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IN THE PRIVY COUNCIL No. 15 of 1957

ON APPEAL
FROM THE WEST AFRICAN COURT OF APPEAL

B E T W E E N:

NANA YAW NKANSAH II (Plaintiff) Appellant

- and -

NANA ASANTE YIADOM III (Defendant) Respondent

CASE FOR THE APPELLANT

KNAPP-FISHERS AND BLAKE & REDDEN,
31, Great Peter Street,
Westminster, S.W.1.

IN THE PRIVY COUNCIL No. 15 of 1957

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL

BETWEEN:- NANA YAW NKANSAH II
(Plaintiff) Appellant

- and -

NANA ASANTE YIADOM III
(Defendant) Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal from a judgment of the West African Court of Appeal delivered on the 4th day of March, 1955, reversing the judgment of Mr. Justice Jackson, acting Chief Justice, who, on the 8th day of August, 1952, granted to the Appellant on behalf of the Stool of Bukuruwa a declaration that the Stool owns lands delineated by a red line upon a plan, Exhibit 1 in the proceedings, and an Order that the Stool recover as against the Stool of Nkwatia that part of those lands of which they had been dispossessed.

By Counterclaim, the Respondent, on behalf of the Stool of Nkwatia, had claimed exclusive rights of occupation of certain lands within the area claimed by the Appellant. The West African Court of Appeal set aside the judgment of the learned Trial Judge and made a Declaration of Title in favour of the Stool of Nkwatia in respect of land within the area claimed by the Appellant and marked in green with the letters A, B, C, D, E, F, G, H, J, K, L, M, on a plan, Exhibit 2. p.3

2. The Appeal before the West African Court of Appeal was concerned with the effect of the decision of Mr. Justice McCarthy, acting Chief Justice, in an earlier suit entitled Yaw Nkansah II, Dsasahene of Bukuruwa, Kwahu, and another v. Wudanu Kwasi, Acting Chief of Atripradaa and others.

This was a claim by the predecessor of the present Appellant for a Declaration of Title in p.251

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respect of the same land as is in issue in the present case.

In that suit the Stool of Bukuruwa succeeded in their claim, and the Appellant's case is that a predecessor of the Respondent was a party to the suit, and the Respondent is therefore bound by the decision therein. The Respondent's said predecessor was Chief Dwamena Ayiripeh II, next referred to in Paragraph 5 (c).

3. It will, therefore, be convenient to deal
p.235 first with the previous suit, which was commenced by Writ of Summons, issued on the 13th day of March, 1940, in the Tribunal of the Paramount Chief of Kwahu State and was eventually appealed to Her Majesty's Privy Council.

4. The Writ in that suit was issued on behalf of the Stool of Bukuruwa in the name of the Ohene of Bukuruwa, Nana Kofi Baada II. The Stool of Bukuruwa is situate in and subservient to the Stool of Kwahu; thus, the Writ was issued in the Tribunal of the Ohene of Bukuruwa's paramount Chief. It was directed to Chief Tawia of Atipradaa and David Akuamoa alias Yaw Akoi of Adukrom, who were not subjects of the Stool of Kwahu. Chief Tawia was a sub-chief of the Stool of Wusuta, and Akuamoa also made his claim through that Stool.

5. The course of events by which the suit became
p.239 entitled as set out in Paragraph 2 above, was, in outline, as follows:

(a) On the 21st day of March, 1942, it was transferred to the Divisional Court of the Supreme Court of the Gold Coast by Order of the Acting Deputy Provincial Commissioner.

(b) On the 8th day of July, 1942, upon application made on his behalf, Osei Tutu, Chief of the Wusutas, was ordered to be joined as a
p.243, Ll.28-34 Defendant. Later, he was de-stooled, and the new Chief, Dzaba II, was substituted for him on the 14th day of October, 1944, by Order of the West African Court of Appeal.

(c) On the 11th day of February, 1944, upon application made on his behalf, Chief Dwamena
pp.266, 267 Ayiripeh II, the Ohene of Nkwatia, was ordered to be joined as a Co-Defendant. As

stated in Paragraph 2 hereof, he was a predecessor of the Respondent. Record

The Appellant appealed against this Order to the West African Court of Appeal, but on the 22nd day of November, 1944, the Appeal was dismissed. Chief Dwamena Ayiripeh was not a Wusuta, but, like the Appellant, was a Sub-chief of the Omanhene of Kwahu. p.269

(d) On the 25th day of August, 1945, upon application made on his behalf, Nana Akwamoa Akyeampong, the Omanhene of Kwahu, was ordered to be joined as a Co-Plaintiff. p.272, l.30 p.273 p.274

(e) On the 27th day of September, 1945, Yaw Nkansah II, Dsasahene of Bukuruwa, was ordered to be substituted for Kofi Baadu II, the original Plaintiff, who had been de-stooled. p.279 p.280

(f) On the 25th day of October, 1945, Wudanu Kwasi, Acting Chief of Atipradaa, was ordered to be substituted for Chief Tawia of Atipradaa, an original Defendant, who had died. It was also ordered that Chief Dzaba III, Chief of the Wusutas, be substituted for Osei Tutu, who had been de-stooled. p.283 p.284

It should be observed that, as mentioned in Sub-paragraph (b), Chief Dzaba II had apparently been substituted for Osei Tutu on the 14th day of October, 1944, although the latter's name continued to appear in the Title of the suit at least until the 27th day of October, 1945.

6. As a result of the above changes, the parties to the suit, were:

Plaintiffs: The Dsasahene of Bukuruwa, Yaw Nkansah, on behalf of the Stool of Bukuruwa; and The Omanhene of Kwahu.

Defendants: Wudanu Kwasi and David Akuamoa, both claiming through the Stool of Wusuta; Chief Dzaba, on behalf of the Stool of Wusuta;

and

Chief Dwamena Ayiripeh, on behalf of the Stool of Nkwatia.

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As has already been observed, both Plaintiffs and the Defendant Chief Dwamena Ayiripeh were all members of the Stool of Kwahu, the remaining Defendants were members of or claiming through the Stool of Wusuta, and the present Appellant and Respondent are, in effect, the Stools of Bukuruwa and Nkwatia respectively.

p.289, Ll.1-20

7. On the 6th day of August, 1946, the trial of the suit was fixed for the 12th day of September, 1946. Chief Dwamena Ayiripeh was neither present nor represented in Court on the 6th day of August. Counsel for the Plaintiffs said he understood that Chief Dwamena Ayiripeh did not intend to defend, but the Court ordered Notice of the date of the hearing to be served on all Defendants who were not then present or represented.

8. The state of the Pleadings on the 12th day of September, 1946, was, in outline, as follows:-

p.251

(a) Statement of Claim on behalf of the Stool of Bukuruwa, dated the 19th day of December, 1942, claiming, inter alia that certain land is the ancestral property of the Stool, and seeking a declaration of title thereto.

p.255

(b) Defence on behalf of the Stool of Wusuta and David Akuamoa, dated the 5th day of February, 1943, claiming that most of the land is within the Stool of Wusuta and that the rest belongs to neighbouring Stools, not to the Stool of Bukuruwa.

p.258

(c) Defence on behalf of the Stool of Atipradaa, dated the 13th day of April, 1943, that some of the land belongs to the Sub-Stool of Atipradaa.

p.274, l.20 to p.275, Ll.1-30

(d) Statement of Claim on behalf of the Omahene of Kwahu, dated the 7th day of September, 1945, supporting, as paramount Chief, the Claim of the Bukuruwas.

9. The trial of the suit did begin on the 12th day of September, 1946, before Mr. Justice McCarthy, and Chief Dwamena Ayiripeh took no part in it. On the 2nd day of May, 1947, Judgment was given in favour of the Plaintiffs.

10. On the 1st day of March, 1948, the West

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African Court of Appeal dismissed the Defendants' Appeal; and a further Appeal to the Privy Council, No. 20 of 1950, was dismissed, the Judgment of the Lords of the Judicial Committee of the Privy Council being delivered the 17th day of November, 1953. By the latter date, Nana Osei Twum, Ohene of Bukuruwa, had been substituted for Yaw Nkansah II.

11. The present suit was commenced in the Native Court of Okwanu, Grade A, Abetifi, by Writ of Summons No. 57/50 issued on the 14th day of June, 1950 on behalf of Nana Osei Twum (predecessor of the present Appellant), the then Ohene of Bukuruwa. It was directed to the present Respondent, the Ohene of Nkwatia in succession to Chief Dwamena Ayiripeh, and it claimed recovery of possession of the land in respect of which the Bukuruwas had obtained a declaration of ownership in the previous suit. p.1

By Counterclaim dated the 22nd day of June, 1950, the Defendants sought a declaration of title to ownership of part of the land. p.3

On the 2nd day of December, 1950, the suit was transferred to the Lands Division of the Supreme Court of the Gold Coast. p.6

12. A further suit was commenced by Writ of Summons No. 7/51 in the Native Court of Okwanu in respect of the title to a part of the land included within that which is the subject matter of this Appeal. It was commenced by Kwabena Duro of Asakraka, who claimed to derive title under and from the Respondent; and the Defendants to that suit were Kwapong Mosi of Obomeng and Ohene Kwadjo of Kyemfere, who both claimed to derive title under the Appellant. This suit was also transferred to the Lands Division of the Supreme Court on the 16th day of June, 1951; it was consolidated with suit No. 57/50 on the 12th of July, 1951; and it was not, and need not now be, considered separately. p.4 p.7 p.16

13. A plan, Exhibit 1, was prepared by Order of the Court showing the land claimed by the Appellant edged in red, and a plan, Exhibit 2, showed the land claimed by the Respondent, edged in orange.

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p.10 p.13

14. By a Statement of Claim dated the 21st day of February, 1951, and a Defence dated the 20th day of March, 1951, respectively, each side claimed to have acquired the land in dispute by conquest two or three centuries ago. The Appellant claimed that the Respondent is bound by the decision in the previous suit and by the result of an arbitration held in accordance with Native Custom by the Omanhene of Kwahu in or about 1942, and the Respondent denied this. The learned Judge at the trial found against the Appellant as to the effect of the Arbitration, and this is not the subject of appeal.

p.20 p.21 p.22 p.23

15. On the 12th day of November, 1951, a preliminary issue was heard as to whether the subject matter of the suit was res judicata between the parties by virtue of the decision in the previous suit. There was some doubt as to whether the Pleadings in that suit had been served upon the Respondent's predecessor, Chief Dwamena Ayiripeh, as required by the Rules and on the 15th day of November, 1951, the learned Judge ruled against the Appellant on the preliminary issue. On the 19th day of November, 1951, he granted the Appellant an interim injunction which, in effect, preserved the status quo.

p.25

16. The trial of the action began before Mr. Justice Jackson and an Assessor on the 3rd day of June, 1952. It was apparently discovered though not recorded that the Pleadings referred to in the previous paragraph had in fact been properly served upon Chief Dwamena Ayiripeh. Counsel for both parties therefore conducted their cases on the basis that questions of estoppel and res judicata arising from the decision in the previous proceedings were still in issue, and the learned Judge considered these questions in his Judgment.

p.182 p.204, Ll.16-35 p.204, Ll.35-45 p.205, Ll.1-6

17. On the 8th day of August, 1952, the learned Judge delivered Judgment in which he held that the Respondent was bound by the decision in the previous action and was estopped from re-litigating it. He further stated that, if he were wrong in law in so holding, then he would find in favour of the Respondent in respect of an area of land whose boundary was marked in green with the letters A B C D E F G H J K L M on the plan, Exhibit 2. Subject to that reservation, he granted the Appellant a declaration that the Stool of Bukuruwa owned all the land delineated by a red line upon the plan, Exhibit 1.

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18. Upon appeal by the Respondent, the West African Court of Appeal, on the 4th day of March, 1955, held that the Respondent was not prevented by the decision in the previous action from setting up his claim. Accordingly, the Judgment of the learned Trial Judge was set aside and Judgment was entered for the Respondent in respect of the land marked with the letters A B C D E F G H J K L M on Plan 2.

19. In the course of the Judgment of the West African Court of Appeal, the learned President said:

> "The Appellant's (the Chief of Nkwatia) case was that his predecessor withdrew from the suit (that is, the previous suit) as a result of an agreement made by the Nkwatia with the Bukuruwa Stool and the Omanhene of Kwahu with the object of not embarrassing the conduct of the case of the Bukuruwa Stool against a common enemy, namely, the Wusutas (Ewes). His Counsel maintained that once the Omanhene of Kwahu was joined as a co-Plaintiff the action became a fight between the Kwahu and Wusutas, and that it was obviously considered desirable not to complicate the issue by internal disputes between subjects of the Omanhene of Kwahu."

This contention was upheld by the West African Court of Appeal substantially upon the following grounds, and it was held that the Respondent was not estopped from pursuing his claim:

(a) Chief Dwamena Ayiripeh, after strenuous efforts to be jointed as a Defendant had "for no apparent reason, unless it was for the one alleged, suddenly dropped out of the case".

(b) The sixth witness for the Bukuruwas in the previous suit, Emmanuel Otukwa, had said:

> "At one time Nkwatia claimed the middle part of the land in dispute from us. As the result of the intervention of the Omanhene, the claim was settled";
>
> and
>
> "For some reason or other the Nkwatias

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got joined as Co-Defendants, but on the Omanhene becoming Co-Plaintiff, they withdrew."

(c) Their thirteenth witness in that suit, G. V. Johnson, had said:

p.306, Ll.15-20

"the Nkwatias claim that they own land between Asabi and Nkami lands. They do not claim any other parts of the land in dispute. However, this is an internal dispute between the Nkwatia and the Bukuruwa, which has nearly been settled by the Omanhene."

(d) Their thirteenth witness, who was clerk to the Omanhene, had also put in evidence three letters, Exhibits M, N and O, which showed, according to the Judgment of the West African Court of Appeal, that the Omanhene had claimed title to a portion of the land in dispute through the Nkwatia Stool.

p.305, l.33

These letters had been written on behalf of the Chief of Fasu (part of the land in dispute) to the Chief of Nkwatia in 1923, 1925 and 1927, and showed that the Chief of Fasu regarded the Chief of Nkwatia as his superior Chief.

(e) The learned Judge in the previous suit had said in his Judgment:

p.309, Ll.19-23

"The Plaintiffs press for a declaration in respect of all the land claimed by them, although it is realised that such a Judgment will only be binding on the Wusuta Stool and those claiming under it".

The West African Court of Appeal said of this passage:

"... from which it would seem clear that the case had been treated by all concerned as a battle between the two opposing Stools, Kwahu and Wusuta".

(f) The name of the Respondent's predecessor had ceased to appear in the title of the previous case and no Judgment had been asked for or given against him at the end of the trial.

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20. It is respectfully submitted that the West African Court of Appeal in the suit the subject of the present appeal was wrong both in its conclusion that there was such an agreement, and also in adjudging that, if there were such an agreement, it could alter or limit the effect of a binding Judgment in the action.

21. The submission that there was such an agreement seems to have been made by Counsel for the Respondent. The Defence did not specifically refer to it in the Pleading, even though in the Statement of Claim it was sought to rely upon the Judgment in the previous action. There appears to have been no evidence of an agreement adduced on behalf of the Defendant, even though - as will be seen from the next paragraph - Dwamena Ayiripeh himself was available to give evidence and was not called.

22. Further, it is submitted that the purport of certain answers given in the present suit in cross-examination of the Defendant Nana Asante Yiadom III was not only that there was no agreement between the Nkwatias and the Bukuruwas but that it would have been to the advantage of the Nkwatias for the Wusutas to have succeeded in the previous action and not the Bukuruwas. These answers, and the questions giving rise to them, were:

"Q. Did your Stool ever take any steps at all to assert its rights - on which occasions were you a Plaintiff? p.127, l.10

A. I've never taken action against him /Bukuruwa/. to

Q. It was quite clear to you or it was to everyone, that the Ewes were claiming what you now say is your land? p.128,l.4

A. Whenever they take anything from the land they give me a part.

Q. Do you mean to suggest you did not know the Ewes were claiming the land as their own?

A. I did not know that.

Q. Why did Nkwatiahene come and join as a defendant, why did he not join as a co-plaintiff with the Bukuruwahene?

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A. The Omanhene said that if I joined the defendants it would be taken that I was on the side of the Ewes.

Q. Did you come to any arrangement with the Bukuruwahene in this respect?

A. No.

Q. Was this arrangement before or after the Omanhene had been joined as a Plaintiff?

pp.127-128

A. It was before.

Q. How long before was this?

A. I cannot say.

Q. You do know that when Omanhene was joined his Statement of Claim was served on your predecessor?

A. I don't know that.

Q. In the Omanhene's Statement of Claim he said that Nkwatia was not entitled to any part of that land?

A. If he had claimed the land we would have sued him. Yes, Dwamena Ayiripeh is in Accra now."

The interpretation to be put upon this appears to be that the Nkwatias received part of the produce of the land from the Ewes, that they joined them as defendants, that they had some conversation with the Omanhene, and that if they had realised the Omanhene was claiming the land, they would have pursued their claim against him.

23. In commenting upon the above questions and answers, the learned Trial Judge said:

p.203, 1.29

> "If there had been any such agreement made, i.e., at a meeting of the Kwahu State then, it is indeed remarkable that not one question was put to the Omanhene of Kwahu to testify to that fact when the Bukuruwahene put him in the box. The evidence of the Defendant that he had come to no such agreement with the Bukuruwahene in this respect also negatives any question of agreement".

24. If, by his last answer, in the passage quoted above in paragraph 22, the Respondent was really saying that the Nkwatias did not pursue their defence because they mistook the nature of the Bukuruwas' and the Omanhene's claim, it is submitted that would not entitle them to claim subsequently that they are not bound by the decision in the action.

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25. Although it is not clear from the recorded evidence what the exact terms of the agreement were alleged to be, the learned Trial Judge referred to them in the Judgment in these words:

> "At the trial Nkwatia sought to show that they were not bound by the Judgment given in 1947 declaring Bukuruwa to be the owners of this land as they had made an agreement out of the Court that this internal dispute between Bukuruwa and Nkwatia would be deferred until after the case against the Ewes had been concluded, and that for this reason Nkwatia took no further part in the action, and that upon the joinder of the Omanhene of Kwahu as a co-plaintiff the Nkwatiahene just dropped out of the action". p.201, l.27

26. The learned Trial Judge also said in his Judgment:

> "If there had been such an agreement Counsel for the Nkwatiahene would have been aware of it and would have applied to this Court for leave for his client to withdraw from the action and which leave would hardly have been granted by any Court for the reasons so pleaded; indeed, to avoid a multiplicity of actions such leave, I think, would have been refused". p.204, Ll.5-12

This is underlined when it is remembered that the Nkwatias were joined as a party upon an Affidavit claiming that the land was theirs, the Bukuruwas having by Affidavit denied the claim and having opposed the joinder as far as the West African Court of Appeal. It certainly does not seem, in view of this, that the Court would lightly have allowed them to withdraw in order to litigate later the very claim upon which they were given leave to be joined. p.261, Ll.1-40 p.262 p.268

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27. Further, if there had been any agreement between the Omanhene of Kwahu, the Ohene of Bukuruwa and the Ohene of Nkwatia, that the right of the Kwahu Stool should be established in the action as against the Wusutas, leaving the Bukuruwas and the Nkwatias to settle their rights later, then it is reasonable to suppose that one of the following applications would have been made to the Court:

(a) That both the Bukuruwas and the Nkwatias be struck out, leaving the Omanhene of Kwahu to set up the paramount right of his Stool; or

(b) That the Nkwatias be struck out as co-defendants and joined as co-plaintiffs of the Omanhene and of the Bukuruwas.

In any event, it seems probable that Counsel for the Nkwatias would only have advised them to take no part at the hearing if the Omanhene and the
p.275, Ll.15-18 Bukuruwas had undertaken to seek a declaration of title in favour of Kwahu alone and if Paragraph 4 of the Statement of Claim of the Omanhene had been amended so as not to include the Nkwatias. There is no suggestion that any application pursuant to such an undertaking was made, and no suggestion on behalf of the Respondent that there was, in fact, such an undertaking.

28. The following comments are respectfully made upon the grounds, set out in Paragraph 19 hereof, upon which the West African Court of Appeal found there was such an agreement. The sub-paragraphs are lettered to correspond with those in Paragraph 19:

(a) As indicated in Paragraph 22 hereof, a more probable reason appears to be that he was concerned to see the rights of the Wusutas prevail, though not willing to support them openly after the Omanhene of Kwahu had joined as Co-Plaintiff. It is submitted, the Court should not look beyond the obvious presumption that the reason he did not attend the hearing to defend was that he did not wish to pursue his claim.

(b) These appear to be statements of fact which, it is respectfully submitted, do not help either way.

(c) and (d) An equally possible deduction from this evidence would be, it is submitted, that the dispute had been settled and the Nkwatias had conceded the Bukuruwas' claim. Further, while these are reasons for which the Nkwatias and the Bukuruwas might have come to some agreement, it is difficult to see how they can be evidence that they did so. Record

(e) It is important, it is submitted, in interpreting this passage from the Judgment, to consider it in its context and in relation to the happenings during the course of the proceedings. These are discussed in the next paragraph.

(f) This is probably nothing more than an acceptance by the other parties that the Nkwatias were not pursuing their defence. It is respectfully submitted that it is not correct to say that no judgment was given against the Nkwatias, since the learned Judge granted the relief claimed in an action to which the Nkwatias had become and not ceased to be parties.

29. It should be observed in regard to (e) that the learned Judge is stressing that the Plaintiffs seek a declaration of title in respect of all the land. The Wusuta defendants had claimed that part of it is theirs and part belongs to other Stools, stated in evidence to be Aveme, Botoku and Tonkaw, all of which, like the Wusutas, were members of the Ewe tribe. As will be seen from the sentence of the Judgment immediately preceding the passage quoted, the Wusuta Stool had argued that any declaration should be limited to the land claimed by that Stool, while the Plaintiffs pressed for, and were granted by the learned Judge's judgment, a declaration relating to all the land mentioned in their Statement of Claim. p.309, Ll.17-20

Furthermore, during the course of the proceedings, attempts, as follows, had been made to join the three other Stools, referred to above:

(a) Asuo Kwasi Iv, Ohene of Tonkaw, made application for joinder as a Co-Defendant, supported by an Affidavit of 15th day of August, 1946, claiming part of the land. On the 12th day of September, 1946, the application p.289 p.290 p.292

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p.296, Ll.33-37

was refused on the ground that the balance of convenience was then against the joinder of yet another party.

(b) As the learned Judge sets out in the paragraph preceding the one quoted, it was ordered on the 24th day of September, 1946, that the three other Stools should be joined as Co-Defendants; but because of difficulties of service the Order was revoked by consent on the 24th day of February, 1947.

p.309, Ll.9-16

It is submitted, therefore, that the learned Judge was merely making it clear that the rights of the three other Stools were not affected by his Judgment, as they were not parties to the action, and that the Plaintiffs realised this and were asking for Judgment on this basis.

30. If there were an agreement between the Plaintiffs in the previous action and the Nkwatias, then the following matters fall to be considered:

(a) What did the Nkwatia Stool do in pursuance of the agreement - Did they cease in some way to be a party to the proceedings, or did they merely refrain from pursuing their defence at the trial?

(b) If they merely refrained from pursuing their defence were they entitled subsequently to set up their claim in the present proceedings?

31. They would only cease to be a party, once joined as such, if they were struck out by order of the Court. It is submitted that there is no sufficient evidence that the Nkwatia Stool at any stage did cease to be a party to the previous proceedings. That they took no part in them, that the name of their Chief vanished from the recorded title, is clear. But there is no record or suggestion that they were at any time struck out of the suit. They, therefore, remained parties to the suit, and, it is submitted, as between themselves and the other parties, were bound by the decision.

32. The remaining question, then, is whether they can pursue the present claim, if, although a party

to the previous action, they did not in fact take steps to pursue their defence whether because of an agreement with the Plaintiffs or for any other reason. It is submitted that the legal consequences which flow from a Judgment cannot be fettered by an agreement which is unknown to the Court. If such an agreement did exist, and was supported by consideration, then breach of it would perhaps give rise to an action either for damages or possibly to set aside the original Judgment as having been obtained by fraud, if that is alleged, but not to an action which would, in effect, constitute an appeal from the original Judgment.

33. Further, if the consideration for the alleged agreement were that the Bukuruwas would consent to the issue being re-litigated between them and the Nkwatias, then it is submitted that the agreement would be invalid as being merely an agreement to ask the Court to re-hear a matter which was res judicata.

34. It is furthermore respectfully submitted that the West African Court of Appeal did not have sufficient regard to where the onus of proof lay, and that the position in regard to this was as follows:-

The Appellant's case before the Learned Trial Judge was that the previous decision is binding upon the Respondent, because his predecessor, Chief Dwamena Ayiripeh, was a party thereto. This, it is submitted, prima facie, must be so.

If the Appellant satisfied the Court that the Respondents predecessor was a party (as the learned Trial Judge found), then the onus was on the Respondent to prove an agreement and to show that the agreement was such as to estop the Appellant from setting up the previous decision.

The West African Court of Appeal appears not to have considered whether the Respondent had discharged this onus.

35. In the further alternative, it is respectfully submitted that the judgment of Mr. Justice McCarthy, and of the West African Court of Appeal and of the Privy Council in the previous suit, are judgments in rem as to the status and ownership of the land which was the subject of that

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suit, and that in consequence those judgments cannot be impeached or challenged by the Respondents.

36. Against the decision of the West African Court of Appeal the Appellant now appeals and he respectfully submits that the decision of the West African Court of Appeal was wrong and that the decision of the learned Trial Judge should be restored for the following, among other

R E A S O N S

(1) BECAUSE both parties are bound by the decision in the previous action entitled Yaw Nkansah II, Dsasahene of Bukuruwa, Kwahu and Another v. Wudanu Kwasi, Acting Chief of Atripradaa and Others.

(2) BECAUSE by virtue of that decision the subject matter of this Appeal is res judicata as between the Appellant and the Respondent.

(3) BECAUSE the predecessor of the Respondent was a party to the previous action, became a party on his own application, and was not struck out thereof. Alternatively, because there was no or no sufficient evidence that he was struck out.

(4) BECAUSE there was no sufficient evidence of any agreement between the parties to the previous action as to the course which the Respondent's predecessor should pursue, and because the Respondent specifically denied in evidence that there had been such an agreement, and there was in fact no such agreement.

(5) BECAUSE even if there were sufficient evidence of some agreement, there was no evidence as to its exact terms.

(6) BECAUSE any such agreement could not alter the binding effect of the previous decision so long as that decision remain unreversed.

(7) BECAUSE in any event that decision was a judgment in rem and binding on all persons.

(8) BECAUSE the Judgment of the West African Court of Appeal is wrong in law. Record

(9) BECAUSE the reasons of the learned trial Judge were right and should be supported.

FRANK SOSKICE.

MARK SMITH.

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