Privy Council Appeal No. 24 of 1958

Nana Adjei III, Ohene of Okadjakrom for and on behalf of the Stool and people of Okadjakrom – – – – – *Appellants*

v.

Nana Adjedu II, Ohene of Atonkor for and on behalf of the Stool and people of Atonkor and others – – – – *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST MARCH, 1961

Present at the Hearing:

LORD TUCKER
LORD KEITH OF AVONHOLM
LORD HODSON

[*Delivered by* LORD KEITH OF AVONHOLM]

This appeal relates to a land dispute between the Ohenes of two Stools in what was formerly Togoland, now included in the republic of Ghana. It will be convenient to refer to the parties as the Okadjakrom Stool (plaintiff and appellant) and the Atonkor Stool (defendant and respondent). Certain persons were added to the proceedings as co-defendants, but nothing turns on this in the present appeal. For present purposes the issue lies between the two Stools. The same observation applies to an action taken by one Asofoatse Kwadjo Nkansa of Atonkor against Nana Adjei III Ohene of Okadjakrom, which has been consolidated with the action between the two Stools. The parties in this action are also before the Board as respondent and appellant respectively, but no separate notice need be taken of this action.

The main action started in the Native Court of the Omanhene of Buem on 5th December, 1951. It was transferred to the Land Division of the Supreme Court of the Gold Coast at Accra. On 16th July, 1954, the Supreme Court gave judgment in favour of the Okadjakrom Stool, holding that the Atonkor Stool were estopped by a judgment in an earlier litigation (to which their Lordships will refer later) from denying the title of the Okadjakrom Stool to the land in dispute. On 25th February, 1956, the West African Court of Appeal allowed an appeal from this judgment, set aside the order and ruling of the Court below, and ordered that the hearing of the consolidated suits should proceed in the Land Court on the merits. From this judgment the case comes before their Lordships' Board, by final leave of the West African Court of Appeal.

The dispute between the two Stools relates to a certain area of land known as Kafetonku Land. Each party seeks a declaration of title to this land, the Okadjakrom Stool by claim in the original proceedings, the Atonkor Stool by counter-claim in its Statement of Defence. There may be a question whether the claim by the Atonkor Stool is to the land as family land, or as Stool land, but this matter is immaterial to the issue raised by the appeal. It is unnecesary to describe the land further than by saying that it lies between the river Konsu to the north

and a road called Motor Road to the south-west. The dispute relates to the ownership of the land so far as it lies within certain limits on the east and west respectively, shown by lines marked on Plan Exhibit J. The Okadjakrom Stool claims that it owns the land up to the western boundary, marked green on the Plan, while the Atonkor Stool claims that it owns the land up to the eastern boundary, marked purple on the Plan. There are thus competing claims to the same area of land.

The dispute is one of long standing. It emerges first in the early twenties of this century when a Captain Lilley, District Commissioner, gave directions for the fixing of a boundary in claims of the contending Stools. It may well be that he thought a boundary had been fixed. Two terminal boundary marks seem to have been set. The precise location of these marks is a large part of the trouble that still exists. On 16th April, 1940, a suit, No. 6/40, 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 land boundary demarcated by order of the District Commissioner 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 a boundary path, there was no proof that a boundary was cut. The judgment concludes: "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." The date of the judgment was 2nd July, 1940. An appeal to the Provincial Commissioner was dismissed and a further appeal to the West African Court of Appeal was also dismissed. In the course of his judgment the Provincial Commissioner said: "It has been proved beyond doubt that on the 23rd January, 1922, Captain C. C. Lilly, the then Political Officer stationed in the Ho District, did determine the boundary between the Plaintiff and Defendant in this case but unfortunately the finding of Captain C. C. Lilly cannot be interpreted owing to mutilation. This is therefore valuless and must be ignored. . . . If it were possible to interpret Lilly's Judgment I would have ordered the boundary be surveyed and cut, but unfortunately this is impossible."

Thereafter application was made by the Okadjakrom Stool to the Buem State Council for an order to cut and demarcate the boundary between the two Stools. This application was dismissed for procedural reasons. A similar application was made, after a lapse of many years, on 19th July, 1949, and with the consent of both parties the Court proceeded with a view of the area for the demarcation of the boundary. After viewing the ground and hearing parties the Court, proceeding apparently on the view that the application was an independent one, divorced from the previous judgment of 2nd July, 1940, decided that, as they could not rely on the boundary marks pointed out by the contesting parties, the disputed land should be divided equally between them. This they proceeded to do by an order of demarcation on 1st August, 1950. After some further procedure this order was set aside by the Magistrate's Court of the Gold Coast, Eastern Province, on 22nd March, 1951, on the ground that the original order of 2nd July, 1940, gave the area in dispute to the Okadjakrom Stool. With reference to the equal division between the parties carried through by the Court below he said: "This may be a sensible solution but it is in face of the original judgment giving the area in dispute to the defendant."

Upon this judgment 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 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 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 2nd July, 1940, could not be read as a declaration of title in favour of the Okadjakrom Stool. The Provincial Commissioner, part of whose judgment has been quoted above, 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:

> "Since the argument in Court my attention has been drawn to a case which was before this Court in 1947, *Abutia Kwadjo II and another* v. *Addai Kwasi*. The judgment of this Court, dated 17th February, 1947, approved and applied an observation of this Court made in an earlier case 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'.
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> In applying that observation in the 1947 case this Court said :—
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> > '. . . 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.'
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> 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.
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> In this 1940 case of *Atonkor* v. *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 Kwasi* decided in the West African Court of Appeal on 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, was 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 22nd 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 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 cost 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.

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.

(39452) Wt. 8109—53 100 4/61 D.L.

In the Privy Council

NANA ADJEI III, OHENE OF OKADJAKROM
for and on behalf of the Stool and people of Okadjakrom

v.

NANA ADJEDU II, OHENE OF ATONKOR
for and on behalf of the Stool and people of Atonkor and others

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DELIVERED BY

LORD KEITH OF AVONHOLM

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