Privy Council Appeal No. 15 of 1957

Nana Yao Nkansah II - - - - - - - - - *Appellant*

v.

Nana Asante Yiadom III (deceased) - - - - - *Respondent*
Nana Atuobi Yiadom IV substituted

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST MARCH, 1960.

Present at the Hearing:

VISCOUNT SIMONDS
LORD JENKINS
MR. L. M. D. DE SILVA

[*Delivered by* MR. L. M. D. DE SILVA]

In this case the appellant Nana Yao Nkansah II, the present Ohene of Bukuruwa, has been substituted as plaintiff in place of Nana Osei Twum II who as Ohene of Bukuruwa in 1950 instituted this action in the Grade "A" Native Court of Okwawu (also known as Kwahu) against the respondent Nana Asante Yiadom III, Ohene of Nkwatia, for a declaration of title to a parcel of land situated in the Kwahu State and edged red in a plan produced in the proceedings, for possession and for damages for trespass.

The respondent denied that the Bukuruwa stool was entitled to all the land claimed by the appellant and counterclaimed a portion hatched pink within the red land. In respect of this land he claimed possession and damages for trespass.

Both the appellant and the respondent are subordinate to the Paramount Chief of Kwahu.

In December, 1950, the suit was transferred to the Land Division of the Supreme Court of the Gold Coast.

In a statement of claim filed in the Supreme Court the appellant set out a historical title to the red land and pleaded further that the respondent was estopped from denying the title of the appellant by reason of a judgment entered in a case commenced by the Bukuruwa in 1940 (hereafter called the 1940 action).

In his defence the respondent denied the historical title alleged by the appellant and set out his own historical title. He also denied the alleged estoppel.

Evidence on the question of ownership was led by each side before the Supreme Court which came to the conclusion that the respondent had established in respect of a portion of land edged green (hereafter called the green land) rights "which possessed all the features of ownership by customary law subject to the over-riding rights of allegiance to Kwahu State". It held however that the respondent was estopped from denying the appellant's title by reason of the judgment in the 1940 action.

On appeal the West African Court of Appeal held that the plea of estoppel failed and entered judgment for the respondent in respect of the green land.

The only point in dispute between the parties on this appeal and the only point for decision by their Lordships is whether or not the plea of estoppel is entitled to succeed. It is agreed by the parties that if the plea of estoppel succeeds the appeal ought to be allowed and that if it fails it should be dismissed. Their Lordships will now examine the judgment and proceedings in the 1940 action upon which the plea is based.

That action was begun in 1940 in the Tribunal of the Paramount Chief of Kwahu between Bukuruwa Stool as plaintiff and the Chief of Atipradaa and one of his subjects as defendants for a declaration of title to the land. The suit was thereafter transferred to the Supreme Court of the Gold Coast in March, 1942. There is some dispute as to whether the land which was the subject matter of that action was identical with the land claimed by the present appellant but in view of what follows it is not necessary for their Lordships to decide that point. Their Lordships will assume without deciding against the respondent (who succeeds on the appeal) that it was identical.

In July, 1942, on the application of the Bukuruwa Stool, the Chief of Wusuta was added as a defendant on the ground that the original defendants were his subjects and claimed to occupy the land under his authority.

The Bukuruwa Stool in its statement of claim (in the 1940 action) pleaded that the predecessor of Chief Atipradaa had been permitted by Bukuruwa to hunt, reside and make farms on payment of tolls but now refused to pay tribute and, in concert with the Chief of Wusuta, claimed the property as part of the Stool property of the Wusuta Stool.

In 1943 a surveyor and the parties visited the land in order to prepare a plan for the purposes of the case. In January, 1944, the respondent made an application to be joined as a defendant on the ground that when the surveyor visited the land the elders of his Stool had been invited to be present and had discovered that a large part of the land claimed in the action was the respondent's Stool land. On the 11th February, 1944, this application, though opposed was granted. An appeal against the order for joinder was dismissed on the 22nd November, 1944, by the Court of Appeal.

On the 25th August, 1945, on an application made by the present appellant (plaintiff in the 1940 action) the Paramount Chief of Kwahu was joined as co-plaintiff on the ground that he had an interest in all Kwahu lands and that the lands in dispute were a portion of the lands held under him.

Thereafter the respondent took no further part in the 1940 action. It has been said on his behalf in this action that he did so because of an arrangement with the Paramount Chief in order not to embarrass him in the proceedings against the Wusutas. But he took no steps to have himself discharged from the action. It is argued for the appellant that the respondent was a party to the 1940 action and is consequently bound by the result of the case namely a declaration of title in favour of the plaintiffs. It is to be observed that the declaration was not in favour of Bukuruwa alone; it was in favour of the Bukuruwa and the Paramount Chief of Kwahu. Their Lordships do not find it necessary to go into the question how far this fact would affect a plea of *res judicata* by the Bukuruwa alone if the plea was otherwise valid because they find it fails on other grounds.

In holding that the plea of estoppel failed the President of the Court of Appeal with whom the other judges concurred said :—

> "There are points which, in my view, strongly support the Appellant's" (Respondent on the appeal to their Lordships) "contention that there was an understanding that his predecessor should drop out of the action when the Omanhene" (this is a reference to the Paramount Chief) "had been joined as a co-plaintiff and it became clear that the battle was really between the Kwahu and the Wusuta.

Firstly, it seems odd that he should after strenuous efforts to be joined as a Defendant, for no apparent reason unless it was for the one alleged, suddenly drop out of the case. In this connection I think it relevant to refer to three pieces of evidence given by witnesses called by the Plaintiffs in the former case." (This is a reference to the 1940 action.) "The 6th witness, Emmanuel Otukwa, 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 again, 'For some reason or other the Nkwatias got joined as co-defendants, but on the Omanhene becoming co-plaintiff, they withdrew', and their 18th witness, G. V. Johnson, clerk to the Omanhene and State Secretary, said: '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 Nkwatia and Bukuruwa, which has nearly been settled by the Omanhene'; secondly, it is quite clear that in the former case the Omanhene claimed title to a portion of the land in dispute through the Nkwatia Stool, vide the three letters Exhibits 'M', 'N' and 'O' which were put in evidence through the State Secretary, G. V. Johnson, thirdly, the passage in the judgment of M'Carthy, Ag. C. J., where he said: 'The Plaintiffs press for a declaration in respect of all the land claimed by them, although it's realised that such a judgment will only be binding on the Wusta Stool and those claiming under it', 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, and fourthly, the name of the appellant's predecessor ceased to appear in the title of the case, and no judgment was asked for, or given, against at the conclusion of the trial.

In all the circumstances I am of the opinion that the Appellant is not estopped from setting up his present claim by reason of the judgment in the former case, and I think the learned trial Judge erred in holding that he was."

The learned trial judge on the evidence before him refused to hold that there was an agreement made between the parties during the 1940-1947 trial that the Nkwatiahene should withdraw from the action. It appears from the preceding paragraph that the Court of Appeal on a strong line of reasoning took the opposite view of what follows it will appear that it is not necessary to decide whether this was correct.

Their Lordships agree with the Court of Appeal that the 1940 action the Paramount Kwahu Chief "claimed title to the land in dispute through the Nkwatia Stool". It is on the observed that the final view of McCarthy, J., who tried the regarding the evidence is stated thus:

"My view is that the balance is slightly in favour of the Kwahu Stools".

The facts already stated and a review of the 1940 whole lead their Lordships to the same conclusion as the Court of Appeal namely that it "had been treated by all concerned as a battle between the two opposing Stools, Kwahu and Wusuta". There is no evidence relevant to any dispute between the Bukuruwa and the Kwahu. It is argued nevertheless that as the respondent failed to appeal and was discharged from the action he is bound by the declaration with regard to the land.

It is relevant at this stage to note the provision with regard to which is to be found in rule 4 of Order 40 of the Civil Procedure Rules (Second Schedule of the Courts Ordinance Cap. 4 Laws of the Gold Coast, Vol. 1, p. 122), namely

> 4. A minute of every judgment, whether final or not, shall be made, and every such minute shall be a decree and shall have the full force and effect of a formal

Court may order a formal decree to be drawn up on the application of either party.

No formal order was asked for or drawn up in the 1940 action. The passage in the judgment, "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" (vide above) appears to their Lordships to possess great significance. The whole course of the 1940 action and the words just quoted indicate that the learned judge intended that the judgment should be binding on the Wusuta Stool only. It is true that the words were used in a passage of his judgment where the immediate question under consideration was whether the declaration to be granted should cover all the land claimed by the plaintiff or only that part of it claimed by the Wusutas. But the course the case has run and the judgment convinces their Lordships that a dominant idea in the mind of the judge was that the Wusuta Stool only was to be bound by anything decided and that if he had been asked for a formal decree he would have so drawn it as to avoid its having any effect on anyone but the Wusutas.

Their Lordships have also observed that at the very end of the proceedings in the 1940 action counsel for the plaintiff asked permission to amend "the description of the land claimed in the Writ of Summons". This amendment was allowed in the absence of the Nkwatia defendant and without any notice to him. If a formal decree had been drawn up it would not have been made binding on a party who had had no notice of this amendment.

For the reasons they have given their Lordships are of opinion that the judgment in the 1940 action could have no effect upon the claim now asserted by the respondent in this case.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of this appeal.

D.L.

In the Privy Council

NANA YAO NKANSAH II

v.

NANA ASANTE YIADOM III

DELIVERED BY
MR. L. M. D. DE SILVA

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1960