

G.H.C. 2

13, 1961

IN THE PRIVY COUNCIL

No. 24 of 1958

ON APPEAL FROM THE WEST AFRICAN
COURT OF APPEAL

(GOLD COAST SESSION)

UNIVERSITY OF TORONTO
V.C.L.

13 FEB 1962

INSTITUTE OF ADVANCED
LEGAL STUDIES

B E T W E E N :

NANA ADJEI III Ohene of Okadjakrom
for and on behalf of the Stool and
people of Okadjakrom
Plaintiff/Appellant

63660

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- and -

NANA ADJEDU II Ohene of Atonkor
for and on behalf of the Stool and
people of Atonkor
Defendant/Respondent

1. YAW DANKWA (deceased)
2. ADO KWASI
3. KWAKU YIRENKYI
4. MANSAH NKANSAH
5. YAW MPEW DARKO
6. G. K. ADDO and
7. KOFI ASARE

20

Co-Defendants/
Respondents

- AND -

B E T W E E N :

NANA ADJEI III Ohene of Okadjakrom
Defendant/Appellant

- and -

ASOFOATSE KWADJO NKANSAH of
Atonkor
Plaintiff-Respondent

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(Consolidated Appeals)

CASE FOR THE APPELLANT

RECORD

1. This is an appeal by leave from a judgment of the West African Court of Appeal dated 25th February 1956 (Coussey, P; Ames and Jackson, Ag.JJ.A) allowing an appeal against a judgment of

p.59.
pp.50-58.

RECORD

- pp.40-43. the Land Division of the Supreme Court of the Gold Coast at Accra dated 16th July, 1954 (Korsah, Ag.C.J.):
- pp.6-13. (a) in favour of the Appellant as Plaintiff in a claim for a Declaration of title of, and damages for trespass and a perpetual injunction to restrain further trespass on, certain land known as Kafetonku Land against the Respondent as Defendant in his representative capacity and against certain of his subjects occupying farms on the said land, as Co-Defendants; and 10
- pp.16-20.
- pp.20-26. (b) in favour of the Appellant as Defendant in a claim brought against him in his representative capacity by one of the Respondent's subjects for a Declaration of title to ownership and possession of the said land, damage for trespass thereon and a perpetual injunction to restrain further trespass thereon. 20
- p.28. 2. The two said actions had been consolidated with each other by Order dated 13th May 1953.
- p.30. 3. On 24th November 1953, the consolidated actions came on for trial before Korsah, Ag.C.J., when he ordered, by consent, that a plea of 'res judicata' constituting one of the issues raised on the pleadings in each action, should be tried first. This issue was decided in favour of the Appellant. This effectively disposed of both actions in their favour. The result of the said judgment of the West African Court of Appeal was that the said decision on the issue of res judicata should be set aside and that the hearing of the said consolidated actions should be continued. This appeal is thus limited to the finding upon the issue of res judicata. 30
- p.39.
- p.58. 4. For the purposes of this appeal it is proposed henceforth to refer only to Nana Adjei III, Ohene of Okadjakrom for and on behalf of the Stool and people of Okadjakrom as the 'Appellant' and Nana Adjedu III, Ohene of Atonkor for and on behalf of the stool and people of Atonkor as the 'Respondent' and not to refer specially to the Co-Defendants/Respondents 40
- p.51,11.38-41.

or the Defendant/Appellant as their interests are identical with those of the Respondent.

5. In describing the facts upon which the issue of res judicata was determined constant reference will need to be made to Exhibit 'J' as "the plan" it being a plan upon which by consent of the parties hereto their respective claims at various times were clearly marked for the purposes of the said actions.

p.26.

10 6. The facts leading to and upon which the said issue came to be tried are as follows:-

(a) the Appellant and the Respondent are respectively Ohene of the Adjacent Stools of Okadjakrom and Atonkor in the Buem State of Ho-Kpandu District in Togoland, the Stool of the Appellant being in the South and that of the Respondent in the North;

pp.40-42.

20 (b) in about 1922 a dispute arose over the boundary dividing Okadjakrom from Atonkor. The Respondent claimed that Atonkor land extended southwards from Atonkor to the line marked in yellow upon the plan; whereas the Appellant claimed that Okadjakrom land extended northwards as far as the green line on the plan. The then District Commissioner one Captain Lilley is alleged to have settled this dispute by ordering demarcation of a boundary along the purple line on the plan. In order to be of binding effect it would need to be proved that (i) the line was cut and (ii) the cutting was accompanied by the carrying out of certain customs.

p.81.
p.83.

30 The Appellant never considered this demarcation as binding upon him in view of the fact that neither condition had been carried out.

40 (c) By Civil Summons in Suit 6/40 the Respondent on 16th April, 1940, commenced an action in the Tribunal of the Buem State Council against the Appellant claiming (i) damages for trespass on the land between the green lines on the plan and the purple line

p.60.

RECORD

thereon as far as Abribriwase in the North East: and (ii) a declaration that the said land between the green line and the purple line to Abribriwase belonged to his (the Respondent's) Stool of Atonkor.

- p.69. (d) The Appellant denied the Respondent's said claim which was based upon the said alleged cutting of the boundary along the purple line in accordance with the said Order of Captain Lilley. 10
- pp.61-82. (e) The said suit 6/40 was tried on 3rd and 4th June, 1940, in the Court of the Buem State Council held at Borada before:-
- Nana Akpandja II Omanhene, Pr.Member
Nana C.O. Adibo Akpafahene, Member
Nana Salo Kofi II Bowirehene, Member
- p.79. (f) The said Court viewed the said land on 1st
p.80. July, 1940, and on 2nd July, 1940,
delivered their unanimous judgment in favour of the Appellant, holding that the Order given by the said Captain Lilley for cutting the boundary along the purple line had never been effectively carried out and that the Appellant should retain his farms within the disputed territory. 20
- p.82. (g) On 22nd May 1941, in the Provincial Commissioner's Court; Eastern Province, held at Koforidua before His Worship Eric Anderson Burner, Esquire, Acting Deputy Provincial Commissioner, the Appeal of the Respondent against the said judgment in the suit 6/40 was dismissed: and on 27th November 1941, a further appeal to the West African Court of Appeal, Gold Coast Session, held at Victoriaborg, Accra (Donald Kingdon, President, P.B. Petrides, R. Strother-Stewart, J) was also dismissed. 30
- p.84.
- p.2. 6. On 5th December 1951, the Appellant
p.4. commenced against the Respondent the present main action (suit 1/1952) for (i) a declaration of title to the land edged red on the plan, (ii) damages for trespass thereon and (iii) a perpetual injunction to restrain further trespass thereon. 40

7. As shown by the Pleadings therein the Appellant founded his claim, inter alia, upon the judgment in the said suit 6/40, and upon a judgment in subsequent interlocutory proceedings as set out in paragraph 5 of his Statement of Claim. Both by his Statement of Claim and by his Reply to the Respondent's Defence the Appellant contended that the Respondent was estopped by the said judgments in the said suit and subsequent interlocutory proceedings from contending that he or his subjects own the land in dispute, i.e. the land edged red.
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8. In the hearing of the suit 1/1952 the Respondent in his evidence admitted:-
- (i) that in the suit 6/40 he sued as Ohene of Atonkor claiming the land then in dispute as family land, and that in this suit he sues likewise;
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- (ii) that both parties call the area in dispute "Kafetonku Land";
- (iii) that in the suit 6/40 he agreed that Otukutaka was the place to where both he and the Appellant cleared the road from Atonkor and Okadjakrom respectively;
- (iv) that the area in dispute in the action is the same as the area in dispute in the suit 6/40 except from Abribriwase to Konsu i.e. the projection Northwards from Abribriwase of the area edged red.
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9. That in giving judgment for the Appellant in this suit Korsah, Ag.C.J. found the facts as follows:-
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- "From the relative positions of the principal towns of the parties viz: Plaintiff's "Okadjakrom" on the South east; and Defendant's "Atonkor" on the north west, and from the evidence which proves that Plaintiff had claimed the site shown on the Plan as "Otukutaka" as the limit of his northwest boundary and the river Konsu as his northern boundary, with the Defendant; while the Defendant in the

p.6.

p.7. l.5.
p.6. l.11.

p.34. l.20.

p.35. ll.19-
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p.35. l.40.

p.36. ll.11-
15.p.36. ll.16-
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p.40.

p.41. l.42.

RECORD

same suit claimed the land which is bounded on the South and East by the Yellow line which overlaps the Plaintiff's claim. From this it is clear that the land subject matter of Suit No.6/40 is the land situated between the two boundaries edged Green and Yellow respectively. This in fact is admitted by the Defendant who however qualifies this admission on two grounds that (a) "The judgment was not complete, and (b) that the rights of the parties, were not conclusively defined".

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"In my view these grounds are untenable, having regard to the evidence which was adduced before the Buem State Council in 1940. It is true that the actual dimensions of the land were not stated; but the judgment fully discussed the merits of the claims and declared Plaintiff who was then defendant owner of the land between the two boundaries edged Green and Yellow respectively."

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"I am satisfied the parties now, as in the former Suit No.6/40 are the same; the land subject-matter of the suit is the same, in so far as the claim of the Plaintiff herein is concerned; he having claimed river Konsu as his Northern boundary. The fact that Defendant herein limited his claim up to Abribriwasi as his Northern Boundary, thus showing that he did not claim a narrow strip of land south of the river Konsu, does not, in my view detract from the judgment the benefits conferred on the Plaintiff in respect of that portion of the land he had in fact claimed."

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p.43.

10. The Respondent appealed to the West African Court of Appeal Gold Coast Session, Accra, and on 28th February 1956, that Court gave judgment upholding the Appeal.

pp.50-58.

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11. The Appellant respectfully submits that the said Judgment of the said Court of Appeal is wrong and ought to be reversed and set aside and that judgment should be given in favour of the Appellant and the judgment of Korsah Ag.C.J.

should be restored for the following amongst other

R E A S O N S

1. That there was ample evidence before the Learned Trial Judge to justify the findings of fact to which he came. p.40.
2. That the said facts are correct. p.40.
3. That on such findings of fact the decision of the Learned Trial Judge was correct in law. p.40.
10. 4. That the judgment in Suit No.6/40 was a declaration of title to the land the subject-matter of this suit.
5. That the Court of Appeal erred in law in holding that the Appellant ought to be non-suited in that they failed to appreciate that the "res judicata" was upon its proper construction a declaration of title and they ignored the existence of the Appellant's claim for damages for trespass and for a perpetual injunction to restrain further trespass. p.50.
- 20 6. That the Court of Appeal further erred in law in that they failed to appreciate that the Appellant was entitled, as he did, to raise the plea of estoppel per rem judicatam by his Reply and Defence to the Respondent's Defence and Counterclaim. p.50.
- 30 7. That the Court of Appeal were wrong in fact and in law in holding contrary to the Appellant's contention that the decision in the suit 6/40 did not create an estoppel in favour of the Appellant by reason of his failure to counterclaim in that suit. p.80.
8. That the facts in this suit are indistinguishable from Abutia Kwadjo II and another v. Addai Kwasi (1947) and there were no facts available on which the said Court of Appeal could draw the distinction which it purported to do between that suit and this suit. p.57. 1.8.
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L. G. SCARMAN

ALAN GARFITT

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AND BETWEEN:

NANA ADJEI III Ohene of Okadjakrom
Defendant/Appellant

- and -

ASOFOATSE KWADJO NKANSAH of Atonkor
Plaintiff/Respondent

(Consolidated Appeals)

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