THE LAW PLATFORM

GOLIGHTLY v. ASHRIFI

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

19 TH DECEMBER, 1960

CORAM: LORD COHEN, LORD KEITH OF AVONHOLM AND LORD DENNING

Customary law | Ga land tenure | Position of Korle priest | Meaning of caretaker.

Estoppel | Res judicata | Whether judgment in a suit instituted in one capacity estops person from suiting on the same subject-matter in an entirely different capacity.

Practice | Point not canvassed in court below | Whether permissible to argue same in Privy Council.

CASE SUMMARY

This case concerned the disputed ownership of a tract of land lying to the north of Accra known as the Kokomlemle lands, which are some two square miles in extent. Some years ago this was open country with a few mud huts on it. It is now being developed as a residential suburb. The principal contestants for years have been, on the one hand, the Atukpai family (which was represented before their Lordships by Nii Tettey Gbeke II); and on the other hand, the Korle family (which was represented before their Lordships by Numo Ayitey Cobblah, the Korle priest.)

The Okaikor Churu family were given the right to farm land at Kokomlemle by the Gbese stool and had been in possession of the land ever since 1875. In 1942, the Atukpai family, claiming to be owners of the land, sold it to purchasers who put up buildings on it. In 1943, the head of the Okaikor Churu family brought an action claiming, inter alia, declaration of title, and later on the Korle priest was joined as co-plaintiff. On the 31st May, 1951, the trial judge, Jackson J., held that the Atukpai family had no right to the land at all and that the Korle family did have a right to it, not by itself alone, but only in conjunction with the two other stools, the Ga stool and the Gbese stool. The declaration made by Jackson J., that the plaintiff and her family "are possessory owners . . . subject to the rights of the Ga and Gbese and Korle stools who are recognised by customary law as being the allodial owners of that land" was similar to the declaration in Suit No. 33 of 1950 (with which their Lordships were not concerned) where the Korle priest was granted a declaration that he was the "caretaker" of stool lands on behalf of the Ga, Gbese and Korle stools.

The West African Court of Appeal (Foster-Sutton P, Smith., C. J., and Coussey, J. A.) affirmed the judgment of Jackson, J. The Atukpai family appealed to the Privy Council against the finding that the Korle family had any right or interest in the land, save as caretakers of it, and the issue to be decided, therefore, was the position of the Korle priest qua caretaker.

Held:

(1) the word "caretaker" does not mean one who looks after land for another but simply connotes one who has an interest in the land. Dicta of the trial judge, Jackson J. approved and applied;

(2) that the findings of the West African Court of Appeal which affirmed the findings of the trial judge save in one respect, should be accepted;

(3) that the Korle priest as the caretaker of the lands may make grants of lands to members of the stool for specific purposes, that is, to farm or to build for the purposes of residence or trade; but this right can only be exercised over land which is deemed to be unappropriated;

(4) that an outright alienation or sale of the lands can only be effected with the prior consent of the three stools, the Ga, Gbese and Korle stools, and that publicity is necessary in such transactions, the publicity being a safeguard provided by customary usage against the clandestine disposal of land without the knowledge of the necessary parties;

(5) that the three stools cannot, however, alienate stool land without obtaining the consent and concurrence of individuals or families who are lawfully in occupation of the land, such as subjects of the Gbese stool who are in occupation, or strangers who have been properly granted some interest, be it farming or occupation interest, in the land.

Judgment of the West African Court of Appeal affirmed.

Obiter: Only in exceptional cases may a point be taken before the Privy Council which has not been taken in the appeal court. The submission that the question was res judicata, having already been settled by the West African Court of Appeal on the 13th December, 1947, was in any case without foundation as it was quite apparent that the Korle priest sued in different capacities in the two proceedings.

CASES REFERRED TO

(1) Yawah v. Maslieno (1930) 1 W.A.C.A. 87

(2) Angu v. Attah (1916) P.C. '74-'28, 43

NATURE OF PROCEEDINGS

APPEAL (No. 31 of 1958) from the judgment of the West African Court of Appeal (Foster-Sutton P., Smith C. J. (Nigeria) and Coussey J.A.) reported at (1955) 14 W.A.C.A. 676. The actions under appeal formed part of 25 consolidated actions, the first of which was commenced early in 1940 and the last on the 27th July, 1950. They were tried before Jackson J., and judgment was given on the 31st May, 1951. In sixteen out of the 25 actions appeals were taken to the West African Court of Appeal which on the 4th March, 1955, affirmed the decision of Jackson J. on all issues. In the sixteen actions appeals were taken to the Privy Council. The actions dealt with in this appeal were suits Nos. 11 and 15 of 1943, 2 and 7 of 1944, 5 of 1949, 39 and 46 of 1950 and 7 of 1951. This report is concerned only with suit No. 15 of 1943. The facts are sufficiently set out in the judgment of the Privy Council.

JUDGMENT OF LORD DENNING

Lord Denning delivered the judgment of their Lordships. [He set out the history of the Korle people and of the previous litigation. His Lordship then dealt with suits Nos. 11 of 1943, 7 of 1944, 5 of 1949, 39 of 1950, 2 of 1944, 46 of 1950 and 7 of 1951. In each case the decision of the trial judge and the West African Court of Appeal was affirmed. His Lordship continued:] Suit No. 15 of 1943: A family named Okaikor Churu had been in possession of land at Kokomlemle ever since 1875. They had been given the right to farm it by the Gbese stool. Distinguished members of the Gbese stool were buried on the land. When the trial judge visited it he found a tomb with a headstone showing that in 1932 a priest was buried there. In 1942, however, the Atukpai family claimed to be the owners of the land. They sold it to purchasers who put up buildings on it. In 1943, the head of the Okaikor Churu family brought an action against the Atukpai family claiming a declaration of title, £G100 damages for trespass and an injunction. Later on the Korle priest was apparently joined as co-plaintiff. At the trial in 1951, the learned judge decided in favour of the plaintiffs and made a declaration which does decide the essential issues in this appeal. His order was as follows:—

"The plaintiff, Afiyie, is granted a declaration that she and the other members of the Okaikor Churu Family are possessory owners of that portion of land [here it is described] which they are entitled to use for purposes of farming and residence by the members of their family, subject to the rights of the Ga and Gbese and Korle Stools who are recognized by customary law as being the allodial owners of that land.

"In respect of the trespass by authorising this building of a house [described] the nature of the trespass was one which has destroyed the character of the land as farming land and was persisted in despite protest . . . . I assess the general damages at £G100.

"The plaintiff is granted the injunction prayed for (that is to say, a perpetual injunction restraining the Atukpai people from entering upon the land or dealing with it in any manner whatsoever)".

Their Lordships are clearly of opinion that this declaration and injunction does decide the rights of these families in a manner which is binding on them. Their Lordships read the word "allodial" as meaning that the three stools are owners free of external control. They do not hold of anyone else. The declaration in that suit, therefore, is similar to the declaration in suit No. 33 of 1950 (which is not subject to appeal to their Lordships) where the judge granted to the Korle priest "a declaration that he is the "caretaker" of stool lands on behalf of the Ga, Gbese and Korle stools and of which lands described in the writ they are the owners". It appears to their Lordships that, by appealing in suit No. 15 of 1943 against the declaration, the Atukpai people are entitled to have resolved the question they desire: what is the position of the Korle priest?

Mr. Khambatta for the Atukpai family argued that the question was concluded by the action (suit No. 12 of 1943) decided by McCarthy J., in 1947, which was affirmed by the West African Court of Appeal, to which their Lordships have already referred. He said that in that action the Korle priest claimed to be the owner of the Kokomlemle lands, and having failed in his claim, he must abide by that failure and could not claim any interest in the Kokomlemle lands now. The question was, he said, res judicata.

Mr. Dingle Foot took a preliminary objection. He said that it was not open to Mr. Khambatta to take this point of res judicata. Their Lordships ruled in favour of Mr. Foot’s submission. True it is that the point had been pleaded in one of the consolidated actions (suit No. 33 of 1950) but the trial judge decided against it. And it had not been raised in the West African Court of Appeal. The appellants at that time apparently acquiesced in the view that there was no res judicata. In these circumstances their Lordships held that they would not allow it to be raised before them. Only in the most exceptional circumstances would their Lordships allow a point to be taken before them which had not been taken in the Court of Appeal. And there were no such exceptional circumstances here.

Now that their Lordships have heard all the case, they would like to say that there is no foundation whatever for the suggestion that the question was res judicata. In the previous action, No. 12 of 1943, the Korle priest claimed to be absolute owner of the land free of any control by the Ga or Gbese stools. The Ga stool and the Gbese stool had applied to come in as parties and had been refused. Whereas in the 25 consolidated suits the Korle priest no longer claimed to be the absolute owner. He sued and was sued as the "Korle priest for and on behalf of the Korle stool, Gbese stool and Ga Mantse stool." The trial in the judge especially amended the proceedings consolidated suits so as to enable him to be so described. At the trial the three stools were represented by counsel. Mr. Hutton-Mills appeared for the Ga Mantse stool, and Mr. Lamptey for the Korle and Gbese stools: and at the hearing before their Lordships Mr. Dingle Foot expressly stated he appeared for that all three stools. It is quite apparent therefore that the Korle priest sued in different capacities in the two proceedings. In the previous proceedings he claimed on behalf of the Korle family or stool solely as absolute owners of the land. In the present three stools as owners together. Both McCarthy, J. and the West African Court of Appeal made it quite clear that the decision in the previous proceedings was not to prejudice such a claim as that made in the present proceedings.

Mr. Khambatta, defeated on his plea of res judicata, then sought to say that the decision of the judge was wrong in so far as he held that the three stools were the owners of Kokomlemle lands. Mr. Khambatta argued that the Korle stool was a mere caretaker, that is to say, a person who takes care of the property on behalf of another but has no right or interest in the lands himself. Their Lordships cannot accept this view. There are some cases where under customary law a caretaker may correspond to a caretaker in English law, see Yawah v. Maslieno1. But there are many others where he may be a person who not only takes care of the land but also has a right or interest in it himself. In the present case the learned trial judge said of the Korle family:—

"Today they are described as being the "caretakers" of these lands for the Ga, Gbese and Korle Stools. But it must be clearly understood that the word "caretaker does not mean simply one who looks after land for another, but connotes one who has an interest in the land."

Their Lordships accept this view which they think is clearly correct.

What then is the position of the Korle priest? This is a question of native customary law which:

"has to be proved in the first instance by calling witnesses acquainted with it until the particular customs have by frequent proof in the Courts become so notorious that the Courts take judicial notice of them."

see Kobina Angu v. Cudjoe Attah.2 In the present case it was found by the West African Court of Appeal on a careful consideration of all the evidence:—

(1) that the Korle priest as the caretaker of the lands may make grants of lands to members of the stool for specific purposes, that is, to farm or to build for the purposes of residence or trade: but this right can only be exercised over land which is deemed to be unappropriated;

(2) that an outright alienation or sale of the lands can only be effected with the prior consent of the three stools, the Ga, Gbese and Korle stools and that publicity is necessary in such transactions, the publicity being a safeguard provided by native customary usage against the clandestine disposal of land without the knowledge of the necessary parties;

(3) that the three stools cannot however alienate stool land without obtaining the consent and concurrence of individuals or families who are lawfully in occupation of the land, such as subjects of the Gbese stool who are in occupation, or strangers who have been properly granted some interest, be it a farming or occupation interest, in the land.

In making these findings the West African Court of Appeal was affirming the findings of the trial judge save in one respect. He had held that the land could not be sold outright except to satisfy a stool debt. The West African Court of Appeal, as their Lordships think rightly, disagreed with him in this: but in all other respects affirmed

his findings. There are therefore two concurrent findings on the points their Lordships have mentioned and they think they should be accepted.

DECISION

Their Lordships will therefore report to the President of Ghana as in their opinion that the appeals should be dismissed and that the appellants should pay the costs.

COUNSEL

S. P. KHAMBATTA, Q.C., JOHN PLATT-MILLS, MISS ROSINA HARE AND J. W. MCDONALD (FOR MR. PLATT-MILLS ON THE 15TH AND 16TH NOVEMBER, 1960) FOR THE APPELLANTS.

DINGLE FOOT, Q. C., J.G. LE QUESNE AND JOHN BAKER FOR THE RESPONDENTS.