16/1961

IN THE PRIVY COUNCIL No. 34 of 1959

ON APPEAL

FROM THE COURT OF APPEAL, GHANA

IN THE MATTER OF PROPOSED BEMU RIVER FOREST RESERVE BLOCK 1

BETWEEN :-

NANA DARKO FREMPONG II,
OHENE OF ACHIASI (Claimant) Appellant

— and —

MANKRADO KWAKU EFFAH.
MANKRADO OF APERADE
(Substituted for
NANA OTSIBU ABABIO II, OHENE
OF APERADE (Claimant) (deceased)) Respondent

CASE FOR THE APPELLANT

RECORD

(1) This is an appeal from a judgment of the Court of Appeal of Ghana (Granville Sharp, J.A., Van Lare, Acting C.J., Ollennu, J.), dated 26th November, 1957, setting aside a judgment of the Reserve Settlement Commissioner of the Gold Coast dated 12th February, 1957, whereby it was decided that an area of land described as Bemu River Block 1 belonged to the Stool of Achiasi and not to the Stool of Aperade, and remitting the case for a rehearing. pp.42-58

(2) The principal issue for determination in this appeal is whether, as held by the Commissioner and by Ollennu, J., a judgment of the Judicial Committee of the Privy Council dated 2nd July, 1956 in relation to land of which the land now in dispute is part should operate in relation to that part as an estoppel by res judicata or whether, as held by Van Lare, Acting C.J. and Granville Sharp, J.A., no estoppel was created.

(3) In Transferred Suit No.12/1949 Nana

Owudu Aseku Brempong II, alias Albert Robertson Micah Korsah and Nana Agyeiku Apare, Chene of Aparade, for themselves and on behalf of their respective Stools, sued Nana Darku Frempong II, Ohene of Tarkwa Achiasi in the Akim Abuakwa State for himself and on behalf of the Stool of Tarkwa Achiasi and people, in the Supreme Court of the Gold Coast, Lands Division, Cape Coast.

Page 60 (4) The Plaintiffs' claim was for: "a Declaration of Title to all that piece or parcel of land commonly known and called Amanfupong and Aperade Stool land situate in the Western Akim District and bounded on the North by lands belonging to the Stools of Eduasa, Ewisa respectively on the South by lands belonging to the Stools of Wurakessi, Jambra and Asantem respectively on the East by lands belonging to the Plaintiff's Stools and Surasi Stool respectively and on the West by Akenkensu Stream and Wurakessi Stool Land." They also claimed £500 damages.

Page 64, line 22. In his judgment dated 11th August, 1951, Dennison, J. held that both parties had slept on their rights and that he had to consider who was the worst offender. He then reached the following conclusion:-

Page 64, l.46 - P.65 "By reason of the two cases filed by the Plaintiffs in respect of this land, and having regard to the fact that the Defendants have never sought a declaration of title, I am satisfied that of the two parties it is the Plaintiffs only who can be said to have acted timeously in asserting their rights, this being so the Plaintiffs are entitled to the declaration sought and I so order."

(4) The Defendants in the suit appealed to the West African Court of Appeal, where the principal judgment was delivered by Foster-Sutton, P.. He held that the trial judge had lost sight of the fact that the Respondents were the persons seeking relief at the hands of the Court, not the Appellants, and that the Respondents had certainly failed to discharge the onus which was upon them. Coussey, J. and Manyo-Plange, J. concurred. The Respondents appealed to Her Majesty in Council.

Page 67, l.36

P.68, l. 9.

(5) On 16th April, 1953, Mr. Commissioner Pullen held an enquiry on the Bemu Reserve. In the course of his opening observations he stated as follows:-

"I do not wish to hear any claims to land on the portion to the North-east of the road leading to Aperade from Amanfupong because there is a dispute lying within the jurisdiction of the Privy Council which may not be settled for some time. It is my intention to exclude that area from this enquiry for the time being by dividing the Reserve into Two Blocks providing that no other disputes arise during this enquiry." P.2, 1.46

(6) By their judgment dated 2nd July, 1956, the Judicial Committee of the Privy Council held that the West African Court of Appeal had rightly rejected the reasoning of the trial Judge and that they themselves did not come to any different conclusion from that reached by the Court of Appeal. P.72, 1.4 P.72, 1.28

(7) On the 26th October, 1956 the enquiry was re-opened by Mr. Commissioner Riley. The Appellants and Respondents in this Appeal were both present. The Commissioner stated:- P.5, 1.22

"You the Stools of Aperade and Achiasi are the two parties concerned in the Bemu River Block I enquiry, you are both I think aware of the position to date but I will recapitulate briefly....." P.5, 1.23

The Commissioner then referred to the proceedings before Mr. Commissioner Pullen in 1952 and 1953, and said:-

"As a result of the above Mr. Pullen divided the Reserve into two Blocks, one being Block I now the subject of this enquiry and which lies to the North-East of the road leading from Amanfupong to Aperade. The Privy Council has now given its decision on the land issue which previously held up the Reserve Settlement in this area so that I can now proceed, having been appointed Reserve Settlement Commissioner by Gazette Notice 302 published in Gazette No.9 of 29th January, 1955. As you are aware it was P.6, 11.7-40

necessary owing to further land disputes to divide Block II of the Reserve into Blocks II and III and the enquiries into these two Blocks have been completed. Some evidence has already been taken in respect of this Block I by Mr. Pullen and if necessary it can be repeated for the sake of clarity, I do not intend to commence proceedings de novo but to continue the enquiry commenced by Mr.Pullen as authorised by Section 5 (2) of Cap.157 (No objection is raised to this). Before proceeding further it will be necessary for the boundaries claimed by each party before the High Court, the West African Court of Appeal and the Privy Council to be shown on a plan in so far as they affect Block I.

From the plans now produced by each party it is clear that Aperade claim all the Reserve as part of their whole claim while Achiasi only claims a part. It is not possible from the plans to fix the actual Achiasi claim in Block I. The Court orders the Ohene of Achiasi to have his boundary cleared and cut in the Reserve by 12th November, 1956 on which date the Forestry Surveyor will go to Achiasi and commence the survey."

P.7
P.14, ll.24-29

(8) The enquiry was re-opened on 27th November, 1956. On 8th January, 1957 the Court announced that it would hear arguments by Counsel to decide on the correct interpretation of the Privy Council decision in so far as it affected the land in the Bemu River Block I. It was further stated that the Court could not in any way reopen the land case or hear further evidence on that subject. Counsel for the Aperade then stated that he wished to produce some documents which would help the Court to understand the position. He continued as follows:-

P.15, ll.1-17

"These documents are not intended in any way to dispute the decision of the Privy Council but to help to clarify that decision. They should have been produced in Court before but were not."

Counsel for Achiasi objected to these documents being produced because, he submitted, their production was tantamount to re-opening the case. His objection was upheld.

In his judgment, dated 12th February, 1957, the Commissioner referred, inter alia, to an argument advanced for Aperade based on the vagueness of the maps and plans produced in the High Court in the earlier suit. He also referred to a passage in the judgment of the Judicial Committee of the Privy Council to the effect that it would have been very difficult for a trial judge to extract from such evidence any pattern of asserted rights that would justify attributing a whole defined area to the Stool lands of one party or the other. The Commissioner then continued as follows:-

P.24, ll.27-28

P.26, l.14

"Full weight has been given to their Lordships' views and were this Court concerned with the whole area in dispute the description of the boundaries as claimed by Aperade would be inadequate for the settlement of title to that area, but I am only concerned with a small area which is in no way contiguous with the land belonging to the Stools of Eduasa, Ewisa, Wurakessi, Jamra or Asantem and indeed has not been claimed by any of these Stools and only by Aperade whose claim has been dismissed. A glance at the plans Exhibit "A" shows the portion of Block I in relation to the Eduasa or Ewisa areas in the North and Exhibit "H" shows the approximate boundaries of Wurakessi, Jamra and Asantem which are many miles to the South of Block I. The area of the latter is in fact almost in the centre of the whole area as regards the boundaries of the above Stools. Similarly to the East the Reserve boundaries do not appear from the plans to be adjacent to Aperade or Suasi lands while the Akenkanso stream on the West which the Plaintiffs claim as part of the boundary is a considerable distance from Block I. This Court is of opinion therefore that the vagueness of the boundaries claimed by Aperade for the whole are not vague in respect of the land inside Block I. Aperade have claimed this land as part of the whole, they have had their claim dismissed and at no time has any other Stool claimed Block I."

P.26, ll.19-47

The Commissioner therefore held (1) that

Page 27, l.26

P.28, l.7 — Aperade by the Privy Council decision had lost all the area they had claimed, which was shown on a plan exhibited both in these proceedings and in the Supreme Court case; (2) that the area of Bemu River Block I was within the area claimed by Aperade and did not border on any of the outer boundaries to the claim in such a way as to make the claims by either party to Bemu River Block I vague or inadequate, and, since no other Stool had yet contested the ownership to this land in the Reserve, it must belong to either Aperade or Achiasi, and the Courts had decided against Aperade; (3) that the fact that no judgment was given by the West African Court of Appeal or the Privy Council for Achiasi did not mean that the land was not theirs and in the absence of any other claimants he would assume that the area they had claimed in Block I belonged to them. The Commissioner therefore held, as aforesaid, that the land in Bemu River Block I belonged to Achiasi.

P.48, l.43 - P.49, l.7 — (9) The first judgment in the West African Court of Appeal was delivered by Granville Sharp, J.A., who dealt first with the argument advanced on behalf of the Respondents that the Privy Council decision must be held to be a bare dismissal of the Appellants' claim and did not amount to a determination of any issue of title between the parties. He found this an attractive argument, but inasmuch as it was not necessary for the purpose of a decision upon the appeal he mentioned it only out of respect for learned Counsel.

P.49, l.44 - P.50, l.3 — The learned Judge of Appeal was of the opinion that, if the Commissioner had not at a very early stage of the resumed enquiry firmly concluded in his mind that the Appellants were estopped by the Privy Council judgment he might have found the documents tendered assisted him, one way or another, in deciding, on the evidence, whether the issue before him was the same as that before the Privy Council.

P.50, l.8 - P.51, l.27 — After referring to the law of Res Judicata, the learned Judge of Appeal held that the Commissioner had erred in this, and had erred further in failing to apply the test of whether the evidence required to support a claim to the area in Bemu River Block I would be the same as that which was

led in the former case, as to wider boundaries, on its way to the Privy Council. For himself he could not see how the evidence could possibly be the same in both cases, but it was a question on which the Commissioner had refused to hear evidence. He then reached the following conclusion:-

"I find myself unable to condescend to the fallacy of asserting that the smaller part is the same as the greater whole, or the equal fallacy, elementary in each case in my opinion, that merely because the part is included within the whole the two are one and the same thing. " P.51, l.40.

(10) The judgment of Van Lare, acting C.J., included the following passage:-

"In my view although the area in dispute is less than the area litigated in the former suit nevertheless the two areas are not identically the same subject matter. The question involved in this enquiry may be substantially similar to the one already decided, but it cannot be said that it is the same question because the extent of the area is not the same. Although the concept of estoppel is not generally regarded as a substantive rule of law it is none the less often described as a rule of evidence. That is why I consider that the Commissioner should not decline hearing the Aperade Stool from leading evidence in respect of its claim to the area in dispute and the matter should then be left at large for a decision. " P.52, l.43 P.53, l.9

(11) In the course of his dissenting judgment, Ollennu, J. held (it is submitted rightly) that a defence of res judicata would succeed not only when the cause of action was the same, but also when the Plaintiff had had an opportunity of recovering, and but for his own fault, might have recovered, i.e. when it was open to him to recover in the first action that which he sought to recover in the subsequent suit. He referred to Halsbury, 3rd Edition, Volume 15, page 185, paragraph 358 and the cases of Re Hilton Ex Parte March (1892), 67 L.T. 594 and Hoystead v. Commissioner of Taxation (1926), A.C. 155 at page 166. He also cited the following passage P.54, l.43 - P.55, l.5 P.55, ll.5-21

from Spencer Bower on Res Judicata at page 115, paragraph 178:-

P.55, ll.26-45

> "For this purpose identity of subject matter means not only eadem res, but eadem questio - not only identity of subject matter in a physical sense, but also identity of subject matter in a juridical sense."

And at page 116, paragraph 179 the following appears:-

> "There is no discrepancy or conflict of the nature above indicated, and there can, therefore, be no estoppel, unless that to which the res judicata relates, whether for instance, land, or its situation, or condition, goods, a person, an instrument, or a legacy is physically identical with, or physically comprehends, that to which the claim, or defence, or case set up in the subsequent proceedings relates."

P.57, l.31 - P.58, l.3

In the opinion of this learned Judge the question to be answered in the present case is, "Does Block I fall within the area of land over which the parties litigated?" In his opinion that question was answered by the Settlement Commissioner, who found that Block I was a small area almost in the centre of the land, the boundaries of which were described in the claim which went before the Privy Council. The land in dispute in the Privy Council case was therefore shown to include or comprehend Block I. He therefore held that the present proceedings were res judicata.

P.59

(12) Final leave to appeal to Her Majesty in Council was granted on the 7th March, 1958.

(13) The Appellant respectfully submits that this appeal should be allowed, with costs throughout, the judgment of the West African Court of Appeal set aside and the judgment of the Reserve Settlement Commissioner restored, for the following (amongst other)

R E A S O N S :-

(1) BECAUSE, as the Commissioner and Ollennu, J. rightly held, the land in dispute in the appeal to the Privy Council included or comprehended

Block I, and the Respondent therefore was estopped by res judicata from putting forward his claim to Block I:

(2) BECAUSE Granville Sharp, J.A., and Van Lare, Acting C.J. were wrong in holding that, because the area in dispute was less than the area litigated in the former suit, there could be no estoppel:

(3) BECAUSE, if it be material, the Commissioner was right in excluding evidence which the Respondent had failed to tender in the former suit, and Granville Sharp, J.A. was wrong in holding that such evidence should be admitted:

(4) BECAUSE the Reserve Settlement Commissioner was right in holding that the land belonged to Achiasi Stool:

(5) BECAUSE the judgment of the Reserve Settlement Commissioner was right and should be restored.

DINGLE FOOT

J.G. Le QUESNE

No. 34 of 1959

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(Claimant) Respondent

CASE FOR THE APPELLANT

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