Privy Council Appeal No. 32 *of* 1952

Chief Kofi Forfie, Odikro of Marban - - - - - *Appellant*

v.

Barima Kwabena Seifah, Kenyasehene. *substituted for* **Nana Owusu Agyeman III, Kenyasehene** (*abdicated*) - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH DECEMBER, 1957

Present at the Hearing:

LORD REID
LORD SOMERVELL OF HARROW
MR. L. M. D. DE SILVA

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

The original parties to this action were the predecessors in title of the present appellant and the present respondent. No question has arisen from the substitution of parties. The terms " appellant " and " respondent " in this judgment refer to the original parties as well as to the parties who appeared on this appeal.

The respondent instituted this action against the appellant on the 6th October, 1936, in Divisional Native Court B of Kumasi to recover a tract of land. That Court found in favour of the appellant and dismissed the respondent's claim. On appeal to the Asantehenes Court A2 the judgment was reversed and the respondent succeeded. The appellant thereupon lodged an appeal to the Chief Commissioner's Court. Mr. A. C. Spooner, the president of the Court at the time, heard the case and delivered judgment in favour of the appellant on the 10th May, 1949.

There was an appeal from this judgment to the West African Court of Appeal. Two dates relating to this appeal are relevant to a point discussed later. The respondent on the 27th May, 1949, obtained conditional leave to appeal and final leave to appeal was granted on the 15th July, 1949. His appeal was based on the contention that Mr. Spooner had had on the 10th May, 1949, no power to exercise judicial functions as, on that day, his appointment to preside over the Chief Commissioner's Court stood rescinded. It appears from the record that he had also been of this opinion and that, as a result, certain steps were taken which it is convenient to examine at this stage.

It is common ground that appointments to preside over the Chief Commissioner's Court can be and were made by Orders signed by the Colonial Secretary and published in the Gazette. When Mr. Spooner heard the case he held office under Order No. 84 of 1948. By Order No. 32 of 1949 signed on the 10th May, 1949, by the Acting Colonial Secretary, one Mr. Allen was appointed to preside over the Chief Commissioner's Court and Order No. 84 of 1948 was rescinded. By a further Order No. 42 of 1949 of 21st June, 1949, Mr. Spooner was appointed Commissioner for the period 23rd June, 1949, to 30th June, 1949. On the 29th June, 1949, acting under

a power to review a judgment conferred by Order 41 Rule 1 contained in Schedule 3 of Chapter 4 of the Laws of the Gold Coast, 1936 (quoted later), Mr. Spooner reviewed his judgment of the 10th May, 1949. He said that he had had no jurisdiction on the 10th May, 1949, to deliver that judgment and, stating that he was acting under his power to review, he delivered a judgment identical in terms with his original judgment. There was an appeal from this judgment also to the West African Court of Appeal.

It appears from the judgment of the Court of Appeal that the appellant at the hearing of the appeal conceded that the judgment of the 10th May, 1949, was a nullity. An endeavour was made by counsel for the appellant to argue that upon this point the Court of Appeal had misunderstood counsel. No indication of such an argument is to be found in the " Case for the Appellant ". Six years have now passed since the Court of Appeal gave judgment and their Lordships did not think that this was a case in which such an argument should be permitted. Nor did they find it possible, in the exercise of their discretion, to allow counsel, despite the concession, to argue that the judgment of the 10th May, 1949, was not a nullity.

The Court of Appeal held that the judgment delivered on review on the 29th June, 1949, must be held to be also a nullity as the judgment of the 10th May, 1949, was a nullity. Their Lordships are unable to agree. They have reached the conclusion that the judgment of the 29th June, 1949, was not a nullity upon two separate and independent grounds.

The power to review a judgment is to be found in Order 41 contained in the Third Schedule to Courts Ordinance which is to the following effect: —

ORDER 41

REVIEW

" 1. 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.

" 2. Any application for review of judgment must be made not later than fourteen days after such judgment. After the expiration of fourteen days an application for review shall not be admitted, except by special leave of the Court, on such terms as seem just."

This is an extremely wide power and its object is to enable a Court which is of opinion that a judgment or decision given by it is erroneous, to correct the error. If, as argued by the respondent, the term " judgment " must be limited to judgments made with jurisdiction, it follows that the Order enables a Court to correct all errors made by it except the error that it has given a judgment which it had no jurisdiction to give. Such a result would be curious. Their Lordships cannot accept the argument. To say that a judgment is a nullity is not to say that the judgment is not a judgment for any purpose, and, in particular, that it is not a judgment within the meaning of the term in Order 41. Their Lordships are of opinion that the term in Order 41 means nothing more than an adjudication by a judge upon rights of parties. If made without jurisdiction it would be ineffectual but the effectiveness or otherwise of the judgment is not relevant to the question whether it is a judgment. Consequently a judge may under the Order review a judgment delivered by him at a time when he had no jurisdiction and, on such review, give a second judgment. If at the time the second judgment is delivered the judge had jurisdiction then that second judgment is not a nullity. That is the position in the present case.

Certain other submissions were made with regard to Order 41. It was said that a judge cannot act under rule 1 unless a party applies under rule 2. Their Lordships cannot accept this argument. There is no reason why a judge, acting under Order 41, should be precluded, after hearing parties, from correcting an error which he has noticed. What the legislature has done is by rule 2 to place parties under limitation as to time without imposing a similar limitation on a judge. It was argued before the Court of Appeal that where it was intended that a judge should have the right to act of his motion the legislature has expressly said so. Thus in Order 26 the words "either of his own motion or on application" occur. Their Lordships are of opinion that, though this argument cannot be said to be without some force, it is not strong enough to defeat the view expressed above.

It was also argued that the words "except where either party shall have obtained leave to appeal" in rule 1 were applicable because the respondent had at the time of the review obtained conditional leave to appeal and fulfilled the conditions although the court had not granted final leave to appeal. Their Lordships cannot agree. They think "shall have obtained leave to appeal" relates to the point of time at which final leave is formally granted by the Court.

It was further argued that the power to review was not exercisable by an appellate tribunal. If this were correct the term "judicial officer" in rule 41 would not include judicial officers exercising appellate jurisdiction. Their Lordships can see no reason for taking this view.

It was said that Order No. 42 of 1949 of 21st June, 1949, which appointed Mr. Spooner to preside for the period 23rd June, 1949 to 30th June, 1949, was ineffective as Mr. Allen's appointment had not been rescinded. Their Lordships are of the opinion that more than one person can be appointed to function at the same time. Section 63 of the Courts Ordinance is to the following effect:—

> "The Governor may at any time by order under his hand appoint a fit and proper person to preside over the Chief Commissioner's Court and such person shall have and may exercise during the period of such appointment and subject to the terms thereof all the judicial powers and jurisdiction for the time being vested in the Chief Commissioner."

It is conceded that under the relevant law the singular includes the plural and consequently "a fit and proper person" includes "fit and proper persons". Their Lordships do not think that the word "preside" stands in the way of this interpretation. Two persons can be appointed but as they will not both sit in the same court at the same time no difficulty can arise. Moreover if only one person can be appointed the later appointment of Mr. Spooner will prevail over the earlier appointment of Mr. Allen.

Their Lordships will now proceed to the second ground upon which they have come to the conclusion that the judgment of the 29th June, 1949, was not a nullity. A court has inherent power to set aside a judgment which it has delivered without jurisdiction. Lord Greene, M.R., in *Craig* v. *Kanssen* ([1943] 1 K.B., 256, at p. 263) after referring to several decisions said:—

> "Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled ex debito justitiae to have it set aside. So far as procedure is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that it is not necessary to appeal from it."

Their Lordships are of the same opinion. Assuming that the judge had no power on the 29th June, 1949, to review his judgment of the 10th May, 1949, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment. This in fact he did, and the only criticism of the proceedings of the 29th June that could be made is that on a question of procedure he attributed the authority to do the thing he did to a source

from which it did not flow. But although the source named was, on the assumption made, incorrect he undoubtedly had power to do the thing he did. No other error can be said to have been committed. Such an error does not in their Lordships' opinion vitiate the act done. It follows that the judgment of the 29th June, 1949, was not a nullity.

The learned judge who delivered the judgment of the West African Court of Appeal with which the others concurred says the " appeal against the reviewed judgment of the 29th June, 1949, has not yet come before this court ", but he has pronounced upon the question whether or not the judgment of the 29th June, 1949, is a nullity. He said " the reviewed judgment must also in my view be declared a nullity ". And under the heading " Court Notes of Judgments " the formal order made is " Appeal allowed. Judgment of C.C.A. set aside as a nullity. Reviewed judgment also declared a nullity. No order as to costs." That view and that order stand in the way of the appeal from the judgment of the 29th June, 1949, being proceeded with. Their Lordships will therefore humbly advise Her Majesty that this appeal be allowed and the case sent back to the Court of Appeal of Ghana to deal with such other points as arise on the appeal from the judgment of the 29th June, 1949, on the basis that that judgment is not a nullity although the judgment of the 10th May, 1949, is a nullity. The respondent must pay the appellants costs of this appeal and of the hearing before the West African Court of Appeal.

(39227) Wt. 8075—17 130 1/58 D.L.

In the Privy Council

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