a Reply on the 28th January, 1947, denying that the Banka Stool was subject to the Adanse Stool or that the land in dispute was under the immediate custody of the Banka Stool as caretaker for the Adanse Stool or that the Adanse Stool had any interest in the land, and averring that the Banka Stool was subject to the Paramount Stool of Akim Abuakwa, that it had PP.6, 7.

RECORD

no separate interest in the subject matter of the Suit and would not be affected by its result.

The Appellants further denied that they were estopped by the judgments referred to in the Defence, the Defendant not being a party to that suit and the judgments not awarding the land in dispute (i.e. in dispute in the present action) to the Banka Stool.

P.8. 10. On the 3rd April, 1947, Brako Ababio II, Bankahene of Banka, Ashanti, swore an affidavit in support of a Motion to join him as a Defendant to the action. He supported the Defendant's case that the lands in dispute were under the immediate custody of the Banka Stool as caretaker for the Adanse Stool and alleged that the Banka Stool claimed an interest in the land and would be affected by the result thereof "as the Banka Stool did not serve the first Plaintiff but was an independent Stool."

P.9. 11. The Defendant also swore an affidavit in support of the Motion, in which he stated that "the Banka Stool is closely concerned with the land the subject matter of the action herein and that Adansi and Banka have each interests therein to a greater or lesser extent and hitherto undefined."

PP.10-15. 12. After affidavits in opposition to the Motion were filed, the Court, on the 22nd July, 1947, made an order that the Banka Stool be joined as a Co-Defendant.

P.16 13. On the 30th August, 1947, the Banka Stool, i.e., the Co-Defendant, filed a Defence adopting the Defence of the Adanse Stool, pleading specifically that the Co-Defendant as Caretaker according to Native Custom of the lands in dispute had an interest in them entitling the Banka Stool to a share or interest in any profits accruing therefrom and to the possession thereof, and disputing that the Banka Stool served the first Plaintiff, it being, so it was alleged, an independent Stool.

RECORD

14. On the 6th April, 1948, the Supreme Court, passed an order for the land the subject matter of the dispute to be surveyed. The plan was in due course put in by consent (being Exhibit "I"). In his judgment the trial Judge (Jackson, J.) stated "The parties are ad idem as /to/ the area in dispute .. The subject matter in the former action was precisely the same as it is now." P.17 P.24, L.36 P.26, L.26. P.26, L.38.

15. It would appear that the trial Judge decided to hear arguments on the plea of estoppel raised by the Defendants as a preliminary issue. The Appellants respectfully submit that, in view of the fact that the relationships between the parties was not then established, the necessary materials were not before the learned trial Judge to enable him to arrive at the conclusions to which he arrived. After arguments were concluded on the 8th November, 1949, he delivered judgment on the 12th November, 1949, dismissing the claim of both Plaintiffs. P.18 PP.25-28

16. After setting out the history of the 1940 litigation, the trial judge came to the conclusion that the second Plaintiff was estopped by res judicata from litigating the "same issue as to the title of ownership of the lands described in the present writ." P.25 P.28, LL.18-20.

As regards the first Plaintiff he held that he was estopped upon other principles and he said as follows:-

> "He is estopped by having stood by and permitted the Muronam Stool to prosecute the former action to the knowledge of the Akim Abuakwa Stool, an action to establish a title of ownership which on the pleadings it is claimed is vested in the Akim Abuakwa Stool, an interest claimed then by Muronam identical with the one now claimed by Akim Abuakwa and who, in the former action, claimed under the Stool of Akim Abuakwa. A declaration for Muronam in the former action would have been in effect, a declaration of which the first Plaintiff would have enjoyed the fruits. They stood by and did not intervene." P.28, LL.25-35

17. The Plaintiffs being aggrieved by the Judgment of the 12th November, 1949, appealed to the P.29

RECORD

West African Court of Appeal. After arguments had
PP.32-35 been heard on the 11th January, 1952, the West African Court of Appeal reserved judgment, and on
PP.35 to 39 the 9th July, 1952, delivered judgment dismissing the appeal with costs. The judgment (in which the President and Coussey, J.A., concurred) was that of Manyo-Plange, J., who held that the judgment of
P.37, L.29 1940 was a final judgment in rem against the second Plaintiff-Appellant and that he was therefore estopped from re-litigating the title to the ownership of the same land, and that as the first Plaintiff-Appellant, the Omanhene of Akim Abuakwa,
P.37, LL.35-38 was privy to the second Plaintiff-Appellant, who claimed title as owner of the land, he was also bound by the judgment in the former action.

P.38, L.38 et seq 18. The judgment of Manyo-Plange, J. proceeded as follows:-

> "Now, there could have been no doubt that the claim put up then" (that is, in the former action) "by the Bankahene would if established, have been adverse to the interests, if any, of Akim Abuakwa in the land in dispute. That being so, what should the Omanhene of Akim Abuakwa have done in the circumstances? In my view he should have applied to be joined as Co-Plaintiff. He took no such course. Being cognisant of the proceedings, he was "content to stand by and see his battle fought by somebody else in the same interest": the interest is the same, because the matter to be determined in the present action was the same as was determined in the former action namely, Muronam's title to the land in dispute, without which, Akim Abuakwa cannot establish an interest in the land. Having stood by and seen the battle fought to a finish to the disadvantage of Muronam, he goes to sleep for nearly five years, then suddenly wakes up and tries to re-open the question of Muronam's title to the land in dispute which had been determined in the former action.
>
> "Clearly the first Plaintiff-Appellant is by his conduct estopped from so doing and, I think the case of In re Lart, Wilkinson v. Blades, /1896/ L.R.2 Ch.788 supports the view that the first Plaintiff-Appellant is estopped by his conduct. I see practically no distinction between that case and the present except that, in Wilkinson v. Blades, Wilkinson actually took a benefit under the judgment; but that in my view only amounted to further evidence of acquiescence."

RECORD

The Appellants respectfully submit that the learned Judge fell into error when he says that the only distinction between In re Lart, Wilkinson v. Blades (supra) was that Wilkinson actually took a benefit under the judgment. That case related to the interpretation of a will, where a member of a family interested in a fund set up by the testator took an active part after judgment (pending a possible appeal) in the litigation regarding the interpretation of a similar fund created by the same testator's will and received a substantial sum under the judgment to which he was not a party. The facts differ widely from those in the present case where the first Plaintiff claimed to be the overlord of Bankahene, Ex-Chief Fosupem of Kade and Ex-Chief Kofi of Akyeampong of Kade, the defendants in the action of 1940, and of the Odikro of Muronam, and further claimed that any internal dispute between subordinate Stools as to their inter-Stool land boundaries does not affect the paramount interest of their identical overlord.

19. The Plaintiffs being aggrieved by the judgment of the West African Court of Appeal of the 9th July, 1952, applied for leave to appeal to Her Majesty in Council and for an order substituting the name of Nana Abu Bonsra II as Adansehene, Defendant-Respondent, in place of Nana Bonsra Agyei who had abdicated, and on the 20th April, 1953, the Court passed an order as prayed. P.40 P.42

20. The Appellants respectfully submit that the judgments of the Courts below should be set aside with costs throughout and that the suit should be remitted to the Supreme Court of the Gold Coast for trial of the issues other than the said preliminary issue, for the following, among other,

R E A S O N S

1. Because the plea of estoppel was wrongly taken and decided:

2. Because neither the first Appellant nor the first Respondent was a privy to any of the parties in the 1940 litigation:

3. Because the Adansehene was not a party to the 1940 litigation:

4. Because the Odikro of Muronam did not claim under the first Appellant in the 1940 litigation:

RECORD

5. Because the 1940 litigation did not decide the ownership of the land in question:

6. Because the interest claimed by Muronam in the 1940 litigation was not identical with that claimed by Akim Abuakwa in the present suit:

7. Because, assuming the Bankahene was the caretaker of the Adansehene, that does not make the Adansehene party to or privy to a party to the 1940 litigation:

8. Because neither the parties nor the issues in the two suits were the same:

9. Because to establish a plea of res judicata the two suits must be between the same parties or their privies:

10. Because the first Appellant was not estopped by conduct by not intervening in the 1940 litigation:

11. Because the judgments in the Courts below were wrong.

PHINEAS QUESS

GILBERT DOLD

P.C.A. 43 of 1953

IN THE PRIVY COUNCIL

ON APPEAL FROM THE WEST AFRICAN

COURT OF APPEAL

(Gold Coast Session)

NANA OFORI ATTA II Omanhene of Akyam Abuakwa and BAFUOR OWUSU AMO Odikro of Muronam ... Appellants

v.

1. NANA ABU BONSRA II as Adansehene and as representing the Stool of Adansehene (substituted for Nana Bonsra Agyei) (Defendant)

- and -

2. BANKA STOOL as represented by Brako Ababio II (Co-Defendant)

Respondents

CASE FOR THE APPELLANTS

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