Privy Council Appeal No. 98 of 1938

Okusanya and another (representing Ake People) – *Appellants*

v.

Akanwo and another (representing Ijesha People) – *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND MAY, 1941

Present at the Hearing:

LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD ROMER
SIR GEORGE RANKIN
LORD JUSTICE CLAUSON

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This is an appeal from a judgment of the West African Court of Appeal, which dismissed an appeal from a judgment of Paul J., dismissing an action brought by the appellants against the respondents. The action was dismissed as to part of the relief claimed upon the ground of *res judicata*, and as to the rest of the relief claimed upon the ground that it was misconceived and unnecessary. The Court of Appeal dismissed the appeal of the appellants upon the ground that all the questions then sought to be raised were clearly *res judicatae*. They made no specific reference to the claim which Paul J. considered to be misconceived and unnecessary.

The appellants represent the people of Ake and the respondents are representatives of the people of Ijesha.

In order to make clear how the question of *res judicata* arises, it is necessary to describe the litigation which has taken place from time to time from the year 1905 onwards, between the representatives of these two peoples; and the litigants in each case will be referred to as the people whom they represented, i.e. as Ake and Ijesha respectively.

In 1905 Ake sued Ijesha in the District Court of Shagamu, claiming damages for trespass to land and an injunction. This action resulted in a judgment (known as the Duncombe judgment) in the following terms:—

> " Judgment for plaintiff for nominal damages. Plaintiff to have and hold all that land known as Ake, with the exceptions of farms there actually being cultivated by and in the possession of the natives of Ijesha."

In 1915 Ake sued Ijesha to recover possession of a parcel of land situate at Ake in the Ijebu-Ode division and known as Inyowu. Ake obtained a judgment in the following terms:—

> " Judgment for plaintiff: the boundary between the plaintiff and defendants to be the Ona river, subject to any rights of the Crown. Defendants to be permitted to reap their corn and yams on the land and to take no further action on this land."

An appeal from this judgment was ultimately decided on the 7th February, 1924, in the Supreme Court of Nigeria by Tew J., who varied the judgment in the court below and declared Ake to be owners of a certain area defined by him, but that Ijesha were entitled to exercise

farming rights over a portion of the said area, which portion was defined by the judge and was stated to comprise ten farms therein described by name, and hereinafter referred to as the specified farms.

It will be observed that this judgment (hereinafter referred to as the Tew judgment) established a right in Ijesha to exercise farming rights over the specified farms. It did not, however, in any way define the farming rights.

In the year 1928 Ijesha sued Ake in the Provincial Court at Ijebu-Ode claiming an injunction to restrain Ake from infringing the farming rights given to Ijesha by the Tew judgment. Ake contended that the farming rights were limited to planting yams and corn. The Resident, however, by his judgment given on the 12th March, 1928, held that Ijesha were entitled to " full farming rights " over the specified farms and granted an injunction. He subsequently changed his mind, and purported to give another judgment on the 26th April, 1928, upon the footing that Ijesha were only entitled to cultivate the ordinary annual crops such as yams and corn, and not to plant cocoa, kola, cocoanut, palm trees, etc.; and were only entitled to exercise their farming rights by agreement with Ake. This *volte-face* may, however, be disregarded, because on appeal by Ijesha to the Supreme Court of Nigeria, that Court decided that the judgment of the 26th April, 1928, was of no legal effect or authority, and that the judgment of the 12th March, 1928, stood.

At this stage of the litigation the position of Ijesha, as judicially determined between the parties, was that Ijesha were entitled to full farming rights over the specified farms: but although the area over which the rights were exercisable was clear, there had been no decision as to what rights were covered by or included in full farming rights.

On the 28th June, 1932, Ake brought an action against Ijesha in the Provincial Court of Ijebu-Ode, in which the following relief was claimed:—

> " The plaintiffs seek a declaration that the farming rights to which the defendants are entitled [under the Tew judgment] on a certain area of farmland referred to in the said judgment, do not include:—
>
> (*a*) The right to reap palm nuts.
>
> (*b*) The right to plant kola, cocoa and other live trees.
>
> (*c*) The right to use the farmlands without payment of tribute.
>
> " 2. An injunction restraining the defendants, their servants and agents from reaping palm nuts and planting kola, cocoa and other live trees on any portion of the said area."

To this claim Ijesha pleaded *res judicata* relying on the Tew judgment, and the judgment of the 12th March, 1928. Ames, Assistant J., upheld the plea of *res judicata* as regards (*a*) and as regards (*b*) in so far as it referred to palm nuts, kola and cocoa trees. As regards the claims in respect of planting " other live trees " and the payment of tribute, Ake were to be at liberty to continue their action. Eventually Ake decided not to continue the action for that purpose, but stated that they would perhaps take another form of action. The judgment, signed by the judge and dated the 5th February, 1935, was in the following terms:—

> " Court reads its ruling on plea of *res judicata*.
>
> " Upholding plea as regards (*a*) of the claim, and as regards (*b*) in so far as it relates to palm nuts, cocoa and kola trees. But rules that plaintiffs can continue the action to sue for the declaration they seek as regards ' other live trees ' in (*b*) of the claim and as regards (*c*) of the claim if they wish to.
>
> " Majekodunmi consults his clients and decides that they will not proceed—but will perhaps take another form of action.
>
> " Judgment for defendants, with costs assessed at 25 guineas."

The litigation next to follow was the action which has given rise to the present appeal. It was instituted by Ake in the Native Court of the Ode Remo Ijebu Province, but was subsequently transferred to the High Court. By the particulars of claim in the writ of summons (dated the 22nd June, 1936). Ake claimed a declaration that certain rights were not included in

Ijesha's farming rights, and an ancillary injunction. The declaration claimed runs thus:—

> " Plaintiffs seek a declaration that the ' farming rights ' which the Defendants were given by the judgment of the Supreme Court, Lagos, dated the 7th day of February, 1924, on a certain area of farmland referred to in the Judgment, do not include
>
> 1.—(*a*) The right to reap palm nuts in farms actually cultivated by, and have always been in the possession of the plaintiffs on the Ake side of the Ona river.
>
> (*b*) The right to reap kola nuts and cocoa on kola trees and cocoa trees actually planted by the plaintiffs as owners of the Ake land according to native custom on the Ake side of the Ona river.
>
> (*c*) The right to fell on the Ake side of the Ona river ' lawful trees '—as Iroko, Oganwo, Opepe and Abora, which only an owner of land has right to fell according to native custom.
>
> (*d*) The right to exercise the said ' Farming Rights ' on the Ake side of the Ona river without payment of tribute, as native law and customs requires."

Ake delivered a statement of claim in which, after sundry allegations and contentions, they conclude with the words " whereupon the plaintiffs claim as per the writ of summons." By their defence Ijesha pleaded that in the action before Ames, Assistant J., Ake had sought precisely and in essence the same declaration as Ake were then seeking, and that the matter was *res judicata* by the judgment of the 5th February, 1935.

The action was tried by Paul J. who was of opinion that since Ames, Assistant J., had given judgment for the defendants, his judgment bound the parties as *res judicata* of the whole claim stated in the writ in that action; and that all that he (Paul J.) had to consider was to what extent the claim in the action before him coincided with the claim in the action before Ames, Assistant J. Applying that test, he was of opinion that the matters covered by paragraph 1 (*a*), (*b*) and (*d*) of the present claim were *res judicatae*. As regards (*c*) he disposed of the claim in the following words:—

> As regards 1 (*c*) of the plaintiffs' claim I hold that the claim is completely misconceived and unnecessary. The right to fell these trees can be given only by a permit from the Forestry Department not by a judgment of this or any other court. The defendants' counsel admitted that a right to fell timber could be given nowadays only by Forestry permit and not by the judgments in question. To give a declaration that the defendants' farming rights do not include a right to fell timber would be in effect simply to declare that the provisions of the Forestry Ordinance were in force. The court does not grant declarations of that nature and for that reason the declaration sought in (1) (*c*) of the claim is refused as unnecessary."

The Court of Appeal in their judgment, after rejecting the obviously false contention (made apparently on behalf of Ake in that Court) that the action did not relate to the specified farms, stated that so far as the specified farms were concerned, " all the questions now sought to be raised are clearly *res judicata* in the judgment of Ames, Assistant J., in 1935. The appeal therefore fails and is dismissed with costs . . ." That is in substance the whole of the judgment in the Court of Appeal.

Their Lordships, unfortunately, have not had the assistance on the hearing of this appeal of any argument on behalf of Ijesha; but having considered the matter from all points of view they have come to the conclusion that the plea of *res judicata* does not afford a defence to the whole of Ake's claim, and that the action must be sent back in order that certain limited issues may be tried.

Their Lordships agree with the Court of Appeal in their opinion that the action is concerned only with the specified farms and with no other land: but they cannot assent to the view that all the questions sought to be raised in the action are *res judicatae* by the judgment of 5th February, 1935. Some they think are, but some are not; and to a partial extent this appeal must succeed.

Thus, so far as the present action seeks to establish that Ijesha are not entitled to reap palm nuts on the specified farms, it is clearly *res judicata*. That was the subject of the judicial decision given by Ames, Assistant J., on

the claim (*a*) in the action before him. Again, while it may be doubtful whether the present action seeks to establish that Ijesha are not entitled to plant kola or cocoa trees on the specified farms, it is clear that if and so far as it does, that matter also is *res judicata* by reason of the same judicial decision.

There remain three other claims to consider. Claim 1 (*b*) is a claim to prevent Ijesha from reaping nuts on trees which have been planted by Ake. Their Lordships do not find that this particular claim has ever been raised before. It was not raised in the action before Ames, Assistant J., nor in any of the other litigation of which their Lordships have information. This matter would not appear to be *res judicata*.

In regard to the claim for tribute their Lordships are unable to hold that this matter is *res judicata*. It is true that it was included in the action before Ames, Assistant J., but there was no judicial decision upon it. The claim has never been judicially considered or adjudicated upon between the parties. All that happened was that Ake elected not to proceed with that action for the purpose, but to seek a judicial decision in other proceedings. In those circumstances the judge had necessarily to give judgment in the action for Ijesha, but, as the judgment shows on its face, without any decision as regards that particular issue.

The last matter is the claim to establish that Ijesha have no right to fell trees. This question is in their Lordships' opinion clearly not *res judicata*. It appears for the first time in the present action. But there are other considerations which apply to it, and which lead their Lordships to the conclusion that the appeal should fail in regard to that particular claim.

It is evident that Paul, J., with his local knowledge of the conditions prevailing under the Forestry Ordinance, and the rights of the Forestry Departments in regard to the trees situate on the specified farms, treated this claim as wholly misconceived. This view seems to have been shared by the Court of Appeal if the claim was made there, for they make no mention at all of the claim in their judgment. But it would seem that the claim was not made before the Court of Appeal. What they say in their judgment is that "all questions now sought to be raised are clearly *res judicata*." These words cannot refer to the claim now under consideration, which, as stated, appears in this action for the first time. Their Lordships accordingly draw the inference that this claim which had been treated with such scant respect by the trial judge, was not further pressed in the Court of Appeal. A note of the proceedings in that Court appears in the record. From that it would appear that Counsel for Ake said that the only point in the appeal was whether the judge was right as to *res judicata*, and no mention is made of the claim in regard to felling trees which the trial judge disposed of on other grounds. Their Lordships, however, are without information as to the author of the note, which may or may not be a judicial note of the proceedings. In those circumstances they prefer to rely for their conclusion upon this point upon the language used by the Court of Appeal in its judgment, and quoted above. They think it right, however, to state expressly that their decision in regard to the claim as to felling trees involves no decision as to what (apart from the powers of the Forestry Authorities) are the rights of either party in that regard.

In the result their Lordships are of opinion that the appeal should succeed to the following extent—viz. that the judgment of the Court of Appeal should be wholly set aside, that the judgment of the trial judge should be set aside in so far as it declares that the claims undermentioned are *res judicatae* and provides for costs and that the action should be remitted to the High Court for the purpose of trying (but only in relation to the specified farms) the claim of the plaintiffs to declarations in terms of paragraph 1 (*b*) and paragraph 1 (*d*) of the particulars of claim and to any necessary ancillary injunction. They will humbly advise His Majesty accordingly.

The respondents will pay to the appellants one-half of their costs of the appeal to His Majesty in Council and of their appeal to the Court of Appeal. The costs in the High Court (including the costs of the original hearing) will be dealt with by the judge on the further hearing of the action.

(11505) Wt. 8194—7 90 6/41 D.L. G. 338

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DELIVERED BY LORD RUSSELL OF KILLOWEN

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