

Elizabeth Anima - - - - - *Appellant*

v.

Akwasi Ahyeye (substituted for Kwame Dwaa, deceased) - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 13TH DECEMBER, 1955

Present at the Hearing:

LORD RADCLIFFE

LORD TUCKER

MR. L. M. D. DE SILVA

[*Delivered by* MR. L. M. D. DE SILVA]

This is an appeal from a judgment of the West African Court of Appeal dated the 9th January, 1952, affirming a judgment of the Supreme Court, of the Gold Coast, Ashanti (sitting as a Divisional Court at Kumasi), dated the 30th March, 1950, granting an application of the respondent to issue execution against the appellant on a consent judgment entered in the Divisional Court on the 23rd March, 1939.

The respondent instituted the action in the Divisional Court on the 10th November, 1938, against the appellant and three other defendants for declaration of title to a house and for £120 damages "for wrongful sale, trespass, use and occupation". He alleged in the Particulars of Claim filed with the writ that the 1st defendant had "given" him a land "about 20 years" previously and that the 1st defendant had (date unstated) sold the house to the 4th defendant (the present appellant). The 2nd and 3rd defendants appear to have been made parties on the basis that they had been concerned with the sale. It will appear that it is not necessary to determine what precisely was the basis of the respondent's action against each or all of the defendants.

Before any statement was made by way of defence the parties settled the case, and the following minute was made by the Court on the 23rd March, 1939, under the heading "Court Notes of Compromise and Order thereon".

"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 2s. 0d. 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 16s. 0d. 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.

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 12s. 0d. 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.

(Signed) WOOLHOUSE BANNERMAN".

After the signature of Woolhouse Bannerman, J., the presiding judge, there followed the signatures of the parties or their representatives except that of the 2nd defendant who was not present. No question regarding him arose or arises on this appeal.

It was argued by the appellant that there was a Native Court with jurisdiction over the subject matter of the case and that consequently the Divisional Court of the Supreme Court had no jurisdiction to make the order set out in the preceding paragraph. It is necessary in dealing with this argument to consider the combined effect of section 7 of the Native Courts (Ashanti) Ordinance (page 80, Laws of the Gold Coast, 1936, Revision Volume II, page 1249), and of sections 14 and 17 of the Courts Ordinance of the Gold Coast (Laws of the Gold Coast, Volume I, pages 31 and 32). Section 7 of the Ashanti Native Courts Ordinance is to the following effect:—

"7. (1) Every Native Court shall have full jurisdiction and power to the extent set forth in the order establishing it and subject to the provisions of this Ordinance in all civil and criminal cases in which all the parties are natives and the defendant was at the time when the cause of action arose resident or being within the jurisdiction of the Court or in the case of a criminal matter is accused of having wholly or in part within the jurisdiction of the Court, committed or been accessory to the committing of an offence.

(2) For the purposes of the preceding subsection the Governor may by order grade Native Courts and prescribe the jurisdiction and power which is to be set forth in the orders establishing the Native Courts of each grade.

Except in so far as the Governor may by such an order otherwise direct, there shall be four grades of Native Courts, namely, grades A., B., C., and D. and the jurisdiction and power which shall be set forth in the orders establishing Native Courts of these grades shall not without the permission of the Governor exceed those prescribed in the First Schedule."

Under the first schedule (page 1262) of the Native Courts Ordinance Native Courts of Grade B have

"Such jurisdiction in suits relating to the ownership, possession, or occupation of land within the area of its jurisdiction as may be stated in the order establishing the Native Court."

It is contended that by reason of the provision just stated a Native Court of B. Grade had jurisdiction over the subject matter of this case.

Section 14 of the Courts Ordinance of the Gold Coast is to the following effect:—

"The Supreme Court shall be a Superior Court of Record, and in addition to any other jurisdictions conferred by this or any other

Ordinance, shall, within the Gold Coast and subject as in this Ordinance mentioned, possess and exercise all the jurisdiction powers and authorities which are vested in or capable of being exercised by His Majesty's High Court of Justice in England."

(There is a proviso which is not material.)

Subsection (b) of section 17 is to the following effect:—

"17. Notwithstanding anything in this Ordinance contained the Supreme Court shall not exercise jurisdiction:—

(a) . . .

(b) in Ashanti in any civil cause or matter subject to the provisions of section 35 of the Native Courts (Ashanti) Ordinance, save and except in accordance with the proviso to such section, or in any cause or matter within the jurisdiction conferred on the Ashanti Chief Commissioner's Court by sections 62 and 64 of this Ordinance.

(c) . . .

(d) . . .

(Subsections (a), (c) and (d) are not material.)

Section 35 of the Native Courts Ordinance referred to in subsection 17 (b) set out above is to the following effect:—

"Whenever it shall appear to the Chief Commissioner's Court or the Divisional Court, or a Magistrate's Court that any civil cause or matter brought before it is one properly cognizable by a Native Court and that a Native Court with jurisdiction to try such civil cause or matter has been established under the provisions of this Ordinance, such Chief Commissioner's Court or Divisional Court or Magistrate's Court as the case may be shall stop the further progress of such civil cause or matter before it and refer the parties to a competent Native Court as the case may be; and the Court shall thereupon order such costs as it shall deem fit."

(There follows a proviso giving a list of cases in which "the obligations as to stoppage and reference" are not to apply. Their Lordships do not find it necessary to refer to this proviso.)

The appellant argued that the present suit was one "relating to the ownership, possession or occupation of land" within the meaning of those words in the Schedule to the Courts Ordinance set out above, and that there existed a Native Court Grade B which had jurisdiction over the subject matter of this case. The question whether the suit was one "relating to the ownership, possession or occupation of land" was disputed by the respondent, but assuming that it was, it does not appear on the face of the record that "a Native Court with jurisdiction" over the subject matter of this case "has been established" (section 35). The record does not contain an "Order establishing" (section 7 (2) above) such a Court, and consequently if such a Court has been established the extent of its jurisdiction is unascertainable by reference to the record. Furthermore it does not appear on the face of the record, except in so far as it can be inadequately suggested from their names, that all the parties were natives.

It is said however by the appellant that the facts were not in dispute when the point was taken for the first time before the West African Court of Appeal, although there is nothing in the judgment of that Court or elsewhere in the record which supports that suggestion. Their Lordships do not find it necessary to consider further what the facts were in view of the opinion they have formed as to the bearing of the sections set out above upon this case.

Their Lordships are of opinion that the effect of section 14 is to confer on the Supreme Court a wide jurisdiction including jurisdiction concurrent with the Native Courts over matters in which the Native Courts have

jurisdiction. Section 17 (above) requires the Supreme Court not to exercise this concurrent jurisdiction when section 35 (above) comes into operation. It is necessary to determine exactly when, if at all, section 35 does so in any particular case.

Their Lordships are of the view that the concurrent jurisdiction of the Supreme Court is ousted by the operation of section 35 whenever, and only "whenever, it shall appear to the Divisional Court that any civil cause or matter is one properly cognisable by a Native Court and that a Native Court with jurisdiction to try such civil cause or matter has been established" (section 35). The Court may of its own motion, at any stage of the action before judgment, upon the material placed before it by the parties for purposes other than those of ousting jurisdiction, with or without further material elicited by itself, come to the conclusion that the requisite circumstances exist. It will be then its duty to stop proceedings and refer the parties to the Native Court. It is also open to a party for the purpose of ousting jurisdiction to endeavour to make it appear to the Court upon the material before it at any stage, or by placing further material before it, that the requisite circumstances exist and to ask for a decision upon the point thus raised. But once judgment is pronounced without the question of ouster of jurisdiction being considered or submitted for consideration, the judgment will be the judgment of a competent court. If it were otherwise, it would be open to a party conscious of the existence of the requisite circumstances not to bring them to the notice of the Court until judgment had been pronounced, and then, if the judgment be adverse to him, to seek to defeat the judgment on the ground of lack of jurisdiction. Their Lordships are of opinion that section 35 has been framed to avoid such a possibility and that, though in the generality of cases jurisdiction depends on the existence or absence of prescribed circumstances whether or not the Court is conscious of them, under section 35 jurisdiction is ousted only when the prescribed circumstances have become apparent, or have been made apparent, to the Court. In the case before their Lordships the trial judge proceeded to judgment and it must be presumed that it did not appear to him that the circumstances requisite for an ouster of jurisdiction were present. Neither party endeavoured to oust jurisdiction by bringing such circumstances, if they existed, to his notice. Their Lordships are therefore of opinion that the judgment of the Trial Court was the judgment of a Court of competent jurisdiction.

It was next argued by the appellant that the minute set out in the preceding paragraph was the record of a compromise agreement upon which proceedings were stayed, and not a judgment upon which execution could be issued. It was further argued that in any case the obligation of the 4th defendant to give up the house under clause 1 (above) did not arise until she had been paid £30 2s. 0d. by the 1st defendant under clause 2. Their Lordships do not agree with either of these arguments.

Their Lordships are of the opinion that the minute of the 23rd March, 1939, is the minute of a judgment on which execution can issue. The minute contains the terms of settlement followed by the order "judgment accordingly" of the court. The combined effect of the terms and the order is, in their Lordships' opinion, to make the obligations of parties in each of the terms of settlement (as contain them) enforceable by execution unconditionally, that is to say enforceable against each of them by execution whether or not the obligations of other parties in other terms have been fulfilled. The benefit to accrue to each party is defined and, if he does not receive it, the right to obtain it by proceeding to execution is given to him. Parties no doubt were induced to undertake obligations, partly at least, by the fact that other parties also undertook obligations. But the fulfilment of obligations in any one term of settlement was not made a condition for the performance of obligations in any other. Thus regarded the duty of the 4th defendant to give up possession of the house within a fortnight of the 30th March, 1939, was not dependent on the payment to her of £30 2s. 0d. by the 1st defendant.

If the 1st defendant failed to pay the money within the stipulated fortnight the 4th defendant could issue execution against him, but her duty to give up the house remained unaffected. Their Lordships are of the view that this is the true meaning of the terms of settlement. It could be no other unless words are read into the terms making the performance of the first term conditional upon the performance of the second. It is not admissible to introduce such words.

Those concerned with the settlement of actions might with advantage study the judgment of Mr. Justice Slade in the case of *Green v. Rozen* (1955) 3 W.L.R. 741 where will be found a discussion on the advantages and disadvantages of the different formulae which can be used for this purpose.

The next point argued by the appellant is that a note recorded by Bannerman. J., on the 24th July, 1939, namely

“ If the 1st defendant has failed within the time-limit to pay the £30 2s. 0d. to the 4th defendant then the 4th defendant should retain possession of the house ”

precludes the respondent from proceeding to execution on the earlier order of 23rd March, 1939. The note recorded was on an application by the appellant for a “ review ” of the order of the 23rd March, 1939. It had been preceded by two applications by the appellant both of which had been withdrawn. The first of these was an application made on the 11th May, 1939, asking on various grounds that the order of the 23rd March, 1939, be set aside “ or for direction ”. It was withdrawn on the 25th May, 1939. The next was an application made on the 16th June, 1939, “ to construe the order made on the 23rd March, 1939, or for direction ”. It was withdrawn on the 3rd July, 1939. An application was then made on the 12th July, 1939, “ to review ” the order of the 23rd March, 1939, and the note recorded on the 24th July, 1939, mentioned above was the result of that application. The appellant argues that the expression of the view amounts to an unconditional order that “ the 4th defendant should retain possession of the house ”. This is disputed by the respondent. Their Lordships do not find it necessary to decide this question as they agree with the Court of Appeal that the learned judge had no jurisdiction to review the order of the 23rd March, 1939, which was a consent order. The power of a Court to review a judgment is contained in Order 41 in the 3rd Schedule to the Courts Ordinance (Vol. 1, p. 123) and is to the following effect:—

“ Any Judge, Magistrate, or other judicial officer, may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, or a reference shall have been made upon a special case, and such appeal or reference is not withdrawn), and upon such review it shall be lawful for him to open and re-hear the case wholly or in part, and to take fresh evidence, and to reverse, vary, or confirm his previous judgment or decision, or to order a non-suit.”

Their Lordships are of opinion that in using the words “ judgment or decision given by him ” the legislature contemplated a judgment or decision formulated by a Court for reasons, stated or unstated, which the Court had thought to be sound. A Court may review the judgment or decision when it thinks that some or all of those reasons need further consideration. The reasons for a consent judgment, frequently, as in this case (vide heading of proceedings of 23rd March, 1939, above), a matter of compromise, may never be known to the Court and once acted upon, their soundness is not a matter for review by a Court. A consent judgment or order may no doubt in appropriate proceedings be set aside on various grounds such as fraud but it may not be reviewed under Order 41. Their Lordships think that the note of the 24th July, 1939, whether or not it purported to be itself an order was made without jurisdiction and in no way affected the order of the 23rd March, 1939.

It was finally argued that the Trial Court had not exercised its discretion correctly in granting leave to the respondent to execute the judgment of the 23rd March, 1939, after the lapse of more than 6 years and that the Court of Appeal had erred in confirming the order of the Trial Court.

An application for execution of a judgment after the expiration of six years is governed by Rule 26 of Order 43 (Schedule to the Courts Ordinance, Vol. 1, Laws of the Gold Coast, p. 129) which is in the following terms:—

“As between the original parties execution, otherwise than against the person, may issue at any time within six years, and, against the person, at any time within two years from the date of the decree. After such periods respectively execution shall not issue without leave of the Court, but no notice to the debtor before applying for such leave shall be necessary”.

It is clear that a Court has a discretion whether to allow or refuse the application. It is for the Court after considering all the circumstances that may be relevant judicially to exercise its discretion. The Trial Court has exercised it in the present case in favour of the respondent and the Court of Appeal has seen no reason to interfere with the Trial Court's order. In their Lordships' opinion nothing placed before them has been sufficient to sustain the argument that the Courts below have exercised their discretion unjudicially although the relevant material to be found in the record is somewhat scanty.

The Trial Court in the course of dealing with the application said of the first defendant that a failure by him to pay the appellant the sum undertaken by him to be paid “savours strongly of collusion between himself and Elizabeth Anima” (the appellant). Their Lordships do not consider that the available evidence justified the expression of this view. The imputation ought not to have been made. But, even so the fact remains that the judgment was unsatisfied, and in the matter of the exercise of discretion the only ground of substance urged by the appellant against the issue of execution appears to be that she had spent £400 in reconditioning the house. The Trial Court dealt with this point by stating that, as against this, the appellant had had the use of the house and profits therefrom for over ten years. There was probably substance in what the Trial Court said, but it does not appear from the record what these profits were, or might have been, or even what the size and state of the house was when the appellant entered into occupation. The allegation that she spent £400, however, does not appear in her affidavit of the 16th March, 1950, filed for the purpose of resisting the application for execution, and there does not appear to be any sworn testimony supporting it. It does not appear to their Lordships that the fact that she spent £400 on the house, if fact it was, was felt by the appellant to be a strong reason for not surrendering the house. Their Lordships do not think that a case has been made out for sending the case back for a fuller investigation of the point whether, in all the circumstances, the appellant is now sufficiently compensated by the payment to her of the £30 2s. 0d. ordered in the judgment of the 23rd March, 1939.

It ought perhaps to be mentioned that the Trial Court had on the 22nd February, 1950, refused an application for execution of the judgment of the 23rd March, 1939. The reason given for the refusal was that “There is nothing in the judgment (of the 23rd March, 1939), upon which the plaintiff can proceed to execution”. Their Lordships do not think it necessary to offer any observations upon this view other than those already made earlier in dealing with the meaning and effect of the judgment of the 23rd March, 1939. It was upon a review of its order of the 22nd February, 1950, that the order under appeal was made on the 30th March, 1950.

In the course of the argument the appellant applied to place by affidavit further material before their Lordships upon the question whether there

had been collusion between herself and the first defendant. No satisfactory reason was given as to why it was not sought to place this evidence before the Court of Appeal for consideration whether it should be admitted or not. Their Lordships saw no reason why they should take the exceptional course of allowing the evidence to be produced for the first time before them and accordingly refused the application. This refusal has made no difference to the appellant, because, as already stated, their Lordships have formed the view that there were no sufficient grounds for holding that there had been collusion between the 1st defendant and the appellant.

For the reasons they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the respondent the costs of this appeal.

In the Privy Council

ANIMA

v.

AKWASI AHYEYE

DELIVERED BY MR. L. M. D. DE SILVA

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