PC
GH4G2

37, 1956

No. 18 of 1953.

In the Privy Council.

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL (NIGERIAN SESSION).

BETWEEN

CHIEF JOSEPH WOBO,
CHIEF WALI WOKEKORO,
CHIEF SAMUEL ATAKO,
PHILIP CHINWA,
BROWN AGUMAGU,
VICTOR AMADI,
APPOLOS AMADI,
AMADI WANODI,
AMADI OPARA,
WOBO CHARA (Plaintiffs) . . . . . *Appellants*

AND

THE ATTORNEY-GENERAL FOR THE FEDERATION OF NIGERIA AND THE ATTORNEY-GENERAL FOR THE EASTERN REGION OF NIGERIA (SUBSTITUTED FOR THE ATTORNEY-GENERAL OF NIGERIA) (Defendant) . . . . . *Respondents.*

Case for the Appellants.

RECORD.

1. This is an Appeal, by special leave, from a judgment of the West African Court of Appeal, holden at Lagos, Nigeria, dated the 9th day of June, 1952, dismissing an Appeal by the Plaintiffs against a judgment of the Supreme Court of Nigeria dated the 4th day of August, 1951, which dismissed their action hereinafter mentioned with costs. p. 66 *seq.* p. 37 *seq.*

2. The substantial question raised in this appeal is the ownership of land in the Rivers Province, Nigeria, now comprising the township of Port Harcourt and certain surrounding areas, which admittedly formerly were part of the Diobu lands belonging to the Diobu people. The Respondent alleges that this land was sold to the Governor of Nigeria under two agreements (Exhibits "F" and "G") dated respectively 18th May 1913 and 2nd May 1928. It is the Appellants' contention that when their predecessors as chiefs (who were illiterate) affixed their marks to these agreements they had no intention of selling the land, which by native law and custom they were not entitled to do, but thought that they were merely granting to the Governor certain occupancy rights over it in accordance with native law and custom; that, in other words, the parties were not *ad idem*. "F," p. 72. "G," p. 83.

3. The lands in question are situate in the Protectorate of Nigeria established in 1914 (formerly the Protectorate of Southern Nigeria established in 1900) in a district which has been under the protection of Her Majesty and Her Majesty's predecessors for many years prior thereto.

4. The town of Port Harcourt is now important as the terminus of the Nigerian Eastern Railway, serving a large hinterland and being a port with a regular liner service. It is in the main situate upon the area edged yellow and green on the plan Exhibit " M " and attempts or proposals to extend it to the area edged pink lying to the north of the area edged yellow led to the present suit.

See copy plan in folder.

It appears to be common ground upon the evidence that the whole area upon which Port Harcourt now stands was, with adjoining areas, part of Diobuland prior to 1911. The Appellants' uncontradicted statement was that in that year two white men came to Obomotu, as Port Harcourt and the surroundings were then called, then part of the living and farming ground of the Diobu people, and were permitted to put up a rest house and sheds by the waterside, near the site of the present wharf (the plan Exhibit " M " indicates " Marine Wharf "). The land was not given away but a settlement upon it was permitted. The Appellants' further evidence was that, later, an offer to purchase was made to the Diobu Chiefs by or with the authority of the Governor, which, in spite of repeated persuasions they declined to accept as, though willing to permit a settlement, by native law and custom communal land cannot be sold. The Appellants deny that it ever was knowingly sold, in spite of the existence of the so-called agreements hereinbefore referred to, of the 18th May 1913 and the 2nd May 1928. The Appellants admit, however, that their ancestors permitted the Settlement of Port Harcourt and its laying out over a series of years upon the areas edged yellow and green or parts thereof, but say that they always persistently refused to sell out and out, which they considered that they had no right to do.

p. 13, l. 29.

p. 14, l. 8.

5. The document Exhibit " F " purports to be an agreement, for the grant and sale of " all the right, title and interest," to which they and their people were " entitled by native law and custom " in certain land, made the 18th May 1913 between the Chiefs, Headmen and persons set out in the Schedule thereto, for and on behalf of themselves and their people (namely, the separate communities of Diobu and several others), and Alexander George Boyle, Deputy Governor of the Colony and Protectorate of Southern Nigeria, for and on behalf of his then Majesty. It recites, *inter alia*, that " certain land was required for the services of the Colony and Protectorate," such land being described by a description which was accepted in this suit as relating to the same land as that edged and hatched in colours in the plan Exhibit " M " and which was in Exhibit " F " described as containing 25 square miles more or less.

p. 73, l. 31.

p. 73, l. 2.

The document Exhibit " F " purports to be executed by seven Chiefs and Headmen of Diobu by their marks, to which execution there purport to be witnesses, whose attestation is followed by what purports to be a certificate by one G. S. Yellow, describing himself as District Interpreter, that the agreement had been " correctly read over and interpreted " to the marksmen " who appeared clearly to understand the same " and had

p. 73, l. 40.

p. 74, l. 8.

made their marks in the presence of the witnesses and the interpreter. Succeeding these purported executions and attestations there are a number of purported executions by the Chiefs of other non-Diobu villages and a final execution by the said Alexander George Boyle.

A Schedule follows these executions, in which appear the names and purported marks of the same Diobu Chiefs and Headmen with an acknowledgment by them of the receipt of the sum of £2,000 on behalf of themselves and their people in full discharge of all their claims under the agreement, such acknowledgment being witnessed by the said G. A. Yellow and one E. S. Ogang, Clerk to the Native Council, Okrika. p. 76.

It is however concurrently found that the said sum of £2,000 was not paid. p. 49, l. 22 *seq.* p. 68, l. 1 *seq.*

It is not clear whether the interpreter was alive at the time of the Suit but, whether this is so or not, no explanation was forthcoming of the fact that, though he is also alleged to have witnessed the Schedule containing an express acknowledgment by the Appellants of the receipt of the £2,000, this sum had never been paid.

6. The Schedule is followed by certain endorsements which accord (or purport to accord) with the local law as to registration of documents affecting land. There was in the year 1913 in force in the Protectorate of Southern Nigeria the Land Registration Ordinance No. 15 of 1907 (as amended) making provision for the registration by the local Registrars of every instrument in writing affecting land in the Protectorate. By section 10 instruments were required to be proved on oath by (*inter alios*) one of the subscribing witnesses to have been duly executed by the grantor, which proof, by the same section, was required to be made, if executed in the Protectorate, before the local Registrar or before a District Commissioner or Justice of the Peace.

Section 12 of the said Ordinance is as follows :—

> " Every instrument executed after the commencement of this Ordinance, whereby land is granted by Natives to any person or persons other than Natives, or by the Crown to any person or persons whatever, shall be void unless the same be registered within a period of sixty days from the date thereof.
>
> " Provided that the Principal Registrar may extend the said period of sixty days by any period not exceeding three months in any case in which he is satisfied that registration has been delayed without default or neglect on the part of the person acquiring the right or interest in the lands in question."

7. The said document of the 18th May, 1913, bears upon it an Oath of Proof by the said Gabriel Yellow, sworn the 31st July, 1913, who therein (*inter alia*) deposes that he saw (*inter alios*) the said Diobu Chiefs and Headmen execute the same on the 18th April, 1913, that they could not read and write and that the said document was read over and interpreted to them by him at the time of execution and that they appeared to understand its provisions. p. 78.

p. 80. The said document also bears an endorsement dated the 14th August, 1913, by Mr. Ernest Gardiner Smith, describing himself as Principal Registrar of Deeds for the Eastern Province of the Protectorate of Southern Nigeria, that, in accordance with the powers vested in him by the Land Registration Ordinance, he extended the time for registration of the document under the Land Registration Ordinance until that date. The said endorsement does not state that Mr. E. Gardiner Smith had been satisfied that registration had been delayed without default or neglect on the part of the Deputy Governor and no explanation was given as to why registration had not been effected within the said period of sixty days.

p. 14, l. 13. p. 18, l. 4. p. 21, l. 14. p. 22, l. 37. 8. There was uncontradicted evidence on the part of the Appellants that it is contrary to native law and custom to sell communal land. This, it is submitted, was the general rule in Southern Nigeria. The learned Trial Judge on this subject observed as follows :—

p. 55, l. 23. > " It is possible that their customary laws did not permit of their lands being sold before the advent of the British Government, but I do not consider the native law and custom so inflexible as not to be capable of exception in the case of the Government in the light of the evidence before the Court."

There was, however, no evidence that native law and custom permitted any exception in the case of the Government.

9. Exhibit " G," hereinbefore referred to as the agreement of the 2nd May, 1928, is according to the copy in the Record, dated the 2nd May, 1926, which the person inserting it may have intended to be the 2nd May,
p. 86 *seq.* 1928, the purported date of Exhibit " H," by which a portion of the land in question was purported to be conveyed by the Governor of Nigeria to Chief Wobo for himself and the people of Diobu, though the Appellants make no admission in respect of the actual date of Exhibit " G." It purports to be made between the same Diobu Chiefs and Headmen as are alleged to have entered into the agreement of the 18th May, 1913, with the exception of Chief Wokekoro who was dead and who was replaced by his son Wali Wokekoro of the one part, and the Governor of Nigeria of the other part. All the executants are deceased except Wali Wokekoro, but their successors as chiefs and headmen are the Appellants together with Wali Wokekoro.

p. 83, l. 17. Exhibit " G " recites that it was supplemental to the Agreement (called the principal agreement) of the 18th May, 1913, for the sale and purchase of the land, which is therein described by the same description
p. 83, l. 43. as in Exhibit " F " aforesaid and that it was desired to vary the terms of the principal agreement.

p. 83, l. 47. It then purports to provide that " the purchase money to be paid to those Chiefs and Headmen, shall be an immediate payment of the sum of £7,500 and hereafter a sum of £500 per annum payable on the 18th May in each year commencing on the 18th May, 1928, and continuing for all time thereafter instead of the purchase money fixed by the original agree-
p. 84, l. 8. ment " and declares that, " subject only to the variations herein contained, the principal agreement shall remain in full force and effect and shall be

read and construed and be enforceable as if the terms of these presents were inserted therein by way of addition or substitution as the case may be."

There appears upon the Exhibit certification by F. C. Allagoa, Interpreter, that he had correctly read over and interpreted the agreement to the Chiefs and Headmen and also an Oath of Proof, sworn by him on the 29th October, 1927, before the Acting Resident, that on the 29th October, 1927, he saw the same Chiefs and Headmen duly execute the document, that they " Can not read and write and that the document was read over and interpreted to them by me at the time of execution and that they appeared to understand its provisions." p. 84, l. 35 *seq.* p. 85, l. 1.

This is followed by a certificate by the Acting Resident that the due execution had been proved before him by Allagoa. p. 85, l. 15 *seq.*

Such Oath of Proof and Certificate are in accordance with the forms prescribed under the Land Registration Laws. At this time the Registration Ordinance in force was the Land Registration Ordinance No. 36 of 1924, Section 14 of which prescribed registration within six months in similar terms to Section 12 of Ordinance 15 of 1907 set out in paragraph 6, above, with a like proviso for extension by the Principal Registrar (but differing from the earlier Ordinance, in not laying down any time limit beyond which an extension could not be given).

Allagoa, the Interpreter, was not called as a witness, though it appears to be clear from the Record that he was alive at the time of the trial and was within reach. p. 20, l. 1. p. 35, l. 13.

10. A sum of £7,500 was paid to the Appellants' predecessors in the month of October, 1927, which the Appellants pleaded was the compensation for the use and occupation of their land by Government and for damage done to their crops etc., but which the Defendant pleaded was the purchase money mentioned in the document dated the 2nd May, 1928, i.e., Exhibit " G " according to the Record. p. 83.

11. A plan (already referred to in paragraph 4 hereof being Exhibit " M "—see copy Plan in folder) of the Port Harcourt area was put in by a licensed Surveyor on behalf of the Appellants. In his evidence he said that " M " and the plan annexed to Exhibit " F " relate to the same land. The town and port of Port Harcourt, referred to in paragraph 4 of this Case, is mainly situate upon the areas edged yellow and green on the plan (Exhibit " M "). The precise boundaries of the area called Obomotu or Igwe Ocha were not defined in the action but they appear to have included the areas marginally hatched pink and those edged pink, yellow, green and purple. In 1913 people from four other villages appear to have occupied some of the land at the north, and land on the extreme east near the creek there (called Okrika Creek on the plan on Exhibit " F," though not so named on the plan Exhibit " M ") was occupied by Okrika villagers and it would appear that these other occupations were mainly in the area edged brown on the plan Exhibit " M." p. 28, l. 26.

The area known as Diobu lay-out and Creek Road, New Block Area, and as having been trespassed upon by the Government, is the area edged pink lying to the north and north-west of the area edged yellow.

The area bounded on the North by Railway No. 1 Gate, on the South by Nwatugbo Creek, West by Bonny River and East by Amadi Creek, is the area of 3·5 square miles in respect of which the Appellants claim arrears of £23,000 at £1,500 per annum, and is or comprises the area edged yellow and possibly the area edged green on the easterly side of the yellow-edged area.

The whole of the areas edged pink, yellow, brown, green and purple together with the area hatched in its margin pink, extending to 25 square miles or thereabouts, are alleged by the Respondent to have been comprised in the said two agreements bearing dates the 18th May 1913 and the 2nd May 1928 marked " F " and " G " respectively, hereinbefore referred to, which the Respondent claims to have been valid grants of the lands comprised therein to the Crown, but which the Appellants claim are invalid. This is, in substance, the question in issue in the suit, which the Courts below have decided in favour of the Respondent.

p. 72 *seq.*
p. 83 *seq.*

12. The action was heard in the Supreme Court of Nigeria in July 1951. After considering the oral and documentary evidence in the case, the learned trial Judge on the 4th day of August, 1951, delivered his judgment dismissing the Appellants' claim with costs.

In the course of his judgment the learned trial Judge found that all the Appellants and their predecessors-in-interest who signed or are alleged to have signed the original alleged agreement of the 18th May, 1913 (Exhibit " F ") and the supplemental alleged agreement of the 2nd May, 1928 (Exhibit " G ") were illiterate.

p. 47, l. 40.
p. 48, l. 35.

The learned trial Judge, when dealing with Exhibit " G," the so-called supplemental agreement, came to the conclusion that, as the Appellants had instructed lawyer Alakija to draw a Petition (Exhibit " J.2 ") of the 19th July, 1934, which contained a paragraph 4 in the following terms—

p. 49, l. 45 *seq.*
p. 83 *seq.*
p. 92.

> " That owing to the need for educating our children and descendants, and owing to the fact that our main source of income is our land rent, we respectfully pray that Your Excellency may graciously grant that the term of the agreement between the Government and ourselves as contained in the written instrument No. A.17 Vol. I of the 2nd day of May 1928 be subject to another revision variation and modification,"

the reference to Exhibit " G " in that paragraph recognised the existence of Exhibit " G " and accepted it as their act and deed and implied that the Appellants acknowledged the existence of Exhibit " F " of the 18th May, 1913, because Exhibit " G " incorporates Exhibit " F."

p. 83 *seq.*
p. 72 *seq.*

The Appellants submit that the learned trial Judge misdirected himself inasmuch as he does not seem to have borne in mind the second paragraph of the same Petition, which stated that the Petitioners receive " annual rent of £500 for the lease of our land as included within the area known as Port Harcourt Township," which it is submitted negatives a sale.

p. 92, ll. 18 to 20.

In the course of his judgment, the learned trial Judge also said as follows :—

p. 51, l. 25 *seq.*

> " It appears to me from the evidence of Umo Uja, 1st Defence Witness, that the Diobus up to 1947 January acknowledged that

their Chiefs had entered into binding agreement with Government, but they believed that their ancestors who entered into the agreement did so in ignorance and that when they decided to come to Court they made up their minds to repudiate the agreements which they acknowledged in para. 4 of Exhibit 'J.2.' It is, therefore, not necessary for the Defendant to call evidence as to the execution of Exs. 'F' and 'G' which the Plaintiffs themselves had acknowledged as their agreement and I find no force in the submission of the learned Senior Counsel for the plaintiffs on the point."

The evidence of Umo Uja was that he was a Clerk in the District Office at Port Harcourt and went with his superior officer and other local authority employees to Diobu to deliver notice to quit to the Diobu Chiefs, who emphatically refused to accept it, so that it was left on the ground. He was then cross-examined on behalf of the Plaintiffs and said as follows :— p. 30.

"The Diobu chiefs refused to accept the notice and stated that they had nowhere to go. They said that their forefathers entered into agreement with Government in ignorance. They said that the land was theirs and that Government had no right to evict them from their land." p. 30, ll. 22–26.

The Appellants submit that the learned trial Judge misdirected himself in so absolving the Defendant from proof of execution of Exhibits "F" and "G." The fact that the Appellants believed in 1947 that their ancestors had entered into the document in question "in ignorance" (that is, it is submitted, in ignorance of what it contained) did not amount to an acknowledgment that it was a binding agreement.

The Appellants further submit that, if the execution of the said agreements Exhibits "F" and "G" by the Chiefs and Headmen who were named as executants had been proved, that would not prove either that they had authority to sell the community land as the deeds purported to do or at all, or that they understood the documents, or either of them, and consequently would not excuse the Defendant from making due proof both of their authority and their understanding of the documents. Such proof, it is submitted, was lacking.

13. The Appellants respectfully refer to the Judgment of the Judicial Committee in *Atta Kwamin* v. *Kobina Kufuor* (Privy Council Appeal No. 94 of 1912) reported in "Judgments of the Privy Council (on appeal from the Gold Coast) 1874–1928," p. 28, when certain questions of both proof of authority and proof that an illiterate African understood an English document arose. Their Lordships there remarked (p. 34)—

"He had no legal adviser and no English adviser of any kind to explain the document . . . the possibilities of misunderstanding are so obvious as to render it imperative on the appellant who alleges his intelligent consent to a contract expressed in a language which he did not understand, to prove that it was clearly explained to him. For this purpose, it was indispensable to examine Kraku

and the Appellant's failure to put him in the witness box is equivalent to an admission of his inability to prove his case by the best obtainable evidence."

(Kraku was an African Clerk in the employment of the Englishman who had presented the document for signature. As in the present case, neither the document nor any copy of it was delivered to the African parties, *vide* p. 33.)

Their Lordships further remarked (p. 38)—

"The contract itself does not prove that one of the parties was empowered to bind a third person, nor that a native of Africa understood a legal instrument in the English language. These are matters of fact which must be proved by the party who avers them."

14. Being aggrieved by the judgment of the Supreme Court of Nigeria of the 4th day of August, 1951, the Appellants appealed against it to the West African Court of Appeal, holden at Lagos, Nigeria. The Appeal was heard by three Judges, the Honourable Sir Stafford Foster Sutton, President; the Honourable Sir James Henley Coussey, Justice of Appeal; and the Honourable Joseph Henry Maxime de Comarmond (Acting Chief Justice, Nigeria) on the 29th and 30th days of April, and the 1st day of May, 1952. Judgment dismissing the Appeal was delivered on the 9th day of June, 1952.

p. 66 *seq.*

15. The leading judgment delivered by the learned President in which the other Judges concurred, after disposing of certain contentions of the Appellants which are not now insisted upon, went on to say that

p. 69, l. 14 *seq.*

"the learned trial Judge had made a clear finding of fact against the Plaintiffs on their plea that the parties were not *ad idem* when Exhibits "F" and "G" were entered into," and upheld this alleged finding because of the oaths of proof hereinbefore referred to, and because of an admission in Court by the Appellant, Philip Chinwa, that the seven Chiefs and Headsmen who were alleged to have signed Exhibit "F" were Diobu Chiefs and that, when the said sum of £7,500 had been paid, the interpreter Allagoa who had made the affidavit of proof had interpreted.

p. 16, l. 15.

The judgment overlooks that the evidence of Chinwa was that the sum of £7,500 was not paid at the time the agreement was signed.

The Court considered that the real objection of the Chiefs and Headsmen of Diobu to Exhibit "F" was the amount of the purchase price and that Exhibit "G" represented a compromise as to price reached after negotiations. It appeared to the Court that "the parties regarded Exhibits "F" and "G" as a conveyance of the land in dispute because, by Exhibit "H," the Governor had purported to grant $3\frac{1}{2}$ square miles of the land in question to the Chiefs, Headsmen and people of Diobu and Chief Wobo acknowledged the grant. Moreover in the Petition to the Governor, Exhibit "J.2," the Chiefs and people of Diobu complain that the annual payment of £500 is insufficient for their needs, acknowledge Exhibit "G," and ask for 'another revision, variation and modification'. In this connection it is relevant to observe that the Plaintiff, Joseph Wobo, admitted in his evidence that 'all Diobu instructed the Chiefs to write the Petition. The Chiefs gave lawyer Alakija instructions'."

p. 69, l. 29 *seq.*

The Court of Appeal then rejected the contention of the Defendant that Exhibits " F " and " G " were conveyances and held that they did not operate to transfer the land to the Government, but that the two agreements did constitute a binding contract for sale, of which there had been part performance. The Court of Appeal consequently held that the Appellants were not entitled to any of the reliefs claimed, but that they held the land described in Exhibits " F " and " G," less any of such area covered by Exhibit " H," as trustees for the Governor, which they were bound to convey to him upon request. p. 68, l. 50 *seq.*

16. The Appellants now bring this Appeal to Her Majesty in Council, by special leave, against the judgment of the West African Court of Appeal dated the 9th June, 1952, and submit that it should be allowed for the following, among other, p. 71 *seq.*

REASONS

(1) BECAUSE the parties were not *ad idem.*

(2) BECAUSE the material on which the Courts below acted in rejecting the Appellants' contention that the parties were not *ad idem* did not justify such rejection.

(3) BECAUSE the predecessors in title of the Appellants were illiterate and did not understand the nature of Exhibits " F " and " G."

(4) BECAUSE the Courts below have failed to have regard to the principles laid down in *Atta Kwamin* v. *Kobina Kufuor.*

(5) BECAUSE the learned trial judge misdirected himself in holding that the Exhibit " J.2 " showed that when Exhibit " G " was executed the parties were *ad idem.*

(6) BECAUSE in the circumstances of the case the documents on which the Respondent relied did not prove themselves and that it behoved the Respondent to prove that the Appellants' predecessors in title knew the nature of the transaction into which they were supposed to be entering and their authority so to do.

(7) BECAUSE the registrations of the said exhibits were out of time and the said exhibits were accordingly void.

(8) BECAUSE the judgments of the West African Court of Appeal and of the Supreme Court of Nigeria were wrong and ought to be reversed.

PHINEAS QUASS.

GILBERT DOLD.

5/12/55.

No. 18 of 1953.

In the Privy Council.

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BETWEEN

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AND

THE ATTORNEY-GENERAL OF NIGERIA (Defendant) *Respondent*

Case for the Appellants

A. L. BRYDEN & WILLIAMS,
53 Victoria Street,
London, S.W.1,
Solicitors for the Appellants.

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