68

IN THE SUPREME COURT OF SIERRA LEONE

CORAM:

The Hon. Mr. Justice E. Livesey Luke - Chief Justice
The Hon. Mr. Justice C.A. Harding - J.S.C.
The Hon. Mr. Justice O.B.R. Tejan - J.S.C.
The Hon. Mrs.Justice A.V.A. Awunor-Renner - J.S.C.
The Hon. Mr. Justice Ken E.O. During - J.A.

Civ. App. No.2/80

BETWEEN:

ABU KAMARA - APPELLANT

AND

AMADU GBOYO - RESPONDENT

Mr. A.F. Serry Kamal for the Appellant

Mr. F.M. Ganew for the Respondent

Judgment delivered this 13th day of July, 1981

TEJAN J.S.C.:- On the 22nd day of May 1972 the Yoni Local Court delivered judgment in the case between Amadu Gboyo (hereinafter referred to as the Plaintiff) and Abu Kamara (hereinafter referred to as the Defendant). The plaintiff's claim against the defendant was for unlawfully brushing their land. The Yoni Local Court, after having heard the parties and their witnesses gave judgment in favour of the defendant. The judgment was in the following terms:-

> "Verdict of the Court after consulting with members. The Court President (now Chairman) informed the Court that according to the case between Amadu Gboyo of Mayobo and Abu Kamara of Mabilla, the Court had found out that the defendant Abu Kamara of Mabilla has right in the case, because the Court has found out that the boundry of Pa Sheka Maila which the witnesses described from the river .....

/110.....

and Konta and confirmed that this was the boundary which the Mabilla and Masiray people swore for. The reason why I accepted this boundary is because it has taken over ten years. There was no objection that some people were having the land. According to the evidence of the witnesses, Pa Alimamy Koroma was the section chief and he was the one who asked the section people to take the bush after the swearing. Since they had sworn, I did not get any report that somebody had gone in this bush to judge them. The witnesses have told me that the defendants have sworn for this bush but he did not go there ..... Being that the witness have told me that Fulamassa came and was present when the boundary was laid and he even sent Pa Kapri Sanka to represent him while the defendants' people were sworn for the boundary between them and the Meeca People. All these made me go give Abu Kamara of Mabilla right. If anybody jumps this boundary the said person will pay fine of Le.100 to the Court. He will be punished by the law.

H.R.T.P. - Abdulai Turay

Court's President"

It is against this judgment of the Yoni Local Court that the plaintiff appealed to the District Appeal Court. The record does not contain the notice and grounds of appeal, but however, the learned Magistrate re-heard the whole case and heard witnesses called by the parties in pursuance of Section 1 of the Local Courts (Amendment) Act 1966 which enacts that -

/111.....

70

"In any such appeal the District Appeal Court shall re-hear the whole case and hear any additional witnesses called by the parties even though they did not give evidence in the Court below."

The jurisdiction conferred on the Magistrate to hear the appeal is to be found in Section 29(1) of the Local Courts Act 1963 which provides that:

"As from the commencement of this Act, there shall be constituted a District Appeal Court which consist of the Police Magistrate for each district sitting with two Assessors selected by him from a list of experts in customary law drawn up by the District Officer:

Provided that in any case where it appears that no question of customary law will arise the Magistrate may sit without Assessors."

Section 29(2) of the same Act states that "the Assessors shall advise Magistrate on questions of customary law but the decision shall be vested exclusively in the Magistrate who shall record the reasons for his decisions."

After having heard the parties and their witnesses, and after careful survey of the evidence, the learned Magistrate allowed the appeal, set aside the decision of the Yoni Local Court and substituted therefor a declaration of title in favour of the plaintiff.

The defendant gave an oral notice of appeal to appeal against the decision of the learned Magistrate to the Local Appeals Division of the High Court on the following grounds:-

/112.....

(1) Pa Alimamy Koroma is a relative of the appellant.

(2) It was Pa Alimamy Koroma who forced us to swear on oath.

(3) The appellant's father was a member of the local Court that gave decision in the case between Sheka Maila and Pa Alimamy Koroma.

At the Local Appeals Division of the High Court, the parties were represented by Counsel. It does not appear from the records that the grounds of appeal were amended but the records show the following grounds of appeal:

(a) That the decision of the Tonkolili District Appeal Court was unreasonable and could not be supported having regard to the evidence.

(b) That the learned Principal Magistrate erred in holding that "it was wrong therefore for the lower Court to conclude that because the respondents (now appellants) succeeded in an action against Pa Alimamy Koroma therefore the land is theirs".

(c) That the learned Principal Magistrate failed to consider the appellant's (then respondent's) defence.

The appeal was heard by Kidogu J. sitting with two Assessors. Judgment was delivered on 15th January 1976 setting aside the judgment of the District Appeal Court and restoring the judgment of the Yoni Local Court.

The plaintiff appealed against the judgment of the Local Appeals Division of the High Court. The grounds of appeal are:-

/113.....

(1) That the learned Appellate Judge was wrong in law in holding that the learned Presiding Magistrate in the Tonkolili District Appeal Court was wrong in holding a re-hearing.

(2) That the learned Appellate Judge was wrong in law in basing his decision on question of Res Judicata and Estoppel even though such principles did not form any part of grounds of appeal before this Court.

(3) That the decision of the Court is unreasonable having regard to all the circumstances of the case.

When hearing started before the Court of Appeal, the third ground of appeal was amended to read: "That the decision was against the weight of evidence".

The Court of Appeal consisting of S.B. Davies (J.A. as he then was) Warne and Navo JJ.A heard the appeal. The judgment of the Court was delivered by Warne J.A. on 23rd April 1980. The Court of Appeal set aside the judgment of the Local Appeals Division of the High Court and restored the judgment of the District Appeal.Court.

The defendant has now appealed against the judgment of the Court of Appeal to this Court. Mr. Serry Kamal for the defendant appealed on four grounds. These grounds are: (1) The Court of Appeal was wrong in holding that the trial Judge based his decision on the grounds that appellant should have justified the grounds of appeal before the re-hearing before the District Appeal Court; (2) The Court of Appeal was wrong in law in law in holding that nothing in Section 50(1)(b) of the Act empowered the District Appeal Court to enquire if proceedings before it had been completed and it was being re-opened;

/114.....

(3) That the Court of Appeal was wrong in law in holding that there was no evidence on which the High Court found that Res Judicata applied; (4) That the Court of Appeal was wrong in law in failing to appreciate the effect of the judgment of the Yoni Local Court 1957.

Mr. Serry Kamal, Counsel for the defendant argued grounds 2, 3 and 4.

With regard to ground 2, Section 50(1)(b) of the Local Courts Act, 1963 enacts that "no proceedings before any such Court which were finally terminated before the commencement of this Act shall be re-opened but any judgment, order or sentence made or passed in any such proceedings may be enforced in the same way as if this Act had not come into operation."

Mr. Serry Kamal placed prime reliance on the above provisions to support his submission that on his notice of motion dated the 6th day of December, 1974, praying for an order to call additional evidence and on the granting of his application by the learned Judge of the Local Appeals Division of the High Court, he was allowed to tender in evidence a record of proceedings before the Yoni Native Court in 1957.

Looking at the record of proceedings before the Yoni Native Court 1957, there is nothing to show that any proceedings between the plaintiff and the defendant were finally terminated. The Yoni Native Court in 1957 decided an action between one Sheka Maila of Maseray and Santigie Bangura of Romaka. The learned Principal Magistrate did not re-open any matter which had been finally terminated by the Yoni Native Court. What the learned Principal Magistrate did was to re-hear the whole case between the plaintiff and the defendant in accordance with Section 1 of the Local Courts (Amendment) Act 1966 which has already been quoted.

/115.....

The Learned Principal Magistrate sitting with two Assessors who were experts in customary law heard the parties and their witnesses and arrived at his findings of fact when he said:

"On the totality of the evidence, there is no doubt in my mind, that the claim of the appellant (plaintiff) is clear and straightforward. It was satisfactorily proved. The evidence of the appellant's (plaintiff's) witnesses are consistent and co-herent and very convincing too." This finding of fact of the Learned Principal Magistrate who sat with expert assessors ought not to have been lightly interfered with by the learned Judge.

Ground 'e' raises the question of res judicata. Mr. Serry-Kamal used the record of proceeding in the Yoni Native Court in 1957 as a basis for his submission.

The doctrine of res judicata is based on two theories; first, the general interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions; and, secondly, the right of the individual to be protected from vexatious multiplication of suits and prosecutions at the instance of an opponent whose superior wealth, resources and power may, unless curbed by the estoppel, weighed down judicially declared right and innocence. The former is public policy, and the latter is private justice. (See Spencer-Bower And Turner on Res Judicata 2nd Ed. at page 10.) For res judicata to succeed, there must be identity of the parties and identity of the issues involved. Lord Reid in his speech in the case of Carl Zeiss Swiftung v. Rayner & Keeler Ltd. No. 2 (1967) 1 A. C. 853 at pp. 910 and 913 said:

/116.....

"Let me take first the identity of the parties. In this preliminary or interlocutory matter the issue is whether the nominal plaintiff is before the Court at all. If it is decided in favour of the defendant, that establishes that the nominal plaintiff was never before the Court . . . . . Again there is no doubt that the requirement of identity of parties is satisfied if there is privity between a party to the former litigation and a party to the present litigation . . . . . The second requirement for res judicata is identity of the subject matter. As to this, it has become common to distinguish between cause of action estoppel and issue estoppel."

In the same case Lord Guest said at page 933:

"The doctrine of estoppel per rem judicatam is relected in two latin maxims (1) interest rei publicae sit finis litium, and (2) nemo debet bis vexari pro una et eadem causa. The former is public policy and the latter is private justice. The rule of estoppel res judicata, which is a rule of evidence, is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation, any party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits (Spencer Bower on Res Judicata, p.3)

/117.....

And he continued at p.935:

> "The requirements of issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies . . . . . ."

And at page 946 of the same Report Lord Upjohn said:

> "The broader principle of res judicata is founded upon the twin principles so frequently expressed in latin that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause. It goes beyond the mere record; it is part of the law of evidence for, to see whether it applies, the facts established and reasons given by the Judge, his judgment, the pleadings, the evidence and even the history of the matter may be taken into account (See Margirson v. Blackburn Borough Council (1939) 2 K.B. 426."

Where res judicata is pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment,

/118.....

which may have involved the determination of questions of law as well as findings of fact. Even though the judgment was pleadable by way of estoppel it is perhaps not strictly correct to regard its determination of legal rights as a question of estoppel. The parties are estopped by the findings of fact involved in the judgment. See Halsbury Laws of England 4th Ed. Vol. 16 at para. 1527.

In order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show either an actual merger, or that the same point has been actually decided between the same parties. See Halsbury Laws of England 4th Ed. Vol. 16 at para 1528.

It is quite clear in the appeal before us that the action which was before the Yoni Native Court in 1957 was between Sheka Maila v. Santigie Bangura, and that the cause of action was for jumping the boundary laid by Pa Reke Kenke. The case before the Yoni Local Court in 1972 and the District Appeal Court in 1972 was between Amadu Gboyo (the plaintiff) v. Abu Kamara (the defendant) and the cause of action was for unlawfully brushing his bush.

There is no evidence that the parties in the 1957 proceedings were the same as those in the 1972 proceedings or that the action was instituted in a representative capacity to qualify the parties as privies. The 1957 action was instituted by Pa Alimamy Koroma against Santigie Bangura. None of the essential ingredients to raise a plea of res judicata was in evidence in the 1957 proceedings. I therefore agree with the Court of Appeal that there was no evidence upon which the Local Appeals Division of the High Court could find that the plea of res judicata applied.

/119.....

With regard to ground 4, Mr. Serry-Kamal complained that the Court of Appeal failed to appreciate the effect of the judgment of the Yoni Local Court in 1957. But Counsel did not elaborate on this ground of appeal, and I cannot find any substance or merit in it.

I would therefore dismiss the appeal.

(Sgd.) O.B.R. Tejan, J.S.C.

I agree ..... (Sgd.) E. Livesey Luke, C.J.

I agree ..... (Sgd.) C.A. Harding, J.S.C.

I agree ..... (Sgd.) A.V.A. Awunor-Renner, J.S.C.

I agree ..... (Sgd.) K.E.O. During, J.A.