NKANSAH II v. YIADOM III

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

21 ST MARCH, 1960

CORAM: VISCOUNT SIMONDS, LORD JENKINS AND THE RT. HON. MR. L. M. D. DE SILVA

Estoppel | Respondent joined as defendant in 1940 action for declaration of title to land | No evidence of dispute between respondent and plaintiff | Failure of respondent to have himself discharged from action | Whether respondent bound by declaration made in 1940 action with regard to the land | No formal order drawn up | Courts Ordinance, Cap. 4 (1951 Rev.) Sched. II Order 41, r.4.

CASE SUMMARY

The appellant, Nana Yao Nkansah II, Ohene of Bukuruwa, claimed declaration of title to a parcel of land situated in the Kwahu State and edged red in a plan produced in the proceedings, possession and damages for trespass. In a statement of claim filed in the Supreme Court, he set out a historical title to the red land and pleaded further that the respondent, the Ohene of Nkwatia, was estopped from denying the title of the appellant by reason of a judgment entered in a case commenced by the Bukuruwa stool in 1940 (hereafter called the 1940 action). It was assumed that the 1940 action concerned land identical with the land claimed by the present appellant. The 1940 action, however, was mainly between the two opposing stools of Kwahu and Wusuta, who were later added as co-plaintiff and defendant respectively. Although the present respondent had, on his own application, also been added as defendant, he had taken no further part in the 1940 action. For the present appellant it was argued that since the respondent had failed to have himself discharged from the 1940 action, he, the respondent, was bound by the declaration made in it with regard to the land.

The respondent, Nana Asante Yiadom III, Ohene of Nkwatia, denied the historical title alleged by the appellant and set out his own historical title, counterclaiming a portion hatched pink within the red land. He also denied the alleged estoppel.

The Supreme Court held that the respondent had established ownership of a portion of land edged green subject to over-riding rights of allegiance to the Kwahu State, but that the respondent was estopped from denying the appellant's title by reason of the judgment in the 1940 action. The West African Court of Appeal, reversing the

Supreme Court, held that the plea of estoppel failed and entered judgment for the respondent in respect of the green land.

Held: the respondent was not estopped by the 1940 action because

(1) that action was treated by all concerned as a battle between the two opposing stools, Kwahu and Wusuta. There was in fact no evidence relevant not to any dispute between the Bukuruwas and Nkwatias;

(2) no formal order was asked for and none drawn up in the 1940 action. But the course the action took and the words used by the trial judge in that action indicated that the learned judge intended the judgment to be binding on the Wusuta stool only, and that if he had been asked for a formal decree he would have so drawn it up as to be of no effect on anyone save the Wusutas;

(3) towards the end of the proceedings in the 1940 action the plaintiff had amended "the description of the land claimed in the writ of summons". This amendment had been effected in the absence of the respondent and without notice to him. A judgment based on that amended writ of summons could not therefore estop the respondent per rem judicatam.

Judgment of the West African Court of Appeal affirmed.

NATURE OF PROCEEDINGS

APPEAL (No. 15 of 1957) from the judgment of the West African Court of Appeal (Foster-Sutton, P., Coussey and Hearne JJ.A), delivered on the 4th March, 1955, which reversed the Land Division of the Supreme Court of the Gold Coast. The action was instituted in the Grade "A" Native Court of Kwahu and transferred to the Supreme Court in December, 1950.

JUDGMENT OF MR. M.L.D. DE SILVA

M.L.D. De Silva delivered the judgment of their Lordships. The only point in dispute between parties in this appeal and the only point for decision by their Lordships is whether or not the plea of estoppel is entitled to succeed. It is agreed by the parties that if the plea of estoppel succeeds the appeal ought to be allowed and that if it fails it should be dismissed. Their Lordships will now examine the judgment and proceedings in the 1940 action upon which the plea is based.

That action was begun in 1940 in the Tribunal of the Paramount Chief of Kwahu between Bukuruwa stool as plaintiff and the Chief of Atipradaa and one of his subjects as defendants for a declaration of title to the land. The suit was thereafter transferred to the Supreme Court of the Gold Coast in March, 1942. There was some dispute as to whether the land which was the subject-matter of that action was identical with the land claimed by the present appellant but in view of what follows it is not necessary for their Lordships to decide that point. Their Lordships will assume

without deciding against the respondent (who succeeds on the appeal) that it was identical.

In July, 1942, on the application of the Burukuwa stool, the Chief of Wusuta was added as a defendant on the ground that the original defendants were his subjects and claimed to occupy the land under his authority. The Bukuruwa stool in its statement of claim (in the 1940 action) pleaded that the predecessor of the Chief of Atipradaa had been permitted by the Bukuruwa to hunt, reside and make farms on payment of tolls but now refused to pay tribute and, in concert with the Chief of Wusuta, claimed the property as part of the stool property of the Wusuta stool.

In 1943, a surveyor and the parties visited the land in order to prepare a plan for the purposes of the case. In January, 1944, the respondent made an application to be joined as a defendant on the ground that when the surveyor visited the land the elders of his stool had been invited to be present and had discovered that a large part of the land claimed in the action was the respondent's stool land. On the 11th February, 1944, this application, though opposed was granted. An appeal against the order for joinder was dismissed on the 22nd November, 1944, by the Court of Appeal.

On the 25th August, 1945, on an application made by the present appellant (plaintiff in the 1940 action), the Paramount Chief of Kwahu was joined as co-plaintiff on the ground that he had an interest in all Kwahu lands and that the lands in dispute were a portion of the lands held under him.

Thereafter the respondent took no further part in the 1940 action. It has been said on his behalf in this action that he did so because of an arrangement with the Paramount Chief in order not to embarrass him in the proceedings against the Wusutas. But he took no steps to have himself discharged from the action. It is argued for the appellant that the respondent was a party to the 1940 action and is consequently bound by the result of the case, namely a declaration of title in favour of the plaintiffs. It is to be observed that the declaration was not in favour of Bukuruwa alone; it was in favour of the Bukuruwa and the Paramount Chief of Kwahu. Their Lordships do not find it necessary to go into the question how far this fact would affect a plea of res judicata by the Bukuruwa alone if the plea was otherwise valid because they find it fails on other grounds.

In holding that the plea of estoppel failed the President of the Court of Appeal with whom the other judges concurred said:—

"there are points which, in my view, strongly support the appellant's [respondent on the appeal to their Lordships] contention that there was an understanding that his predecessor should drop out of the action when the Omanhene had been joined as a co-plaintiff and it became clear that the battle was really between the Kwahu and the Wusuta (Ewes).

Firstly, it seems odd that he should after strenuous efforts to be joined as a defendant, for no apparent reason unless it was for the one alleged, suddenly drop out of the case. In this connection I think it relevant to refer to three pieces of evidence given by witnesses called by the plaintiffs in the former case. [This is a

reference to the 1940 action]. The sixth witness, Emmanuel Otukwa, said: 'At one time Nkwatia claimed the middle part of the land in dispute from us. As the result of the intervention of the Omanhene the claim was settled,' and again, 'For some reason or other the Nkwatias got joined as co-defendants, but on the Omanhene becoming co-plaintiff, they withdrew', and their 18th witness, G. V. Johnson, clerk to the Omanhene and State Secretary, said: 'The Nkwatias claim that they own land between Asabi and Nkami lands. They do not claim any other parts of the land in dispute. However, this is an internal dispute between Nkwatia and Bukuruwa, which has nearly been settled by the Omanhene'. Secondly, it is quite clear that in the former case the Omanhene claimed title to a portion of the land in dispute through the Nkwatia Stool, vide the three letters Exhibits 'M', 'N' and 'O' which were put in evidence through the State Secretary, G. V. Johnson. Thirdly, the passage in the judgment of M'Carthy, Ag. C.J., where he said. 'The plaintiffs press for a declaration in respect of all the land claimed by them. Although it is realised that such a judgment will only be binding on the Wusuta stool and those claiming under it,' from which it would seem clear that the case had been treated by all concerned as a battle between the two opposing stools, Kwahu and Wusuta.

And fourthly, the name of the appellant's predecessor ceased to appear in the title of the case, and no judgment was asked for, or given, against him at the conclusion of the trial.

In all the circumstances I am of the opinion that the appellant is not estopped from setting up his present claim by reason of the judgment in the former case, and I think the learned trial judge erred in holding that he was."

The learned trial judge on the evidence before him refused to hold that there was an agreement made between the parties during the 1940-47 trial that the Nkwatiahene should withdraw from the action. It appears from the preceding paragraph that the Court of Appeal on a strong line of reasoning took the opposite view. From what follows it will appear that it is not necessary to decide which view is correct.

Their Lordships agree with the Court of Appeal that in the 1940 action the Paramount Kwahu Chief "claimed title to a portion of the land in dispute through the Nkwatia Stool." It is also to be observed that the final view of McCarthy, J, who tried the 1940 case regarding the evidence is stated thus: "My view is that the balance is slightly in favour of the Kwahu Stools." The facts already stated and a review of the 1940 action as a whole lead their Lordships to the same conclusion as the Court of Appeal namely that it "had been treated by all concerned as a battle between the two opposing stools, Kwahu and Wusuta." There was in fact no evidence relevant to any dispute between the Bukuruwas and Nkwatias. It is argued nevertheless that as the respondent failed to have himself discharged from the action he is bound by the declaration made in it with regard to the land.

It is relevant at this stage to note the provision with regard to decrees which is to be found in rule 4 of Order 41 of the General Procedure Rules namely: —

"4. A minute of every judgment, whether final or interlocutory, shall be made and every such minute shall be a decree of the Court, and shall have the full force and

effect of a formal decree. The Court may order a formal decree to be drawn up on the application of either party."

No formal order was asked for or drawn up in the 1940 action. The passage in the judgment, "The plaintiffs press for a declaration in respect of all the land claimed by them, although it is realised that such a judgment will only be binding on the Wusuta Stool and those claiming under it" (vide above) appears to their Lordships to possess great significance. The whole course of the 1940 action and the words just quoted indicate that the learned judge intended that the judgment should be binding on the Wusuta stool only. It is true that the words were used in a passage of his judgment where the immediate question under consideration was whether the declaration to be granted should cover all the land claimed by the plaintiff or only that part of it claimed by the Wusutas. But the course the case has run and the judgment convinces their Lordships that a dominant idea in the mind of the judge was that the Wusuta stool only was to be bound by anything decided and that if he had been asked for a formal decree he would have so drawn it as to avoid its having any effect on anyone but the Wusutas.

Their Lordships have also observed that at the very end of the proceedings in the 1940 action counsel for the plaintiff asked permission to amend "the description of the land claimed in the writ of summons". This amendment was allowed in the absence of the Nkwatia defendant and without any notice to him. If a formal decree had been drawn up it would not have been made binding on a party who had had no notice of this amendment.

For the reasons they have given their Lordships are of opinion that the judgment in the 1940 action could have no effect upon the claim now asserted by the respondent in this case.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of this appeal.

COUNSEL

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R. WALTON AND R. F. SOLOMAN FOR THE RESPONDENT.