Privy Council Appeal No. 28 of 1942

Oke Lanipekun Laoye and others - - - - *Appellants*

v.

Amao Oyetunde - - - - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JUNE, 1944

Present at the Hearing:

LORD THANKERTON
LORD WRIGHT
SIR MADHAVAN NAIR

[*Delivered by* LORD WRIGHT]

This appeal raises an important question as to the customary and statutory law relating to the election of chiefs in the Protectorate of Nigeria. The policy of the British Government in this and in other respects is to use for purposes of the administration of the country the native laws and customs in so far as possible, and in so far as they have not been varied or suspended by statutes or ordinances affecting Nigeria. The Courts which have been established by the British Government have the duty of enforcing these native laws and customs so far as they are not barbarous as part of the law of the land. In particular native laws and customs regulating the appointment and election of chiefs have been recognised as having the force of law. This was pointed out in the judgment of this Board in the case of *Eshugbayi Eleko* v. *Nigerian Government* [1931] A.C. 662 at p. 673. In this way the dispute which had arisen as to the successor to the chieftainship of the town or district of Ogbomosho was brought for adjudication to the High Court of the Ibadan Judicial Division of the Protectorate of Nigeria, to which it had been transferred from the Native Court of Oke Are Land Court, and on appeal from the High Court to the West African Court of Appeal held at Lagos, Nigeria.

Ogbomosho is a town in the Protectorate of Nigeria, in the Province of Oyo. Its native authority consists of a head called the Bale and a Council. This is subordinated to the Olubadan and Council of Ibadan, the native authority appointed for the Ibadan Division in which Ogbomosho is situate. It is important to observe both that Ogbomosho is in the Protectorate of Nigeria and not in the Colony of Lagos, and that the Bale of Ogbomosho though a chief is not a head chief, within the definition of the Interpretation Ordinance 1939 Laws of Nigeria, No. 27, which apply to this case. The material definitions are:—" Chief or Native Chief " means any native whose authority and control are recognised by a native community, and " Head Chief " means any chief who is not subordinate to any other chief or native authority, and " Native authority " means a native authority constituted under any ordinance authorising the constitution of native authorities. These definitions apply in the facts of the present case.

The subordination of the native authorities of Ogbomosho to those of Ibadan is for purposes of administration and does not affect the rules as to the appointment of the Bale of Ogbomosho which are regulated by the custom applying to it. What this custom is was the subject of elaborate evidence at the trial before the Judge of the Ibadan Division. His finding on this matter was not questioned in the West African Court of Appeal, but it was treated as irrelevant on the ground that it had been superseded in its operation by Nigerian Ordinances. Before examining these issues in detail, their Lordships will briefly explain how the dispute arose.

The Bale of Ogbomosho by native law and custom is entitled to the use and occupation of a property in the town known as Sohun. This property contains shrines, furniture and paraphernalia which it is part of the Bale's duty to keep up so that separation of the property from the Office would be intolerable under native law and custom. The appellants who were plaintiffs in the action as representing their several families claimed that the respondent was illegally in possession of the Sohun, which he held on the footing that he was the Bale, whereas he had not been elected in accordance with the relevant law and custom. The four families which the appellants represented, together with a further family, that of Ajibola were, it was alleged, entitled to elect the Bale according to the custom. That custom, so the appellants objected, had not been followed in the appointment of the respondent, which was thus invalid. The appellants accordingly claimed possession of the Sohun.

The custom alleged and proved by the appellants, is that when the office of Bale became vacant, the five families in turn are entitled to fill the vacant office, their eldest member, and if he was unfit, their next eldest member being appointed to the office. The difficulty which led to the trouble was that on the previous vacancy Oyekola, of the family of Laoye, which was the family whose turn it was, would have become Bale but he died before going to Ibadan for the approval of his succession by the Bale and Council of Ibadan. He thus died before his installation and never became Bale. The contest which arose was whether the vacancy should be filled by his son, the respondent, or by his brother Oke Laniperkun Laoye, who was the next eldest fit member of the same family. It was not disputed that the appointment remained in the family since it was the family's turn to appoint. The appellants alleged as a further ground of their claim that according to custom no one could be a Bale whose father had not been a Bale. Another element of the custom which was spoken to in the evidence was that the member of the family entitled to the right of selecting the Bale must have at least the general consent of the responsible members of the family. The trial Judge accepted the evidence called by the appellants and held that the custom which they alleged was proved. He summed up his conclusion as follows: " The result of my consideration of the evidence about the relevant native law and custom, is that if I thought the case had to be decided according to whether or not I find that the appointment of the defendant as Bale accorded in all respects with the relevant traditional law and custom, my finding would be that it did not so accord and I should give judgment in favour of the plaintiffs. I do not think that the case so falls to be decided. There are other relevant factors as it seems to me." His view, which he goes on to explain, is in effect that the traditional law and custom in regard to this matter had been altered by the legislation, contained in the Native Authorities Ordinance, 1933. In virtue of that ordinance, the Baleship of Ogbomosho had become, in his opinion, " a cog in the machinery of Government and administration ": all native authorities being charged with the obligation to maintain order and good government. From this he seems to have deduced that the law and custom regulating the mode of appointing a Bale has been changed and that as there was a difference of opinion in the Council as to whether the first appellant in his personal capacity or the respondent should become Bale, this difference was properly put before the Olubadan and his Council at Ibadan. These authorities having made a recommendation in favour of the respondent, which was approved by the Resident, the Judge held that the respondent was in due course

ins alled as Bale and entered into possession of the compound. The Judge also relied on General Order (*e*) which he held delegated to Chief Commissioners and Residents the executive power to approve appointments and dismissals of staff under the native administration, with exceptions not here relevant. This order he held, justified a letter from the Chief Commissioner approving the Resident's recognition of the respondent's appointment.

Their Lordships are of opinion that the ordinance and general orders on which the Judge relies furnish no ground for over-ruling the traditional law and custom in the matter. They agree in this respect with the decision of the Court of Appeal, who point out that the Native Authorities Ordinance " gives supplementary powers to a Bale, but has nothing to do with the actual appointment." On this ground the Court of Appeal rightly in their Lordships' opinion, held that the ordinance and the General Orders did not change the native law and custom here in question. The Court moreover while they quote, with apparent approval, the finding of the trial Judge as to the native law and custom, proceed to dismiss the appellants' claim on a different statutory ground which they find in ordinance 14 of the Laws of Nigeria of 1930. The title of this is " An Ordinance to provide for the appointment and deposition of Chiefs in the Colony (sc Lagos) and Head Chiefs in the Protectorate." The Court base their decision on sec. 2 (2) of the ordinance which is in the following terms:—

> " (2) The Governor shall be the sole judge as to whether any appointment of a Chief or Head Chief as the case may be, has been made in accordance with native law and custom."

Those words, the Court holds, oust the jurisdiction of the Court and make conclusive the recognition by the Governor of the respondent as Bale.

Their Lordships are unable to agree with this decision. It is true that section 2 (2) does not contain the words " Chief of the Colony " or " Head Chief in the Protectorate " but these qualifications are clearly imported if the ordinance is read as a whole. The title quoted above forms part of the enacting statute and may be considered in determining the scope of the enactment. This is now settled law for which if authority is needed reference may be made to the clear statement of Lindley M.R. in *Fielden* v. *Morley Corporation* [1899] 1 Ch. 1. It is true that the title, much in the same way as the preamble, cannot be taken to override any clear and specific provision in the body of the statute. The statute must be read as a whole. There is, however, in the ordinance now being considered, nothing to extend the particular scope defined in the title. Section 2 (1) uses the full phrases " Chief in the Colony ": " Head Chief in the Protectorate." The curtailed language of subsection (2) which is merely ancillary to subsection (1) is in their Lordships' opinion not to be taken to refer to anything other than what is specified in subsection (1) or to go beyond the scope of the title.

It follows from this construction that since the Bale of Ogbomosho is, according to the definition quoted above, not a Head Chief being subordinate to Ibadan and is not a Chief in the Colony of Lagos but in the Protectorate of Nigeria, subsection (2) has no application to his Office. This ordinance therefore cannot any more than the legislation relied on by the trial Judge, serve to override or qualify the relevant law or custom, which both Courts on evidence which their Lordships regard as conclusive, have accepted as established.

In the result their Lordships are of opinion that the appeal should be allowed and the judgment appealed from should be set aside, and that it should be declared that the possession of the Sohun is illegal and that the first appellant is entitled to be appointed Bale and to be given possession of the Sohun with its furniture and paraphernalia and that the case should be remitted to the Court in Nigeria to do what is necessary to carry out these declarations. The respondent will pay the appellants' costs of the appeal and in the Courts below. They will humbly so advise His Majesty.

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In the Privy Council

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v.

AMAO OYETUNDE

DELIVERED BY LORD WRIGHT

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