Privy Council Appeal No. 57 of 1929.

Osumanyawa Yaw Ewua - - - - - - *Appellant*

v.

Nana Sir Ofori Atta - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE GOLD COAST COLONY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1930.

Present at the Hearing:
VISCOUNT DUNEDIN.
LORD BLANESBURGH.
CHIEF JUSTICE ANGLIN.

[*Delivered by* VISCOUNT DUNEDIN.]

This is an appeal *ex parte* against the judgment of the Supreme Court of the Gold Coast, affirming a judgment of the Chief Justice of the same Colony which dismissed an action brought by the appellant against the respondent on the ground that there was no cause of action disclosed. The appellant is a native of the Colony and the respondent is President of the Native Tribunal of Akyem Abuakwa. The proceedings in the Native Tribunal are regulated by an ordinance entitled "The Native Administration Ordinance."

The respondent issued a summons against the appellant alleging that he had contravened article 28 of the Ordinance by attempting to undermine the authority of the paramount chief. Nothing so far as appears has actually yet been done under that summons, but the appellant instead of appearing before the Tribunal and pleading that he had not contravened section 28, raised the present action in the Divisional Court, in which he craves a declaration that the issue of the summons was *ultra vires* and oppressive and asks for an injunction against the respondent from proceeding further with the case in the Native

Court. After service of the summons the appellant applied for an interim injunction, and he put in an affidavit in which he merely repeated *ad longum* the charges made by the original writ. Before the hearing the appellant tendered another affidavit which again repeated in substance what he had said before, but added a fresh allegation that the respondent before the taking of the process in the native Court had threatened to and meant to invade the appellant's lands. The Chief Justice refused to receive this second affidavit and gave judgment against the appellant, holding that no cause of action was disclosed. His judgment was very much wrapped up in allusions to procedure and did not proceed on the simple ground which was open to him.

On appeal the appellant made no motion to amend his writ of summons. The learned Judges of the Court of Appeal dismissed the appeal, and Hall. J. explicitly said that he was content to assume that the second affidavit was before the Court.

On the hearing before this Board the appellant's counsel complained that he had never had the opportunity of really stating the case on which his writ of summons was based. As their Lordships were very unwilling that the case should be decided merely on a point of pleading they allowed him to put in a statement of claim. The statement put in merely reiterated what had been said, but it added one allegation in a clearer form than had been stated in the second affidavit. It was as follows:—

> "The defendant before the commencement of this action threatened, both directly to the plaintiff and to other members of the said stool of Assamangkese and threatens forcibly to enter and trespass on the plaintiff's lands as aforesaid and to occupy and possess them in violation of his ownership and occupation thereof, and this without any lawful warrant or authority."

He also claimed damages.

Their Lordships think that the judgment of the Court below was right upon very simple grounds which, indeed, are the foundation of the judgment of the Court of Appeal. There is no question but that the complaint as to the violation of section 28 of the Native Ordinance is a relevant complaint, properly brought before the Native Court. The appellant can put in a defence and if judgment is against him he can appeal and he can also apply for transfer. That being so it is quite out of the question, viewing it as a civil proceeding, to stop the case by raising a case in another Court and craving by means of a declaration to make good what is really the defence in the original action simply by saying that the bringing of the case is malicious.

As to *ultra vires* there is a serious misuse of the term. What could be *ultra vires* was not the action of the respondent, but the clause of the ordinance, and that point, if to be taken, must be taken in the Native Court. On the other hand, viewing the matter as one of malicious prosecution, no action in a Court to claim damages could lie until there has been an acquittal in the first Court.

The allegation in article 5, however, raises a separate question. The action there alleged is an action independent of the other process, and lays no foundation for stopping that process. It might have been a good case if made out for an injunction against trespass and for damages, but the writ of summons cannot be held to include it, and no motion was made to amend the writ of summons.

Their Lordships do not see that the motion if made would necessarily have been granted, for it would have been really grafting a good new action on one that was intrinsically bad; but at any rate the motion was not made in the Court below, and cannot be entertained by their Lordships now.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal.

In the Privy Council.

OSUMANYAWA YAW EWUA

v.

NANA SIR OFORI ATTA.

DELIVERED BY VISCOUNT DUNEDIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1930.