~~GHC G.4~~

23, 1961

IN THE PRIVY COUNCIL No. 48 of 1960

ON APPEAL FROM
THE COURT OF APPEAL, 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

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CASE FOR THE RESPONDENT

Record

1. This is an appeal from a Judgment of the Court of Appeal, Ghana (Korsah C.J., Van Lare and Granville-Sharpe JJ.A.) dated the 13th June, 1960, dismissing an appeal from a Judgment (hereinafter referred to as "the trial Judgment") and a Ruling on an application for a review thereof, dated respectively the 21st December, 1957, and 31st October, 1959, delivered and given by Acolatse, J. in the High Court of Justice (Land Court), Ghana, whereby he gave the trial Judgment in an action, wherein the Appellant was the plaintiff and the Respondent was the defendant, in favour of the Respondent, and dismissed the Appellant's application for a review thereof made pursuant to Order 39 of the Rules of the High Court of Ghana.

pp.59-65.
p.19, l.20-p.23.
p.50, l.19-p.53.
p.23, ll.34-40.
p.53, ll.12-13.

2. It is provided by Order 39 of the Rules of the High Court of Ghana (Laws of the Gold Coast, Subsidiary Legislation etc., 1954 Part 2, pp.314-315) (inter alia) as follows:-

"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.

.....

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.

.....

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". Record

3. By Notice of Motion dated the 4th January, 1958, the Appellant gave notice in due form of her intention to apply for a review of the trial Judgment. p.24.

4. On the 8th March, 1958, Acolatse, J. on the said application being made to him on the 22nd February, and adjourned to the 8th March, 1958, made an order as follows - p.33; p.34.

"Order: p.34, ll.1-31.

After hearing argument from both sides it is evident that the issue involved herein is the physical identity and situation of the Agissu land of which the Plaintiff is the owner and the three plots of land admitted and as belonging to the Defendant.

I accordingly order as follows that the boundaries of the Defendant's three plots of land, Nanado, Abberzaboasie and Abissiwa as described at page 21 of the Record of the Proceedings, Exhibit 'D' and the boundaries of Agissu land as described in Exhibit 'C' at page 61 of Exhibit 'D' be severally delineated on a Plan to be prepared by the Surveyors, Selby and T.F. Mensah, both of Cape Coast.

.....

Plan to be filed within three weeks from today's date.

This motion is allowed to the extent of the Order above. Hearing adjourned."

5. The hearing of the said application was resumed on the 17th May, 1958, and after adjournments was completed on the 17th October, 1959. p.34-p.37, l.11. p.37, l.15 to p.50, l.15.

6. On the 31st October, 1959, Acolatse J., gave his Ruling on the said application, which he dismissed. And at the conclusion of his Ruling he said:- p.50, l.20 to p.53, l.15. p.53,ll.8-13.

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"The review is dismissed; costs to the opposer assessed at One Hundred Guineas inclusive".

p.54 - p.56, 1.20. 7. The Appellant by Notice dated the 3rd November, 1959, appealed from the said Ruling and the trial Judgment.

p.56, 1.26 to p.57, 1.19. 8. By Notice dated the 23rd May, 1960, the Respondent gave notice of the preliminary objection to be taken by her to the competency of the said Appeal on the ground that the Court of Appeal had no jurisdiction to hear the same inasmuch as the said Notice of Appeal had been given long after the expiration of the statutorily prescribed period of three months within which a Notice of Appeal is required to be given.

pp.59-65. 9. On the 13th June, 1960, the Court of Appeal at the hearing of the said Appeal upheld the preliminary objection aforesaid which had been taken thereat by the Respondent; the said Court of Appeal in their unanimous Judgment saying -

p.65, 11.21-30

"In the result the refusal to review would be the only matter upon which appeal could in any event be to this Court, but in fact and in law no appeal lies against a refusal to grant a review. Therefore the only matter remaining against which this appeal is brought is the final Judgment dated the 21st December, 1957. The Notice of Appeal was filed on 5th November, 1959, by which date the time had long expired. The appeal is not properly before the Court and therefore stands dismissed."

p.59, 1.18 to p.65, 1.20. 10. In their said Judgment the Court of Appeal in arriving at the conclusion set forth in paragraph 9 supra said -

"The question that arises for determination in this appeal involves the interpretation to be placed upon Order 39 of the Rules of the High Court and the rules made under the order ..... the argument placed before us by Mr. Bentsi-Enchill for the Appellant - the plaintiff in the suit - expressed succinctly, is that by his ruling of the 31st October, 1959, the learned Judge granted a review of (the trial Judgment) by confirming it, and that therefore if the ruling is set aside on appeal,

(the trial Judgment) may also be set aside if it should appear that on the merits of the case it was erroneous, and further that the time for appealing against (the trial Judgment) begins to run only from the 31st October, 1959, because it was then that the learned Judge confirmed it so as to make it his final Judgment. On this basis it was submitted that the Notice of Appeal was filed within the time fixed by the Rules.

Mr. Bentsi-Enchill has brought to our notice certain authority upon which he seeks to rely in support of his contention. Firstly he cites from Woodroffe and Ali on 'Civil Procedure in British India' 2nd Edition at pp.1377 and 1378 a passage which he submits is 'in pari materia' with the present case. The passage is as follows -

> 'When a case is reheard on review the 'order on the rehearing is a new decree 'whatever the result is. Even though on 'the application for review coming on for 'hearing the Judge allowed it on a compara- 'tively insignificant point and forthwith 'directed a clerical error in the decree 'to be rectified; and the time within which 'to appeal on the decree runs from the date 'of such order.'

Counsel stresses the last sentence of this citation. Next he has called to our attention a passage from the judgment of Gardiner Smith, J. in the case of Effom & Ors. v. Frumah & Ors., reported in Selected Cases of the Divisional Courts of the Gold Coast Colony at p.41. The case in question arose under the old order 42 r.1 which we do not doubt has for the purpose of this appeal not been changed in material respects by Order 39 rule 6 on which Counsel places so much reliance. What Gardiner Smith, J. said was 'In my opinion Order 42 r.1 reopens 'the whole case and enables the Court to make 'any Order whatsoever. This is the effect of 'the Indian Rules, which are similar to our own.'

The importance of these citations from the point of view of their relevance or irrelevance to the facts of the present case will appear from what follows later in this judgment."

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Then having set out the provisions of Order 39 as set forth in paragraph 2 supra they continue -

p.62, l.1 to p.65, l.20.

"In the light of these provisions must be considered what the learned Judge did in the case of the application before him and also the extent and limitation of and to his jurisdiction under the Rules.

The Application for a review of his Judgment dated 21st December 1957 was made by motion dated and filed the 4th January 1958 in the following form:

'MOTION ON NOTICE FOR REVIEW UNDER ORDER 39'

'Take Notice that this Honourable Court 'will be moved by Bentsi Enchill, Esquire, 'of Counsel for and on behalf of Sarah 'Quagraine the Plaintiff-Appellant herein 'praying under Order 39 for an Order review-'ing the Judgment herein delivered by 'Acolatse, J., on the 21st December, 1957, 'and for such further or other order as to 'this Honourable Court may seem fit.

'Court to be moved on Saturday the '25th day of January, 1958, at 9 o'clock in 'the forenoon or so soon thereafter as 'Counsel for the applicant can be heard.

'Dated at Naoferg Chambers, Accra, this '4th day of January, 1958.'

This motion was supported by full affidavits but neither to these nor to the evidence filed in reply is it necessary to refer.

On February 8th 1958 the proceeding came on for hearing under sub-title as follows:- 'Motion on Notice for an Order reviewing the 'judgment of 21st December 1957.' The hearing of the motion was adjourned. It was resumed under the same sub-title on February 22nd 1958 and, again under the same sub-title, on the 8th March 1958. From then onwards to the 17th October 1958 the nature of the proceeding with which the learned Judge was concerned was described by him, when he described

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it, as 'Motion for Review' and it was not until the 31st October 1958 that the learned Judge, in our view through inadvertence, used an expression which appears to us to be both equivocal and wanting in validity 'Ruling upon the Review', and added, after reading his Ruling, a consequent Order in the terms 'The review is dismissed with costs for the Opposer.'

Mr. Bentsi Enchill relied on the following passages in the Ruling of the learned Judge:

'I gave Judgment on the 21st day of December, 1957, for the Defendant upon the evidence before me. Mr. Enchill moved the Court for Review of the Judgment which came before me on the 22nd February, 1958, sitting at Sekondi, for hearing. His argument was based upon the point that 'the Court was misled by distinction drawn between the two Certificates of Purchase of 1881 and 1893 into an interpretation of the P.C. Judgment which is incorrect.' His contention was that the three pieces of Nanado, Aberzaboasi and Abisiwa lands are outside the area edged pink lying south of the area. He also raised the question that the plaintiff was not given the opportunity to call witnesses in support of her case.

'On the 8th March, 1959, after hearing Counsel and finding that the issue involved is the physical identity and situation of the Agissu land of which the plaintiff is the owner and the three pieces of land admitted as belonging to the defendant I made an Order that boundaries of the Defendant's three plots of land as described at page 21 of Exhibit 'D' and the boundaries of Agissu land as described in Exhibit 'C' at page 61 of Exhibit 'D' be severally delineated on a Plan to be prepared by Surveyors Selby and T.F. Mensah, both of Cape Coast. I allowed the notice to the extent of the Order above: It was meant to see whether the Surveyors would produce a plan different to the plans tendered in the trial and to clear up the confusion in the identity of the land or lands claimed by each side.'

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x x x x x x x

'I think this Review does not justify me
'to vary the Judgment I had given and
'there is no foundation whatever to say
'that the plaintiff was prevented from
'calling his witnesses. The Review is
'dismissed costs for the Opposer assessed
'at One Hundred Guineas inclusive.'

p.64 These passages he said clearly indicated that the learned Judge had allowed the application for Review to some small extent, and he would no doubt on his cited authorities, contend that this reopened the whole case and made the time for appealing against the (trial Judgment) run from October 31st 1958.

Counsel however seemed to fail in his appreciation of another passage in the Ruling:

'Mr. Enchill tendered six exhibits which
'were refused by the Court upon the objec-
'tion taken by Mr. Abadoo.

p.64, l.14 - 'I find at the conclusion of the hearing
'of the Review that the new plan is iden-
'tical with the plans tendered in the
'trial. The location of the disputed
'lands in the new plan is just the same
'and tallies more or less with Selby's old
'plans.

'Mr. Enchill was seeking to introduce
'fresh evidence in this Review contrary to
'the Order and entirely different evidence
'from the evidence in the trial. It was
'an attempt on part of Enchill to re-open
'the matter and go one better than the
'plaintiff's former Counsel.

'In my opinion the plaintiff failed to
'satisfy this Court upon the Record upon
'which the Court based its judgment, to
'justify a review of that judgment. The
'Counsel for Plaintiff had every oppor-
'tunity of raising points taken by him in
'this Review in the trial and in truth
'some of the points taken in this Review
'are the same facts and submission made in
'the trial.'

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This passage in our opinion destroys the validity of the argument that the learned Judge reheard the case and confirmed his previous judgment. Indeed it indicates clearly in our opinion that the proceeding was for the purpose of eliciting the strict proof of allegations which is required by the proviso to rule 3(2) of Order 39. The learned Judge did not make any alteration or correction clerical or of any other kind in his judgment or 'decree'. In dismissing the motion he refused to vary it in any way. The rule requires to be emphasised - I will read it again (r.3(2) re-read). On his findings it is p.65. evident that the learned Judge concluded that the requisite proof of these allegations was wanting, and in the circumstances if he purported to grant the application for Review he acted without jurisdiction and his ruling would therefore be a nullity. He in fact dismissed the application, though it must be said that he did so in inappropriate words, which with a little more care he could easily have avoided. We cannot allow ourselves to be enslaved to mere words, particularly when, as here, they are used loosely and inaptly. It is the real intendment of the ruling, read as a whole and in the light of the true nature of the proceedings, that must be regarded.

Looking at the matter in this way there is only one conclusion to which we can come namely, that the Application for Review was dismissed by the learned Judge within the limits of his jurisdiction, which he would have transgressed if he had purported to do more".

11. It is respectfully submitted that the said Judgment of the Court of Appeal is right and should be affirmed and the said Appeal dismissed for the following amongst other

R E A S O N S

1. BECAUSE Acolatse, J. dismissed the Appellant's application for review of the trial Judgment.

2. BECAUSE no other view of the Ruling by Acolatse, J. given on the Appellant's Application for review of the trial Judgment is possible than that he dismissed it.

3. BECAUSE Acolatse, J. had no power under O.39 of the Rules of the High Court of Ghana otherwise than to dismiss the application for review of the trial Judgment.

4. BECAUSE an Appeal cannot be brought against a refusal to grant an application for review.

5. BECAUSE the Appellant's said appeal against the trial Judgment was well out of time.

6. BECAUSE for the reasons given by them and for other good and sufficient reasons the Judgment of the Court of Appeal is right.

S.N. BERNSTEIN.

No. 48 of 1960

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B E T W E E N :

SARAH QUAGRAINE
(Plaintiff) Appellant

- and -

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

CASE FOR THE RESPONDENT

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