Appeal No. 47 *of* 1959
Appeal No. 24 *of* 1960

Nana Kataboa II, Ohene of Apesokubi – – – – – – *Appellant*

v.

Nana Osei Bonsu, Ohene of Asatu (Consolidated Appeals) – – *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JULY, 1961

Present at the Hearing:
LORD HODSON.
LORD GUEST.
MR. L. M. D. DE SILVA.
[*Delivered by* LORD HODSON]

These consolidated appeals are from judgments of the West African Court of Appeal given in the first case on the 20th February, 1956, and in the second on the 13th February, 1956.

The first (No. 47 of 1959) is dependent upon the second (No. 24 of 1960) and their Lordships will accordingly deal with the second appeal before referring again to the first.

Their Lordships agree with Coussey, President of the West African Court of Appeal, that it is unnecessary to recapitulate the history of the litigation which has lasted for more than forty years for it is set out in more than one judgment of the Courts and fully and accurately summarised in the judgment of the learned Chief Justice Sir Mark Wilson sitting in the Land Court. His judgment, the subject of the appeal to the West African Court of Appeal, reversed the judgment of the Buem Native Appeal Court and restored that of the trial Native Court the Akan Native Court " B " at Kadjebi dated 2nd September, 1953.

The dispute is between the Stool and people of Asato (the respondent) and the Stool and people of Apesokubi (the appellant) and relates to a piece of land to the east of the Oprana Range in Togoland possession of which has been awarded to the respondent.

The main question for consideration is whether a judgment of the 3rd March, 1931, purporting to fix the boundary in dispute operates as a valid judgment for the purpose of the litigation in which this appeal arises or is no longer operative having been superseded by a settlement between the parties reached on the 12th July, 1939.

The judgment of the 3rd March, 1931, declared as follows: " Apesokubi Chief is guilty, the land property belongs to Asatu. The proper boundary fixed in this judgment is the top of Oprana Hill from river Asuikoko southward stream Mutabe and down the stream to an " Ntombe tree ", and the road cleaning heap on Asato-Apesokubi road ". The effect of this judgment is shown upon a plan prepared for the parties by a surveyor on the 15th June, 1932, which has been exhibited (N). This judgment stands unreversed.

After eight years of litigation while an appeal was pending on the part of the appellant in the Buem State Council the parties came to terms on the 12th July, 1939.

These terms were in writing and read as follows:

> " Whereas there is dispute between the Sub-Division of Apesokubi and the Sub-Division of Asato in the Buem District, British Togoland, as the boundary between them.
>
> And whereas this dispute has been in the Omanhene's Court, in the District Commissioner's Court of Kpandu, in the Court of the Commissioner of the Eastern Province, in the West African Court of Appeal and back to the Court of Buem State Council.
>
> And whereas it is desirable to effect an amicable settlement between the two said parties so that peace and prosperity may result to the mutual benefit of both parties and their subjects.

Now it is agreed as follows:

1. The Ohene of Apesokubi and the Ohene of Asato agreed to discontinue the land dispute, and each party should bear his own costs incurred during the 30 years controversy.
2. The Ohene of Apesokubi and the Ohene of Asato acting each and on behalf of his respect Elder's and Councillors agree to abide by the decision of the Councillors Worawora, Tapa, Apesokubi and Asato that the boundary should remain as traditionally known.
3. The Committee as appointed by the both parties will carry out the preliminary investigation as to the extension of the traditional boundary right cross the forest if any.

> THIS DOCUMENT was executed by the parties after the contents have been read over and interpreted in the Twi language by Mr. Seth D. Opoku of Worawora to the Assembly of the representatives of Worawora, Tapa, Apesokubi and Asato, they seemed perfectly to understand and approved of the provisions thereof and the principal parties thereto signified their said approval in the customary manner by providing one (1) bottle wine and one (1) life sheep ".

On the same day a notice of discontinuance was sent by both parties to the Buem State Council in pursuance of paragraph 1 of the terms.

This notice reads as follows:

> " It is agreed together by the above-mentioned parties viz. Nana Kwasi Adu of Apesokubi and Nana Osei Bonsu of Asato with our undersigned Elders upon the valuable advice of our Nkwantahene and the youngmen of our respective towns Apesokubi and Asato to discontinue the above-named suit pending in your Court ".

It is to be noted that the appeal was discontinued and not the action. Accordingly the only question is whether the whole litigation was effectively compromised by the terms of settlement so that no reliance could thereafter be placed upon the judgment of 1931.

The submission of the appellant is first that the parties by the terms of 1939 compromised the suit by substituting for the boundary fixed in 1931 that boundary which was described as " the traditional boundary " a new formula set out in paragraph 2 of the terms and complete in itself. It is further submitted that as a separate matter the fixing of the boundary on the ground rendered it necessary that a committee should carry out a preliminary investigation as provided in paragraph 3 of the terms.

Abortive attempts were made to carry out the arrangement envisaged in paragraph 3. They came to nought but it is submitted that in the events which have happened it cannot be contended that the judgment of 1931 survived the settlement of 1939.

It is argued that when the parties agreed to abide by the decision of the councillors that the boundary should remain as traditionally known they

were in effect saying that the new decision superseded the 1931 judgment and that a different boundary was fixed. It is said that, notwithstanding the tentative provisions of paragraph 3, this agreement is enforceable since if the parties cannot agree as to the boundary fixed by the decision of the councillors either party can establish as a question of fact where the new line ought to be drawn. In other words it is the agreement of 1939 which has to be enforced not the judgment of 1931. This is not the way in which the case was put in West Africa but is no doubt the strongest way in which the appellants can put their case.

In their Lordships' opinion this argument cannot succeed for paragraphs 2 and 3 of the settlement must be read together.

The effect of the combined paragraphs is that a new boundary was to be fixed and that steps were to be taken as indicated in paragraph 3 to that end but that there was no concluded agreement between the parties fixing a boundary in substitution for that declared by the 1931 judgment. There was here nothing more than an ineffective agreement to go to arbitration to fix a boundary and there was never any certainty as to what the parties had agreed should be the boundary. It was said to be the traditional boundary but the fixing of that boundary remained uncertain until the arbitrators had done their work. This they never did. The settlement of 1939 was inchoate and never ripened into a concluded agreement settling the boundary in supersession of that fixed by the 1931 judgment. Accordingly their Lordships are of opinion that the main contention of the appellant fails.

The second contention is that here there has been a miscarriage of justice because the respondent obtained an order for possession of the land in the action without the appellant having a proper opportunity of putting his case before the Court.

This contention arises from the course taken by the appellant in defending the action and in order to explain the point it is necessary to refer to the relevant Regulations which are the Native Court (Southern Togoland) Procedure Regulations (23 of 1949). The respondent's claim was based on the declaration earlier set out as part of the judgment of the 3rd March, 1931, and identified the land as shown in the plan made on the 15th June, 1932. The claim was contained in a civil summons and prayed for recovery of possession of all portions of the land wrongly occupied by the defendant (the present appellant) or any of his subjects according to the boundary defined in the judgment. The following are the relevant regulations:

> " Regulation 15. The subject matter of the claim or the charge shall be read out by the Registrar to the defendant or the accused person who shall be asked how he answers to the claim or charge.
>
> Regulation 17. Where a defendant or accused person wishes to plead that the Native Court has no jurisdiction or that the claim or charge does not disclose any cause of action or offence or that the subject matter of the claim has already been adjudicated upon, or that (if it is a criminal cause) he has been previously convicted or acquitted of the same offence, the defendant or accused person shall make such plea at any time after he is asked what he has to say in answer to the charge or claim, and his plea shall be written in the Record Book.
>
> Regulation 18. The Native Court shall consider whether a plea made under Regulation 17 is made out and give its decision which shall be written in the Record Book. If the Native Court is satisfied that the plea has been made out, the suit must be dismissed or the accused discharged, as the case may be. If the Native Court is not satisfied that the plea has been made out, it shall order the defendant or the accused (as the case may be) to plead in the ordinary way under Regulation 15, or that the hearing shall continue.
>
> Regulation 34. Interlocutory applications may be made by motion at any stage of proceedings in a cause ".

The appellant moved the Court as he was entitled to do and supported his motion by an affidavit in which he sought to dismiss the respondent's claim

" in limine ". The history of the case was briefly set out in the affidavit and the terms of settlement of July 1939 were exhibited. The point was taken that the plaintiff was not entitled to bring the action in view of the terms of settlement and that the judgment of the first trial Court confirmed by the judgment of the West African Court of Appeal was now of no effect and could not be relied on by the plaintiff (respondent to this appeal) in the prosecution of any rights that that judgment conferred on him.

It will be seen that the point then taken by the appellant is the same as the main point upon which he now relies that is to say that the judgment of 1931 had been superseded by the settlement of 1939.

After various adjournments of the hearing of the motion the record shows under date the 2nd September, 1953 the following note:

> " After having studied Mover's and Opposer's motion and affidavits the Court orders that parties do give statement under Regulation 17 of Regulations 23 of 1949 to enable it to give a fair judgment ".

The Plaintiff's representative was then sworn and gave evidence in support of the claim.

After the plaintiff's representative had concluded his evidence the appellant asked no questions and added " I have nothing to say again in regard to making a statement apart from the explanation given in support of my motion ".

The Court thereupon retired for consultation, then returned and delivered judgment in favour of the plaintiff ordering that by virtue of the judgment of 3rd March, 1931 confirmed by the West African Court of Appeal on the 20th April, 1937 he has been declared the " Decree Holder " of the area in dispute and should therefore by virtue of this order take possession thereof.

The contention of the appellant is that the Court was in error in giving judgment when it did for the preliminary point only had been disposed of and the respondent never had an opportunity of pleading " not guilty " to the general issue under Regulation 15. Their Lordships are in agreement with the Chief Justice and with the West African Court of Appeal that there is no substance in this contention. If the appellant had in fact been shut out from his defence by the compressed procedure which was followed the result would be different but it is clear that the defence raised in the action was the same as the ground for disposing of the action by preliminary motion so that no injustice was done. The last words spoken by the defendant (respondent) show that he did not desire to add anything to the grounds stated in his affidavit.

There was no injustice although it is true that there was not a definite decision given upon the motion before judgment in the action as the Regulations contemplate.

Their Lordships agree with the Chief Justice who in his judgment said of the appellant " In effect his filing of the motion as mentioned was obviously taken by the Court as a denial of liability. It could mean nothing else and it stated very fully why the defendant denied the plaintiff's right to a decree for possession. It cannot in those circumstances be said that anybody was in any doubt when the hearing began on 4th August, 1953 as to what the defendant's answer to the claim was ". In a later passage after referring to the note on the record, he said:

> " After full consideration I have come to the conclusion, largely from studying the proceedings which actually followed this interim decision of the Court, that what they meant to do was to order, in the words of the last clause of Regulation 18, that the hearing of the suit should continue. It is true that at that stage they had not recorded their decision on the preliminary point raised by the defendant, but a perusal of the judgment will show that they considered and dealt with that point and came to a definite decision on it which is recorded in the judgment ".

Their Lordships are in agreement with the Chief Justice that the appellant was never shut out from arguing his full case and that the irregularities of procedure which occurred at the trial did not cause any injustice to him.

When asked before judgment whether he had anything more to say he was content to rely on the statement already made and gave no indication that he had any other defence to the action than the one he has consistently raised throughout the litigation, viz. that the respondents were barred by the settlement of 1939 from relying upon the judgment of 1931.

For these reasons their Lordships will advise the President of Ghana that the appeal be dismissed and that the costs of the appeal be paid by the appellant.

The other appeal (47 of 1959) arises out of an enquiry under the Forestry Ordinance in the matter of the Kabo River Forest reserve the Oprana section of which comprises in whole or in part the area of land which is the subject of the appeal which has been previously dealt with in this judgment.

This appeal is from the West African Court of Appeal which on the 20th February, 1956 following its judgment of the 13th February, 1956 dismissed the appellant's appeal from a decision of the Reserve Settlement Commissioner dated 3rd May, 1954. The Commissioner acting pursuant to section 9(6) of the Forestry Ordinance accepted the decision of the Native Tribunal dated March, 1931 and recorded the boundary between the Stools of the appellant and respondent accordingly.

Their Lordships will advise the President of Ghana that this appeal also be dismissed and that the appellant pay the costs of the appeal for the same reasons as those given in support of their judgment in the main appeal.

(83193) Wt. 8233/71 100 8/61 Hw.

In the Privy Council

NANA KATABOA II, OHENE OF APESOKUBI

v.

NANA OSEI BONSU, OHENE OF ASATU
(CONSOLIDATED APPEALS)

DELIVERED BY
LORD HODSON

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