

~~CHL 9.3~~

35,1955

No. 6 of 1953.

In the Privy Council.

UNIVERSITY OF LONDON W.C. 1
25 OCT 1956
INSTITUTE OF ADVANCED LEGAL STUDIES
44809

ON APPEAL
 FROM THE WEST AFRICAN COURT OF APPEAL (GOLD COAST
 SESSION)

BETWEEN

ELIZABETH ANIMA (Defendant) *Appellant*

AND

10 AKWASI AKYEYE (substituted for KWAME DWAA,
 deceased) (Plaintiff) *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal from a Judgment of the West African Court of Appeal, delivered upon the 9th January 1952, which dismissed the present Appellant's appeal against a decision on the 30th March 1950 of Mr. Justice Jackson in the Supreme Court of the Gold Coast, whereby he reviewed a previous decision by him on the 22nd February 1950 and gave leave to the Plaintiff Kwame Dwaa, upon payment into Court by him of a sum of £30.2.0 to be deposited in favour of the Defendant-Appellant, to levy execution against certain property of such Defendant at Bantama in the town of Kumasi in the Colony of Ashanti. On the 22nd February 1950 Mr. Justice Jackson had refused (it is submitted rightly) leave to issue execution.

2. On the 10th November 1938 (before which date the Appellant admittedly was in possession of the house and land hereinafter described and which she has occupied ever since) the Plaintiff issued, out of the Divisional Court for Ashanti of the Supreme Court of the Gold Coast, a writ of summons in Suit No. 71/1938 against four Defendants (1) Kwame Amankwatia, Chief of Bantama, (2) Kwame Atta, (3) J. B. Abaidoo and (4) the Appellant. The Claim upon the writ was, firstly, for a declaration of title to the Compound House situate upon leasehold premises No. 23 Bantama, Kumasi, as per particulars attached and secondly for "£120 damages for trespass, wrongful sale, use and occupation." The said

p. 3. writ stated the value of the compound house as £280. The particulars of claim, required by the Rules of the Supreme Court to accompany the Writ, were in the form of a Statement of Claim and were signed by Counsel. Such particulars alleged that, about 20 years before the then Chief of Bantama had given a piece of land to Plaintiff on which the latter had erected a compound house and that neither that Chief nor his successors had ever demanded ground rent from Plaintiff who had never paid ground rent to anyone; that the Plaintiff left his compound house in Kumasi (on a date not stated) in charge of one Mensah and stayed in the bush (for a period not stated) and, through Mensah, Plaintiff had been paying 10 his Town rate of £2 a year regularly; that on Plaintiff's return to Kumasi (at a time not stated) he was made to understand (by whom not stated) that his compound house had been sold (on a date not stated) by the first Defendant, the Chief of Bantama, through the second Defendant (but in what capacity the second Defendant was concerned as intermediary was not stated); that the third Defendant was the auctioneer and the Appellant the purchaser; that neither Plaintiff nor his Agent Mensah had been served with a writ of summons before the compound house was sold.

p. 2. The summons and particulars were served upon all Defendants. 20

p. 4. 3. Proceedings in the Supreme Court are ordinarily summary and without pleadings and it does not appear that there were any further proceedings in the suit until it came on to be heard on the 23rd March 1939, before Mr. Justice Bannerman in the presence of Counsel for the Plaintiff, of the Chief of Bantama, the first Defendant, and of the third Defendant Abaidoo, the alleged auctioneer, both in person, and of Akosua Mansah, the Appellant's mother representing her. The second Defendant was absent. No evidence is recorded but the case was then settled by consent upon terms which are recorded in the Court notes of the proceedings as follows:— 30

“ This case is, by consent, settled as follows:—

1. The 4th Defendant is to give up possession of the house in dispute within a fortnight from to-day's date.

2. The 1st Defendant is to pay the 4th Defendant the sum of £30.2.0 being purchase price. This amount is to be paid within a fortnight from to-day's date.

3. The Plaintiff is to pay the 1st Defendant the sum of £11.16.0 within a fortnight from to-day's date.

4. The Plaintiff wholly and unconditionally abandons his claim for £120 damages in his writ of summons. 40

5. The Plaintiff unconditionally withdraws the case against the 2nd and 3rd Defendants with costs.

6. The Plaintiff is to receive the sum of £12.12.0 from the 1st Defendant being assessed costs herein.

7. The Plaintiff is to pay the 4th Defendant the sum of £7 upon production of receipts by the Court for ground rents.

Judgment accordingly.

(Sgd.) WOOLHOUSE BANNERMAN.
(Sgd.) EVELYN BROWN,
Solicitor for Plaintiff.

		Their
	KWAME AMANKWATIA	X
	AKOSUA MANSAH,	X
10	For and on behalf of	Marks
	4th Defendant.	

(Sgd.) J. B. ABAIDOO,
3rd Defendant.

Witness to marks :

(Sgd.) SAM. K. BANSON,
Court Registrar."

4. It is submitted that paragraphs 1, 2 and 3 of the compromise agreement imposed concurrent and reciprocal obligations, all to be performed within a fortnight, upon the Appellant to give up possession of the compound house on being paid £30.2.0 by the Chief of Bantama, upon the Chief of Bantama to pay £30.2.0 to the Appellant on or after himself being paid £11.16.0 by the Plaintiff, and upon the Plaintiff to pay to the Chief of Bantama the sum of £11.16.0 on or after which he was to be given possession of the compound house ; and that the Appellant was not under any obligation to give possession of the compound house unless she were paid £30.2.0 within the period limited.

5. It is not ordinarily the practice in the Supreme Court to draw up judgments or orders, and no formal order was drawn up.

6. The Courts below have however proceeded, it is submitted erroneously, to regard the proceedings on the 23rd March 1939 as resulting in a judgment upon which execution could be issued.

7. On the 24th July 1939 the Appellant by Counsel moved the Supreme Court upon notice to the Plaintiff and to the Chief of Bantama for review by the Court of the said Order of the 23rd March 1939. Her affidavit in support deposed that she was prepared to give possession of the said house but that the Chief had failed to pay her the £30.2.0, that the Plaintiff had " escaped " (disappeared) and could not be found to pay to her the £7 ground rents referred to in the 7th term of the said compromise and that she was being required by the Commissioner of Lands to pay further ground rent and by the Kumasi Public Health Board to pay water rates.

There was no affidavit in reply.

p. 12.

The application came before Mr. Justice Bannerman, all parties to the compromise being present by Counsel or in person. The Court note of his decision is as follows:—

“ By the Court.

If the first Defendant has failed within the time-limit to pay the £30.2.0d. to the fourth Defendant then the fourth Defendant should retain possession of the house.

WOOLHOUSE BANNERMAN,
Judge.”

8. It is respectfully submitted that the meaning of this decision plainly is that if (that is to say)—as it had been proved that—the Chief had failed, within the period of fourteen days limited by paragraphs 1, 2 and 3 of the compromise agreement, to pay to the present Appellant the sum of £30.2.0 specified in paragraph 2 of such agreement, the present Appellant was no longer bound to give up possession of the compound house. It is further respectfully submitted that this is the true construction of such compromise agreement and that this decision does not vary the compromise agreement or if it does vary it, it was a variation by consent or, in any event, the decision was binding upon the parties. 10

9. No formal order was drawn up of the decision of the 24th July 20 1939, and it has not been appealed against.

pp. 13–15.

10. Upon the 3rd December 1940 the Plaintiff by his Counsel, moved the Supreme Court upon notice to restrain the present Appellant from alienating the property known as Plot No. 23 in the Bantama District of Kumasi.

This application was dismissed on the 3rd December 1940 by Mr. Justice Fuad in view of the order of the 24th July 1939. No appeal was made against this decision.

11. The Plaintiff did nothing further until the year 1950, when there were launched the interlocutory proceedings in the Suit No. 71/1938 30 which have given rise to this present appeal.

p. 16.

Upon the 16th February 1950 one Yeboah, on behalf of the Plaintiff, issued notice of motion addressed to the then Chief of Bantama and the present Appellant for leave to proceed to execution against the Appellant (the fourth Defendant) and for the substitution of the then Chief for the former Chief, “ in respect of a judgment awarded against the said fourth Defendant . . . on the 23rd day of March 1939.” The alleged judgment is a reference to the compromise of that date.

p. 17.

Yeboah made an affidavit upon the 17th February 1950 in which, after deposing that he had the authority of the Plaintiff to make it, he 40 proceeded to depose as if he were the Plaintiff in his proper person.

Therein he deposed (*inter alia*):—

“ 3. That on the 23rd day of March 1939, I obtained judgment in this Honourable Court against the fourth Defendant for a

declaration of title to a compound house situate on leasehold premises No. 23 Bantama Kumasi and also £120 damages for trespass.

4. That my claims against the first, second and third Defendants were withdrawn also my claim for £120 damages was wholly and unconditionally abandoned."

12. On the 22nd February 1950 this motion was dismissed by Mr. Justice Jackson, who held there was nothing in the consent order of the 23rd March 1939 (which the Plaintiff had brought forward as a judgment by consent and which the learned Judge calls a judgment) upon which the Plaintiff could proceed to execution against either the present Appellant or the Chief of Bantama. It is submitted that this decision was right. p. 18.

However, on the 4th March 1950, the Plaintiff filed an *ex parte* notice of motion praying for review of the decision of the 22nd February 1950 and for leave to issue execution against the Appellant. p. 22.

This motion eventually was heard upon notice to the Appellant and the Chief of Bantama on the 18th March 1950. It was then supported by an affidavit by the Plaintiff in which he set out only the first and seventh paragraphs of the compromise, alleged that he had offered "on several occasions," without any details of time or place, to pay £7 upon production by the present Appellant of ground rent receipts but she had refused to accept this sum, and was still in possession and that he was still willing to pay the £7 or "any sum or sums accruing thereafter" (presumably meaning any further ground rent paid by the present Appellant) if the Court so ordered. An affidavit in opposition by the said Akosua Mansah was filed on behalf of the present Appellant, which in substance alleged that the Plaintiff's claim to the house was barred in the proceedings of the 24th July 1939, deciding that the present Appellant should retain possession in consequence of the failure of the other parties concerned to carry out the compromise of the 23rd March 1939. p. 26.
p. 23, cf. p. 20.

13. Upon the hearing of the motion, the Plaintiff and the present Appellant were heard by Mr. Justice Jackson. The present Appellant put in evidence the said Court Notes of the 24th July 1939 and the Plaintiff offered to pay her £30 2s. if an order was made in his favour. To this the present Appellant objected, stating that she had spent more than £400 in reconditioning the house. p. 25.
p. 26.

14. In a considered judgment delivered on the 30th March 1950 Mr. Justice Jackson reviewed and amended his previous decision of the 22nd February 1950 by directing that, upon payment into Court of a sum of £30 2s. to be placed to the account of the present Appellant, the Plaintiff might issue "execution against the said property at No. 23 Bantama, Kumasi." p. 26.
p. 30, l. 22.

It is submitted that this decision was erroneous both in its statement of facts and in its conclusions of fact and law and that the learned Judge had no jurisdiction in the circumstances to give leave to issue execution against either the house or the leasehold land.

15. In his said judgment the learned Judge first stated the facts as he understood them and discussed their legal effect.

It is submitted however that, in material respects, he misunderstood or misinterpreted the facts and was wholly in error as to their legal effect.

Among the misunderstandings or misinterpretations and errors are the following :—

p. 27, ll. 6-11.
p. 1, l. 29.

(A) That the Writ of Summons claimed a declaration of title to leasehold premises at No. 23 Bantama, Kumasi, whereas, in fact, the claim was for a declaration of title to the Compound House situate on leasehold premises No. 23 Bantama. 10

p. 27, l. 13.
p. 28, l. 42.
p. 29, l. 5.

(B) That the allegations in the said Particulars of Claim (referred to in paragraph 2 of this Case) were not denied. But he omits to note the ambiguity of such Particulars, that there were no pleadings in this action, that under the Rules the proceedings were summary, that the Defendant had neither the right nor the obligation to deliver a defence and that there was nothing in the Record to show that when the case came up for hearing on the 23rd March 1939 the Particulars of Claim were not denied. It would seem from the Court Notes of the 18th March 1950 that there had been no discussions of the Particulars of Claim before Mr. Justice Jackson 20 himself, but only of the compromise.

p. 4.
pp. 25-26.

(C) He treats what was done by Mr. Justice Bannerman on the 23rd March 1939 as a consent judgment, whereas there was merely an order staying proceedings upon the terms of the compromise set out in paragraph 3 of this Case.

p. 27, l. 21.
p. 28, l. 4.
p. 29, l. 13.

(D) That the result of the proceedings before Mr. Justice Bannerman on the 24th July 1939 constituted a variation by him of the consent judgment (of the 23rd March 1939) and that it was quite clear upon the Record that there was no consent by Kwame Dwaa to the variation; as to which the submissions made in 30 paragraph 8 of this Case are repeated.

p. 29, ll. 30-39.

(E) That he construed the supposed variation as giving the Bantamahene "a limitless time-limit" to pay the sum of £30 2s. and that he held consequently, if the Appellant recovered the sum of £30 2s. and surrendered to the Plaintiff receipts for ground rent in accordance with the compromise of the 23rd March 1939, she would be precisely in the same position (i.e., in the year 1950 on the date of his judgment) as the position to which she had consented on the 23rd March 1939, even if she had spent £400 in repairs to the house, in view of her having had its use and profits for more than 40 ten years.

As to this it is respectfully submitted that the Record of the proceedings of the 24th July 1939 is incapable of the meaning attributed to it by the learned Judge and that, if it were capable of that meaning, it could not be regarded as, in effect, giving the Plaintiff an option at any time thereafter, on paying to the Appellant the sums of £30 2s. and £7, of becoming entitled to the immediate

possession of whatever he might have been entitled to had he and Bantamahene observed the terms of the compromise of the 23rd March 1939, and still less to possession of that property in a greatly improved form and without compensating the Appellant for her improvements.

10 (F) That the conduct of the late Bantamahene had been frankly dishonest, that he had sold the Plaintiff's house when he had no right to do so, and that his failure to pay the Appellant " what she paid for the house to enable Kwame Dwaa to recover back his property was not only dishonest but savours strongly of collusion between himself and Elizabeth Anima to defeat a judgment to which they had consented and upon which they escaped on very easy terms." There was however no evidence or admission that the late Bantamahene had been dishonest, or that he had sold the Plaintiff's house when he had no right to do so or that there had been any collusion or any grounds to suspect the Appellant of collusion not to carry out the agreement. On the contrary there was evidence that she had been willing and even anxious to do so in the repeated attempts she had made to obtain the directions of the Court when the other parties failed to implement the compromise.

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p. 30, ll. 12-21.
pp. 5-12.

16. It is submitted that it was largely due to the disapproval by the learned Judge of the supposed dishonesty with which the Plaintiff had been treated by the Appellant that he reviewed his former decision for—after stating his said findings as to the dishonesty of the late Chief and the strong savour of collusion between him and the Appellant—he proceeded :—

" I should be doing far less than justice if I did not amend my decision given on the 22nd February and I do amend it on the following terms at the request of the Applicant.

p. 30, l. 31.

30 Upon payment into Court of a sum of £30 2s. to be deposited in favour of Elizabeth Anima the applicant may issue execution against the said property at No. 23 Bantama, Kumasi.

. . . The applicant is entitled to the cost of these proceedings which I assess at 2 guineas as against Elizabeth Anima."

17. The Appellant was given no opportunity by the learned Judge of dealing with any of the matters of dishonesty and collusion imputed to her ; she, therefore proposes to present a petition to Her Majesty in Council for leave to adduce further evidence.

40 She desires to prove that she purchased the present Respondent's interest in the compound house by public auction at an execution sale under a decree of a Native Court on or about the 4th November 1936 and paid the full purchase price to the auctioneer, as appears from a receipt signed by the auctioneer and a Certificate of Purchase issued to her on the 23rd February 1938 by the Native Court ; that by an underlease dated the 4th June 1938 the Stool underlet to her the said plot No. 23 for the residue less the last day of a term created by a lease No. 632 dated the 5th February 1912 granted by the Government of the Gold Coast (in whom all the land in the town of Kumasi was vested in right of the Crown)

to the Bantama (otherwise Kronti) Stool, that on the 5th August 1938 the Government of the Gold Coast by its proper officer consented to the first Defendant on behalf of his Stool underleasing to her plot 23 but that such licence was expressed not to authorise any further assignment underlease or mortgage of the plot or of any buildings erected or being upon the plot either by the Stool (to whom the plot had been leased by Government on the 5th February 1912) or the present Appellant or by any person whatsoever and whether voluntary or involuntary; that, from the grant of the said lease up to the present time, the Appellant has paid the ground rent reserved by the said sublease to the persons entitled 10 to receive the same, being now the Kumasi Council, and also the house rates and water rates levied upon her as owner of the compound house thereon; and that she did not collude with the late Chief of Bantama to frustrate the compromise of the 23rd March 1939.

p. 32. 18. The Appellant appealed from the said decision of Mr. Justice Jackson of the 30th March 1950 to the West African Court of Appeal upon various grounds, including grounds that the decision of the 30th March 1950 was in effect a review (and reversal) of the decision of Mr. Justice Bannerman on the 24th July 1939 and that this was not competent; that this decision had been misconstrued as imposing a 20 "limitless time limit"; that the decision of Mr. Justice Jackson ignored the failure of the Plaintiff to comply with the terms of the judgment of the 23rd March 1939 (i.e. the terms of the compromise); that the decision of the 24th July 1939 had not been appealed against; that the Plaintiff had been guilty of laches and that at any rate the Appellant should be compensated for her improvements.

p. 34. 19. The West African Court of Appeal on the 9th January 1952 dismissed the appeal with costs.

p. 33, l. 8.
p. 33, l. 24. They treated the proceedings of the 23rd March 1939 as resulting in a judgment by consent, whereby the Appellant was unconditionally ordered 30 to give up possession on the footing that the Plaintiff was the legal owner, and held that the proceedings before Mr. Justice Bannerman on the 24th July 1939 were a review of the judgment of the 23rd March 1939 but that the Court could only have reviewed such judgment with the consent of the parties, and there was no indication that they did so consent, that the Plaintiff had been entitled under the consent judgment to proceed to execution (but whether execution was to be against the first Defendant or the fourth Defendant or whether it was to be by way of Writ of possession to recover the plot of land with house thereon or to recover possession of the compound house is not stated); that the Appellant had been entitled 40 to proceed to execution against the first Defendant (i.e. to recover from him the sum of £30 2s.) and the Appellant, after production of receipts, had been entitled to proceed to execution for the £7 referred in paragraph 7 of the consent judgment, and that, though the Appeal Court doubted the part of the order of Mr. Justice Jackson which required payment of £30 2s. into Court by the Plaintiff before proceeding to execution, the learned Judge was entitled to give leave to the Plaintiff to proceed to execution. Finally the Court overruled a point raised by the Appellant's Counsel which had not been stated in the grounds of appeal.

Appellant's Counsel had submitted that, having regard to section 17 (c) p. 36, l. 19. of the Courts Ordinance (Chapter 4 Laws of Gold Coast 1936 Revision), together with section 35 of the Native Courts (Ashanti) Ordinance, Mr. Justice Bannerman had not had jurisdiction to pronounce any judgment but ought to have "transferred the suit to the Native Court."

On this the Court of Appeal held, that apart from any question of waiver by the parties where the Court has inherent jurisdiction, the Appellant could not, after the lapse of 10 years when she herself (the Court said) had taken steps under the consent judgment, be then heard
10 to say that the Court had no jurisdiction and that it would be unjust to hold so.

The Appeal Court accordingly dismissed the Appeal with Costs.

20. With regard to the question of jurisdiction, it is submitted that, if the Supreme Court had no jurisdiction to adjudicate and enter judgment, the consent of the parties could not confer jurisdiction. Furthermore the Appeal Court were in error in holding that the Appellant had herself taken steps under the "consent judgment." She had not taken any step whatever under it but in effect had rested upon her prior rights which, it is submitted, had not been, in the circumstances, disturbed
20 by the compromise or the alleged "consent judgment" if such there were.

There was a Native Court established under section 3 of the Native Courts (Ashanti) Ordinance (Chapter 80 Laws of the Gold Coast 1936 Edition) with full jurisdiction in suits relating to the ownership possession or occupation of land in Kumasi Division, namely, the Asantehene's Divisional Native Court established by the Native Courts (Confederacy) Order as a "B" grade Court (Laws of the Gold Coast 1936 Edition Volume 3 page 395).

It is submitted therefore that Mr. Justice Bannerman could not on the 23rd March 1939 have rightly made, and should not be presumed to
30 have intended to have made, an order conflicting with his duty under section 35 of Chapter 80 to stay proceedings and refer the parties to a competent Native Court.

It is further submitted that if the Plaintiff desired to enforce the compromise of the 23rd March 1939 or any other alleged rights in respect of Plot 23 he could only do so in a competent Native Court.

21. Leave to appeal to Her Majesty in Council was granted by an p. 38. order of the West African Court of Appeal dated 27th June 1952.

22. On the 24th June 1954 an Order for Revivor was promulgated p. 38. substituting the Respondent in place of the said Kwame Dwaa deceased.

40 23. The Appellant humbly submits that this Appeal should be allowed with costs and the judgment of the Court of Appeal of the 9th January 1952 and the judgment or decision of the Supreme Court of

the 30th March 1950 should be reversed and the decision of the Supreme Court of the 18th March 1950 should be restored for the following, among other,

REASONS

- (1) BECAUSE Mr. Justice Jackson and the West African Court of Appeal erred in holding that the proceedings of the 23rd March 1939 constituted a judgment upon which Kwame Dwaa could levy execution against the Appellant.
- (2) BECAUSE further, or in the alternative, the Courts below erred in holding that the decision of the 24th July 1939 was of no effect.
- (3) BECAUSE further, or in the alternative, Mr. Justice Jackson improperly exercised his discretion in giving leave to Kwame Dwaa to issue execution in view of the latter's own conduct and the hardship to the Appellant, and in view of the fact that there was no evidence on which he could find that the Appellant was guilty of collusion to defeat a judgment.
- (4) BECAUSE further, or in the alternative, by reason of section 17 (b) of the Courts Ordinance (Chapter 4, 20 Laws of the Gold Coast, 1936), and of section 35 of the Native Courts (Ashanti) Ordinance (Chapter 80, Laws of the Gold Coast, 1936), Mr. Justice Bannerman had no jurisdiction to give judgment and, by reason of those Ordinances as amended, Mr. Justice Jackson had no jurisdiction to give leave to issue execution in respect of the property in dispute.
- (5) BECAUSE the judgment of the Court of Appeal of the 9th January 1952 was erroneous.
- (6) BECAUSE the judgment or decision of the Supreme 30 Court of the 30th March 1950 was erroneous but the decision of the 22nd February 1950 was correct.

GILBERT DOLD.

In the Privy Council.

ON APPEAL

*from the West African Court of Appeal
(Gold Coast Session).*

BETWEEN

ELIZABETH ANIMA

(Defendant) *Appellant*

AND

AKWASI AKYEYE

(substituted for Kwame
Dwaa, deceased) (Plaintiff) *Respondent.*

Case for the Appellant.

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