Before the Judicial Committee
Her Majesty's Most Honourable Privy Council
On Wednesday, the 6th day of November 1957
Appeal No 43 of 1953

Before Their Lordships

Lord Tucker ..... Privy Councillor
Lord Denning ..... Privy Councillor
The Rt. Hon. L.M.D. de Silva ..... Privy Councillor

Between

Nana Ofori Atta II ..... Appellants
(Omanhene of Akyem Abuakwa)
& Another

And

Nana Abu Bonsra II ..... Respondents
(As Adansehene)
And As Representing the Stool of Adanse
& Another

Judgement of the Court
Delivered by
Alfred Thompson. The Lord Denning

This case was a dispute about the title to certain lands in Ghana called the Nsuakwate or Anungya lands (hereinafter called "the lands in dispute "). The principal parties who appeared before the Board to claim title to them were, on the one hand, the plaintiff, the Stool of Akyem Abuakwa, which was represented by the Omahene or head chief Nana Ofori Atta II (hereinafter called " Akim Abuakwa ") and on the other hand, the defendant, the Stool of Adanse, which was represented by the Adansehene or head chief Nana Abu Bonsra II (hereinafter called " Adansi ").

The plaintiff Akim Abuakwa was a paramount stool and said that the lands in dispute were under its paramountcy and in particular that they were part of the Muronam lands which were subject to it. The Odikro or sub chief of Muronam was joined as a co-plaintiff with Akim Abuakwa. (He is hereinafter called" Muronam.")

The defendant Adansi was a neighbouring stool which claimed that the lands in dispute formed part of the Adansi stool but were under the immediate custody of the Stool of Banka, which was represented by the Ohene or Chief Brako Ababio II (hereinafter called "Banka "). Adansi said that Banka was caretaker for the lands in dispute for Adansi. In the Courts of West Africa Banka, applied to be joined as co-defendants with Adansi and were joined accordingly, but they were not represented before the Board.

The question in this appeal was whether it was open to Akim Abuakwa and Muronam to litigate in this action the title to the lands in dispute. Adansi said that the title to the lands in dispute was fought out 16 years ago in proceedings between Muronam and Banka. In that earlier case Muronam failed to establish its title to the lands in dispute. The question was whether that finding precludes the paramount stool of Akim Abuakwa from now claiming title against Adansi. Adansi said that Akim Abuakwa were so precluded on one or other of two grounds:

(1) estoppel by *res judicata* on the ground that Muronam was a party to the previous proceedings and Akim Abuakwa was a privy to them; or, alternatively,

(2) estoppel by conduct on the ground that the Akim Abuakwa knowingly stood by whilst the title was fought out by their subordinate in the previous proceedings and it would be inequitable to allow them to bring up the question again.

Jackson J. upheld the contention of Adansi on the second ground. The West African Court of Appeal (Foster Sutton P., Coussey J.A. and Manyo Plange. J.) upheld the contention of Adansi on both grounds. The result was

that the claim of Akim Abuakwa and Muronam had been dismissed. They appealed to Her Majesty in Council.

Everything depends on what took place in the previous proceedings which were heard in the Chief Commissioner's Court of Ashanti in the year 1940. Their Lordships have found some difficulty in ascertaining the issues in those proceedings because there were no pleadings. The Rules of Court say that suits shall ordinarily be heard and determined in a summary way without pleadings: and this suit was so heard and determined. But it is permissible to look at the opening statements by counsel and at the evidence as well as the judgment. In the case of *Kobina Angu* v. *Cudjoe Attah* in 1916 (Judgments of the Judicial Committee on appeal from the Gold Coast, 1874-1928, 43, 48). Sir Arthur Channell, delivering the judgment of the Board, said that

> "the former evidence could be looked at in order to explain what was really the subject-matter of the former dispute."

Looking at these materials, it becomes clear that on May 6, 1940, Muronam sued Banka in the Chief Commissioner's Court claiming a declaration of title to the self-same lands as are now in dispute, £100 damages for trespass, and an injunction to restrain Banka from entering the lands. In the course of the evidence both sides claimed to be the first settlers and both claimed to have exercised acts of ownership over the lands in dispute. A good deal was said about a decision of Captain Soden in 1907, when he, at talks with some of the chiefs, laid down the boundaries of the Banka lands. That was an executive decision only, not a judicial decision; but, after it was given, Banka acknowledged that the lands in dispute belonged to Adansi and said that Banka was caretaker of them for Adansi.

On November 19, 1940, the court gave its decision. The Acting Assistant Chief Commissioner dismissed Muronam's claim to the land, but he relied much on the executive decision of Captain Soden. He said:

> "I find there is no evidence on the plaintiff's side to justify the grant of the declaration of title which he seeks, but, on the other hand, that the question of the ownership of the land has already been decided by validated executive decision. There will therefore be judgment for the defendants."

Muronam appealed from that decision to the West African Court of Appeal, who, on May 29, 1941, dismissed the appeal. They saw no reason to differ from the decision in the court below that

> "there is no evidence on the plaintiff's side to justify the grant of the title which he seeks,"

but they thought it necessary to add that they did not subscribe to the other finding that the matter had been decided by the executive decision. Muronam failed, therefore, on the ground that it had not made out its title to the lands in dispute.

Akin Abuakwa and Adansi were not parties to those proceedings, but they undoubtedly knew of them and of the disputes that had been going on for years before. There is ample material to show that whenever Muronam or Banka complained of a trespass, each reported it to his superior, Akim Abuakwa or Adansi, as the case might be, who then took the matter up on behalf of his subordinate. Thus, the secretary to Akim Abuakwa gave evidence on behalf of Muronam and put in a series of letters in 1935 which showed that the Adansi had purported to grant a concession over the land to a mining company, that white men had gone onto the land, whereupon Muronam reported to Akim Abuakwa, who took up the matter with the mining company saying that "all questions affecting Muronam land have got to be settled by him" and that the "Adansi has no right over this land". On the other hand, the linguist representing the Adansi gave evidence on behalf of Banka. He said that Banka was caretaker for Adansi and added that "if anyone trespasses on the land the Banka is to report to Adansehene who, if he chooses, will take action."

Under the Rules of Court it would have been open to Akim Abuakwa or Adansi to apply to be joined as parties in those earlier proceedings, but neither of them did so.

Such being the facts, there is, as between Muronam and Banka, a clear *estoppel* by *res judicata* because they were parties; but their Lordships have to say whether there is an estoppel between Akim Abuakwa and Adansi, who were not parties.

The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence. But this general rule admits of two exceptions:

> one is that a person who is in privity with the parties, a "privy" as he is called, is bound equally with the

parties, in which case he is estopped by *res judicata*

the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct.

Their Lordships propose in this case to consider first estoppel by conduct.

English law recognises that the conduct of a person may be such that he is estopped from litigating the issue all over again. This conduct sometimes consists of active participation in the previous proceedings, as, for instance, when a tenant is sued for trespassing on his neighbour's land and he defends it on the strength of the landlord's title and does so by the direction and authority of the landlord. If the tenant loses the action, the landlord would not be allowed to litigate the title all over again by bringing an action in his own name. On other occasions the conduct consists of taking an actual benefit from the judgment in the previous proceedings, such as happened in *In re Lart, Wilkinson* v. *Blades* ([1896] 2 Ch. 788). Those instances do not however cover this case, which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question the West African Court of Appeal quoted from a principle stated by Lord Penzance in *Wytcherley* v. *Andrews* «1871) 2 P. & D. 327, 328). The full passage is in these words:

"There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done *bona fide* in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened."

Mr. Phineas Quass argued before their Lordships that the principle stated by Lord Penzance was confined to wills and representative actions and has never been extended further. No decision, however, was cited to their Lordships which confines the principle to wills and representative actions. Their attention was indeed drawn to one case where a like principle was applied to mortgages in somewhat special circumstances: see *Farquharson* v. *Seton* (1828) 5 Russ. 45). But assuming, without deciding, that the English decisions have hitherto been so confined, their Lordships would point out that there is nothing in the principle itself which compels it to be limited to wills and representative actions. The principle, as Lord Penzance said, is founded on justice and common sense. It may have been found appropriate in England only in special conditions. But there is no reason why in West Africa it should not be applied to conditions which are found appropriate for it there, but which have no parallel in England. It seems to be the recognised thing in this part of West Africa for all persons with the same interest in a land dispute to range themselves on one side or the other. Sometimes they apply to be joined as parties, on other occasions they regard the named party as their champion and support him by giving evidence. If he wins, they reap the fruits of victory. If he fails, they fall with him and must take the consequences. It is now 25 years ago that the Chief Justice drew attention to this way of looking at litigation: see *Yode Kwao* v. *Kwasi Coker* ([1931] 1 W.A.C.A. 162, 167), *Appoh Ababio* v. *Doku Kanga* ([1932]1 W.A.C.A, 253, 255). It has led the Court of Appeal in West Africa to look for a principle to meet the situation and they have found it in the principle stated by Lord Penzance: see *Akwei* v. *Cofie* ([1952]14 W.A.C.A. 143).

In the present case the judges have applied the principle and given reasons which show that it is salutary. In the Supreme Court, Jackson J. said:

"The principle is clear and well established and to hold otherwise would only tend to encourage perjury and to seek to bolster up a case by later adducing evidence which, had it been in existence, would or should have been adduced at the first trial."

In the Court of Appeal, Manyo-Plange. J. said ([1952] 14 W.A.C.A. 152)

" ... what should the Omanhene of Akim Abuakwa have done in the circumstance? In my view he should have applied to be joined as co-plaintiff. He took no such course. Being cognisant of the proceedings, he was content to stand by and see his battle fought by somebody else in the same interest: the interest is the same, because the matter to be determined in the present action was the same as was determined in the former action, namely, Muronam's title to the land in dispute, without which Akim Abuakwa cannot establish an interest in the land. Having stool by and seen the battle fought to a finish to the disadvantage of Muronam, he goes to sleep for nearly five years, then suddenly wakes up and tries to re-open the question of

Muronam's title to the land in dispute which had been determined in the former action."

Their Lordships are of opinion that the principle stated by Lord Penzance should be applied in this case unless technical legal reasons exist which prevent its application. Their Lordships are unable to find any such reasons and are therefore of opinion that the principle was correctly applied.

Their Lordships ought to notice one further argument. It was said that both Muronam and Banka were subordinate stools under the one paramount stool of Akim Abuakwa and that therefore there was no call on Akim Abuakwa to intervene because its title would not be affected. The answer is, however, that whilst originally they may both have been subject to Akim Abuakwa, since 1907 Banka has never admitted that it was subordinate to Akim Abuakwa. In the proceedings of 1940 Banka said that the land belonged to Adansi and that Banka was only caretaker for Adansi. When Adansi's title was thus asserted, it was, as the Court of Appeal said,

" clearly the duty of Akim Abuakwa to intervene"

if it had an interest in the land. Akim Abuakwa did not do so and cannot now be allowed to fight the battle all over again.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs.

Solicitors

A. L. Bryden & Co.
T. L. Wilson & Co.

Counsel

Phineas Quass Q.C. *with him* Gilbert Dold	.....	For the Appellants
Ralph Millner	.....	For the First Respondent