

Gr. 365

16, 1961

1.

IN THE PRIVY COUNCIL

No. 34 of 1959

ON APPEAL FROM
THE COURT OF APPEAL, GHANA

UNIVERSITY OF LONDON
W.C.1.
15 FEBRUARY
INSTITUTE OF ADVANCED
LEGAL STUDIES

IN THE MATTER of PROPOSED BEMU RIVER
FOREST RESERVE BLOCK 1

B E T W E E N :

63668

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

- and -

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

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CASE FOR THE RESPONDENT

1. This is an appeal from the Judgment of the West African Court of Appeal dated the 26th November, 1957, allowing the appeal of the Respondent from the Judgment of the Court of the Reserve Settlement Commissioner of the Gold Coast dated the 12th February, 1957.

Record
pp. 42-58.
pp. 20-28.

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2. Both the Appellant and the Respondent claimed rights on behalf of their respective Stools over an area of forest land known as Block 1 of the Bemu River Forest Reserve. The area claimed by the Respondent included the whole of Block 1, while the Appellant claimed only the larger part of Block 1. The Reserve Settlement Commissioner held that the Respondent was precluded from giving any evidence or otherwise asserting his claim by virtue of the Judgment of the Privy Council delivered on the 2nd July, 1956 in the case of Nana Owudu Aseku Brempong III and Another v. Nana Darku Frempong II (Privy Council Appeal No. 24 of 1953) which is hereinafter referred to as "the Privy Council Case". The West

Ex.C., p.68.

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Record

African Court of Appeal held by a majority of two to one that the Privy Council Case did not estop the Respondent and accordingly they ordered that the claim be remitted for rehearing. The principal question to be decided on this appeal is whether or not the principle of Res Judicata applies in the circumstances of this case so as to prevent the Respondent from claiming rights over Block 1 for the purposes of the Forests Ordinance (Chapter 157 of the Laws of the Gold Coast, 1951).

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3. Section 4 of the Forests Ordinance empowers the Governor to constitute a Forest Reserve out of certain lands, including Tribal or Stool lands, in accordance with the provisions of the Ordinance. Section 7 of the Ordinance provides that notice of a proposal to constitute a Forest Reserve shall be given so as to enable any person or native community to claim any right affecting the land or rights over the land, and under Section 9 the Reserve Settlement Commissioner is required to conduct an Enquiry into and to determine the existence, nature and extent of the rights in respect of which he has received claims. Section 9 further provides that if in the course of the Commissioner's Enquiry any dispute arises as to the ownership of any land lying within the proposed Forest Reserve the Commissioner shall refer the dispute either to an appropriate Native Court or, if the dispute is not within the jurisdiction of such Court, it shall on the application of the Commissioner be referred to the Supreme Court for trial and determination. The proviso to sub-section (2) of the Section prescribes that it shall not be necessary to refer any dispute which has already been decided by any Native Court or other Court, and under sub-section (6) the Commissioner is obliged to accept and adopt the Judgment of the Court in question (including the Judgement of the Appellate Court) for all the purposes of his Enquiry and Judgment. Under Section 14 of the Ordinance every right in or over any land in respect of which no claim has been made is extinguished when the Commissioner delivers his Judgment, and Section 15 provides that the Judgment of the Commissioner shall (inter alia) specify those claims which the Commissioner considers not to have been established. Section 18 declares that the ownership of land is not altered by its constitution as a Forest Reserve.

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4. In this case, at the opening of the Enquiry

into the proposed Bemu River Forest Reserve on the 16th April, 1953, the Commissioner stated that he did 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 was a dispute lying within the jurisdiction of the Privy Council, and accordingly he excluded that area from the Enquiry for the time being. The area in question was thereafter designated as Block 1.

Record
p.2, 1.46.

- 10 5. At the reopening of the Enquiry on the 25th October, 1956, the Commissioner stated that as the Privy Council had now given its decision on the land issue he could proceed with the Enquiry with regard to Block 1. He then stated -

p.6, 1.8.

p.6, 1.11.

p.6, 1.26.

"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 effect Block 1.

- 20 "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 1. 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."

- 30 The Enquiry was again re-opened on the 27th November, 1956, when formal evidence was given by the Assistant Conservator of Forests, who stated as follows -

p.8, 1.42.

- 40 "Block 1 in which there was a land dispute between the Stools of Achiasi and Aperade has now been taken on appeal to the Privy Council where judgment has been given. I produce as Exhibits copies of the decisions given in the Supreme Court, Cape Coast, the West African Court of Appeal and Privy Council in respect of this land dispute."

The Conservator also tendered in evidence copies of two Gold Coast survey maps, scale 1 in 62,500, showing the boundaries of the whole Bemu River

p.8, 1.49.

Ex. D and E.

Record
Ex. F.
p.9, 1.16.

Forest Reserve and of Block 1, and also a plan of Block 1 on a scale of 1 in 12,500. In answer to a question from the Court he said -

"The Achiasi people showed the Forestry Survey- or their boundary which is shown on the plan. It was not necessary to show the Aperade claim as they were claiming the whole Reserve The farms in Block 1 belong to the Achiasi, Aperade, Awisa and Nyankumasi farmers."

p.10, 1.29.

In cross-examination by Counsel for the Respondent he stated -

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"I am not aware of any previous demarcation of land in Block 1 in connection with a dispute with Aperade. I do not know the exact boundaries between Achiasi and Aperade in their land dispute which has been before the Privy Council."

pp.12-13.

Both the Respondent and the Appellant gave evidence relating to the disposal of the revenue from the enjoyment of the rights they claimed over the land.

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p.14, 1.24.

6. The Enquiry was further adjourned to the 8th January, 1957, when the Commissioner stated as follows -

"The Court will now hear arguments by Counsel to decide on the correct interpretation of the Privy Council decision in so far as it affects the land in the Bemu River Block I. The Court cannot in any way re-open the land case or hear further evidence on this subject."

p.15, 1.4.

Counsel for the Respondent then said that he wished to produce some documents that would help the Court to understand the position. He said that these documents were not intended in any way to dispute the decision of the Privy Council but to help to clarify that decision. He said that they should have been produced in Court before but were not.

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p.15, 1.15.

Counsel for the Appellant objected to the production of such documents on the ground that they comprised further evidence and that it would be tantamount to re-opening the case. This objection was upheld by the Court. Counsel for the parties then addressed the Court solely on the basis of the Privy Council Case, except that they also produced and referred

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Ex. H and I.

to the maps which had been exhibited in that Case.

Record

10 7. The Privy Council Case was a joint claim by the Respondent and the Stool of Amanfupong for a declaration of title to an area of land described in the Writ of Summons by its boundaries with neighbouring Stools. The claim was brought against the Appellant, who, although he contended that he was entitled to part of the land claimed and produced maps purporting to show such land, did not himself ask for a declaration of title to such land or for any other relief. The Judge of the Lands Division of the Supreme Court decided in favour of the Respondent and his Co-Plaintiff on the ground that they had slept less on their rights than the Appellant, basing his decision on the case of Ado v. Wusu 4 W.A.C.A. 96. The West African Court of Appeal reversed this decision, holding that the principles of that authority were not applicable but that the case was governed by the principle of Kodilinye v. Odu 2 W.A.C.A. 336, citing the following passage -

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Ex. A, p.60.

Ex. B, p.65.

"The onus lies on the Plaintiff to satisfy the Court that he is entitled on the evidence brought by him to a declaration of title. The Plaintiff in this case must rely on the strength of his own case and not on the weakness of the Defendant's case. If this onus is not discharged, the weakness of the Defendant's case will not help him and the proper judgment is for the Defendant. Such a judgment decrees no title to the Defendant, he not having sought the declaration. So if the whole evidence in the case be conflicting and somewhat confused and there is little to choose between the rival traditional stories the Plaintiff fails in the decree he seeks, and judgment must be entered for the Defendant."

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p.67, l.20.

40 The Privy Council upheld the decision of the West African Court of Appeal on the ground that the Respondent had not made out his title to the land claimed on "the established principle in such cases, that a Plaintiff must succeed on the strength of the evidence that supports his own title not on any weakness in the evidence that might prove title in his Defendant." The Respondent will submit that the decision in this case turned very largely upon the impossibility of identifying precisely the

Ex. C, p.68.

Record

extent of the land claimed by the Respondent in that the boundaries had not been surveyed or mapped for the purposes of the case and the maps produced by the parties seriously conflicted. On this aspect of the case the Judgment of the Privy Council contained the following relevant passages -

- p.69, 1.5. "It is to be noted that neither in the Statement of Claim nor in the Order of the Court is there a reference to any plan by means of which it would be possible to identify the boundaries of the area in respect of which the declaration of title was thus granted. The description used is no more than a verbal description of the land There is nothing in the evidence which makes it possible to say that these are adequate descriptions of boundaries and in fact an Order made in such form would do little to settle the title to any particular disputed area
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- p.69, 1.22. "The Appellants called representatives of several Stools whose lands were said to border on the disputed area and they deposed that they had boundaries with the Appellants and not with the Respondent. But except for the testimony given for the Eduasa Stool no definition was afforded as to where these boundaries ran and this branch of the evidence therefore did not provide the useful proof that it might otherwise have done."
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8. On the 12th February, 1957 the Commissioner delivered Judgment in favour of the Appellant. At the conclusion of his Judgment he summarized his views as follows -
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- p.27, 1.27. "1. That Aperedade by the Privy Council decision have lost all the area they have claimed which area is shown on the plan, Exhibit 'H' produced in this Court and which plan was produced and accepted as Exhibit 'B' in the Supreme Court case.
2. That the area of Bemu River Block 1 is within the area claimed by Aperedade and does not border on any of the outer boundaries of the claim in such a way as to make the claims by either party to land in the Bemu River Block 1 vague or inadequate. The fact that no
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other Stool has yet contested the ownership to this land in the Reserve must indicate it belongs to either Aperade or Achiasi and the Courts have decided against Aperade.

Record

- 10 3. That the fact that no judgment was given by West African Court of Appeal or the Privy Council for Achiasi does not mean the land is not theirs and in the absence of any other claimants and since Achiasi are already occupying portion of the land it is assumed the area they claim in Block I belongs to them.

In view of the above this Court decides that the land claimed by Achiasi in Bemu River Block I as shown in the plan Exhibit 'F' belongs to Achiasi."

20 9. On appeal to the West African Court of Appeal Granville Sharp, J.A. was favourably disposed to the argument that in the circumstances of this case the dismissal of the Respondent's previous action did not constitute an absolute determination by the Court that the Respondent had no title so as to amount to an estoppel by judgment. He held, however, that this argument was not necessary for the purpose of a decision upon the appeal, since the subject matter of the two proceedings was not identical in that, as the Commissioner had found, the boundaries in dispute in the Privy Council Case in no way related to the boundaries involved in the case before him. The learned Judge held that it was not possible to equate the claims in the two proceedings merely because the land claimed in the second proceeding was contained somewhere within the land claimed in the previous proceeding. Van Lare, Acting Chief Justice, delivered a concurring Judgment, holding that the plea of estoppel failed if the previous Judgment was not sufficiently clear and unqualified with respect to the subject matter in the subsequent litigation, and that although the question involved in this Enquiry might be substantially similar to the one already decided it could not be said that it was the same question because the extent of the area was not the same. Ollennu J. in his dissenting Judgment was of opinion that the Judgment in the Privy Council operated as Res Judicata, and that the Commissioner was right in so deciding on the grounds that the title

p.49, 1.1.

p.50, 1.36.

p.51.

p.52, 1.15.

p.52, 1.42.

p.58, 1.4.

of the Respondent was in issue in both instances and that the physical subject matter in dispute in the Privy Council Case included within it and comprehended the physical subject matter of the present case.

10. On the 26th May, 1958 the Court of Appeal, Accra, granted the Appellant final leave to appeal to Her Majesty in Council.

11. The Respondent humbly submits that this Appeal should be dismissed and that the Judgment of the West African Court of Appeal should be affirmed or that the dispute should be transferred to the appropriate Division of the Supreme Court of Ghana for trial and determination for the following, among other 10

R E A S O N S

- (1) BECAUSE the rule of Res Judicata does not apply in that the subject matter of the Privy Council Case was not identical with the subject matter of the Enquiry before the Commissioner. 20
- (2) BECAUSE in the circumstances the decision in the Privy Council Case does not constitute an absolute determination of the rights of the parties so as to involve the rule of Res Judicata.
- (3) BECAUSE the area as to which Declaration of Title was claimed by the Respondent and refused by the Court in the Privy Council Case comprised a larger area than that claimed in that case by the Appellant but neither the Judgments of the West African Court of Appeal nor of the Privy Council purported to decide where the boundary lay between the lands of the Appellant and Respondent respectively. 30
- (4) BECAUSE, although the Commissioner purported to apply the decision in the Privy Council Case, he in fact accepted that the boundaries of the land claimed by the Appellant were not ascertainable from the record of the Privy Council Case and decided that such land belonged to the Appellant, on the basis of evidence of a unilateral marking out and demon- 40

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stration of such land by the Appellant to the Forestry Surveyor, which the Respondent had no opportunity to challenge.

(5) BECAUSE the Respondent is not precluded by the dismissal of his claim for a declaration of title to the land at law from claiming rights over the land for the purposes of the Forests Ordinance.

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(6) BECAUSE the majority decision of the West African Court of Appeal is correct and ought to be affirmed, alternatively because there is a dispute as to the ownership of the land in Block 1, which dispute has not already been decided and ought to be referred to the Supreme Court for trial and determination.

MAURICE LYALL

JOSEPH DEAN

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Appellant

-- and --

NANA OTSIBU ABABIO II, OHENE
OF APERADE (Claimant)
Respondent

CASE FOR THE RESPONDENT

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