# ADJEI III v. ADJEDU II

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

## 21 ST MARCH, 1961

**CORAM: LORD TUCKER, LORD KEITH OF AVONHOLM AND LORD HODSON**

*Estoppel | Res judicata | Dispute over stool land boundaries | Whether judgment not given on a question of ownership operates as estoppel in subsequent dispute between same parties about same land.*

*Costs | Adjournment of hearing as result of receiving unauthorised cable.*

## CASE SUMMARY

The Ohene of Okadjakrom, the appellant herein and the Ohene of Atonkor, the respondent herein, both sought declaration of title to an area of land known as Kafetonku land. The dispute was one of long standing, going back to the 1920's when a Captain Lilley, District Commissioner, gave directions for the fixing of a boundary between the two contending stools. As a result two terminal boundary marks seem to have been set, but their precise location was in doubt. In 1940, a suit was started before the Buem State Council by the Atonkor stool against the Okadjakrom stool for damages for trespass, claiming that there was a recognised boundary demarcated by order of Captain Lilley between the lands of the two stools. After evidence and a view of the land, the Buem State Council found that, though Captain Lilley gave orders for the cutting of the boundary path there was no proof that a boundary was cut. The judgment given on the 2nd July, 1940 concluded "Judgment is for defendant with costs to be taxed. Defendant to retain his farms. No order as to the fixing of boundary is made until one or both of the parties move this Court for it".

In dismissing an appeal from this judgment the Provincial Commissioner said: "unfortunately the finding of Captain C.C. Lilley cannot be interpreted owing to mutilation. This is therefore valueless and must be ignored. If it were possible to interpret Lilley's judgment I would have ordered the boundary to be surveyed and cut but unfortunately this is impossible".

A further appeal to the West African Court of Appeal was also dismissed.

Further unsuccessful attempts were made to have boundary demarcated and cut, and finally the present proceedings were initiated by the Okadjakrom stool against the Atonkor stool for declaration of title to the said land, damages for trespass and injunction. The plaintiff, who was successful in the Supreme Court, relied upon the judgment of the 2nd July, 1940, and subsequent interlocutory proceedings as constituting an estoppel per rem judicatam against the Atonkor stool. The West African Court of Appeal held that the judgment of the 2nd July, 1940, could not be read as a declaration of title in favour of the Okadjakrom stool.

In a further appeal to the Privy Council, the hearing was adjourned on the second day in consequence of a cablegram informing counsel for the respondents that the dispute had been settled. It later transpired that the sending of the cablegram was unauthorised and the dispute had not in fact been settled.

Held:

(1) where a judgment has been given in a dispute between two parties on a question of ownership, the party in whose favour the judgment was given is entitled to stand on his judgment;

(2) the 1940 action however, decided nothing as to the ownership of land; it was an interim decision leaving matters in statu quo pending the fixing of a boundary and it is not for their Lordships to say how this should be done. Accordingly, no question of estoppel arises; Kwadjo II v. Kwasi, W.A.C.A. February 17, 1947, unreported, distinguished;

(3) the respondent's costs, to be borne by the appellants, should be modified to three-quarters of their cost of the appeal by reason of the adjournment which had meant extra cost to the appellant.

Judgment of the West African Court of Appeal affirmed.

CASES REFERRED TO

(1) Okadjakrom Stool v. Atonkor Stool (1956) 1 W.A.L.R. 162, W.A.C.A.

(2) Abutia Kadjo II v. Addai Kwasi, W.A.C.A. February 17, 1947, unreported.

NATURE OF PROCEEDINGS

APPEAL (No. 24 of 1958) from the judgment of the West African Court of Appeal (Ames, Ag. J.A., Coussey P., and Jackson, Ag. J.A.) delivered on the 25th February, 1956 (reported sub nom. Okadjakrom Stool v. Atonkor Stool at (1956) 1 W.A.L.R. 162) which set aside the ruling and order of Korsah Ag. C.J. in the Land Court, Eastern Judicial Division given on the 16th July, 1954, on transfer of the case from the Buem Native Court, in an action for declaration of title to land, damages for trespass and a permanent injunction. The facts are set out in full in the report of the judgment of the West African Court of Appeal at (1956) 1 W.A.L.R. 162.

JUDGMENT OF LORD KEITH OF AVANHOLM

He delivered the judgment of their Lordships. [He referred to the facts as set out in the headnote and the previous proceedings and continued:] The present proceedings were initiated by the Ohene of the Okadjakrom stool against the Ohene of the Atonkor stool for (1) declaration of title to the said land: (2) damages for trespass; and (3) injunction. He relied on the judgment of the 2nd July, 1940, and the subsequent interlocutory proceedings as constituting an estoppel per rem judicatam against the Atonkor stool. In the statement of defence the Atonkor stool contended that the judgment of the 2nd July, 1940, was not complete and did not constitute an estoppel per rem judicatam. It in turn claimed a declaration of title and an injunction. The Supreme Court (Korsah, Ag. C.J.) held that by virtue of the previous proceedings the Atonkor stool was estopped from denying the plaintiff's title and granted perpetual injunction as craved. On appeal to the West African Court of Appeal (Ames, Ag. J.A., Coussey, P. and Jackson, Ag. J.A.) this judgment was set aside and it was ordered that the hearing of the two consolidated suits be continued.

Ames, Ag. J.A. with whom Coussey, P. And Jackson, Ag. J.A. concurred, held, in their Lordships' view rightly, that the judgment of the 2nd July, 1940, could not be read as a declaration of title in favour of the Okadjakrom stool. The Provincial Commissioner did not, he said, so regard it. "Otherwise", he said, "what need to regret not being able to find out where Lilley intended his line to run." His view is summarised in the penultimate paragraph of his judgment as follows:1

"Since the argument in court my attention has been drawn to a case which was before this court in 1947, Kwadjo and Another v. Kwasi. The judgment of this court, dated February 17, 1947, approved and applied an observation of this court made in an earlier case Kwasi v. Kwadjo about the same land between the same parties but the other way round, in which the earlier plaintiff had sued the earlier defendant for a declaration of title to the land in dispute without there being any counterclaim by the earlier defendant for a declaration of title. The observation was this: `In such cases' (meaning those in which a plaintiff claims a declaration of title but fails) `the proper course is merely to dismiss the plaintiff's claim. This, of course, does not mean that the matter is any the less res judicata in favour of the defendant'.

In applying that observation in the 1947 case this court said:-

'. . . It is clear that the learned judges in that case were endeavouring to make it clear that although a declaration of ownership and possession could not be given in the particular case before the court because of the omission on the part of counsel for the defendant to enter a counterclaim to this effect nevertheless the judgment would be a bar to any further proceedings between the parties.'

That case, which at first sight seems similar to this one, is nevertheless distinguishable. I have not the pleadings in the case, but from the judgment one must presume that it was the ownership of the land which had been in issue in the earlier case and which had been adjudicated upon.

In this 1940 case between Atonkor and Okadjakrom the Buem Court did not adjudicate upon the ownership of the land although the appellant had claimed a declaration to the land behind his alleged boundary line. The court adjudicated only upon the issue 'is there an established boundary?' and omitted to consider where the boundary ought to be and how much, if any, of the land in dispute was owned by the appellant. There has been no adjudication upon these latter questions."

The argument for the appellant before their Lordships' Board turned wholly upon the plea that the Atonkor stool was estopped by the 1940 decision from seeking a declaration of title to the land in dispute. Conversely, it might be put that the Atonkor stool was estopped by the previous decision from challenging the right of the Okadjakrom stool to a declaration of title. No question of estoppel, in their Lordships' opinion, arises at all. It is clear in their view that the 1940 decision decided nothing as to the ownership of the land. It may be that part of the land belongs to one stool and part to the other, or that the whole belongs to one stool or to the other. Nothing on this point was ever decided, for no boundary was ever fixed. No question of ownership can be determined until this is done. The decision of 1940 must be taken as an interim decision leaving matters in statu quo pending the fixing of the boundary. It is not for their Lordships to say how this must be done, or to consider the evidence in the matter of the boundary. That matter is not before the Board and has been reserved by the order of the West African Court of Appeal.

As considerable argument was developed by counsel for the appellant on the doctrine of res judicata their Lordships would only say that where a judgment has been given in a dispute between two parties on a question of ownership, the party in whose favour the judgment was given is entitled to stand on his judgment. Estoppel operates against the party who has lost if he seeks to dispute the rem judicatam. The Okadjakrom stool has no judgment here on which it can stand in the matter of ownership and no question of estoppel against the Atonkor stool can accordingly arise. Reference was made by appellant's counsel to the case of Abutia Kwadjo II and Another v. Addai Kwasi2 decided in the West African Court of Appeal on the 17th February, 1947, a copy of the judgment in which was supplied to their Lordships. This is dealt with by the Court of Appeal in the present case and their Lordships agree with the view expressed by Ames, Ag. C.J. that that was a case where the question of ownership had already been adjudicated upon in an earlier case. This earlier case, between the same parties, apparently not brought to the notice of the Court of Appeal in the present proceedings, but their Lordships were furnished with a copy of the judgment of the West African Court of Appeal in the case, dated the 2nd February, 1944. This judgment confirms the view taken by Ames, Ag. J.A. It is true that in this and in some other cases in West Africa to which their Lordships were referred no declaration of title which could be relied on as a res judicata had been made, but this was regarded as a mere procedural defect not derogating from the substance of what was decided in the earlier action. This cannot be said in the present case.

In the course of the hearing before the Board, on the second day of the hearing on the 6th October, 1960, their Lordships were informed by counsel for the respondents that a cable had been received from his clients in West Africa that this land dispute had been settled. Further hearing of the appeal was accordingly adjourned. It

thereafter transpired that the dispute had not been settled and that the respondents had no authority from the appellant to transmit the cablegram. The consequent adjournment of the hearing has meant extra costs to the appellant. Their Lordships accordingly propose that the respondents' costs which will fall to be borne by the appellant should be modified to three-quarters of their costs of the appeal.

DECISION

Their Lordships will accordingly report to the President of Ghana, as their opinion, that the appeal ought to be dismissed and that the appellant should pay three-quarters of the respondents' costs of the appeal.

**COUNSEL**

**A. GARFITT FOR THE APPELLANT**

**G. DOLD FOR THE RESPONDENT.**