Privy Council Appeal No. 43 *of* 1951

Alhaji Ibrahimah of Sekondi - - - - - - - *Appellant*

v.

Mamma Gariba and others - - - - - - - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH OCTOBER, 1954

Present at the Hearing :

LORD COHEN

LORD KEITH OF AVONHOLM

MR. L. M. D. DE SILVA

[*Delivered by* LORD COHEN]

The main question at issue in this appeal is whether a house at Old Zongo in the Gold Coast (hereinafter referred to as "the old house") was in the year 1911 the property of one Salamatu (alias Salam Attah Mami Attah or Krama or Kramo Atta) or of her husband Mallam Gariba.

All the parties to this litigation are by birth or adoption members of the same family which is part of the Hausa tribe and Moslem by religion. The respondents (hereinafter referred to as "the plaintiffs") are children of Mallam Gariba. The first two plaintiffs are his sons by another wife Fati Wangara. The third plaintiff is his daughter by a third wife whose name does not appear in the evidence. The appellant (hereinafter referred to as the defendant) is the adopted son of Salamatu.

It is common ground between the parties that at some time after the marriage of Salamatu to Mallam Gariba they lived together in the old house. Fati Wangara also appears to have lived there. It is further common ground that at some date prior to the year 1911 Mallam Gariba left Old Zongo and went abroad to "the French Ivory Coast" leaving his wives and family at Old Zongo. He never returned to the Gold Coast and died in the year 1935.

In the year 1911 the Government of the Gold Coast decided to move the members of the Hausa tribe residing at Old Zongo to a new site (hereinafter referred to as "New Zongo"). They made a plot of ground at New Zongo available to each family so removed and paid compensation to cover the cost of rebuilding the various homes. In pursuance of this policy a site was made available to Salamatu and she was paid £190 compensation for the old house. The defendant contends that this site and that sum were paid to her as the owner of the old house. The plaintiffs contend that the old house was the property of Mallam Gariba and that Salamatu was accountable to him and after his death to his heirs for the new house erected at New Zongo.

There were extensive building operations on the new site. They were commenced by Salamatu and continued by the defendant after her death which occurred in 1935 shortly after the death of Mallam Gariba.

Salamatu, the plaintiffs and the defendant all lived in the new house and no dispute appears to have arisen between the parties until the year 1947 when the defendant's sister one Suttey applied for her portion of the estate of her mother Salamatu. The then priest of New Zongo, one Lemanu Moru, proposed to divide the new house between the defendant and others but the first plaintiff objected. On the 24th February, 1948, the plaintiffs issued in the Native Court " B ", Western Province, Sekondi, a summons by which they claimed to eject the defendant from the new house which they alleged had been the property of Mallam Gariba.

When the matter came before the Native Court " B " the first plaintiff gave evidence himself and oalled as witnesses the Siriki Zongo who, their Lordships were informed was head of the Hausa tribe in New Zongo, and his mother Fati Wangara.

Most of the first plaintiff's own evidence was plainly hearsay. Counsel were unable to tell their Lordships to what extent under the Law of the Gold Coast hearsay evidence is admissible in the native Courts but the question is not of great importance since the material evidence of Siriki Zongo was plainly not hearsay. The relevant portions of his evidence were as follows:—

> " I am Siriki Zongo. I know both parties. All houses at Zongo were built by my permission. When Government removed us from Old Zongo each house owner was paid reasonable sum for re-building. An amount of £190 was paid in respect of Mallam Gariba's house to me and I gave same to his slave domestic by name Salamatu whom Mallam Gariba married. When we removed I gave her a plot on which a house should be built. Mallam Gariba had been gone away. Mallam Gariba then having heard his house had been broken he remitted £50 to add to that which Government paid and build a new house. Plaintiffs were then young ; the money was given to Salamatu who built the house. When Salamatu died myself and my priest gave the properties to Defendant to look after until plaintiffs are grown to have possession. About 4 months ago plaintiff reported that my priest had divided the estates between the defendant and others. I found he had no authority. I summoned him before my elders, was found guilty and as a result he ordered to return an amount of £76 collected in respect of the house in dispute, and the priest was destooled. . . . Mallam Gariba's money was paid to me and I gave to Salamatu. I did not receive Receipt for the money I paid to her. . . . It is about 37 years since new Zongo was established. You were given the house and the children to look after. It was so done by me and my elders after one week of Salamatu's death."

The only material facts to which Fati Wangara deposed were that Salamatu had told her that Siriki Zongo had given her some money (presumably the £190) and that the first plaintiff married some 20 years before her evidence was given, i.e., in 1928.

The defendant also gave evidence and called as witnesses the priest Lemanu Moru, Andrew Essien who built part of the new house and Petteh Esson who moved part of the old house and built the first part of the new house. Much of the defendant's evidence was hearsay but he deposed to the building of the first house on the new site by Esson and to its replacement by what he called the swish building containing some 26 rooms. He also deposed to the contract with Essien saying:—

> "Mr. Essien prepared the plan in my name Ibrahima. The plan was proved. Kofi Ackon took the contract of the building and erected same. The contract was £354. Agreement was prepared in

> presence of witnesses. The £354 was workmanship, excluding building materials which my mother provided. In course of the building my mother broke the contract and was sued before Police Magistrate's Court for balance of £125 6s. 3d. My mother felt sick and I was given an Attorney to represent her. I did. It was found that $\frac{3}{4}$ of the work was done and so £49 10s. was ordered to be paid by me to Ackon. The amount was paid. While my mother was alive I was responsible for the house. I completed the building after the death of my mother."

He also said that he gave some rooms to let, that he pledged part of the house and paid debts, subsequently redeeming the part pledged. He further deposed that he collected the rents and did not pay anything to the plaintiff though he allowed the plaintiff to live in a house on the site " because he is my mother's rival son ". He put in three plans of buildings to be erected on the new site dated respectively 6th April, 1922, 11th September, 1924 and 20th July, 1942. In all of them the buildings were described as the property of Salamatu or of the defendant. There was no evidence as to how this description came to be inserted but there can be no doubt that the orders for the buildings were given by Salamatu or by the defendant.

Two other documents were put in. The first was the contract dated the 20th November, 1924 for the work referred to in the passage their Lordships have cited from the defendant's evidence. This certifies that Salamatu had engaged Ackon to build her a storey house. The other was a power of attorney dated the 13th January, 1928 executed by Salamatu who was described as " seised of and entitled to the messuage and tenement and the uncompleted block building erected thereon situate and being in Hausa Zongo (i.e. the new house) " and authorising the attorney to mortgage the premises on her behalf as security for a loan of £300.

The priest Lemanu Moru said he had been told by Salamatu that the building in dispute was hers and that he signed as witness the agreement for the loan of £300. This agreement was not produced. He also deposed that he knew Salamatu before she married Mallam Gariba and that he knew her in the old house and that it was her property. Essien deposed that he had built a house for Salamatu.

Esson confirmed that he had moved the iron sheets and boards from the old house to the new house and that Salamatu had said that the old house was hers.

It was on this evidence that on the 30th March, 1948 the Native Court " B " gave judgment. The judgment summarised shortly the evidence given on behalf of the parties and it should be noted that the summary of the evidence for the plaintiffs included the statement by Siriki Zongo that Salamatu had cared for the plaintiffs from their infancy and that as the plaintiffs were " little grown " at the death of Salamatu the property after her death was given to the defendant to manage the estates until such time as the plaintiffs would attain the age of puberty.

The actual decision of Native Court " B " is summed up in the following extract from their judgment:—

> " The only question for this Court to consider is whether the property is Mallam Gariba's or Salamatu's (both deceased). To this question it has been evident that the compensation of £190 paid for the Old Mallam Gariba's house put this new building up by Salamatu. Going strictly into the question of the right of succession, there is little difficulty in determining it as Mallam Gariba died before Salamatu, but since it is admitted by parties that plaintiffs are children of the late Mallam Gariba and defendant an adopted child of Salamatu, and both have been living in the premises to the present date, this Court in its opinion find that plaintiff's action to

oust defendant entirely from occupation should fail and in dismissing the action without costs, orders that parties should continue to live in the premises, and that the rooms should be divided among themselves. Action therefore dismissed each to pay his own costs."

The *ratio decidendi* is a little obscure but it is, their Lordships think, clear that Native Court " B " must have preferred the evidence of Siriki Zongo to that of the priest Lemanu Moru as to the ownership of the old house.

Both sides appealed to the Native Court of Appeal (Native Court "A " Sekondi Area). The duties of the Native Court of Appeal are defined in section 50 of the Native Courts (Colony) Ordinance 1944. This section makes it clear that the hearing before the Native Court of Appeal is a rehearing and that the Court may admit such further evidence as it sees fit. When the case came before the Native Court of Appeal on the 15th October, 1948 no new witnesses were called but the defendant and the first plaintiff made statements on oath. The defendant said that the first plaintiff was fully grown before Salamatu's death having then three children and that since her death he had been in possession of the premises for thirteen years without interference from the plaintiffs. The Native Court of Appeal reversed the decision of Native Court " B " saying that there was no proof to convince the Court that the old house belonged to Mallam Gariba. They plainly preferred the evidence of the priest to that of Siriki Zongo. They had not of course seen either of these witnesses but they relied on the documents, the evidence of Petteh Esson, the collection of the rents by the defendant, the evidence of Essien and the obvious falsity of the statement by the Siriki Zongo that when Salamatu died he handed over the property to the defendant because the plaintiff's were " little grown ". In the result they dismissed the plaintiffs' action with costs.

The plaintiffs appealed to the Supreme Court of the Gold Coast, Western Judicial Division, Land Court. On the 4th August, 1949 Ragnar Hyne J., delivered judgment dismissing the appeal. He summarised the evidence at considerable length and then proceeded to consider the contention advanced by counsel for the plaintiffs that as the Native Court of Appeal took no evidence it would not be justified in reversing the judgment of Native Court " B " except on strong grounds. He made the following citation from a judgment which their Lordships have been unable to trace:—

> " An Appeal Court is not debarred from coming to its own conclusion on the facts, and where a judgment has been appealed from on the ground of the weight of evidence the Appeal Court can make up its own mind on the evidence, not disregarding the judgment appealed from, but carefully weighing and considering it and not shrinking from overruling it if, on full consideration it comes to the conclusion that the judgment is wrong."

He expressed the view that the case before him really was one in which the judgment of Native Court " B " was impugned as being against the weight of evidence and that the passage cited was therefore applicable. Applying it to the evidence he had summarised he reached the same conclusion as the Native Court of Appeal and for substantially the same reasons. Like that Court he laid great stress on the documentary evidence.

The plaintiffs appealed to the West African Court of Appeal. That Court came to the conclusion that the trial Court (Native Court " B ") was right in its findings of fact as to the main issue in the case, namely the respective rights of Mallam Gariba and Salamatu in the old and new houses with which the case was concerned and in its conclusion from the evidence that both parties to the litigation had some rights in the property

now in dispute. Delivering the judgment of the Court Sir Mark Wilson, C.J., said:—

"The trial Court found, and we agree with their view, that the original house in which the predecessors of the parties resided in the Old Zongo at Sekondi was the property of Mallam Gariba and that the later house built by Salamatu in the New Zongo, called the "swish" house, was built with the compensation money paid by the Government for the old house on the demolition of the Old Zongo, and that the plaintiffs (who are the children by other wives of Mallam Gariba) therefore have rights in the property by succession under Mohammedan Law. But the trial Court also found (as we infer from the passage of their judgment quoted above) that Salamatu also had rights in the present property which consists of the "swish" house with additions and improvements, and that the defendant as her adopted son succeeded to those rights." He continued:—

"Being in agreement with these findings we should have been disposed to restore the judgment of the Native Court "B", subject to its being varied so as to set out clearly and precisely the respective rights of the plaintiffs and of the defendant in the property. Unhappily, we are not in a position to make such a variation, since, although it is clear that the plaintiffs and the defendant each have some rights in the property, the exact nature and extent of those rights must obviously be governed by Mohammedan law in its local application. As to this, and any possible variations we have had nothing to assist us, either in the evidence on record or in the arguments of counsel."

In the result the appeal was allowed, the judgment of the Land Court set aside and the matter remitted to the Land court, Sekondi "with the direction that the Land Court shall proceed on the basis of the above findings of fact of the Native Court "B" as approved by this Court, and shall—

"(A) after taking evidence, including evidence as to the capital expenditure on the property as it now stands, define the respective rights to be enjoyed by the plaintiffs and the defendant in accordance with Mohammedan law, as locally applied, in House No. 23/19, and the compound thereof, situate at George Street, Hausa Zongo, Sekondi;

"(B) after inspecting the premises, make an appropriate order partitioning the property between the plaintiffs and the defendant according to those rights, and make and give all necessary consequential orders and directions."

From this decision the defendant appealed to this Board. Mr. Albery on his behalf invited their Lordships to restore the judgment of Ragnar Hyne, J., in the Land Court for the reasons he gave in his judgment and in the alternative he submitted that the doctrine of equitable estoppel applied in the Gold Coast and that the plaintiffs having allowed Salamatu and the defendant to expend their money on the property without questioning their title thereto could not now be heard to deny that title. This point had not been raised in the Courts below and in the course of the argument Mr. Albery found himself compelled to admit that the Record did not disclose facts which would bring the doctrine into operation. None the less he invited their Lordships if they were against him on the first point to insert a qualification in the Order of the West African Court of Appeal which would enable the defendant to raise the point in the resumed hearings in the Land Court. Their Lordships would have felt a difficulty in allowing so belated an attempt to raise a new point but in view of the conclusion they have reached on the first point they do not find it necessary to reach a conclusion on the alternative submission.

Their Lordships approach the main point under some difficulty for the West African Court of Appeal have not given their reasons for rejecting the conclusion reached by Ragnar Hyne, J., in the Land Court after a careful summary of the relevant evidence. They think however that the West African Court of Appeal must have been relying on the observations of Lord Atkin when delivering the Judgment of the Board in *Abakah Nthah* v. *Anguah Bennieh* [1931] A.C.72. Lord Atkin said at page 75:—

> " By colonial legislation all suits relating to the ownership of land held under native tenure are placed within the exclusive original jurisdiction of native tribunals, unless satisfactory reason to the contrary is shown. It appears to their Lordships that decisions of the native tribunal on such matters which are peculiarly within their knowledge, arrived at after a fair hearing on relevant evidence, should not be disturbed without very clear proof that they are wrong, and their Lordships fail to find such proof in the present case."

In that case the Provincial Commissioner to whom an appeal had been preferred had reversed the decision of the Native Court and Lord Atkin said at page 76:—

> ". . . in any case in view of the legislation referred to, it appears quite irregular to have extended the dispute so as to give the Commissioner, on appeal, original jurisdiction over land which had never been in dispute before the native tribunal, and as to which there was no reason for interfering with their jurisdiction if the dispute had been raised before them."

Their Lordships respectfully agree with the opinion of the Board in the case cited as to the respect that ought to be paid to decisions of the Native Courts in matters such as the present but in that case there was no Native Court of Appeal and the facts of the present case are very different from those in the case cited.

Had the Native Court of Appeal affirmed the decision of Native Court " B " it would have needed a strong case to justify an interference with that decision but having regard to the difference of opinion between the two Native Courts their Lordships think that a wider discretion lay with the Land Court especially bearing in mind that section 50 of the Native Courts (Colony) Ordinance, 1944, provides that the Native Appeal Court may rehear the cause and admit further evidence. It is no doubt still the case that great importance in matters of credibility must be attached to the opinion of the Court that saw the witnesses ; but in the present case the evidence of Siriki Zongo especially as to the age of the plaintiffs at the time of the death of Salamatu is at least as unsatisfactory as that of the priest Lemanu Moru. In these circumstances documentary evidence becomes important. The documentary evidence in the present case though not conclusive seems consistent with the case of the defendant and lends no support to that of the plaintiffs. Looking at the matter as a whole their Lordships agree with the careful summary of the evidence by Ragnar Hyne, J., and with the conclusion to which he came.

Their Lordships regret that the decision which they feel bound to reach does not necessarily dispose finally of the dispute between the parties. The action was an ejectment action and this must necessarily fail since their Lordships have come to the conclusion that the old house was the property of Salamatu and not of Mallam Gariba. It is however to be observed that the West African Court of Appeal who took the opposite view thought that the defendant might none the less have some rights in the property in accordance with Mahommedan law as locally applied. It is possible that that law may give some rights to the plaintiffs even though the old house was Salamatu's property, but that issue does not arise in this appeal and must be left to future determination if a claim is made.

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal, set aside the Judgment of the West African Court of Appeal and restore the Order of Ragnar Hyne, J., in the Land Court. Since the respondents who resisted the appeal were granted leave to contest this appeal in *forma pauperis* there will be no order as to the costs of the appeal to the Board or as to the costs in the West African Court of Appeal.

(39120) Wt. 8082—47 120 11/54 D.L.

In the Privy Council

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DELIVERED BY LORD COHEN

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS, DRURY LANE, W.C.2.

1954