Privy Council Appeal No. 39 *of* 1962

Azuike Ume and others for themselves and as representing the people of Akpo – – – – – – – – *Appellants*

v.

Alfred Ezechi and others for themselves and as representing the people of Achina – – – – – – – – *Respondents*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH APRIL, 1964

Present at the Hearing:
LORD EVERSHED
LORD HODSON
LORD PEARCE
[*Delivered by* LORD EVERSHED]

In these proceedings the plaintiffs acted as representatives of an ancient family known as the Achina family and the defendants resisted the plaintiffs' claim on behalf of and representing another family known as the Akpo family. The issue in the proceedings was as to the family ownership of a strip of land which lies between other and larger pieces of land, that to the west of the disputed area being Akpo family land and that to the east being Achina family land. The exact dimensions of the land in dispute are illustrated by plans exhibited before the trial judge by both sides. There is some divergence between the two plans but the divergence has no significance for present purposes. The disputed strip is a narrow one—that is, from east to west—but appears in length to be about four miles.

It was a point made in the courts below by the respondents before the Board (that is, the plaintiffs) that the western boundary of the disputed land consisted of natural features which (as the respondents contended) was a circumstance favourable to their submission.

By their claim in the action the plaintiffs sought a declaration of title in their favour to the whole disputed area with consequential relief. It may be noted that the proceedings had been transferred from the Mbemisi Native Court to the Nigeria Supreme Court as long ago as December 1954 and in the order for transfer and by way of its justification the District Officer referred to the fact that there had already been many judgments of the Native Court concerning this land " apparently contradictory "; and that having regard to the strong local feeling about the land it was desirable to transfer the case to the Supreme Court.

The judgment of the Supreme Court was delivered in February 1960 by Reynolds J. who concluded that the plaintiffs had upon the evidence before him wholly failed to prove their case; and by his Order he dismissed the action granting to the defendants their costs at the figure stated in the Order. The plaintiffs appealed to the Federal Supreme Court and the judgment of that Court was that of Taylor F. J. dated the 9th November 1961 with which the learned Chief Justice and Unsworth F. J. concurred.

Taylor F. J. expressed his entire concurrence with Reynolds J. in the view that the plaintiffs had not proved their case and so had not made good their claim to a declaration of title or other relief and he noted and took account of the view taken by Reynolds J. of the credibility of the plaintiffs' witnesses.

In the circumstances however he thought that the just result was to substitute a non-suit for the order dismissing the action. The order of Reynolds J. as to the costs of the trial was not disturbed and no order was made as to the costs of either party before the Federal Supreme Court.

The Defendants in the action now appeal to their Lordships Board by leave of the Federal Supreme Court and ask that the Board should restore the original order made by Reynolds J. dismissing the action. The plaintiffs have not sought by cross appeal to make good their claim for a declaration of title to the disputed land but have asked only that the order made by the Federal Supreme Court should not be disturbed. It follows that their Lordships are now only concerned with this one point, namely, accepting the failure of the plaintiffs to make good their claim to the title of the disputed land, is the appropriate order in all the circumstances of the case one for dismissal of the action or one for a non-suit? Having so formulated the question it must be said at once that the question of the appropriate form of order being on the face of it (and particularly in the present case for the reason presently stated) a matter for the discretion of the Federal Supreme Court, their Lordships would not think it right to disturb the exercise of that discretion unless it were shown that the Federal Supreme Court's order had proceeded from some substantial error or would effect some real injustice. But in the present case it was strongly urged on the part of the defendants that the members of the Federal Supreme Court had in their turn overruled the discretion exercised by the trial judge and that it was therefore in the special circumstances of this case open (and proper) for their Lordships to reach their own independent conclusion as regards the order proper to be made—the plaintiffs having, as already stated, on any view failed to make good their claims in the action.

The power of the Courts in Nigeria to order a non-suit is to be found in Order XLVIII (1) of the High Court Rules:

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

The terms of the Order cited reflect the similar power vested some long time ago in the common law courts of this country but now only remaining in the County Courts as first conferred by Section 79 of the County Court Act 1846 (9 and 10 Victoria C.95) the language of which section closely resembles that of the Nigerian Order above set out. That the power to order a non-suit under the English Act was and is discretionary is well established by English decisions (see *Poyser v. Minors* 7 Q.B.D. 329 per Lush L.J. at p. 332); and it has been similarly ruled as regards the Nigerian Courts by judgments of African Courts to which their Lordships were referred and to one of which (that of *Kodilyne v. Odu* 1935 2.W.A. C.A. 336) a later reference will be made in this judgment.

In the circumstances their Lordships pose what appears to them to be the question to which they must, as they think, be persuaded by the defendants to give an affirmative answer if they are to disturb the Order made by the Federal Supreme Court—that is, has the Order proceeded upon some substantial error or is some real injustice thereby done?

There is no doubt that the ownership and the right to possession of lands in Nigeria have unhappily been and are the subject of much litigation in that country. There is also no doubt that a sharp distinction must be drawn between rights of (or claims to) ownership of land, on the one hand, and, on the other hand, rights of (or claims to) possession merely. Broadly, as their Lordships understand, the ownership of land is vested in numerous families (having originally in many cases been acquired by conquest) and family land can at best only be effectively disposed of by a chief or other persons acting on behalf of the family; whereas disputes as to possession are disputes between particular individuals, the determination of which would (normally at any rate) not at all affect the question of proprietorship. Having regard to the origin of family proprietorship, claims in such cases, that is, claims to ownership, must be made good either by strong traditional evidence or by

"acts of ownership extending over a sufficient length of time numerous and positive enough to warrant the inference" of the exclusive ownership claimed. The words quoted are taken from the judgment of the Trial Judge who thereby invoked well established authority (see e.g. the judgment of Webber J., in the case of *Ekpo v. Ita* XI Nigeria Law Reports p. 68).

The contest at the trial related to certain specific and well defined pieces of land within the disputed area, namely the land now occupied by the Church Missionary Society, the land now occupied by the Salvation Army, certain land associated with the name of Chiagu, and lands which had been the subject of suits brought before Native Courts and defined by the suit numbers 128/48, 131/48, 132/48 and 128/52–53. Of these lands it was conceded before their Lordships that the Church Missionary Society and Salvation Army properties had been derived from the family of the defendants and that the Chiagu property lay to the east of the disputed area, being upon land of the plaintiffs' family. As regards all the lands, the subject of the native suits above mentioned, the learned trial judge concluded that in every case the suit had been between individuals involving only possessory rights. After stating that the findings in such suits were "far from being clear or conclusive of the rights of the communities" (that is, the families) Reynolds J. held that the plaintiffs had failed to prove any title *virtute familiae* over any part of the disputed area, that they had therefore wholly failed to discharge the burden of establishing a right to the declaration sought and that the action must be dismissed. The learned judge did not in his judgment make specific reference to the discretion vested in him to order a non-suit, but since the matter had been discussed in argument their Lordships do not doubt that he had considered it and upon the premise of his findings the order for dismissal of the action was in accordance with the decision of the *Kodilyne* case (supra) in which the claimants had likewise wholly failed to establish any family title to any of the land there in question. Reynolds J. did however add that his decision would not, in his view, overrule those decisions of the Native Courts which had been in favour of members of the Achina family since they were decisions upon personal as distinct from family claims.

The Federal Supreme Court did not, as already stated, at all qualify or dissent from the view taken by Reynolds J. of the credibility of the witnesses before him. But the learned Federal Justices were able to show that in one respect Reynolds J. had misdirected himself; viz in holding that the suit 132/48 had been concerned with merely personal claims; for, as they observed, the claimants in that suit had in fact sued *virtute familiae*—that is to say their claim was as representing the Achina family to family land. It is further to be noted (as was pointed out by Taylor F. J.) that the subject matter of that suit was also related to the user in common by both the Achina and Akpo families of the Oye market, and the common worship at the Ezeokolo Juju. Mr. Gratiaen also stressed before their Lordships that the claimant in the suits 128/48 and 128/52–53 (who was the defendant in suit 131/48), namely one Simon Obiora, did invoke Achina family title. As regards these suits however the Federal Justices did not dissent from the view of Reynolds J. that they were, in truth, possessory or individual claims only. But as regards the subject-matter of the suit 132/48 it would appear to follow, as indicated by the Federal Justices (whose knowledge of such local matters their Lordships naturally respect), that the effect of dismissing the present action would at least in that case appear to conflict with the Native Court decision.

If the only error in the judgment of Reynolds J. was in his treating the suit 132/48 as concerned with purely individual or personal claims it might be said (and was urged on the defendants' part) that the Achina family had made out a good title to only one small piece of land out of the whole of the large area in dispute. Even so however the essential premise to the judge's conclusion has been displaced—the case is no longer one like the *Kodilyne* case in which the claimants have failed to prove any title at all to any of the disputed land. But the Federal Justices draw attention to another point which their Lordships have regarded as highly significant, namely to the undoubted fact

that there was clear evidence of a considerable degree of common user on the part of members of both families over the disputed area and also to the fact that both families, Achina and Akpo, appear to have been descended from a common ancestor—a fact which, as Taylor F. J. pointed out, might well explain the common user—illustrated as it was particularly by the facts relating to the Oye market and the Ezeokolo Juju and by the circumstances that the C.M.S. station is now called the " Achina-Akpo " station. In the circumstances, as Taylor F. J. pointed out, it might well be that the whole area was, or was in large measure, communal to both families and that the claim of the plaintiffs to the land as exclusive Achina family property had been misconceived.

In the circumstances which they have stated their Lordships feel satisfied that there was solid ground for the fresh exercise of the discretion conferred by Order 48 on the part of the Federal Supreme Court and that upon the general principle stated earlier in this judgment their Lordships ought not to interfere with that exercise. From the cases cited to the Board it seems clear that such discretion is, in cases of family disputes of this kind and other classes of case, not infrequently exercised by the Nigerian courts, if some injustice might otherwise be done. By way of example their Lordships refer to the decision of the present Chief Justice in the case of *Akadiri Akani and another v. Olubodan-in-Council* Suit No. 1/120/49 recently cited to their Lordships' Board in the case of *Moukarihm v. Coker* Privy Council Appeal No. 38 of 1962. See also the case of *Ajetunmobi v. Omowunomi* (1961) 1 All N.L.R. 120 where de Lestang C. J. said that a non-suit should in justice have been ordered in an action by a moneylender on the ground that the plaintiff had not had legal assistance and therefore had not been aware of the requirements of the Moneylenders Ordinance for making good his claim for return of the money lent.

In all the circumstances of this case their Lordships accept therefore the view of Taylor F. J. that injustice might be done to the Achina family and its members by the estoppel *per rem judicatam* to which the family and its members would be subjected by the dismissal of the action; and in any case they have not been satisfied that the case is one in which the Board ought upon principle to interfere with the exercise of its discretion by the Federal Supreme Court.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of this appeal.

(S9761) Wt. 8052/99 100 5/64 Hw.

In the Privy Council

AZUIKE UME AND OTHERS FOR THEMSELVES AND AS REPRESENTING THE PEOPLE OF AKPO

v.

ALFRED EZECHI AND OTHERS FOR THEMSELVES AND AS REPRESENTING THE PEOPLE OF ACHINA

DELIVERED BY

LORD EVERSHED

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