23, 1957

No. 43 of 1953.

In the Privy Council.

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL
(GOLD COAST SESSION)

UNIVERSITY OF LONDON
W
25 FEB 1958
INSTITUTE ... ANCED
LEGAL ... UDIES
49796

BETWEEN

NANA OFORI ATTA II, Omanhene of Akyem Abuakwa, and BAFUOR OWUSU AMO Odikro of Muronam (Plaintiffs) . . . . *Appellants*

10 AND

1. NANA ABU BONSRA II as Adansehene 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 First Respondent

RECORD.

1. This appeal is from a judgment of the West African Court of Appeal (p. 35.) dated the 9th July, 1952, dismissing an appeal from a judgment of the
20 Supreme Court of the Gold Coast, dated the 12th November, 1949, dismissing (p. 25.) a claim by the Appellants for a declaration of title to land and an injunction.

2. The principal issue to be determined on this appeal is whether the Courts below were right in upholding a plea put forward by the Defence that the Appellants are estopped from claiming the relief sought by them.

3. The land in dispute is known as Nsuakote or Anungya. The Appellants claim that this land is attached to the Muronam Stool lands. (p. 2, ll. 33–38.) The second Appellant is the Odikro of Muronam and it is alleged by the Appellants that the Muronam Stool and Stool lands are subject to the first
30 Appellant the Paramount Chief of Akyem Abuakwa. It is the Respondents'

contention that the land is held by the first Respondent in his capacity as Omanhene of the Stool of Adanse through the Stool of Banka, as represented by the second Respondent, as caretaker.

p. 43.

4. In May, 1940, a claim in respect of the said land was made in the Chief Commissioner's Court, Kumasi, Ashanti, on behalf of the Stool of Muronam against the then Bankahene and other representatives of the Stool of Banka. The claim was for a declaration of title to the land, damages for trespass and an injunction. The Particulars of Claim in those proceedings are dated the 6th May, 1940, and the Writ of Summons therein is dated the 9th May, 1940. There were no pleadings in that suit and the nature of the claimants' case was stated on his behalf by Counsel. They alleged that the Muronam people had been on the land from time immemorial. Oral evidence was given and an Executive Decision dated February, 1907, laying down the boundaries of Banka lands, was put in.

p. 43. p. 44. p. 45. p. 45, l. 32. p. 63.

p. 58.

5. On the 19th November, 1940, judgment on the Muronam claim was given by G. P. H. Bewes, Esq., Ag. Assistant Chief Commissioner. The judgment contained *inter alia* the following passages :—

p. 59, l. 7.

" I have heard the parties and their witnesses, and I have had made by a Licensed Surveyor a tracing of Fumso Topo sheet and on it has been marked the extent of the land about which the parties are litigating, together with boundaries of other lands also Concessions, and such features as the parties wish marked."

* * * * *

p. 61, l. 7.

" I will now set out briefly the traditional history as given by both parties. The Plaintiffs' story is that their ancestors came down from Heaven on a brass pan suspended on a chain and settled on this land, or in other words that they have been on the land from time immemorial and were the first settlers. That Moro was the first arrival on the land (hence the name Muronam). That during the time of Owusu Amo, a successor of Muro, Obeng Dako and Abeyaa Atta came from Hemang Denkera and asked for a place to settle and Owusu Amo settled them at Nsuakote (on land in dispute) and that these two were the ancestors of the Kade people. That the predecessors of Banka came from Essumeja and Manka a brother of Owusu Amo settled them at his town Manka (now corrupted to Banka). A little later Osei Tutu then King of Ashanti (circa 1740 A.D.) waged war and the Bankas and the Kades fled south across the Prah and left the land and did not come back again and Nsuakote was reoccupied by Muronam people.

" Defendant's story is that he and the Kade people were the first settlers on the land, that he settled at Banka and the Kade people settled on the west side of Anum. That when Muro came Banka settled him at Apotosu, which is now called Muronam, and that later he Muronam left leaving his people behind him there. That at the time of the flight of the people from the Ashanti army his (Banka's) predecessor stayed behind and the Kade people gave him Nsuakote land to look after. His story of the name Banka is that it is a corruption of ' Ebanie Aka ' i.e., he who remained behind.

" This briefly is the traditional history of the two parties."

* * * * *

" I will now turn to the evidence offered by the parties as to dealings in this land." p. 61, l. 39.

* * * * *

" Since 1934 it is clear that both parties have been busy putting people on the land. When the Bankahene gave his evidence he stated *inter alia* that he was caretaker of the land for the Adansi and indeed in view of the validated executive decision Exhibit ' M ' on which he relies, he could hardly do otherwise. In my opinion the answer to the question as to who this land belongs to is found in that decision. p. 62, l. 19.

10

" I find there is no evidence on the Plaintiff's 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." p. 63.

6. On appeal to the West African Court of Appeal (Kingdon, C.J. Nigeria, Petrides, C.J. Gold Coast, and Paul, C.J. Sierra Leone) the judgment of the Ag. Assistant Chief Commissioner was upheld in the following terms—

20

" 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 Plaintiffs' side to justify the grant of the declaration of title 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. 65, l. 21.

30

7. By a Writ of Summons dated the 29th August, 1954, in the Supreme Court the Appellants instituted p. 1.

THE PRESENT SUIT

against Nana Bonsra Agyei the then Adansehene representing the Stool of Adanse (hereinafter referred to as the first Defendant). By their Statement of Claim dated the 13th November, 1946, the Appellants alleged *inter alia* as follows— p. 2.

(1) That the first Appellant is Paramount Chief of Akyem Abuakwa to whom Muronam Stool and Stool lands are subject and the second Appellant is Odikro of Muronam to whose Stool are attached the Muronam Stool lands, including the land in dispute.

40

(2) That the land in dispute has from time immemorial formed part of the Akim Abuakwa Stool lands, and has not at any time been attached to the Stool of the Adansehene.

(3) That in about 1929 the Adansehene for the first time laid claim to the Muronam Stool lands as being subject to his Stool and instituted an action for trespass against the Chief of Muronam which eventually terminated in favour of the Muronam Stool.

(4) That from about 1942 the Adansi Stool has sought to exercise rights of ownership over the lands in dispute.

(5) The Appellants claim a declaration of title to the land in dispute and a perpetual injunction against the first Defendant to restrain the occupant and subjects of the Adanse Stool from entering upon the land and interfering with the quiet enjoyment 10 of the Appellants and their people or from dealing with it in any manner whatsoever.

8. By his Statement of Defence dated the 4th January, 1947, the first Defendant stated, *inter alia*, as follows—

(1) That the land in dispute is held by him in his capacity as Omanhene of the Stool of Adanse.

(2) That the land is under the immediate custody of the Banka Stool represented by Brako Ababio as caretaker of the land for the Adanse Stool and the Banka Stool should be a party to the action as a Co-Defendant. 20

(3) That the Appellants are estopped from claiming against the first Defendant the relief sought. This defence of estoppel was based upon the following facts and matters—

(A) The proceedings in the Chief Commissioner's Court instituted in May, 1940, on behalf of the Stool of Muronam against the Bankahene.

(B) The judgment of the Ag. Assistant Chief Commissioner, dated the 19th November, 1940.

(C) The dismissal of the appeal by the judgment of the West African Court of Appeal, dated the 29th May, 1941. 30

(D) That the first Appellant in the present suit claims through and jointly with the second Appellant a declaration of title to the same lands as were the subject-matter of the proceedings in the Chief Commissioner's Court and that the relief claimed in the present suit is similar to that claimed in the previous proceedings.

(E) That the first Defendant claims to hold the land through the Stool of Banka as caretaker.

(4) That the first Defendant denies that the land is attached or belongs to the Muronam Stool. 40

(5) That the land in dispute has not from time immemorial formed part of the Muronam Stool lands and/or part of the Akim Abuakwa Stool lands, that the said land from time immemorial formed part of the first Defendant's Stool lands.

(6) That the alleged action for trespass referred to in the Statement of Claim terminated on appeal by a finding that the Court of first instance had no jurisdiction.

(7) That the first Defendant claims the right to exercise rights of ownership over the land in dispute, the said land forming part of the first Defendant's Stool lands.

9. The Appellants' delivered a Reply to the first Defendant's Statement of Defence. They thereby joined issue with the first Defendant and further alleged as follows :— p. 6.

10 (1) That the Banka Stool is subject to the Paramount Stool of Akim Abuakwa, the first Appellant, and has no separate interest in the subject-matter of the suit.

(2) That the first Defendant was not a party to the previous proceedings in the Chief Commissioner's Court and that the judgments in those proceedings did not award the land in dispute to the Banka Stool.

10. By Notice of Motion, dated the 10th April, 1947, Brako Ababio II, the second Respondent herein, applied to be joined as a Co-Defendant. The application for joinder was granted on the 22nd July, 1947. The 20 second Respondent delivered a Statement of Defence dated the 30th August, 1947, wherein he stated *inter alia* as follows :— p. 8. pp. 14–15. p. 16.

(1) That the land in dispute is under the immediate custody of the Banka Stool as caretaker for the Adansi Stool the first Defendant.

(2) That the second Respondent adopts the Statement of Defence filed by the first Defendant.

(3) That the second Respondent as caretaker has an interest in the land.

(4) That the Banka Stool does not serve the first Appellant but is an independent Stool.

30 11. On the 6th April, 1948, the land in dispute was ordered to be surveyed and in due course the plan made pursuant to the said order was admitted in evidence by consent. p. 17. p. 24, ll. 33–36.

12. On the 8th November, 1949, the issue as to estoppel was argued before the Supreme Court (Jackson, J.). In the course of the said argument the record in the previous proceedings in the Chief Commissioner's Court was admitted in evidence. pp. 18–25. p. 19, ll. 29–32.

13. The judgment of the Supreme Court was delivered on the 12th November, 1949. After stating that the parties were *ad idem* as to the area in dispute and that the land in dispute in the previous proceedings 40 was precisely the same as that in dispute in the present suit, and that the p. 25. p. 26, ll. 25–26.

cause of action was precisely the same in that the claim in the previous proceedings as well as in the present suit was for a declaration of title and an injunction, the learned judge proceeded as follows :—

p. 26, l. 42.

"Now as to the parties. In the former action Kwame Andoh and Kofi Fofie of Muronam sued for and on behalf of the Muronam Stool. In this present action the Plaintiff Bajuor Owusu Amo pleads in paragraph 1 of his Statement of Claim that he is—

'Odikro of Muronam to whose stool are attached the Muronam Stool lands.'

In the former action the Omanhene of Akyem Abuakwa was not a party. In that action there were no pleadings ordered. In his opening address Dr. Danquah who, as now, appeared for the Plaintiffs said— 10

'Originally all 3 parties lived on Anum and Prah lands subject of (?) the Ofor Stool i.e. the Paramount Stool of Akim Abuakwa.'

"The claim made by the Muronam Stool at that time was quite clearly within the knowledge of the Omanhene of Akim Abuakwa State as a perusal of that record of appeal makes self-evident. 20

"To-day the Plaintiff Ofori Atta II pleads that these Muronam lands are attached to his Stool. This is also a part of the pleadings on behalf of Muronam.

"There was then upon these facts, if they were true, a clear duty to intervene, and having been cognisant of those proceedings and having a right to intervene, he is now estopped by his conduct from questioning a judgment obtained by a Stool claiming under him. It was not only the rights of possession of Muronam which were then attacked, it was the title of absolute ownership which was challenged. 30

"Quite clearly a party having an interest of that nature in land cannot stand by watching one, who claims under him an interest subordinate to his own, prosecuting an action to secure a declaration of title of ownership to those lands, and then when he finds his privy in estate is unsuccessful, prosecute another action at a later stage to obtain what his privy in estate has failed to do and what by his own conduct he has permitted. The principle is clear and well established and to hold otherwise would only tend to encourage perjury and to seek to bolster up a case by later adducing evidence which, had it been in existence, would or should have been adduced at the first trial." 40

Later the learned Judge stated as follows :—

p. 27, l. 45.

"In actions for declaration of title to land a Plaintiff can only recover judgment upon the strength of his own title and not upon that of the weakness of his adversaries.

"The judgment of the learned Commissioner was very definite in its terms when he said—

'I find there is no evidence on the Plaintiff's side to justify the grant of the declaration of title which he seeks . . . There will therefore be judgment for the Defendants with costs to be taxed.'

"I have purposely omitted from that judgment these words—'but on the other hand that the question of the ownership of this land has clearly been decided by validated executive decision Exhibit "X" (*sic* "M"),'

10

since by the judgment dated the 29th May, 1941 (Exhibit 'B') the West African Court of Appeal whilst seeing no reason for differing from the finding of the Acting Assistant Chief Commissioner did not subscribe to that portion of the judgment, and in saying so, dismissed the appeal with costs. The judgment given by the Chief Commissioner's Court and which stands unreversed on appeal has been evidenced and established estoppel by verdict upon the same matters in issue in the present action and affords evidence for and against all parties and those claiming under them. The judgment estops the Stool of Muronam from litigating this same issue as to the title of ownership of the lands described in the present writ and is conclusive and final as *res judicata*.

20

"Estoppel in respect of the 1st Plaintiff Nana Ofori Atta II operates upon other principles. 1st Plaintiff sues on behalf of the Stool of Akim Abuakwa and claims in paragraph 2 of his Statement of Claim that these same lands i.e. the Muronam lands 'have from time immemorial formed part of the Akim Abuakwa Stool lands.' 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 1st Plaintiff would have enjoyed the fruits. They stood by and did not intervene. In my judgment they are now estopped from litigating the matter again, and for these reasons I do uphold the plea of estoppel and do dismiss the claim by both Plaintiffs."

30

40

14. The first Respondent submits that the judgment of the Supreme Court is correct. It is further submitted that the first Appellant is also bound by the judgment in the previous proceedings on the ground that he was privy to the second Appellant as well as being estopped for the reasons stated by the learned trial Judge.

15. The Appellant's grounds of appeal included the following :— p. 29.

(1) The learned Judge of the Court below was wrong in finding for the Respondent and Co-Respondent on their plea that "the issues between the parties had been determined by a decision given

by the Court of the Chief Commissioner of Ashanti on the 19th December, 1940, and which decision had been upheld by the West African Court of Appeal on the 29th May, 1941," in that, taken together, the two previous decisions did not in fact and in law determine the issue of ownership of the land in dispute, the parties in the previous action were not the same, the issues to be determined were not the same, and the evidence required in support was also not the same. Neither the first Plaintiff nor the principal Defendant in the present action was privy to any party in the previous action of 1940. 10

(2) The learned Judge of the Court below was wrong in holding that the claim made by the Muronam Stool in 1940, was quite clearly within the knowledge of the Omanhene of the Akim Abuakwa State, or that there was a clear duty on the part of the Omanhene to intervene, and that not having so intervened he is now estopped by his conduct from questioning a judgment obtained against a Stool claiming under him. The Odikro of Muronam did not claim under the Omanhene of Akim Abuakwa in that suit.

p. 35.

16. In the West African Court of Appeal (Foster Sutton, P., Coussey, J.A., and Manyo-Plange, J.) the judgment, dated the 9th July, 1952, was 20 delivered by Manyo-Plange, J. The learned judge stated that in his view the determination of the appeal turned only on the first two grounds of appeal (set out in paragraph 15 above). With regard to the first ground the learned Judge considered the record in the previous proceedings and concluded that the learned trial judge was right in deciding that the Appellants are thereby estopped from re-litigating the title to the ownership of the same land. Before leaving the first ground of appeal, however, the learned judge stated as follows :—

p. 36, ll. 34-36.

p. 37, ll. 9-32.

p. 37, l. 33.

" Before leaving this ground, I would like to add that, although the learned trial Judge did not base his finding against the first 30 Plaintiff–Appellant on his being privy to any party to the former action, I am of the opinion that the first Plaintiff–Appellant is also bound by the judgment in the former action on the ground of his being privy to the second Plaintiff–Appellant who claimed title as owner to the land."

As regards the second ground of appeal the learned judge reviewed all the circumstances and stated :—

p. 38, l. 33.

" In these circumstances, I find it inconceivable that the Omanhene of Akim Abuakwa could have been unaware of the proceedings. The matters I have referred to, in my view, 40 abundantly support the learned trial Judge's finding that the proceedings were clearly within the knowledge of the then Omanhene of Akim Abuakwa.

" Now, there could have been no doubt that the claim put up then 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 suddently wakes up and tries to re-open the question of
10 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."

The judgment concluded with the following words :—

" The conclusions at which I have arrived make irrelevant, any consideration of the other grounds of appeal. I would therefore dismiss this appeal with costs." p. 39, l. 32.

Foster Sutton, P., and Coussey, J.A., concurred. p. 39.

The first Respondent submits that the judgment of the Court of
20 Appeal is right.

17. On the 20th April, 1953, final leave to appeal to the Privy Council was granted and it was ordered that the name of the first Respondent as Adansehene should be substituted for that of the first Defendant. p. 42.

18. The first Respondent submits that this appeal ought to be dismissed with costs for the following, amongst other,

REASONS.

(1) BECAUSE the Appellants are estopped by the judgments in the previous suit from litigating the issue as to the title to the land in dispute and therefore it is not open
30 to them to claim the relief sought.

(2) BECAUSE the said issue is *res judicata* by reason of the judgments in the previous suit.

(3) BECAUSE the first Appellant is estopped by conduct from litigating the said issue.

(4) BECAUSE the judgment in the Supreme Court is right for the reasons therein stated and other good and sufficient reasons.

(5) BECAUSE the judgment in the West African Court of Appeal is right for the reasons therein stated and other
40 good and sufficient reasons.

(6) BECAUSE in so far as the judgments below rest upon findings of fact there are concurrent findings in favour of the Respondents.

RALPH MILLNER.

No. 43 of 1953

In the Privy Council.

ON APPEAL

from the West African Court of Appeal (Gold Coast Session)

BETWEEN

NANA OFORI ATTA II, Omanhene of Akyem Abuakwa, and Bafuor Owusu Amo Odikro of Muronam (Plaintiffs) . . . . *Appellants*

AND

1. **NANA ABU BONSRA II as Adansehene 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 First Respondent

T. L. WILSON & CO.,
6 Westminster Palace Gardens,
London, S.W.1,
Solicitors for the First Respondent.

The Solicitors' Law Stationery Society, Ltd., Law and Parliamentary Printers
Abbey House, S.W.1. WL6497-37318