Appeal No. 48 *of* 1960

Sarah Quagraine – – – – – – – – *Appellant*

v.

B. Crosby Davies (substituted for Sam Ferguson, deceased) – *Respondent*

FROM

THE COURT OF APPEAL, GHANA

REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST MAY, 1961

Present at the Hearing:

VISCOUNT SIMONDS.

LORD RADCLIFFE.

LORD GUEST.

[*Delivered by* LORD GUEST]

The question raised in this appeal is a purely procedural point, whether an appeal by the appellants to the Court of Appeal, Ghana was timeous. But in order to appreciate the point it is necessary to rehearse briefly the circumstances under which it arises.

The history starts with a Privy Council judgment in 1929 in a litigation between a caretaker on behalf of the present appellant and a predecessor of the present respondent in regard to the title to Agissu land. The Board decided in favour of the appellant but no declaration of title was made. On 14th October 1948 the appellant issued a summons for a claim in trespass for recovery of possession of the Agissu land relying on the judgment of the Privy Council. In 1956 the case was still pending in the Native Court and it was thereafter transferred to the Land Court. In the Statement of Claim the plaintiff claimed recovery of possession of the Agissu land relying on the Privy Council judgment and alleging that the respondent was estopped from claiming ownership of the Agissu land. The respondent in his defence denied that he was occupying Agissu land. The land which he occupied consisted of three parcels of land known as Nanado, Abberzaboasie and Abiswa. A dispute was thus disclosed as to the boundaries of the Agissu land and the respondent's land.

After evidence Acolatse, J. on 21st December 1957 gave judgment in favour of the respondent. The appellant on 4th January 1958 gave notice of motion under Order 39 of the Rules of the High Court of Ghana for review of the judgment of Acolatse, J. Affidavits were lodged in support of this motion and on 8th March 1958 the Judge made an order which concluded with these words: " This motion is allowed to the extent of the Order above ". The Order will be more fully referred to later. Thereafter evidence was taken by the Judge and on 31st October 1959 the Judge gave a ruling dismissing the review. An appeal was tabled on 3rd November 1959 and on 13th June 1960 the Court of Appeal dismissed the appeal on the ground that it had not been timeously taken. By Rule 9 of the Supreme Court (Court of Appeal) Rules, 1957 an appeal against a final decision must be taken within three months.

When a case is reheard on review, the order on the rehearing is a new decree and the time for appealing runs from the date of the order. The question which sharply arises is thus whether the " Ruling " of 31st October 1959 is an order on the rehearing. If it is, then the appeal was brought

timeously. If it is not, the appeal is incompetent, as no appeal lies against a refusal to grant a motion for review. In these circumstances the final judgment would be that of 21st December 1957 in which case the time for appealing had long expired.

Order 39 of the Rules of the High Court of Ghana is in the following terms:—

" 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.

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."

It is not altogether clear whether the proceedings took a consistent course after the application for review was made and the headings of the various stages in the proceedings are in some cases misleading. The affidavits in support of the notice for review made it clear that the ground upon which review was sought was a patent error on the face of the Record. (See Order 39, Rule 1 (1)). The essential question being what was the effect of the orders of Acolatse, J. on 8th March 1958 and 31st October 1959, their Lordships prefer to take what the Judge said when he gave judgment. In his Order dated 8th March 1958 the Judge stated that it was evident that the issue involved was the physical identity and situation of the Agissu land and the three plots belonging to the respondent. He ordered the boundaries of the respondent's land and the Agissu land to be delineated on a plan to be prepared by the surveyor. The concluding sentence of his Order is in the following terms: " This motion is allowed to the extent of the Order above ". Their Lordships' view is that the Judge was then granting the application for review, but was limiting the review to the extent mentioned in the Order. The Judge was plainly entitled to limit the rehearing having regard to the

terms of Order 39, Rule 6. There is clear authority in India that under section 630 of the Civil Procedure Code, which is in substantially similar terms to Order 39, Rule 6, it is in the discretion of the Court to rehear the whole case or only the particular point on which review has been granted (*Hurbans Sahye* v. *Thakoor Purshad* (1882) 9 Calcutta 209; *Bhainram Rathi* v. *Ambica Charan Hazra* (1926) 53 Calcutta 856).

It is necessary to consider whether the subsequent steps in the procedure bear out this interpretation of the Order of 8th March 1958. Two surveyors then gave evidence at length in regard to the boundaries of the respective properties of the appellant and respondent in an endeavour to clear up the confusion in the identity of the lands. But on 10th October 1959 there occurred a development which has to some extent obscured the issue. Plaintiff's counsel asked to call fresh evidence. Defendant's counsel objected on the ground that the Order of 8th March 1958 did not entitle the plaintiff to adduce evidence which was within his knowledge at the date of the original hearing. The Judge refused to allow the plaintiff to adduce fresh evidence presumably in reliance on the proviso to Order 39, Rule 3. It was suggested that if the Judge had on 8th March 1958 granted the application for review, he would not have been entitled to refuse to hear such evidence. There may have been some confusion, but one possible explanation is that the plaintiff was seeking to support the review by appealing to new evidence and that this really was an application to call fresh evidence within the hearing of a review. But in any event the review had only been granted for a limited purpose.

If this had been, as the respondent suggested, an application for review on the ground of the discovery of new evidence, it might have been expected that the proceedings would terminate at this point with a refusal of the application for review. But counsel for parties thereafter made submissions, the terms of which clearly indicate that in their view the Judge was conducting a review of his original judgment.

The ruling of 31st October 1959 in their Lordships' opinion also demonstrates that the Judge was entering into the merits of the case and was in fact reviewing his original judgment. It is sufficient to quote this passage from his judgment:

> " 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 opportunity 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.
>
> " 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."

The word " vary " in the last paragraph could not have been justified unless the Judge had already granted the application for review and a " dismissal " of the review can only be explained upon the basis that he had in fact been conducting a review.

Their Lordships are always reluctant to differ from the opinion of the Court of Appeal upon a matter of procedure with which they are very familiar. But they are not satisfied that the Chief Justice has given the correct interpretation of the words used by the Judge in his ruling. The Chief Justice nowhere refers to the Order of 8th March 1958 or explains the statement of the Judge " This motion is allowed to the extent of the Order above ". He appears to think that the ruling of 31st October 1959 dealt only with the applicability of the proviso to Rule 3 (2) of Order 39, failing to notice that this matter was dealt with by the Judge on 10th October 1959. He also relies on the fact that the Judge did not alter his judgment in any way. But the Judge may under Order 39, Rule 6 confirm his judgment and he could only do this, if he had been conducting a review of his previous judgment.

Their Lordships are of opinion that the appeal to the Court of Appeal was not time barred and that the Court of Appeal ought to have heard the appeal.

Their Lordships will report to the President of Ghana as their opinion that this appeal ought to be allowed, the judgment of the Court of Appeal, Ghana, set aside and the case remitted to that Court for hearing and that the respondent ought to pay the appellant's costs of this appeal.

(82848) Wt. 8233/71 100 6/61 Hw.

In the Privy Council

SARAH QUAGRAINE

v.

B. CROSBY DAVIES
(SUBSTITUTED FOR SAM FERGUSON,
DECEASED)

DELIVERED BY LORD GUEST

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