P.C. 114 6 2

Judgment
19/1964

IN THE PRIVY COUNCIL No. 39 of 1962

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF NIGERIA
HOLDEN AT LAGOS

B E T W E E N :

(1) AZUIKE UME
(2) REMY NWOSU
(3) RAPHAEL DIM
(4) HYCINTH ONWUGIGBO
(5) UMEANONIGWE DIM
(6) ANAEDUM DIM
(7) DANIEL OKONKWO
For themselves and as representing the people of Akpo Defendants/Appellants

- and -

(1) ALFRED EZECHI
(2) ALBERT OBI
(3) EZEOLIO EZENWOKOLO
(4) GEORGE AMICHI
(5) EZENWEKE OKPALA
(6) OKPALA OBIEGBU
(7) PATRICK OKPALAUGO
For themselves and as representing the people of Achina Plaintiffs/Respondents

CASE FOR THE RESPONDENTS

Record

1. This is an appeal from a Judgment and Order of the Federal Supreme Court of Nigeria, dated the 9th November 1961, setting aside a Judgment and Order of the High Court of the Eastern Region of the Federation of Nigeria, dated the 20th February 1960, by which the

P. 71. l. 32.

P. 61. l. 16.

action of the Plaintiffs-Respondents against the Defendants-Appellants was dismissed, and substituting therefore an order of non-suit.

2. The main question for determination on this appeal is whether the Federal Supreme Court was justified in substituting an order of non-suit for the order of the High Court dismissing the action of the Plaintiffs-Respondents.

P. 2. L. 1. 3. The action which is the subject matter of this appeal was commenced as Native Court Suit No. 223/53-54 in the Mbemisi Native Court in the year 1953, by the Plaintiffs-Respondents as representing the community of Achina against the Defendants-Appellants as representing the community of Akpo, and was for a declaration of title of certain land referred to in the claim as "Achina land" (and hereinafter referred to as "the land in dispute"), and for £20 for damage done on the land. The Judgment of the Mbemisi Native Court was for the Plaintiffs-Respondents for "the land claimed, according to the pillars fixed as boundaries", and for certain fees and costs.

P. 3. L 32.

4. The Defendants-Appellants appealed from the said Judgment of the Mbemisi Native Court to the District Officer's Court of Appeal, and the District Officer by a decision made on the 18th December 1954, set aside the said Judgment of the Native Court, and by a Transfer Order dated the 16th December 1954, ordered the case to be retried in the Supreme Court of Nigeria, Onitsha Division. The reasons of the District Officer for his said decision were, as set out in the Transfer Order, as follows:-

P. 5. L. 1.

P. 1. L. 30

> "Reasons: 1. The case concerns land about which several apparently contradictory judgments have been given in connected cases. In particular, the same members of the Native Court have given two inconsistent and contradictory judgments about the same land and between the same parties within the space of three months.
>
> 2. Local feeling about this land dispute runs high and it is difficult for the Native Court members to be strictly impartial.

3. Reference is made in the proceedings to plans in previous cases and to documents concerning the lease of land to the Church Missionary Society and Salvation Army the Legality of which plans and documents the Native Court would find it difficult to interpret and assess."

5. The Plaintiffs-Respondents, by their Statement of Claim filed in the Supreme Court of Nigeria, Onitsha Judicial Division, on the 5th October 1955, claimed, and the Defendants-Appellants by their Statement of Defence filed on the 12th December 1955, admitted, that the Plaintiffs-Respondents were the authorised representatives of the people of Achina and brought the action in a representative capacity, and that the Defendants-Appellants were sued as representatives of the people of Akpo. P.5. l.20. P.9. l.1.

The Plaintiffs-Respondents claimed to be owners in possession of the land in dispute and to have always exercised maximum acts of ownership thereover, and alleged trespass by the Defendants-Appellants, and claimed a declaration of title, £20 damages for trespass and an injunction to restrain the Defendants-Appellants from further trespass.

The Plaintiffs-Respondents alleged various acts of ownership and relied upon decisions of the Mbemisi Native Court in Suits Nos. 128/48, 131/48 and 132/48.

6. The Defendants-Appellants by their Statement of Defence denied the claim of the Plaintiffs-Respondents and alleged that the land in dispute was Akpo land, and asserted various acts of ownership and relied upon certain other decisions of the Native Courts. With regard to the three decisions of the Native Court relied upon by the Plaintiffs-Respondents, the Defendants-Appellants alleged that Suits Nos. 128/48 and 131/48 were not representative actions but personal actions which did not affect the Akpo people, and that Suits Nos. 131/48 and 132/48 were the subjects of appeals which had been adjourned sine die.

7. The land in dispute lay between the land of the Akpo to the west, and the land of the Achina

to the east. The Plaintiffs-Respondents in their Statement of Claim relied on a plan which was subsequently admitted in evidence as Exhibit "A", and the Defendants-Appellants relied on a plan in their Statement of Defence which became Exhibit "O". The land in dispute was described in the Judgment of Taylor F.J. in the Federal Supreme Court as follows:-

P.74. L.11. "The area to which the Appellants laid claim running from north to south is shown in pink in Exhibit "A" as being bound on its western side by the Awema lake, Ogbonmile stream, Ugolo tree, Ubeokpoko tree and Ukwa, ube and owulu trees. That, the Appellants say, is the boundary with the Akpo people, and, further, that all land to the east of that is land of Achina. The Respondents' plan is Exhibit "O", and the natural boundaries shown on the Appellants' plan, i.e. the stream and lake or pond and marsh are all depicted therein, and also the Ubeokpoko tree. The Respondents, however, put their boundary to the east of these features along what is shown on their plan as being marked out by trees, a water track, an (Ekpe) ancient boundary stretching for a considerable way up to Oye market, and then a trench, footpath and some trees. This is also in the north to south direction."

8. The case was heard by Reynolds J. in the High Court of the Eastern Region of the Federation of Nigeria (as the court of relevant jurisdiction became known in 1956 by virtue of the High Court Law, 1955, E.R. No. 27 of 1955) on the 28th December 1959, and on ten subsequent days, and on the 20th February 1960 Judgment was given dismissing the claim of the Plaintiffs-Respondents as a community to the land in dispute, with costs.

P.61. L.17

9. Apart from the evidence describing the boundaries relied upon by the Plaintiffs-Respondents and the Defendants-Appellants respectively, the evidence was directed to the proof of the exercise of acts of ownership and of decisions in Native Court suits relating to 6 particular areas within the whole area of the land in dispute. Those areas were:-

(1) The land occupied by the C.M.S. Church and

School known as "C.M.S. Achina-Akpo", situated near the western boundary of the land in dispute, and towards Akpo land.

(2) The land occupied by the Salvation Army Mission, also situated near the western boundary of the land in dispute.

(3) The Oye market, situated on the eastern boundary of the land in dispute. The Achina community claimed the whole of the market area, but the Akpo community claimed only a part of the market. The Plaintiffs-Respondents relied upon the decision in Native Court Suit No. 132/48.

(4) The Azeokolo juju, situated in the area of the Oye market. The Plaintiffs-Respondents relied upon the decision in Native Court Suit No. 132/48.

(5) The Nkpukpo land, situated towards the western boundary of the land in dispute, but not so far west as the C.M.S. Church and School or as the Salvation Army Mission. The Plaintiffs-Respondents relied upon the decisions in Native Court Suits Nos. 128/48 and 131/48.

(6) Obiora's farm, which was the subject of Native Court Suit No. 128/52-53, on which the Plaintiffs-Respondents also relied.

10. In his Judgment Reynolds J. found as a fact that the land occupied by the C.M.S. Church and School and by the Salvation Army Mission was owned by the Akpo community, and that the Ezeokolo juju was on the boundary between Achina and Akpo land and was worshipped by both communities. Reynolds J. made no other specific findings, but dismissed the claim of the Plaintiffs-Respondents, and gave no effect to the decisions in the said Native Court Suits upon which the Plaintiffs-Respondents relied, and attached no weight to those suits as evidence in favour of the Plaintiffs-Respondents.

11. The Plaintiffs-Respondents appealed to the Federal Supreme Court on the grounds set out in a Notice of Appeal dated the 7th March 1960, and in a Notice of Additional Grounds of Appeal

P.66. l.1.
P.67. l.10.

dated the 4th September 1960, the main grounds on which the Plaintiffs-Respondents relied, stated shortly, being that the decision of the Court was against the weight of the evidence, and that the learned trial Judge mis-directed himself in not giving any effect to the decisions in the said Native Court Suits and in not attaching any weight to those suits as evidence of the exercise of acts of ownership by the Plaintiffs-Respondents.

P.72. 12. The appeal in the Federal Supreme Court came up for hearing before Ademola F.C.J. and Taylor and Unsworth F.J.J., who on the 9th November 1961 unanimously set aside the Judgment of Reynolds J. and substituted in its place an order of non-suit. The Court did not vary the order for costs made by the High Court, but ordered that each party should bear its own costs in the Federal Supreme Court. The reasons of the Court are contained in the Judgment of Taylor F.J., with which Ademola F.C.J. and Unsworth F.J. concurred.

13. The relevant rule of practice which confers a power on the Court to order a non-suit is contained in Order XLVIII, rule 1 of the High Court Rules,1955, made under Section 100 of the High Court Law, 1955 (E.R. No.27 of 1955), and is as follows:-

" Order XLVIII

Non-suit

Power of Court to non-suit

1. The Court may in any suit, without the consent of the parties, non-suit the Plaintiff, where satisfactory evidence shall not be given entitling either the Plaintiff or Defendant to the judgment of the Court."

14. In his Judgment Reynolds J. said of the Native Court Suits relied upon by the Plaintiffs-Respondents:-

P.64. L.31. "The findings in these cases are far from being clear or conclusive of the rights of the communities over the areas

affected by these decisions particularly as they were suits between individuals. Having regard to this and to the unsatisfactory nature of the Plaintiffs evidence and that of their witnesses which I considered unreliable I have come to the conclusion that the Plaintiffs have failed to prove acts of ownership extending over a sufficient length of time numerous and positive enough to warrant the inference that the Plaintiffs are exclusive owners of the land in dispute."

15. In giving the reasons of the Federal Supreme Court for holding that Reynolds J. had misdirected himself in regard to the effect of the said Judgments of the Native Court, Taylor F.J. said:

P.73. l.25.

"Counsel for the Appellants sought to establish that the trial Judge misdirected himself in two respects:-

(a) In saying that the findings are far from clear of the rights of the communities, and

(b) in saying that the previous Native Court proceedings were suits between individuals and not in a representative capacity between the parties to this appeal".

Later in his Judgment Taylor F.J. considered each of the said Native Court Suits and held that Reynolds J. had misdirected himself in respect of Suit No. 132/48 by holding that it was a personal action and not a representative action:-

P.77. l 6.

"Exhibit "C" i.e. the proceedings in suit 128/48 was an action between Simon Obiora of Achina, as Plaintiff, and Jacob Onyebuche and another, described as "all Akpo", as Defendants. The claim was for £7 for the damage done by entering the Plaintiff's Otosi bamboo and palm nuts farm. This suit seems to have been taken together with 131/48, between the same parties, but this time Simon Obiora is Defendant and Jacob Onyebuche is Plaintiff

and the claim is for title to Ofia Owelle and Nkpukpo land, and an injunction. After reading through these proceedings, and bearing in mind that I must not pay too deep a regard to the heading or the form of the suit but must look at the proceedings as a whole in order to see what the real issues were, it is clear to me that they were personal as opposed to representative actions. Indeed, in the first suit the Native Court Judges sought to mark out the boundary between the Plaintiff and Defendant and it is in the course of doing this that mention is made of the Ekpe wall of which the present Appellants' Counsel says his clients knew nothing. There was in my view no misdirection by the learned trial Judge here.

In Suit No.132/48 one Okpaltawara and two others for Achina people sued Jacob Onyebuche and four others described as "all Umuaehallo Akpo" for £10 as damages for trespass to land at Oye Market by planting yams therein. In this, undoubtedly, the Plaintiffs sued as representing Achina, but the Defendants, from Akpo, were sued personally as the persons who planted the yams, though in various passages in the proceedings and the judgment it would appear to have been a dispute between Achina and Akpo over the ownership of Oye market. It would seem that in respect of this suit the trial Judge misdirected himself. In the last one, suit 128/52-53, Simon Obiora of Achina sued Enoch Nwosu of Akpo for £3 as damages for the trespass committed by the Defendant in carrying away some breadfruit from the Plaintiff's farm. This was clearly a personal action."

Taylor F.J. then held that the said Judgments did not give rise to an estoppel per rem judicatam against the Defendants-Appellants as a community, but that Reynolds J. had misdirected himself in not giving any weight to the proceedings in Suit No. 132/48 as relevant to the ownership of Oye market and of Ezeokolo juju, or to the proceedings in Suit No. 131/48 as relevant to the ownership of the Nkpukpo land:-

"Chief Okorodudu in his argument before us contended that even where the Defendants were sued personally they contested the case on the basis that their right to the land disputed was derived from the Akpo community,

and similarly, Achina people put the title of their community in issue. As long as the people of Akpo did not sue or defend as representing their community they are in no way estopped by the judgments of the Native Courts in the above proceedings, but the Appellants may rely on those proceedings where it is shown clearly that the land therein disputed is within the area now in dispute, as acts of ownership exercised over such areas. Suit No.131/48 relating to Nkpukpo shown on both plans, and Suit No.132/48 relating to Oye market also shown on both plans, are in my view material on this point. The latter suit, as I have said before, also dealt with Ezeokolo juju. The learned trial Judge does not appear anywhere in his judgment to have taken any particular notice of these matters in the Appellants' favour. The question now is whether such misdirection or non-direction has resulted in a miscarriage of justice, and, as stated by Lindley, L.J. in Anthony v. Halstead 37 L.T.N.S.433 at page 434, "the onus is on the Respondents to show that there was no miscarriage of justice".

16. The Judgment of Taylor F.J. contained a further criticism of the finding of Reynolds J. in relation to the Ezeokolo juju:-

"I now come to the finding of the trial Judge in respect of the Ezeokolo Juju. He says on this point that :-

P. 76. L. 12.

'On my visit to the locus in quo however, it was clear that there were two walled areas one on the east and the other on the west side of the Ezeokolo juju, the eastern one of which was used by worshippers of Achina and the other used by Akpo.

.....

I have therefore come to the conclusion and find as a fact that the Ezeokolo juju is in the boundary between Achina and Akpo land and is worshipped by both communities'.

This juju is shown on both plans as being on the eastern boundary of the land in dispute near Oye market and whereas the Respondents'

plan depicts the walled areas referred to by the trial Judge, the Appellants' plan, made some four months before then, does not. The ground of appeal filed by learned Counsel on this point reads thus:-

> 'The learned trial Judge was wrong when he held that the Ezeokolo juju which is within the premises of Oye market is on the boundary between Akpo and Achina thereby overruling the decisions in Suits 128/48, 131/48 and 132/48'.

Counsel contended that the area referred to by the trial Judge could have been walled at any time between 1948 when those suits were heard in the Native Courts and 1959-1960 when the trial Judge visited the locus. One must concede that these plans, which were made in 1955, were made some two years after these proceedings, the subject matter of this appeal, began in the Native Court and were therefore made with a view to litigation."

17. The reasons given by Taylor F.J. for the decision of the Federal Supreme Court to substitute an order of non-suit for the order of Reynolds J. dismissing the action of the Plaintiffs-Respondents, were as follows:-

P.78. L.25

"Mr. Araka has argued, for the Respondents on this point, that the trial Judge has made two specific findings in relation to the areas marked C.M.S. and Salvation Army Mission which were based on the facts before him and that in view of this the Appellants could not in any case have succeeded in the lower Court to title to the whole action, as the onus lay on them to prove their case. With this argument I must agree, but what I have to consider in the circumstances of this appeal is the outcome of or result of the dismissal of the Appellants' case by the trial Judge. It has been said that such a dismissal does not give title to the Defendants, but it certainly has the effect of forever barring the Plaintiffs from disputing the case with the Defendants, and where, as in this appeal, the Appellants have Native Court judgments in their favour which were not given full consideration by the trial Judge, to shut the door against them for ever, in my view, involves a miscarriage of

justice. The proper order in these circumstances, I feel, should have been a non-suit.

In passing I would like to remark that from the evidence before the Court and from a perusal of the plans tendered, both parties to this action have been using portions of the land in dispute as they wished. It would appear from the judgment of the Native Court in Suit No.132/48 that both parties are descended from a common ancestor, which factor may explain this common user of the land in dispute or portions thereof. It may very well be that the land is communal to both Achina and Akpo, having on it schools and missions, a market and juju, which on the evidence are used in common by both sides.

In view of what I have said above, I would set aside the judgment of the trial Judge and in its place substitute an order of non-suit".

18. On the 4th June, 1962, final leave to appeal to Her Majesty in Council was granted to the Defendants-Appellants by Order of the Federal Supreme Court. P.79. l. 30.

19. The Plaintiffs-Respondents humbly submit that the appeal should be dismissed, with costs, for the following among other

R E A S O N S

1. BECAUSE satisfactory evidence was not given entitling either the Plaintiffs-Respondents or the Defendants-Appellants to the Judgment of the Court.

2. BECAUSE the Federal Supreme Court has exercised a discretion under the relevant rule of practice judicially and in accordance with the merits.

3. BECAUSE the Plaintiffs-Respondents have Native Court Judgments in their favour.

4. BECAUSE the decision of the Mbemisi Native Court in Suit No. 223/53-54 in this case was in the Plaintiffs-Respondents' favour.

5. BECAUSE there was evidence that the land in dispute was in whole or in substantial part common to the Achina and Akpo communities.

6. BECAUSE the Judgment appealed from involves a question as to the public interest in regard to the limitation of further litigation between the Achina and Akpo communities, which is a question specially within the competence of the Federal Supreme Court to decide.

7. BECAUSE the Judgment of the High Court was wrong and unjust, and the Judgment of the Federal Supreme Court was correct, for the reasons stated in the Judgment of Taylor F.J.

KENNETH POTTER

No. 39 of 1962

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL SUPREME
COURT OF NIGERIA
HOLDEN AT LAGOS

BETWEEN :-

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(2) REMY NWOSU
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Plaintiffs/Respondents

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