P.C.A. No. 43 of 1951.

In the Privy Council.

ON APPEAL

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

BETWEEN

ALHAJI IBRAHIM . . . . . *Defendant-Appellant*

AND

1. MAMMA GARIBA,
2. MAAZU GARIBA and
3. ADJARA GARIBA, as children and successors of the late Mallam Gariba (deceased) of Sekondi . . . . . *Plaintiffs-Respondents.*

Case

FOR RESPONDENTS Nos. 1 AND 3, MAMMA GARIBA AND ADJARA GARIBA.

RECORD.

1. This is a Defendant's Appeal from a Judgment of the West African Court of Appeal (Gold Coast Session) dated the 16th day of March, 1951, reversing a judgment of the Supreme Court of the Gold Coast, Western Judicial Division, Land Court, Sekondi, dated the 4th day of August, 1949, the latter Court affirming a judgment of the Native Court "A," Western Province, Sekondi, dated the 16th day of October, 1948, the last-named Court modifying a judgment of the Native Court "B," Western Province, Sekondi, dated the 30th day of March, 1948. pp. 52–55. pp. 36–43. pp. 32–33. pp. 17–19.

2. The proceedings were brought in the last-named Court on the 24th day of February, 1948, by the Plaintiffs, who as children and successors according to Mahommedan Law of the late Mallam Gariba, deceased, claimed to eject the Defendant, now the Appellant, from certain property referred to in the Particulars of Claim and also a perpetual injunction restraining the Defendant his servants and workmen from interfering with the Plaintiffs in the use and possession of the said property. The Plaintiffs on the 15th day of March, 1948, obtained an injuction restraining the Defendant from further collection of the rents of the property in question and an Order appointing the Registrar of the Court as the Receiver and Manager of the rents pending the final determination of the suit. pp. 2–3. pp. 6–7.

3. The following extract is taken from the Record of Proceedings :—

p. 18, ll. 5–19.

" The 1st Plaintiff for and on behalf of 2nd and 3rd Plaintiffs " stating his case said (*inter alia*) that his father Mallam Gariba " bought one Salamatu otherwise called Kramo Atta and took " her to wife, but had no issues with her, and Defendant was also " his late father's domestic servant (slave). He further added " that while at Old Zongo, his father went abroad when they were " young, and did not return till he died. And in course of time, " Hausas in Old Zongo were removed by Government and each " house owner was compensated with a sum of money to rebuild " on a new site allocated to the Siriki Zongo, and his late father's " compensation was £190 paid to the Siriki Zongo who gave such " money to Salamatu Mallam Gariba's slave-wife who built the " present house and premises in dispute. Concluding he said that " Salamatu cared for them all from their infancy, the Defendant " then being little grown was given the property after the death " of Salamatu to be caretaker to manage the Estates until such " time that Plaintiffs would attain the age of puberty . . .

p. 18, ll. 22–30.

" Defendant on the other hand led evidence that he was a " son by adoption to Salamatu and not Mallam Gariba's slave, and " that his mother Salamatu owned the old premises at Old Zongo. " When married to Mallam Gariba and after Mallam Gariba left " her away for some time and died abroad, the Old Zongo was " removed by Government when his late mother Salamatu started " building the present house which was not completed before she " died ; and that the building was brought to completion by " himself as her (*sic*) mother bequeathed to him, and that his right " of succession to the said property is indisputable."

4. After recording evidence both oral and documentary the Native
p. 18, l. 19. Court " B," Sekondi, on the 30th day of March, 1948, and, after finding that two witnesses called for the Plaintiffs confirmed that late Mallam Gariba owned the old premises at Old Zongo for which £190 was paid and given to Salamatu for the new premises in dispute, gave judgment in the following terms :—

" Going strictly into the question of the right of succession, " there is little difficulty in determining it as Mallam Gariba died " before Salamatu, but since it is admitted by parties that Plaintiffs " are children of the late Mallam Gariba and Defendant an adopted " child of Salamatu, and both had been living in the premises to " the present date, this Court in its opinion find that Plaintiff's " action to oust Defendant entirely from occupation should fail " and in dismissing the action without costs, orders that parties " should continue to live in the premises, and that the rooms " should be divided among themselves. Action therefore dismissed " each to pay his own costs."

p. 19. 5. Being aggrieved by the judgment of the 30th day of March, 1948,
p. 20. both the Defendant and the Plaintiffs on the 7th day of April, 1948,

appealed against it to the Native Appeal Court " A," Sekondi Area. Both Appeals were by Order of that Court dated the 14th October, 1948, consolidated into one for purposes of determination. p. 30.

6. Further evidence by the Defendant and the Plaintiffs was led in the Native Appeal Court " A " on the 15th day of October, 1948, and on the following day the said Court (through its Acting President) delivered judgment setting aside the judgment of the Native Court " B," Sekondi, of the 30th March, 1948, and dismissing the Plaintiffs' action with costs. After setting out the respective cases of the parties, the judgment proceeded as follows :— p. 31. pp. 32-33.

" There is no proof to convince this Court to believe that the " old house belonged to Mallam Gariba." p. 32, l. 41.

It is respectfully submitted that the trial Judges who saw the witnesses and whose finding should not have been disturbed, expressly found, as stated in paragraph 4 hereof, that two witnesses called for the Plaintiffs confirmed that Mallam Gariba owned the old premises at Old Zongo, and the Trial Court clearly based the concluding part of their judgment set out in the said paragraph 4 above on the footing that both the Plaintiffs and the Defendant had rights in the new house, a finding which would be entirely inconsistent with the finding of the Native Appeal Court " A " that the old house did not belong to Mallam Gariba. The refusal by the Native Appeal Court " A " to accept the findings of the Trial Court has, it is respectfully submitted, coloured the reasoning of the Native Appeal Court " A " and affected its appreciation of the evidence throughout and has led it to support its conclusions by equivocal facts as will appear hereafter.

7. The Native Appeal Court " A," after stating that Mallam Gariba went to the French Ivory Coast, stayed there and died, relies on the evidence of Siriki Zongo, the Hausa Chief, that although Mallam Gariba was alive when the new house was being put up, he was only out of town, yet the plot was in Salamatu's name, but not in the name of either Mallam Gariba or his successors, the Plaintiffs. It is respectfully submitted that the Native Appeal Court " A " has not borne in mind that the nearest point in the French Ivory Coast to Sekondi as the crow flies is nearly 80 miles, and that in the circumstances the Hausa Chief was justified in handing the compensation to Salamatu, and that the utilisation by Salamatu of the £190 paid by the Government to the Hausa Chief as compensation for the demolition of the Old House and the further sum of £50 given by Mallam Gariba towards the erection of the New House constituted her a trustee of such house for Mallam Gariba and the Plaintiffs as his successors, subject to any possible claim for compensation to her for the difference between the sums of £190 and £50, i.e., £240 and the then proper cost of building the new house. p. 33, l. 7.

8. The Native Appeal Court " A " found that the evidence proved that the old house was owned by Salamatu long before Mallam Gariba married her, whereas the Defendant, in examination by the Court, admitted that Salamatu built the old house at Old Zongo when she was actually married to Mallam Gariba. p. 33, l. 5. p. 14, l. 15.

p. 33, l. 12. 9. The Native Appeal Court " A " stated that " It was an admitted fact that when the Plaintiff reached the age of puberty and even first Plaintiff had married and had about three children, Salamatu was then alive, but the Plaintiff never interfered with the question of her ownership to the house in dispute. The demolition of the old house took place in about 1911 and Salamatu also died in 1935, but since 1935 to 1947 nobody challenged Defendant's title to the house in dispute."

p. 31, l. 8, *seq.* The first part of this statement is taken from the evidence given by the Defendant on the 15th October, 1948, but although the first Plaintiff gave evidence thereafter on the same day, it was not put to the latter at all, 10
p. 8, l. 17, *seq.* who moreover had said in his evidence that, when he heard that the Defendant had altered the old name of the house and made a new plan, he went to the Defendant with his sister, the third Plaintiff, and demanded possession. As the Defendant tendered in evidence three plans, one
p. 14, l. 22. dated 6th April, 1922, one dated 23rd July, 1924, and one dated 31st August, 1932, it is clear that first Plaintiff had raised the question of ownership long before he instructed his solicitor to commence proceedings.

10. The Native Appeal Court " A " further stated as follows :—

p. 33, ll. 18–21. " According to the evidence of Petteh Esson the old house " belonged to Salamatu. Salamatu engaged Petteh Esson to 20 " demolish her old house and put up a temporary building with " iron sheets and boards and he did the work for £8 . . .

p. 33, ll. 29–34. " The evidence of Andrew Essien, Surveyor and Contractor, " supported by Exhibit ' A ' proves that Salamatu engaged Andrew " Essien to prepare the plan of her house in the name of her son, " the Defendant. Exhibit ' D ' proves that when Salamatu alias " Salam Attah was financially handicapped in completing the house " in dispute, she pledged the incompleted house for £300."

It is respectfully submitted that, on the evidence accepted by the Trial Court, which the Native Appeal Court " A " had no right without 30 good reason to reject, that the old house belonged to Mallam Gariba, a course of conduct by Salamatu which was equivocal could not divest her of her character as a trustee and the Plaintiffs of their title as beneficial owners.

11. The Native Appeal Court " A " further stated :—

pp. 33, ll. 21–26. " Defendant was not contradicted in his statement that he " allowed the Plaintiffs to stay with him in House No. 23/19 as his " mother and their mother were both married to the same man, " Mallam Gariba and that at one time when first Plaintiff collected " two months' house rents from a tenant without his (Defendant's) 40 " knowledge, he sued him."

It appears, however, that neither of these alleged facts were put to the first Plaintiff when he gave evidence, and the Defendant did not say that he sued the first Plaintiff for having collected two months' house rents from a tenant, but that the first Plaintiff had collected two months' rent from a tenant whom he (the Defendant) had sued, which is a totally

different thing and which would be strong evidence of an assertion of a right by the first Plaintiff in derogation of any alleged right of the Defendant.

12. The Native Appeal Court " A " further stated as follows :—

" Indisputably the late Salamatu was succeeded by the " Defendant and according to Mohammedan Law when the ' Salaka ' " was being performed in the presence of Mallam Lemanu Moru " (Priest) nobody put up any claim against the Estate of the late " Salamatu." p. 33, ll. 34–37.

The Plaintiffs respectfully submit that this alleged fact was never put to them nor to their witnesses, and such alleged fact is, therefore, without any value at all for this and other reasons.

13. The Plaintiffs, being aggrieved by the judgment of the Native Appeal Court " A " of the 16th October, 1948, appealed against it on the 13th November, 1948, to the Land Court, Sekondi. p. 34, *seq.*

14. On the 4th August, 1949, the Land Court, Sekondi (Ragnar Hyne, J.) delivered judgment dismissing the Plaintiffs' appeal with costs. The learned Judge followed substantially the reasoning of the Native Appeal Court " A." pp. 36–43.

15. The Plaintiffs being aggrieved by the judgment of the Land Court, Sekondi, of the 4th August, 1949, applied for leave to appeal to the West African Court of Appeal, Gold Coast Session, on the 3rd November, 1949, and final leave to appeal was granted on the 31st day of January, 1950. p. 43. p. 44.

16. The judgment of the West African Court of Appeal was delivered by Sir Mark Wilson, Chief Justice of the Gold Coast (Lewey, J.A., and Sir James Coussey, J., concurring). p. 52, *seq.*

In concurrence with the finding of the Trial Court, the West African Court of Appeal on the 16th day of March, 1951, found that the original house in which the predecessors of the parties resided in the Old Zongo was the property of Mallam Gariba and that the later house built by Salamatu in the New Zongo was built with the compensation money paid by the Government for the old house on the demolition of the Old Zongo, and that the Plaintiffs, therefore, have rights in the property by succession under Mohammedan Law, but the West African Court of Appeal stated that the trial Court also found that Salamatu had rights in the present property, to which the Defendant as her adopted son succeeded, and continued :— p. 18, l. 20. p. 53, l. 22.

" Being in agreement with these findings we should have been " disposed to restore the judgment of the Native Court ' B,' subject " to its being varied so as to set out clearly and precisely the " respective rights of the Plaintiffs and of the Defendant in the " property. Unhappily, we are not in a position to make such a " variation, since, although it is clear that the Plaintiffs and the " Defendant each have some rights in the property, the exact nature p. 53, l. 34, to p. 54, l. 21.

" and extent of those rights must obviously be governed by " Mohammedan law in its local application. As to this, and any " possible variations we have had nothing to assist us, either in the " evidence on record or in the arguments of counsel. Nor is there " upon the record sufficiently precise evidence as to matters of fact " bearing upon the issue regarding the respective rights of the " parties. In assessing those rights it will be desirable to have " information as to the source and exact amount of the capital " expenditure made by Salamatu and the Defendant in building and " adding to the original ' swish ' house, thus making it the more " durable and valuable property it is to-day, and as to whether " any rents were received by them for letting rooms in the house " and to what extent these were applied to improvements and " addition. This is an aspect of the matter which might considerably " affect the extent of the respective rights of the parties in the " present property.

" We feel, therefore, that the only course to follow is to allow " the appeal and send the case back to the Land Court at Sekondi, " so that the Court may take evidence and decide once and for all " what are the precise rights of the parties under Mohammedan " Law as locally applied. We therefore make the following " Order :—

" The appeal is allowed and the judgment of the Court " below is set aside and the case is remitted to the Land Court, " Sekondi, with the direction that the Land Court shall proceed " on the basis of the above findings of fact of the Native Court " ' B ' as approved by this Court, and shall—

" (A) after taking evidence, including evidence as to the " capital expenditure on the property as it now stands, define " the respective rights to be enjoyed by the Plaintiffs and the " Defendant in accordance with Mohammedan law, as locally " applied, in House No. 23/19, and the compound thereof, " situate at George Street, Hausa Zongo, Sekondi ;

" (B) after inspecting the premises, make an appropriate " order partitioning the property between the Plaintiffs and " the Defendant according to those rights, and make and give " all necessary consequential orders and directions."

17. The Defendant, being aggrieved by the judgment of the West African Court of Appeal dated the 16th day of March, 1951, applied on the 4th day of April, 1951, for leave to appeal to His Majesty in Council, and on the 18th day of July, 1951, final leave to appeal was granted. On the 13th day of April, 1954, leave was granted by Her Majesty in Council to Plaintiffs Nos. 1 and 3 (now Respondents Nos. 1 and 3 to this Appeal) to contest the appeal *in forma pauperis*.

p. 55, l. 25.
p. 56, l. 27.

18. The Plaintiffs (now Respondents) submit that the Appeal of the Defendant (now Appellant) should be dismissed, with costs, and the

judgment of the West African Court of Appeal of the 16th day of March, 1951, upheld for the following, among other

REASONS

(1) BECAUSE both the Intermediate Courts, i.e., the Native Appeal Court "A" and the Land Court, erred in departing from the findings of fact of the Trial Court, as there was abundant evidence to support those findings (*Okoye* v. *Ejiefo*, 2 W.A.C.A. 130; *Kuma* v. *Kuma*, 5 W.A.C.A. 4 (P.C.); *Akpandja* v. *Egblomesse*, 5 W.A.C.A. 10 (P.C.); *Dadzie* v. *Kojo & anor.*, 6 W.A.C.A. 139), and no good reason was shown by the two intermediate Courts for departing from those findings. (*Reynard* v. *Allan*, 2 W.A.C.A. 52.)

(2) BECAUSE the judgment of the West African Court of Appeal was otherwise right.

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