Privy Council Appeal No. 27 of 1952

Mary Vanderpuye and others - - - - - - *Appellants*

v.

Mary Akua Botchway - - - - - - - - *Respondent*

FROM

WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD APRIL, 1956

Present at the Hearing:

LORD OAKSEY
LORD TUCKER
LORD COHEN
LORD KEITH OF AVONHOLM
MR. L. M. D. DE SILVA

[*Delivered by* LORD COHEN]

The appellants are 17 of the children by "six-cloth" marriages of Jacob Vanderpuye deceased who died on the 5th October, 1918. On the 28th June, 1947, they commenced proceedings in Ga Native Court "B" Eastern Province Gold Coast Colony against Joel Douglas Kwaku Botchway who was a first cousin in the matrilineal line of the deceased and had been appointed head of the family of the deceased pursuant to Ga Native customary law. The appellants claimed the following relief:

(*a*) A declaration of the share (Gbena) to which they are entitled and the appropriation to them of such of the Estate as represents the share to which they are entitled according to Ga Native Customary Law.

(*b*) An account of all rents and profits as have accrued to the estate since June, 1935, and the payment to the appellants of such amount as represents their share of the estate which may be found due."

On the 25th November, 1947, the Native Court delivered judgment in which it was declared that the interest of the six-cloth children of the deceased was the whole estate but it was ordered that for the reasons stated in the judgment Mr. Botchway and his sister the present respondent should be permitted to occupy one room each in the Garden House, one of the properties forming part of the estate of the deceased, and that one third of the rents accrued in the hands of the receiver and manager of the estate at the date of the judgment after deducting outgoings should be given to Mr. Botchway and the respondent. The Court directed Mr. Botchway to file an account and ordered that the costs should be taxed and paid out of the estate.

Mr. Botchway appealed from this judgment to the Land Court at Accra. On the 29th September, 1948, despite an objection that the Land Court had no jurisdiction in the matter as it was a succession case, Smith, J. allowed the appeal and substituted a declaration that the appellants are entitled to one-third of the property of the deceased and to an accounting from Mr. Botchway of one-third of the rents and profits from December, 1935, to 1946. He awarded costs to Mr. Botchway.

From this decision the appellants appealed to the Court of Appeal, including in their grounds of appeal the objection that the Land Court had no jurisdiction to hear Mr. Botchway's appeal as the matter was not a land cause or matter. On or about the 13th May, 1950, Mr. Botchway died and on the 30th January, 1951, the respondent as the duly appointed head of the family was substituted for him as respondent to the appeal. On the 1st February, 1951, the West African Court of Appeal rejected the contention that the matter was not a land cause or matter and on the 8th March, 1951, delivered judgment on the merits. They dismissed the appeal but set aside the order of the Land Court declaring the appellants' right to one-third of the property of the deceased and to an account of one-third of the rents and profits of the estate. They awarded costs to Mr. Botchway.

From that decision the appellants appealed to this Board. Mr. Roche on their behalf intimated that he would repeat the submission that the Land Court of the Supreme Court of the Gold Coast had no jurisdiction to entertain the appeal against the judgment of the Ga Native Court and would also submit that on the merits the judgment of the West African Court was erroneous and misconstrued Ga Native customary law.

Their Lordships heard argument first on the question of jurisdiction and in view of the conclusion they reached on this point did not find it necessary to go into the question of the correctness of the decision on the merits.

To appreciate the points argued on the question of jurisdiction their Lordships must refer not only to the provisions of the Native Courts (Colony) Ordinance (C. 98 of the Laws of the Gold Coast, 1951), which came into force on the 1st April, 1945, and was therefore the relevant ordinance when this suit was commenced, but also to the provisions of an earlier Ordinance the Native Administration Ordinance (C. 111, 1928).

At the date of the last mentioned Ordinance the Native Court was called a Paramount Chief's Tribunal and by s. 43 of the Ordinance that Tribunal was given jurisdiction only in relation to certain specified matters and " any other causes and matters by this Ordinance expressly assigned to a Paramount Chief's Tribunal or to a Divisional Chief's Tribunal." Among the matters referred to in s. 43 (2) were " (*c*) Suits relating to the ownership, possession or occupation of lands situated within the State of such paramount Chief; . . . (*f*) Suits and matters relating to the succession to the property of any deceased native who had at the time of his death a fixed place of abode within the State."

The question under which head a particular suit fell might be important not only as deciding which native tribunal had jurisdiction in the matter but also because appeals in land causes lay to the Provincial Commissioner's Court whereas appeals in cases of succession lay to the Court of the District Commissioner see e.g. *Ekuah Mansah* v. *Kofi Ambradu and others*, 7 W.A.C.A. 204. This case followed the decision of this Board in *George Hagan and others* v. *Effuah Adum and others*, 5 W.A.C.A. 35. In the last-mentioned case it was argued (see p. 39) that subhead (*f*) included only suits as to the right to succeed and did not include such matters as valuation of the estate, a declaration as to the amount of the share to which a successor was entitled, or the distribtuion of the estate. Their Lordships rejected this contention saying that they saw no reason for such a narrow construction of the words " suits and matters relating to the succession to the property," as in their opinion, distribution of the property naturally came within the meaning of those words, and valuation of the estate was necessarily incidental to the ascertainment of the shares for the purpose of distribution.

It has been suggested that a case might fall under both headings thus offering a litigant dissatisfied with the decision of a Native Court a choice of Court to which to appeal. This argument has been rejected, and as their Lordships think rightly rejected by the West African Court of Appeal. See e.g. *Archie Kwow* v. *Ohene Essien Eku II* (2 W.A.C.A. 180) where Kingdon C.J. said, when dealing with the question whether a cause was

a suit relating to the ownership possession or occupation of land "in cases such as this the real issue between the parties must be the test and not merely the wording of the suit." See also *Adu* v. *Dapaa* (unreported) decided in the West African Court of Appeal on the 2nd March, 1950. In that case Smith J. said that it has long been the policy of Appeal Courts hearing appeals from Native Courts to look beyond the wording of the claim as brought and to decide the real matter in issue by a study of the whole record of the case. The inconvenience of allowing a choice of courts is manifest since two Native Courts might simultaneously be exercising jurisdiction in relation to the same issue, one at the suit of a member of the family who relied on the location of the land, the other at the suit of another member of the family who relied on the fact that the deceased had a fixed place of abode within the jurisdiction of that other Court.

The decision of this Board in *George Hagan* v. *Effuah Adum and others* seems at first sight conclusive in favour of the appellants, but Mr. Scarman for the respondent submitted (1) that an alteration in the law had been effected by the 1945 Ordinance so that the decision in the case cited is not applicable ; (2) that whereas in the present case only the quantum of the share is a live issue, in the case cited the right to succeed as well as the quantum of the share was in issue and that this established a vital distinction between the present case and the case cited.

To appreciate the first point their Lordships must refer to certain provisions of the 1945 Ordinance, S.13 so far as material provides as follows:—

> "(1) Every Native Court shall have full jurisdiction and power to the extent set forth in the order of the Governor in Council establishing it and, subject to the provisions of this Ordinance, in all civil and criminal causes in which the parties are persons subject to the jurisdiction of Native Courts.
>
> (2) For the purposes of subsection (1) the Governor in Council may by the order made under section 3 grade the Native Court thereby constituted and there shall be four grades of Native Courts, namely, grades A, B, C, and D, and the jurisdiction and power of any Native Courts of these grades shall not exceed those prescribed in the First and Second Schedules hereto in respect of each such grade.

S.14 draws a distinction between land causes and civil causes other than land causes and provides that land causes shall be tried and determined by a Native Court having jurisdiction over the area in which the land which is the subject matter of the dispute is situated whereas in other civil causes jurisdiction depends on the area in which the defendant was at the time the cause of action arose.

Part 8 of the Ordinance deals with appeals. S.46 deals with appeals from a Native Court grade B or grade C or grade D and provides that in a case such as the present, where there is no Native Court of Appeal constituted under s.3 of the Ordinance, the appeal is to the Magistrate's Court or in the case of a land cause, to the Land Court.

S.2 (the Interpretation section) provides that "Land cause" and "Land matter" means a cause or matter relating to the ownership, occupation, or possession of land and that "Land Court" means a Land Court constituted and formed under the Courts Ordinance. Section 24 (2) of the Courts Ordinance provides for the establishment of a Land Court of the Lands Division of the Supreme Court.

Mr. Scarman pointed out that whereas in the earlier Ordinance there had been an express reference to succession, neither the jurisdiction section of the 1945 Ordinance nor the appeals section of that Ordinance contained any express reference to succession and he submitted that if on the face of the pleadings it appeared that the matter did affect the ownership, possession or occupation of land, the matter was a Land cause or matter within the meaning of the Ordinance.

Their Lordships think however that the distinction between the two Ordinances is in this respect apparent not real, for s. 13 (2) brings in the Schedules to the Ordinance and the second Schedule makes it clear that the jurisdiction of a Native Court may depend on the category into which a particular suit falls. The categories set forth in the Schedule are substantially the same as those appearing in paras. (*a*) to (*f*) of s. 43 (2) of the Ordinance of 1928. It is plain therefore that the jurisdiction of a Native Court to deal with a matter depends on whether the cause is a suit relating to the ownership, possession or occupation of land or a suit relating to the succession to property of a deceased native. In their Lordships' opinion therefore the decisions under the earlier Ordinance still apply. They decided that a suit must fall into one category or the other and that in order to determine into which category a particular suit falls the Court must apply the test of what is the real issue between the parties and not look only at the wording of the plaint. Accordingly their Lordships hold that a cause is not a land cause within the meaning of s. 46 of the 1945 Ordinance if the substance of the issue between the parties was succession to the property of a deceased native.

Mr. Scarman submitted that the substance of the present case is not succession since as he said the right of both parties to succeed as distinct from the quantum of the share had been determined in previous litigation. So far as the appellants were concerned he said that that issue had been determined in their favour by the Supreme Court (East Judicial division) given on the 30th October, 1945, in the case of *P. R. Vanderpuye* v. *Botchway*, a copy of which decision forms exhibit "A" in the present suit. So far as the respondent was concerned he said that the issue had been determined in favour of Mr. Botchway and the respondent by decision of the Supreme Court given on the 28th June, 1935, in the case of *Ashong* v. *Solomon* as interpreted by a later decision of the Supreme Court in the case of *Botchway* v. *Solomon* given on the 7th December, 1935, copies of such decisions being exhibits "C" and "D" in this suit.

The parties do not appear to have treated these decisions as binding them on the question of entitlement. Before the Native Court the appellants appear to have claimed the right to the whole of the estate and Mr. Botchway appears to have argued his right to succeed through his mother. It seems doubtful therefore whether the facts afford the necessary support for Mr. Scarman's argument. Their Lordships, however, prefer to base their decision that the suit was not a Land Cause and that the Land Court had therefore no jurisdiction to entertain the appeal from the Native Court on the wider ground that a suit for the determination of the share of the appellants and for the distribution of the estate is a succession case and not a case relating to the ownership, possession or occupation of land. Such decision is in accordance with what their Lordships consider to be the *ratio decidendi* of this Board in *George Hagan and others* v. *Effuah Adum and others 5 W.A.C.A.* 35, and for the reasons already stated their Lordships think that that case is still relevant despite the enactment of the 1945 Ordinance.

The West African Court of Appeal thought the present case was more analogous to *Archie Kwow* v. *Ohene Essien Eku II* 2 W.A.C.A. 180 than to the case last cited. The *Archie Kwow* case is not fully reported but it appears that the substance of the matter was a claim to a share of rents and the question was whether this was a land cause or a money cause action. There is nothing to indicate that the plaintiff's claim was based on any right of succession and their Lordships are unable to derive any assistance from the case except so far as it decides that the Court must look to the substance of the dispute between the parties in determining whether the cause is a Land Cause. For the reasons already stated their Lordships are of opinion that the substance of the present dispute is a succession case.

Mr. Scarman asked their Lordships, in the event of their holding that the Land Court had no jurisdiction, to make a declaration to that effect and to send the matter back to the West African Court of Appeal. Their Lordships see no reason for making such an order. The necessary consequence of the lack of jurisdiction of the Land Court is that the order of the Native Court stands. Alternatively he asked that there be inserted in the Order in Council some such words as "without prejudice to the right, if any, of the respondent to apply to the appropriate court in the Gold Coast for leave to appeal out of time from the order of the Native Court". Their Lordships see no reason for the insertion of any such words. If such right exists nothing in the order which their Lordships propose will prevent the making of the application to the proper court. Their Lordships desire to say nothing which could in any way fetter the discretion of that court in dealing with such application if made.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be allowed, the orders of the West African Court of Appeal and of the Land Court be set aside, and the order of the Native Court be restored. The respondent must pay the costs of the appeals to the Land Court, the West African Court of Appeal and to this Board.

(39672) Wt. 8064—69 120 5/56 D.L.

In the Privy Council

MARY VANDERPUYE AND OTHERS

v.

MARY AKUA BOTCHWAY

[DELIVERED BY LORD COHEN]

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