GH2 G.1. 23,1961

IN THE PRIVY COUNCIL No. 48 of 1960

ON APPEAL
FROM THE COURT OF APPEAL OF GHANA

B E T W E E N

SARAH QUAGRAINE (Plaintiff) Appellant

—— and ——

B. CROSBY DAVIES (substituted for SAM FERGUSON, Deceased) of Anomabu (Defendant) Respondent

C A S E FOR THE APPELLANT

RECORD

1. This is an appeal from a judgment, dated the 13th June, 1960, of the Court of Appeal of Ghana (Korsah, C.J., van Lare and Sharp, JJ.A.) dismissing upon a preliminary objection an appeal from a judgment, dated the 21st December, 1957, of the High Court of Ghana (Acolatse,J.) and a ruling, dated the 31st October, 1959, of Acolatse, J. refusing, upon a review under 0.39 of the Rules of the High Court, to vary the said judgment of the 21st December, 1957. By the said judgment of the 21st December, 1957, the High Court dismissed a claim by the Appellant for recovery of possession of certain land and an injunction restraining the Respondent from entry thereon. The Appellant then applied to Acolatse, J. for a review of the said judgment. Acolatse, J., in the Appellant's submission, granted the said application, and, by his said ruling of the 31st October, 1959, confirmed the said judgment upon review.

pp.59-65
pp.19-23
pp.50-53
pp.5-7
p.24

2. 0.39 of the Rules of the High Court of Ghana reads as follows:

1. (1) Any person considering himself aggrieved -

(a) by a judgment or order from which

an appeal is allowed, but from which no appeal has been preferred; or

(b) by a judgment or order from which no appeal is allowed;

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the judgment was given or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the judgment given or order made against him, may apply for a review of the judgment or order to the Judge who gave judgment or made the order.

(2) A party who is not appealing from a judgment or order may apply for a review of the judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appeal Court the case on which he applies for the review.

2. An application for review of a Judgment or order of a Court or Judge shall be made only to the Judge who gave the Judgment or made the order sought to be reviewed.

3. (1) Where it appears to the Judge that there is not sufficient ground for a review, he shall dismiss the application.

(2) Where the Judge is of opinion that the application for review should be granted, he shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the Judgment or order was given or made, without strict proof of such allegation.

4. Where the Judge or Judges, or any one of the Judges who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application

for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

5. (1) Where the application for a review is heard by more than one Judge and the Court is equally divided the application shall be dismissed.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

6. When an application for review is granted, a note thereof shall be made in the register and the Court or Judge may at once rehear the case or make such order in regard to the rehearing as it thinks fit, and upon such rehearing the Court or Judge may reduce, vary or confirm its previous judgment or order.

7. No application to review an order made on an application for a review of a judgment or order passed or made on a review shall be entertained.

8. (1) Applications to review any order made in Chambers shall be by summons in Chambers returnable in four days.

(2) Applications to review any order made or judgment given in Court shall be by four days notice of motion.

(3) Applications for review under this order shall be made within 14 days from the date on which the judgment or order in respect of which review is sought was entered or made: Provided that where the review sought is in respect of a final judgment, the Court or Judge may on such terms as seem just, grant special leave to apply for review at any time within three months from the entering of such final judgment.

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9. For the purpose of this Order "Court" means the Judge or Judges who gave the judgment or made the order in respect of which review is sought.

* * * * *

pp.1-2 3. On the 14th October, 1948, the Appellant issued a summons against Sam Ferguson in the Native Court B of Ayan-Breman Confederacy, claiming possession of certain land called Agissu land and an injunction restraining the Defendant from further entry thereon. pp.3-4 By an Order of the Supreme Court of the Gold Coast made on the 26th November, 1956, the action commenced by this summons, which was then still pending in the Native Court, was transferred to the Supreme Court.

pp.5-7 4. The Appellant delivered a Statement of Claim dated the 22nd May, 1957, and the Respondent (who had been substituted as pp.7-9 Defendant after the death of Ferguson) delivered a Defence dated the 29th May, 1957. In her Statement of Claim the Appellant relied upon a judgment of the Privy Council delivered on the 15th November, 1929, in proceedings between the ~~respective~~ predecessors in title of the ~~Appellant and the Respondent,~~ Respondent and the representative or caretaker of the Appellant, raising the question which of them had title to the Agissu land. The judgment of the Privy Council was in favour of the Appellant's predecessor. By his Defence, the Respondent admitted this judgment, but alleged that the Agissu land to which it referred was only a part of the land claimed by the Appellant in these proceedings.

pp.10-19 5. The action was tried by Acolatse, J. on the 22nd and 23rd October, 1957. The pp.19-23 learned Judge delivered a reserved judgment on the 21st December, 1957. He accepted the Respondent's contention that the Agissu land was only a part of the land claimed by the Appellant, and dismissed the action.

p.24 6. On the 4th January, 1958, the Appellant gave notice of motion under O.39 of the Rules of the High Court for a review of pp.25-29 the judgment of the 21st December, 1957. In two affidavits which she swore in support of

the motion, the Appellant contended that the learned Judge's identification of the Agissu land constituted a patent error on the face of the Record, and asked for leave to put in further evidence. The motion came before Acolatse, J. on the 22nd February, 1958. Counsel for the Appellant submitted that the learned Judge had been misled into an incorrect interpretation of the judgment of the Privy Council of 1929, and said that he wished to demonstrate that there was a mistake or error on the face of the judgment. p.33

7. The hearing of the motion was concluded on the 8th March, 1958, and Acolatse, J. then made his Order upon it. He said it was evident that the issue involved was the physical identity and situation of the Agissu land and of adjoining land admittedly belonging to the Respondent. He accordingly ordered that the boundaries of the Agissu land and of the Respondent's land be delineated on a plan which was to be prepared by two Surveyors, whom he named, and then to be filed in Court. The learned Judge concluded with these words: p.34

> "This motion is allowed to the extent of the Order above". p.34,ll.28-29

8. On the 17th May, 1958, the matter came before Acolatse, J. again. The plan made by the two Surveyors was put in, and one of the Surveyors, Mr. Mensah, gave evidence of how the plan had been prepared and what had happened when the Surveyors visited the site. Mr. Mensah's evidence was continued on the 29th May, 1958, and the 26th September, 1959. On the latter date the other Surveyor, Mr. Selby, began to give evidence on the same matters, and his evidence was concluded on the 10th October, 1959. On that day counsel for the Appellant asked for leave to submit various documents in evidence, which the learned Judge declined to allow. pp.34-42 pp.42-46 pp.46-48

9. On the 31st October, 1959, Acolatse,J. delivered his ruling. He described the course of the proceedings, and said that on pp.51-53

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p.52,ll.3-4 the 8th March, 1959, he had "allowed the motion to the extent of the Order" directing the preparation and filing of the

p.52,ll.9-29 new plan. He then referred to the oral evidence subsequently given, and to the new plan, and said that the delineation of the disputed lands in the new plan was just the same as it had been in the plans submitted at the trial. He concluded :

p.53,ll.8-12 > "I think this review does not justify me to vary the judgment I had given ... the review is dismissed...."

pp.54-56 10. On the 3rd November, 1959, the Appellant gave notice of appeal against the learned Judge's judgment of the 21st December, 1957, and his ruling of the 31st October, 1959. The grounds of the appeal were that Acolatse, J. had failed to apprehend and deal with the real issues raised by the pleadings, had misdirected himself concerning the effect of the Surveyors' evidence, and had been wrong in declining to admit the additional documentary evidence tendered by the Appellant.

pp.56-57 11. On the 23rd May, 1960, the Respondent submitted a preliminary objection that the Court of Appeal had no jurisdiction to hear the appeal. The ground of this objection was that the judgment of the High Court had been delivered on the 21st December, 1957, and the notice of appeal had been filed after the expiry of the statutory period of three months.

pp.57-58 12. The appeal came before the Court of Appeal on the 31st May, 1960, and the preliminary objection was argued. The Court (Korsah, C.J., van Lare and Sharp,

pp.59-65 JJ.A.) reserved their ruling upon the preliminary objection, and the judgment of the Court was delivered by Sharp, J.A.

pp.60-62 on the 13th June, 1960. The learned Judge referred to O.39 and to the notice of motion of the 4th January, 1958. He said

p.62,ll.28-38 that the proceeding on the 8th February,1958,

had been described as "motion on notice for an order reviewing the judgment of 21st December, 1957", and the same sub-title had been used on the adjourned hearings of the 22nd February and the 8th March, 1958. From then until the 17th October, 1958, the proceeding had been described as "motion for review". It was only on the 31st October, 1958 that Acolatse, J., as a result of what the learned Judges of the Court of Appeal considered to be inadvertence, used the expression "ruling upon the review", and consequently at the end of his ruling made an Order that the review be dismissed. The learned Judges held that the whole of the proceedings up to the 31st October, 1958 had been "for the purpose of eliciting the strict proof of allegations which is required by the proviso to Rule 3(2) of O.39". Acolatse,J., they said, had concluded that the requisite proof had not been given, so if he had purported to grant a review he had acted without jurisdiction. They said he had in fact dismissed the application, though he had done so in inappropriate words. They said that "in fact and in law" no appeal lay against a refusal to grant a review, and by the 3rd November, 1959, when the notice of appeal had been filed, the time for appealing against the judgment of the 21st December, 1957 had long expired. The learned Judges accordingly held that the appeal was not properly before the Court and should be dismissed.

p.62,l.38
p.63,l.1
p.64,l.36
p.65,l.14
p.65,ll.21-30

13. The Appellant respectfully submits that the learned Judges of the Court of Appeal attached undue weight to the mere language of headings used in the record, and were wrong in thinking that Acolatse,J. dismissed the application for a review. In the Appellant's submission, Acolatse, J. granted the application on the 8th March, 1958, the proceedings between the 17th May, 1958 and the 17th October, 1959 were the review, and as a result of the review the learned Judge on the 31st October, 1959 confirmed his previous judgment, in

accordance with 0.39, r.6., That this was the true nature of the proceedings appears from the terms of the order of the 8th March, 1958, the subsequent submissions of counsel on both sides and the ruling of the 31st October, 1959.

14. Further, the proceedings between the 17th May, 1958 and the 17th October, 1959 can, in the Appellant's submission, only be explained on the footing that Acolatse, J. had granted the application for a review on the 8th March, 1958. The learned Judges of the Court of Appeal thought the object of those proceedings had been to elicit the 'strict proof', required by 0.39, r.3(2) before the granting of an application for a review on the ground of the discovery of new matter or evidence which could not be adduced when the original judgment was given. The Appellant respectfully submits that this view is inconsistent with the facts, viz. that on the 8th March, 1958 Acolatse, J. had already ordered the filing of additional evidence consisting of a new plan; this plan was put in on the 17th May, 1958, and the oral evidence given between then and the 17th October, 1959 was devoted entirely to explanation of the way in which the new plan had been made and had no relevance to the allegations required to be proved by 0.39, r.3(2). This shews that on the 8th March, 1958, as he stated in his order of that date, the learned Judge allowed the motion for a review to a certain extent, and the subsequent proceedings were a review, not merely consideration of the question whether a review ought to be granted on the one particular ground mentioned in 0.39, r.3(2). (This nature of the proceedings was not affected by the fact that on the 10th October, 1959, in the course of the review, counsel for the Appellant applied unsuccessfully for leave to put in further documents.) It was not necessary for the learned Judge to consider whether the 'strict proof' required by 0.39, r.3(2) had been given, because the application for a review had not been made on that ground alone, but on all the grounds provided by 0.39, r.1(1), and because, as shown in paragraph 7 above, the Limited Order For

review was expressly granted on grounds to which the proviso in O. 39 r 3 (2) does not apply.

15. The Appellant respectfully submits that her notice of appeal of the 3rd November, 1959 was in time so far as it referred to the judgment of the 21st December, 1957. When an application for a review is made, the running of time for appealing from the original judgment is suspended between the date of the application and the date upon which it is granted or dismissed. If the application is granted, the running of the time is further suspended until the date of the decision upon the review. Accordingly, whether the application for a review was allowed on the 8th March, 1958 or dismissed on the 31st October, 1959, the time for appealing from the judgment of the 21st December, 1957 had not expired on the 3rd November, 1959.

16. The notice of appeal of the 3rd November, 1959, was also in time, in the Appellant's respectful submission, so far as it referred to the ruling of the 31st October, 1959. When an application for a review is granted, the order made upon the review is to be treated as the final judgment and either party may appeal from it accordingly. Alternatively, the Appellant respectfully submits that the learned Judges of the Court of Appeal were wrong in holding that 'in fact and in law no appeal lies against a refusal to grant a review'. O.39, r.7 excludes a review of an order made on an application for a review, but not an appeal from such an order. Accordingly, whether the ruling of the 31st October, 1959 was a refusal of the application for a review or a confirmation upon a review of the judgment of the 21st December, 1957, notice of appeal against it was properly given on the 3rd November, 1959.

17. The Appellant respectfully submits that the judgment of the Court of Appeal of Ghana was wrong and ought to be reversed, and this appeal ought to be allowed, and the preliminary objection to the appeal to the Court of Appeal of Ghana ought to be overruled and the case remitted to that Court so that the appeal from the judgment of the High Court of Ghana of the 21st December, 1957 and the ruling of the 31st October, 1959 may be

heard, for the following (amongst other)

R E A S O N S

1. BECAUSE Acolatse, J. granted the application for a review on the 8th March, 1958:

2. BECAUSE on the 31st October, 1959 Acolatse, J. confirmed upon review his judgment of the 21st December, 1957:

3. BECAUSE notice of appeal from the said judgment of the 21st December, 1957 was given in time:

4. BECAUSE an appeal lies from the said ruling of the 31st October, 1959 and notice of appeal from it was given in time.

J.G.Le QUESNE

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— and —

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CASE FOR THE APPELLANT

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