

Privy Council Appeal No. 139 of 1917.

Chief Ntiaro and another - - - - - *Appellants*

v.

Ibok Etok Akpan and another - - - - - *Respondents*

FROM

THE SUPREME COURT OF NIGERIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL DELIVERED THE 24TH OCTOBER, 1918.

Present at the Hearing :

LORD SUMNER,
LORD PARMOOR,
LORD WRENBURY.

[*Delivered by* LORD SUMNER.]

This was an appeal by two Chiefs, proceeding in right of their tribes, from a judgment of the Supreme Court of Nigeria, which dismissed their appeal, with a variation from a judgment of Mr. Justice Weber, who tried the case for many days at Calabar. There are pleadings in the case which state with precision what the issues raised were as between the plaintiffs and the original defendant. At the trial another Chief, Edoho Ekit, representing another tribe not akin to the plaintiff and defendant tribes, applied to be joined as having an interest in the subject-matter, and, the same Counsel appearing for both, the issues raised for the second defendant also appear tersely, but quite clearly.

The subject-matter was the ownership of two regions, one on the seashore from the mouth of the Qua Ibo river eastwards to Child Point, and the other the swamp land, at most seasons of the year largely under water, which lies immediately behind that coast line, and extends back to a creek known as "Stubbs Creek."

As to this the plaintiffs claim a declaration that the whole of this area was the property of their people, the people of Big Town, and they claim "an injunction restraining the defendants or their people from building houses or sheds on the said land or otherwise interfering with the plaintiffs' rights of ownership," and damages. In answer the original defendant pleaded, along with other pleas, that his tribe enjoyed common ownership of the swamp land with the plaintiff tribe, and that the plaintiffs were not entitled to the exclusive use of the swamp land and the seashore. The second defendant, representing the Eket tribe, pleaded that the ownership of the whole land was in them. Neither defendant asked for relief either by way of declaration or counterclaim for damages, or in any other way. The conclusion arrived at by Mr. Justice Weber, on the plaintiffs' claim was that they had no exclusive ownership of either of these two descriptions of area. He went at some length into the evidence in the judgment which he delivered; discussed the effect of a number of payments, so-called of tribute, which the plaintiffs said they had received from the defendants, or one of them, in respect of the land; offered an explanation of them, so far as those payments had been made, namely that they were on account of the custom known as "inon," and concluded:—

"There has not been in my finding of the facts in respect of the seashore, any such exclusive occupation by the plaintiffs, apart, of course, from the fact that they have not established such evidence of long possession as would entitle them to claim ownership of the soil."

He then passed to the swamp land: "The plaintiffs, on the evidence, have failed absolutely to establish their title or ownership to this swamp," he said: "I think the claim for a declaration and injunction fails and the action must be dismissed," with costs. He then went on to add a couple of sentences to the effect that he was granting a declaration of title to the second defendants, the Ekets, in so far as the swamps were concerned, and expanded that by saying:—

"They will be allowed to fish in the swamps known as Okoyak, which extend to the seashore, in the same manner as they have done hitherto; and as to the seashore, no exclusive ownership has been proved by anyone, and the Uben Ekang will be permitted to enjoy the use of the seashore in common with the other Ibenos for erecting temporary huts for the purpose of fishing in the sea."

No formal judgment was drawn up; his written judgment stands as the judgment of the Court.

When the matter came before the Court of Appeal the Court varied this judgment by deleting the concluding paragraph of the said judgment, and their Lordships are of opinion, not merely by inspecting the record which has been sent over, but from the structure of Mr. Justice Weber's judgment, that what the Court of Appeal calls the "concluding paragraph" in its order as drawn up, is the whole of the passage which begins by saying that by this judgment he granted a declaration of title, and so on, down to the

end of the judgment. That passage was superfluous because, as the pleadings showed, no declaration of title had been asked by the Ekets. There was no reason for giving them a declaration which they had not prayed for, and, as to the remainder of the passage, it was, in the opinion of the Court of Appeal, rather an expression of opinion than a definition of the rights of the two defendants as regards one another. Therefore, the plaintiffs' claim, as pleaded, stood dismissed.

Their Lordships think that the whole of the case made was one of fact. It rested on proof of acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that the plaintiffs were exclusive owners, as they claimed to be, and it would be difficult to find a case which was more essentially a question of fact only. That being so, and the judgment below having been affirmed with this variation, which need not be further referred to, the appeal here would have been concluded by the rule that, where two Courts below have concurred in one finding of fact, which disposes of the claim, their Lordships will not re-hear the facts for a third time. But there is a passage in the judgment of the Court of Appeal, which, after stating with perfect truth the circumstances of the trial, its length, the care with which it had been conducted, and the fact that the witnesses were before the learned Judge, who had the best opportunity of estimating their weight, says this:—

“And this Court will not interfere with the verdict of the Judge below unless such verdict is shown to be perverse or not the result of a proper exercise of his judicial discretion. That has not been done in this case.”

and then deals with the question of the costs. It was strenuously contended that the Court of Appeal had come to no finding of fact of its own, and that there were not two concurrent findings of fact in the Courts below; but, that, inasmuch as Mr. Justice Weber had shown that he had exercised some judicial discretion, the Court of Appeal had accepted his findings. Their Lordships are by no means satisfied that this was the *ratio decidendi* or that the Court of Appeal took the view of its duty which has been contended for. It is unnecessary to say more because, in view of the doubt that was raised upon it, their Lordships have carefully examined the whole of the evidence, and are unable to see that the decision of Mr. Justice Weber at the trial, as limited by the issues raised upon the pleadings and as reduced by the deletion of the concluding paragraph of the judgment, was erroneous. It was for him to select the witnesses whom he thought worthy of credit. One, a missionary at the station, of long service in one of the defendants' towns, who gave evidence at length, was treated by him as an important witness; others he may have considered, and obviously did consider, inconclusive and, there being conflicting evidence, he came to the conclusion that the acts of ownership which were relied on, which were principally

the receipt of tribute, had not been proved, or had not been proved under circumstances which resulted in establishing ownership; that they might be explained, and, in his opinion, were to be explained by reference to native customs.

Their Lordships can see no necessity for considering any questions of law in connection with what is, after all, a pure finding of fact.

They also think it unnecessary to go through this evidence, which has been carefully examined with the assistance of Counsel on both sides, or to re-state the story and the conclusions. All they think it right to say, and all their Lordships desire to say, is that they do not affirm anything but the judgment which, upon the issues raised by the pleadings, was the judgment of the Court, namely, the dismissal of the plaintiffs' claim, and, in so far as isolated passages, either in the judgment or in the paragraph which is struck out, might appear to support other claims than those which arise upon the pleadings, their Lordships express no opinion.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

CHIEF NTIARO AND ANOTHER

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IBOK ETOK AKPAN AND ANOTHER.

DELIVERED BY LORD SUMNER.