

Privy Council Appeal No. 11 of 1959

Nwuba Mora and others - - - - - Appellants

v.

H. E. Nwalusi and others - - - - - Respondents

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 19TH JUNE 1962

Present at the Hearing:

LORD EVERSLED

LORD MORRIS OF BORTH-Y-GEST

LORD PEARCE.

[*Delivered by* LORD EVERSLED]

This appeal is related to the claim of the respondents before the Board, who were the plaintiffs in the action and to whom their Lordships will for convenience refer in this judgment as the plaintiffs, to the ownership of a tract of land in Eastern Nigeria. Their Lordships were informed that the land is situated some distance to the north of Enugu, the capital of Eastern Nigeria and that its extent is some 250 acres. It appears from the evidence to be farming land, used substantially for the cultivation of yams and cassava but without buildings or habitations upon it.

It was not in dispute between the plaintiffs and the defendants (the appellants before their Lordships) that the tract of land in question was part of a larger area which had in ancient times belonged to and been occupied by the Norgu tribe; that at some date long ago the Norgu tribe had been evicted therefrom in war; and that the land in dispute (hereafter called the Agu Norgu land) had since been occupied by victors in the war claiming it by right of conquest. The issue in the action was—who those victors were. It was the plaintiffs' case that the tribe which they represented, the Amawbi tribe, had fought the war against the Norgu as one of an alliance of several tribes and had ever since possessed the Agu Norgu land as their share of the fruits of victory—until (except for a survey in 1941) about the year 1948 when (according to their case) their possession was disturbed by invasion of men of the Awka tribe represented by the defendants.

The answer of the defendants to the claim was, in addition to its denial, that the Norgu people had been conquered by the Awka people alone and that, as a consequence, the Agu Norgu land had ever since been occupied by that tribe—until the year 1948 when (as the defendants said) the plaintiffs disturbed their possession.

There is in Nigeria no law corresponding to the English rule of prescription for conferring a title to land. It is however not in doubt that proof of possession following conquest will suffice to establish ownership. In the present case therefore, as Mr. Dingle Foot pointed out in opening the appeal, the evidence was related to two matters; first, evidence (what he called the traditional evidence) related to the ancient Norgu war, its participants and consequences; second, evidence related to the occupation in fact in recent times and during living memory.

One of the difficulties in the case much experienced by their Lordships has been the precise identification of the Agu Norgu land. There were before their Lordships four plans, two prepared on behalf of each side; but the

correlation of the plans in some respects has been impossible. On the other hand all the plans were mutually admitted as regards physical features, measurements, areas and general accuracy. The learned trial judge further made a personal inspection of the land in the presence of the parties and their counsel. In the circumstances, and particularly since the defendants for the purposes of one of their plans—as appears upon its face—adopted one of the plaintiffs' plans, called GA 62/49, their Lordships agree with the Federal Supreme Court that the judge was entitled for the purposes of his judgment to treat the Agu Norgu land as that shown on the last mentioned plan. This however is a matter of detail.

Upon the substance of the case the learned trial judge, Hurley J., after hearing twelve witnesses for the plaintiffs and eight for the defendants and after making his inspection and the hearing of counsels' arguments delivered a long and careful judgment on the 28th April 1954. Upon the traditional evidence he expressed a preference for the story of the ancient war put forward by the plaintiffs and in so doing alluded to his disbelief of the defendants' witnesses who in course of cross-examination denied an understanding of the words "Ogu Amakom" which were suggested to be well understood in Ibo as meaning "war of alliance". On the evidence of possession he also preferred unhesitatingly the evidence given on the plaintiffs' side. He therefore made the declaration of title sought by the plaintiffs and awarded them a sum of £300 for damages.

The case came before the Federal Supreme Court of Nigeria (Sir Stafford Foster Sutton F.C.J., Jibowu and de Lestang F.JJ.) who on the 18th March 1957 dismissed the appeal. It was conceded before the Federal Supreme Court on the plaintiffs' part that there was no justification for the trial judge's conclusion on the evidence that the word "Amakom" was well known and that the defendants had lied by stating the contrary; and that the judge had therefore upon this matter misdirected himself. Nonetheless the Federal Supreme Court held that the trial judge's judgment was not thereby disabled and, more particularly, saw no reason to disturb the judge's findings of fact on the possessory evidence.

Mr. Foot put in the forefront of his forcible argument for the defendants the submission that both the trial judge and the Federal Supreme Court had failed to give effect to the rule, unquestionably applicable to a claim of this character, that the onus of proof rests firmly upon the claimant. He further contended that the misdirection of himself by the trial judge in regard to the word "Amakom" had in truth a much more far reaching effect upon his general conclusion. Putting the matter interrogatively, Mr. Foot asked: if the judge had not disbelieved the defendants' witnesses for the reason which he stated (as he should not have done) is it clear that he would not have preferred the defendants' case on the traditional evidence; and if and so, what would have been the effect as regards the possessory evidence? Mr. Foot also laid emphasis, naturally enough, upon the series of law suits successfully fought by the defendants during the period from 1922 to 1949 (their success being in one case affirmed by the Federal Supreme Court) in which the defendants had established their right and title to lands, formerly Norgu territory, in the immediate neighbourhood of—if they did not, as Mr. Foot submitted, in some cases overlap—the Agu Norgu land. If, as Mr. Foot submitted, some of the lands which were the subject of this litigation did overlap the Agu Norgu land, then, as he contended, the plaintiffs should be held to be estopped from asserting their present claim by their conduct in standing passively by while the legal contests were being fought. But even if the claim to estoppel were not made good the trial judge and the Federal Supreme Court had, as Mr. Foot contended, failed to give due significance to the defendants' consistent successes in these actions.

Allied to this submission was Mr. Foot's further contention that in the Court below no attention had been paid to the terms of section 45 of the Nigerian Evidence Ordinance: "acts of possession and enjoyment of land may be evidence of ownership . . . not only of the particular piece of land with reference to which such acts are done but also of other land so situated or connected therewith by locality . . . that what is true as to the one piece of

land is likely to be true of the other piece of land." Even therefore if, contrary to his argument, the plaintiffs were not estopped by their passivity in regard to the long succession of law suits above mentioned, and if those law suits were rightly regarded by the Courts below, quoad the plaintiffs, as *res inter alios actae*, still, said Mr. Foot, the unbroken series of successes by the defendants in those actions, which were related (at least) to adjacent lands and had depended on the prevalence of the defendants' traditional evidence, should have been taken into account and should, had they so been, have weighed heavily in the defendants' favour. Finally, upon matters more of detail, Mr. Foot challenged the validity of the trial judge's rejection of certain evidence given on the defendants' side because it had (contrary, as the judge said, to the testimony of the defendants' own plans) suggested the concurrence of the southern boundary of the disputed land with the Uvunu river; and submitted that the plaintiffs' possessory evidence, at best, fell short of establishing the extent of their alleged possession.

The acceptance of these submissions would have required a re-trial ab initio of the plaintiffs' claim—a result from which, however lamentable after so great a lapse of time, Mr. Foot did not at all shrink; and in their Lordships' view it would not indeed be right on that ground alone to reject the appellants' arguments, so forcibly urged by Mr. Foot and, at least in their cumulative effect, by no means unimpressive. In their Lordships' view however the conclusive answer to all these criticisms upon the judgments under appeal lies in this. The issues raised in the action were, essentially, issues of fact and in respect of those issues there are before their Lordships concurrent judgments of the trial judge and the Federal Supreme Court. In such cases the rule which the Board should follow was clearly enunciated in the judgment of Lord Thankerton as recently as 1946 in the case of *Srimati Bibhati Devi v. Kumar Ramendra Narayan Roy*. In his judgment in that case Lord Thankerton reviewed the previous authorities and formulated the conclusions which resulted from those cases and which the Board in cases such as the present should follow in a series of numbered paragraphs (see [1946] A.C. 508 at pages 521 and 522). From this formulation it is made clear that the Board should decline to review the evidence for a third time when there are concurrent judgments of two courts on a pure question of fact unless a departure from such practice was justified by proof of "some miscarriage of justice or some violation of some principle of law or procedure" or unless the case were of so unusual a character as sensibly to make the general rule inapplicable. Lord Thankerton proceeded to define the phrases "miscarriage of justice" and "violation of some principle of law or procedure" as follows: . . . miscarriage of justice means such a departure from the rules which permeate all procedure as to make that which happened not in the proper sense of the word judicial procedure at all. . . . the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law".

Can it then be said that the circumstances of this case are so unusual or that there has been here established some miscarriage of justice or violation of some principle of law or procedure going so much to the root of the issues in dispute, as to bring the present case within the exception to the general rule?

The first submission made by Mr. Foot as suggesting an affirmative answer to the question just posed is that founded on his argument as to the onus of proof which he put in the forefront of his argument. Mr. Foot referred to the recent unreported case before the Board of *Nwabisi and another v. Idigi and another* (Privy Council Appeal No. 4 of 1958) in which the judgment of the Board by Lord Jenkins emphasised the proposition, undoubtedly correct, that in a case of a claim to land the onus lies firmly upon the claimant. In the course of his judgment the noble Lord accepted the statement of Webber J. as regards onus of proof in *Ekpo v. Ita XI* Nigerian Law Reports page 68 namely: "In a claim for a Decree of Declaration of Title the onus is on the plaintiff to prove acts of ownership extending over a sufficient length

of time, numerous and positive enough to warrant the inference that the plaintiffs were exclusive owners—if the evidence of tradition is inconclusive the case must rest on question of fact”. The noble Lord also cited with approval the language in the case then under appeal of Sir Stafford Foster Sutton F.C.J.: “ the onus of proving that they were entitled to the declaration of title to the land in dispute was upon the plaintiffs. The learned trial judge reached the conclusion that they had not discharged that onus, and nothing that was said at the hearing of this appeal has persuaded me that he ought to have held otherwise.”

The date of the judgment (28th July 1959) is later than that of the Federal Supreme Court in the present case and it was Mr. Foot’s contention that, had the decision in *Nwabisi v. Idigi* been before the Federal Supreme Court on the hearing of the appeal in the present case, their conclusion might well have been different.

Their Lordships have been unable to accept this argument. It is to be noted that the Board in *Nwabisi v. Idigi* affirmed a judgment of the Nigerian Federal Supreme Court (affirming a judgment of Hurley J.) delivered in February 1957 by Sir Stafford Foster Sutton F.C.J. who was a member in the present case of the Court upon the hearing of the appeal from the same trial judge. We cannot think in the circumstances that either Hurley J. or the Federal Supreme Court could have been unmindful of the rule which had so recently been invoked.

Mr. Foot drew attention to a passage (at page 103 of the record) where Hurley J. is reported as saying “ On the evidence as a whole on the question I am not satisfied that Amawbia were not the original owners of Amawbia lands or that Awka were the original owners . . . ” But this passage referred to a secondary defence of the defendants related not to the land in dispute but to the land lying to the south thereof and now, unquestionably, occupied by the Amawbi tribe. Upon the main question the learned trial judge after referring to the witnesses whom he had had the advantage of seeing and hearing and to his inspection said: “ I find the weight of evidence greatly in favour of the plaintiffs ”. And again: “The plaintiffs have satisfied me that within living memory at least they have been in possession, disturbed only by the 1941 survey, to the exclusion of Awka until 1948 ”. In the circumstances their Lordships cannot find in the judgment of the trial judge any failure on his part to appreciate where lay the onus of proof.

In the Federal Supreme Court Jibowu F.J. referred in his judgment (with which the other members of the Court concurred) to the passage secondly cited from Hurley J.’s judgment and proceeded: “ the finding of fact is, in my view, amply supported by the evidence before him, and the finding could not, in my view, have been affected by the misdirection on Ogu Amakom.”

Their Lordships respectfully accept the language of Jibowu F.J. In their view the judgment under appeal cannot be disabled by attributing to the Court below any failure to appreciate where lay the onus of proof.

As regards the trial judge’s misdirection on Ogu Amakom their Lordships find themselves equally in concurrence with the view of the Federal Supreme Court. As observed by Jibowu F.J. the trial judge had expressed a preference for the account of the Norgu war put forward on the plaintiffs’ traditional evidence and relied only upon the witnesses’ answers about “ Ogu Amakom ” in support of that view. “ One cannot say ” observed Jibowu F.J. “ that he was wrong as to that ”, and the learned Federal Justice went on to point out that in any case the trial judge’s decision was not based only on the traditional evidence “ which could not be conclusive apart from the question of possession and exercise of rights of ownership over the land in dispute ” (page 124 of Record).

Their Lordships come, third, to the arguments based on the previous litigation. In their Lordships’ view, agreeing with the judgment in the Court below, the defendants failed to show that any of the land which was the subject of their lawsuits overlapped the Agu Norgu land. In these circumstances Mr. Foot conceded that his argument as to estoppel could not be sustained. As regards the effect of section 45 of the Nigerian Evidence Ordinance the

most that can be gained from an invocation of the section is that the title to the lands disputed in those cases which the Awka tribe established could be taken into account, as a matter of relevant evidence, in determining the ownership of the Agu Norgu land. It is no doubt true that the result of those actions involved an acceptance in them of the defendants' account of the ancient war. But, in their Lordships' view, those lawsuits being, as regards the plaintiffs, *res inter alios actae*, the weight of the evidence to be derived therefrom in the present dispute was pre-eminently a matter for the trial judge. Their Lordships upon this question as upon the preceding two questions cannot find any miscarriage of justice or violation of principle of law or procedure sufficient to take the case out of the general rule to be applied where there have been concurrent judgments in a case involving a question of fact. Nor, in their Lordships' view can the case be said to be so unusual as for that reason to take it out of the general rule.

In the circumstances their Lordships can deal briefly with Mr. Foot's more detailed arguments. Upon the point made by him in reference to the defendants' plans it is sufficient to say that, as regards the Agu Norgu land, the river Uvunu in fact, as is conceded, lies substantially to the south of its southern boundary. As regards the evidence of possession it is true that the plaintiffs' witnesses did not precisely state the bounds of the areas respectively farmed by them. On the other hand the total area is but 250 acres. It is difficult to suppose, if the plaintiffs' evidence be accepted upon the face of it, that the intrusion anywhere on the land in dispute of men from other tribes than the Amawbi would not have been evident and quickly noticed. In their Lordships' view, having regard to the size of the area in question, the nature of the farming, so far as explained, and the apparent absence upon it of any dwellings or buildings, it cannot be fairly said that, if the trial judge accepted the plaintiffs' evidence (as he did and as their Lordships think he was entitled to do), it nonetheless failed sufficiently to state the extent of the possession and therefore to make good the plaintiffs' claim.

In the circumstances and for the reasons stated their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

In the Privy Council

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DELIVERED BY
LORD EVERSHED

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