GH GZ

37, 1956

No. 18 of 1953.

In the Privy Council.

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL (NIGERIAN SESSION).

BETWEEN

CHIEF JOSEPH WOBO,
CHIEF WALI WOKEKORO,
CHIEF SAMUEL ATAKO,
PHILIP CHINWA,
BROWN AGUMAGU,
VICTOR AMADI,
APPOLOS AMADI,
AMADI WANODI,
AMADI OPARA,
WOBO CHARA (Plaintiffs) . . . . . *Appellants*

AND

THE ATTORNEY-GENERAL FOR THE FEDERATION OF NIGERIA AND THE ATTORNEY-GENERAL FOR THE EASTERN REGION OF NIGERIA (SUBSTITUTED FOR THE ATTORNEY-GENERAL OF NIGERIA) (Defendant) . . . . . *Respondents.*

CASE FOR THE RESPONDENT

RECORD

1.—This is an appeal from an Order, dated the 9th June, 1952, of the West African Court of Appeal (Foster Sutton, P., de Comarmond, Ag. C. J. and Coussey, J.A.), dismissing an appeal from a judgment, dated the 4th August, 1951, of the Supreme Court of Nigeria (Jibowu, J.), dismissing an action in which the Appellants sought relief of various kinds based on their claim to be the rightful owners of all the land in the Rivers Province of Nigeria on which stands the town of Port Harcourt. p. 70 pp. 37–57

2.—The Appellants brought their action under the Petitions of Right Ordinance (Laws of Nigeria, 1948, c. 167). In their Statement of Claim, dated the 1st February, 1949, they claimed to be representatives of the people, and successors of the chiefs and headmen, of Abali and Ogbum Diobu. They alleged that the Respondent represented the Governor of Nigeria, the Resident of the Rivers Province, and the Local Authority and the Planning Authority of Port Harcourt. Their allegations were : p. 1, ll. 28–30 p. 1, ll. 31–33

RECORD

pp. 2–4

Up to the year 1911 they and their ancestors had lived as lawful owners in the area now known as Port Harcourt, then known as Obomotu. In 1911 their predecessors in title had granted a resting place at Obomotu to an Englishman named Harcourt. In 1913 the Deputy Governor of the Colony and Protectorate of Southern Nigeria sought to buy Obomotu from the Diobu people; the people refused to sell, but allowed a portion for settlement. By an agreement dated the 18th May, 1913 between the Deputy Governor and representatives of Diobu and other villages, the Deputy Governor purported to buy Obomotu from the Diobu people for £2,000. The people refused to sell or to accept the money, and continued so to refuse until October, 1927. In 1925 in an attempt to persuade the Diobu chiefs to sell Obomotu, the Government offered to put up storey buildings for them. The chiefs refused, and opposed any extension of the town boundary beyond No. 1 railway gate. In 1927 the Government appointed one Captain Cooke to arbitrate between them and the Diobu people. The arbitrator defined the boundaries of Port Harcourt, but failed to persuade the Appellants' ancestors to extent the town boundary beyond No. 1 railway gate. In 1913 the Appellants' ancestors had refused to take an annual grant of £500 unless an undertaking were given that the boundary would not be so extended and the town would not be sold to any Europeans. The arbitrator assured the Appellants' ancestors that arrears of this grant up to 1927 would be paid as compensation for damage done to crops, etc. by the Government, and they would receive rent for the land of £1,500 per annum; on this assurance they received the arrears of £7,500 in October, 1927. In February, 1928 the Acting Resident acknowledged, in a letter written to a third party, that the land outside No. 1 railway gate was Diobu land. By an agreement dated the 2nd May, 1928, supplementary to the agreement of 1913, six chiefs and two headmen, all of them illiterate, purported to sell Diobu land to the Governor for £7,500 down and an annual payment of £500. The purchase money of £7,500 was not paid, and, if the chiefs and headmen purported to enter into the agreement, it was invalid because the parties were not "ad idem." From 1928 to 1930 the Appellants received annually £500 on account of the £1,500 recommended by the arbitrator. Since the balance was not paid they refused to accept any payment in 1931, until the Governor persuaded them to accept the £500 for the time being, saying this would not affect their claim against the Government. Thereafter the Government had trespassed on Diobu land by extending the town boundary beyond No. 1 railway gate. The Appellants, in spite of their complaints and representations, had been served with notices to quit their homes.

p. 4, ll. 16–41

The Appellants claimed (i) a declaration that they were the rightful owners of all the land known as Port Harcourt, (ii) £30,000 compensation and damages for trespass, (iii) £23,000, being arrears from 1928 of the annual payment of £1,500, (iv) cancellation of all alleged agreements purporting to transfer the rights of the Abali and Ogbum Diobu over their lands, in that the parties were not "ad idem," and conclusion of a new

agreement, and (v) an injunction restraining further trespass or encroachment on their lands.

3.—By his Defence, dated the 4th May, 1949, the Respondent said he represented the Governor of Nigeria and the Resident of Rivers Province and no other person. He admitted that on the 18th May, 1913 an agreement was made between the chiefs and headmen of Diobu and other villages of one part and the Deputy Governor of the Colony and Protectorate of Southern Nigeria of the other part. By this agreement the chiefs and headmen, in consideration of a sum of money, granted and sold to the Deputy Governor all the right, title and interest to which they and their people were entitled by native law and custom in a piece of land, of which particulars were set out. The Diobu chiefs agreed to accept £2,000 as their share of the purchase price, and this sum the Deputy Governor was at all times ready and willing to pay. He entered into possession of the land under the agreement. The Respondent also admitted that on the 2nd May, 1928 the chiefs and headmen of Diobu and the Governor of Nigeria made an agreement, supplemental to the agreement of 1913 and varying its terms. By this supplemental agreement there was substituted for the sum of £2,000 payable to the chiefs and headmen the sum of £7,500 to be paid immediately and an annual sum of £500 : with these variations, the principal agreement was to remain in full force and effect. The chiefs and headmen executed the supplemental agreement, and received the purchase price of £7,500, on the 29th October, 1927. £500 was paid by the Crown to the Appellants under the supplemental agreement on or about the 18th May in each year from 1928 to 1947. On or about the 18th May, 1948 £500 was tendered by the Crown but refused by the Appellants. The Crown was ready and willing to pay this sum. By an indenture made on the 2nd May, 1928 between the Governor and Chief Wobo, a part of the land which was the subject of the agreement of 1913 was reconveyed to Chief Wobo. The Respondent either denied, or did not admit, the other allegations in the Statement of Claim. He averred, under the Crown Lands Ordinance (Laws of Nigeria, 1923, c. 84, s. 29) (now replaced by Laws of Nigeria, 1948, c. 45, s. 30), that the land described in the agreement of 1913, except the land reconveyed in 1928 was Crown land.

pp. 5–7
p. 5, ll. 5–7
p. 5, ll. 10–46
p. 6, ll. 12–40
p. 6, l. 44–p. 7, l. 3
p. 7, ll. 19–23

4.—The following statutory provisions are relevant to this appeal :

Crown Lands Ordinance

(Laws of Nigeria, 1948, c. 45)

30. In any action, suit or proceedings against any person for or in respect of any alleged unlawful occupation, use of or trespass upon Crown land, the proof that the occupation or use in question was authorised, shall lie on the Defendant, and in every such action, suit or proceedings and in every action by or against the Government in

which title to land shall be in issue the averment that any land is Crown land shall be sufficient without proof of such fact, unless the Defendant prove the contrary.

Land Registration Ordinance, 1907

(of Southern Nigeria)

2. In this Ordinance, unless the context otherwise requires,—

* * * * *

" Instrument " includes every instrument in writing affecting land in the Colony or Protectorate of Southern Nigeria, including a will and a power of attorney under which any instrument affecting land may be executed.

" Land " includes any estate or interest in real property.

* * * * *

12. Every Instrument executed after the commencement of this Ordinance, whereby land is granted by Natives to any person or persons other than Natives, or by the Crown to any person or persons whatever, shall be void unless the same be registered within a period of sixty days from the date thereof.

Provided that the Principal Registrar may extend the said period of sixty days by any period not exceeding three months in any case in which he is satisfied that registration has been delayed without any default or neglect on the part of the person acquiring the right or interest in the lands in question.

Land Registration Ordinance

(Laws of Nigeria, 1948, c. 108)

2. Definitions :—

* * * * *

" Instrument " means a document affecting land in Nigeria, whereby one party (hereinafter called the grantor) confers, transfers, limits, charges or extinguishes in favour of another party (hereinafter called the grantee) any right or title to, or interest in land in Nigeria, and includes a certificate of purchase and a power of attorney under which any instrument may by executed, but does not include a will.

* * * * *

14. Every Crown grant executed after the commencement of this Ordinance, and every instrument affecting land the subject of a Crown grant or whereby land is granted by a native to a non-native executed after the commencement of this Ordinance shall, so far as it affects any land, be void unless the same is registered within six

months from its date (or, in the case of an instrument whereby land is granted by a native to a non-native, from the date on which it receives the Governor's consent) if executed in Nigeria . . . provided that the registrar may extend such period whenever he shall be satisfied that registration has been delayed without default or neglect on the part of the person acquiring the right or interest in the lands in question.

5.—The action was tried by Jibowu, J. between the 19th and the 27th July, 1951. The Appellants put in the following material documents :

(i) the agreement made on the 18th May, 1913 (Exhibit F), the effect of which is summarised in paragraph 3 of this Case. This document bore the marks of five Diobu chiefs and two Diobu headmen, and a certificate by the District Interpreter of Degema that the agreement was correctly read over and interpreted by him to these chiefs and headmen, who appeared to understand it clearly and made their marks to it in his presence. The same Diobu chiefs and headmen put their marks to the Schedule, by which they acknowledged receipt of £2,000 in full discharge of all their claims under the agreement. The document also contained an oath of proof by the District Interpreter. At the foot of the document was a statement by the Principal Registrar of Deeds for the Eastern Province of Southern Nigeria, dated the 14th August, 1913, that he had extended the time for registration of the instrument under the Land Registration Ordinance (No. 15 of 1907) until that date, and statements by the Registrar of Deeds that the instrument had been registered as No. 16 of 1913 ; pp. 72–80 p. 73, ll. 41–47 p. 74, ll. 8–18 p. 76, ll. 13–35 pp. 78–79 p. 80, l. 31–47

(ii) a memorandum dated the 21st January, 1923 by a Colonel Moorhouse (Exhibit C), describing discussions with the Diobu chiefs for the acquisition of more land at Port Harcourt for purposes of the railway ; pp. 81–82

(iii) the agreement made on the 2nd May, 1928 (Exhibit G), the effect of which is summarised in paragraph 3 of this Case. This document bore the marks of five Diobu chiefs and two Diobu headmen (the same, with one exception, as those who executed Exhibit F), and a certificate by an Interpreter that the agreement was correctly read over and interpreted by him to the chiefs and headmen, who appeared clearly to understand it. There was an oath of proof by the same Interpreter. At the foot were statements by the Deputy Registrar that the instrument had been registered ; pp. 83–85 p. 84, l. 20–p. 85, l. 15 p. 85, ll. 34–40

(iv) the indenture of the 2nd May, 1928 mentioned in paragraph 3 of this Case (Exhibit H). This document bore Chief Wobo's mark, and a certificate by the Interpreter and statements of registration similar to those in Exhibit G ; pp. 86–87

(v) a memorandum dated the 11th May, 1929 from the Resident of Owerri Province to the Land Officer of Port Harcourt (Exhibit A), p. 87

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stating that the Diobu had on the 28th October, 1927 been paid £7,500 by way of rent for fifteen years and £300 by way of compensation, and were not entitled to any further compensation ;

pp. 88–89 (vi) a memorandum dated the 22nd August, 1929 between the same parties (Exhibit B), dealing with the boundaries of the land to which the Crown was entitled ;

p. 89 (vii) notes of a meeting between the Governor and representatives of the Diobu on the 20th September, 1931 (Exhibit E). The representatives complained they were not receiving enough rent for the land acquired by the Government. The Governor said the rent of £500 was generous, but undertook to have an economic survey made to ascertain the annual value of the land ;

pp. 90–91 (viii) a memorandum dated the 17th May, 1932, giving an account of this economic survey (Exhibit D). The estimated annual rental value of the land was £597 11s. 1d. ;

p. 93 (ix) a letter, dated the 12th September, 1934, from the Acting Chief Secretary to a barrister named Alakija (Exhibit J). This letter acknowledged receipt of a petition from the Diobu chiefs and people about their rent. After receiving the economic survey, the Government had abandoned all claim to land of an annual value of £363 9s. 4d. The annual value of the land retained was only £234, but no reduction had been made in the rent of £500. The Governor was unable to reopen the subject ;

p. 95 (x) the Acting Chief Secretary's reply, dated the 13th May, 1933 (Exhibit J1), to another petition of the Diobu chiefs asking for an increase of the rent. The Governor had nothing to add to Exhibit J.

6.—The Respondent put in the following documents :

p. 92 (i) a petition of the Diobu chiefs and people to the Governor dated the 19th July, 1934 (Exhibit J2). This was the petition acknowledged by Exhibit J. It asked that the terms of the agreement of the 2nd May, 1928 (Exhibit G) be subject to another revision, as the rent of £500 was absolutely inadequate. The petition bore the signatures or marks of seven Diobu chiefs and headmen, including some of the Appellants. It was submitted through Mr. Alakija ;

p. 94 (ii) a similar petition dated the 15th September, 1937, asking for an increase of the rent (Exhibit J3). This was the petition mentioned in Exhibit J1. It bore the signature or marks of eight Diobu chiefs, including some of the Appellants ;

pp. 96–97 (iii) a letter and notice dated the 17th January, 1947 from the Resident of Owerri Province (Exhibit P). These stated that the Diobu chiefs and headmen had been allowed to use land acquired by the Government outside the township area of Port Harcourt until the

Government might require it; that the Government intended to use the land as from the 17th January 1948, and that all farming must cease by that date. The letter was addressed to ten Diobu chiefs, including all the Appellants except the fourth.

7.—Other evidence was given on behalf of the Appellants as follows :

(i) the fourth Appellant said the Diobu people had appointed p. 13, ll. 26–28
the Appellants to represent them. He remembered when the p. 13, ll. 29–42
Europeans first came. Two came, with a police constable and
a dog. Chief Atako refused them land to settle, but later one, named
10 Harcourt, was allowed land for a rest house. Later the Governor p. 14, ll. 8–19
came and offered to buy the land at Obomotu, but the people refused
to sell. To the witness's knowledge the chiefs entered into no agreement
of sale. He said Diobu land was communal, and every Diobu man was
entitled to work on it. Everybody should be present if an agreement
was to be signed. He said the people supposed to have executed
Exhibit F were not Diobu people. His people did not agree to sell the
land for £2,000 and did not receive the money. About twenty years p. 14, ll. 19–24
ago, he said, the Resident of Owerri had asked the chiefs to sell Obomotu
but they had refused. Up to that time they had accepted no purchase
20 price. In 1927 a District Officer named Cooke came to make peace p. 14, ll. 24–41
between them and the Government. He asked them to let the
Government have land up to the railway gate for £1,500 per annum,
but they refused. Later the people received £7,500 from the
Government, as (according to the witness) compensation for crops at
£500 per annum from 1912 to 1927. The Government called it rent,
but they took it as compensation. In 1927 they agreed to accept p. 14, l. 47–
compensation for crops, etc. destroyed and rent. They received £500 p. 15, l. 10
per year, but refused the money in 1931. They met the Governor,
and told him they refused the money because they had been told
30 they would get substantial rent. The Governor said he could do
nothing more for them. They had not negotiated with the p. 15, ll. 15–27
Government about land beyond railway gate No. 1; that land, the
witness said, they let to strangers. The Government had extended
Port Harcourt beyond the land granted to them. The Government
had given the people notice to quit about four years previously, but
they had sent the notices back. The witness said he had attended p. 16, ll. 2–7
all the meetings at which sale of the land was discussed, but had never
heard of Exhibits F, G and H until about three years before. The
people had received £500 per annum between 1931 and 1947. The p. 16, ll. 11–12
40 witness's father had signed Exhibit G; that document was wrong in p. 16, ll. 13–19
describing the £7,500 as purchase price. They had received £300 in 1927
as compensation for houses demolished, but the £7,500 was compensation
for houses demolished as well. The witness's father had made his p. 16, ll. 26–38
mark on Exhibit J2. He and his father knew about the 1928 agreement.
In their petition they had not suggested the £7,500 was compensation,

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nor had they referred to the alleged trespass. Anyone wanting Diobu land had to negotiate with representatives appointed by the people. When re-examined, the witness said the £7,500 had been accepted in 1927 as part rent ;

p. 16, ll. 42–45

p. 17, ll. 30–34

(ii) the third Appellant said that about forty years before two white men had come to Obomotu and been granted land for a rest house. Later some white people had offered £2,000 for Obomotu, but the Diobu people refused to sell. It was their custom never to sell lands. He said their native law and custom did not permit the sale of land, and the chiefs who executed Exhibit F could not sell the land. The chiefs, he said, had agreed with Captain Cooke to grant the Government certain land, and Captain Cooke had promised them £1,500 rent per annum. In 1927 they had received three bags of money as compensation for houses destroyed, and seventy-five bags as part of the money promised by Captain Cooke. They had accepted the seventy-five bags as part rent for fifteen years, because they were told it would not prejudice their claim for the balance. They had not received the balance. Since 1927 they had received five bags of money each year, which they were told was rent. They complained that this was inadequate. He said the people had not made Exhibit G and the £7,500 was not purchase price. The land given to the Government did not extend beyond No. 1 railway gate. The witness said he had first known of Exhibit F three years before and of Exhibit G four years before. He had signed Exhibit J2. It had been read over and interpreted to him and others. He did not know whether Exhibit G was the agreement to which Exhibit J2 referred. In the two petitions they had not suggested that the chiefs who executed Exhibits F and G did not understand their terms. The witness suggested that the chief's marks on Exhibits F and G had been forged. He said he did not know that the Government and his people had entered into any agreement. When the part of Exhibit J2 referring to Exhibit G had been read to him, he refused to say whether he adhered to this statement ;

p. 17, ll. 35–40

p. 18, ll. 3–6

p. 18, ll. 10–33

p. 18, ll. 35–38

p. 18, ll. 40–43

p. 19, ll. 15–27

p. 19, l. 43–
p. 20, l. 3

p. 20, ll. 26–31

p. 21, ll. 10–12

(iii) the second Appellant said that about forty years before permission had been given to two white men to build their rest house on a small piece of land. About two years later they offered to buy the Diobu land for £2,000. The people refused this offer, as it was not their custom to sell their land. The Government, he said, then took the land. Captain Cooke had wanted an extension beyond No. 1 gate, but they did not grant it. They had not agreed to sell the land, but to let it for £1,500 per annum. Afterwards, according to the witness, they were paid £7,500 as compensation. Captain Cooke, he said, had told them that this would not prevent them from getting £1,500 annual rent. They subsequently received £500 annual rent, and when the balance was not paid they stopped receiving the £500. The witness said he had not put his mark on any agreement with the

p. 21, ll. 13–20

p. 21, ll. 21–34

p. 21, ll. 35–40

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Government in 1928. The land beyond No. 1 gate belonged to the people, and they had tenants on it. He was one of the men who wrote exhibit J2 through Mr. Alakija. It had not been read over to them. He had put his mark on it. He did not remember if it had been read over and interpreted to them. They had told Mr. Alakija about the agreement mentioned in Exhibit J2. He had known about Exhibit G about four years after they had received the money ; p. 22, ll. 1–12 p. 22, ll. 16–17

(iv) the first Appellant said that about forty years before two Europeans had come and asked for land to build a rest house. The people refused at first, but ultimately gave them some land. They then wanted to buy land for £2,000, but the people refused, as it was not their custom to sell land. They had agreed with Captain Cooke to let the Government have land up to No. 1 gate, because Captain Cooke said the Government would pay £1,500 rent yearly. The Government had by then given up the idea of buying the land, and proposed to lease it instead. £7,500 had, he said, been paid and had at first been said to be compensation, but later was said to be part of the rent. The Government had taken over land beyond No. 1 gate without permission. They (the chiefs) had known about the agreement about four years after receiving the £7,500. They instructed Mr. Alakija to write the petition, but had not given him particulars of the agreement mentioned therein. The witness said his father, but not he himself, had been among those instructing Mr. Alakija. The witness did not know how Mr. Alakija got particulars stated in Exhibit J2 ; probably he got them from the Resident's office. The witness did not know about Exhibit G until 1931. They had not had a copy of it until four years before the hearing. The witness had heard Mr. Alakija read Exhibit J2, but could not understand it because he had read it in English. He could not remember whether there had been a man interpreting ; p. 22, ll. 25–35 p. 22, ll. 35–39 p. 22, l. 40– p. 23, l. 11 p. 23, ll. 17–19 p. 23, ll. 29–30 p. 23, ll. 35–36 p. 23, ll. 41–42 p. 24, ll. 6–12 p. 24, ll. 16–17 p. 24, ll. 29–32

(v) two Africans living outside No. 1 gate said they gave palm oil, etc. to the Diobu people for their land, and paid no rent to the Government ; p. 25

(vi) evidence was also given about the development of land at Port Harcourt, including land beyond No. 1 gate, and the amount of money spent on it by the Government. pp. 26–29

8.—For the Respondent, a clerk in the District Office gave evidence about the service of the notice (Exhibit P) on the Diobu chiefs in January, 1947. The chiefs had come up in a rage and said they were not accepting the notice. They said their forefathers had entered into agreement with the Government in ignorance and the land was theirs. p. 30, ll. 8–15 p. 30, ll. 16–26

9.—Jibowu, J. delivered a reserved judgment on the 4th August, 1951, having first summarised the pleadings and the evidence, he said the questions for the Court to determine were : pp. 37–46 p. 46, ll. 27–35

RECORD

(i) whether the Diobu people had sold or let Port Harcourt to the Crown, and on what terms;
(ii) what was the extent of the land sold or let; and
(iii) whether the Crown had trespassed on Diobu land.

p. 46, l. 40–p. 49, l. 12 / p. 49, ll. 13–21 / p. 49, l. 46–p. 50, l. 3

The learned Judge then examined Exhibits F, G and H. Exhibit F shewed that the evidence of the first four Appellants, that the Diobu chiefs did not agree to sell Obomotu to the Government, was wrong. Because of the reference in Exhibit J2 to Exhibit G, there could be no doubt that the chiefs and headman who instructed Mr. Alakija knew about Exhibit G, accepted it as their act and deed, and, therefore acknowledged the existence of Exhibit F. Accepting the third Appellant's evidence that Exhibit J2 was read over and interpreted to the signatories, the learned Judge held that they knew its contents. He rejected the evidence of the first four Appellants on various points connected with Exhibits F and G. Those exhibits shewed beyond doubt that the Diobu chiefs and headmen, on behalf of themselves and their people, sold Obomotu to the Government for valuable consideration. The allegation that Captain Cooke had promised them £1,500 per annum was untrue. Had he done so, they would have mentioned the promise in one of their petitions (Exhibits J2 and J3) or at their meeting with the Governor in 1931 (Exhibit E). The evidence of the third Appellant, that they were told the £7,500 paid in 1927 was part of the sum due at the rate of £1,500 per annum, was untrue. Exhibit E shewed that No. 1 railway gate had never been agreed and fixed as a boundary. Up to January 1947, the Diobu had acknowledged that their chiefs had made binding agreements with the Government, but when they came to Court they had decided to repudiate the agreements. In view of this acknowledgment, it was not necessary for the Respondent to call evidence about the execution of Exhibits F and G. The reasons why the price of £2,000 reserved in Exhibit F was not paid was not that the Diobu chiefs were unwilling to sell the land, but that they probably thought they were not getting enough money for it. When the Government offered £7,500 down and £500 yearly for ever, they agreed and entered into Exhibit G. That was the only document stipulating for £500 per annum; the suggestion that the £7,500 was fifteen years' rent at this rate was false. The fact that the word "rent" was loosely used in some of the documents to describe the annual payment of £500 reserved in Exhibit G could not vary the terms of Exhibit G. It was a deed of sale, and evidence adduced to shew it was a Lease could not vary it. It had been submitted that Exhibit G was defective because no fixed sum was put down as the price; the learned Judge held that the price reserved, although it was to be paid in an unusual way, was definite and certain. The Court was not concerned with the adequacy of the consideration. The learned Judge then considered an argument based on the alleged inconsistency of the dates in Exhibits F, G and H, and rejected it. He entirely disbelieved the story that an attempt had been made to bribe the chiefs and headmen with an offer to build them storey houses. In executing Exhibit G, the parties had been

p. 50, ll. 4–8 / p. 50, ll. 8–26 / p. 50, l. 27–p. 51, l. 7 / p. 51, ll. 8–18 / p. 51, ll. 19–25 / p. 51, ll. 26–36 / p. 51, l. 37–p. 52, l. 5 / p. 52, ll. 6–12 / p. 52, l. 13–p. 53, l. 8 / p. 53, ll. 9–38 / p. 53, l. 39–p. 54, l. 7 / p. 54, ll. 8–49 / p. 55, ll. 1–18 / p. 55, ll. 19–39

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" ad idem." Native law and custom were not so inflexible as to be incapable of exception in the case of the Government. The learned Judge was satisfied that matters affecting the community had to be discussed by the people with their chiefs ; the Diobu people had discussed the question of selling the land, and had empowered their chiefs and headmen to negotiate with the agents of the Government. Six communities had executed Exhibit F, and only the Diobu people had had any dispute with the Government. Having considered the question of the boundaries, and held that the Government had not committed any trespass, the learned Judge dismissed the action with costs.

p. 55, ll. 40–43

pp. 55–57

10.—The Appellants appealed to the West African Court of Appeal. In their notice of appeal, dated the 13th October, 1951, they complained that the judgment was against the weight of the evidence, and Jibowu, J. had misdirected himself on various points. The appeal was argued, before Foster Sutton, P., de Comarmond, Ag. C.J. and Coussey, J.A., on the 29th and 30th April and the 1st May, 1952. Counsel for the Appellants then argued only two points : (i) that Exhibits F and G were not agreements for sale, and (ii) that the parties had not been " ad idem."

pp. 58–59

p. 62, ll. 17–22

11.—The judgment of the Court of Appeal was delivered on the 9th June, 1952. Foster Sutton, P. (in whose judgment the other learned judges concurred) summarised Exhibits F and G, and disposed of certain arguments on which the Appellants do not now rely. Turning to the argument that the parties had not been " ad idem " the learned President said Jibowu, J. had made a clear finding of fact against the Appellants, and it would have been difficult to support any other conclusion. Both documents contained oaths of proof, testifying that they had been read over and interpreted and the chiefs and headmen had appeared to understand them. Their real objection to Exhibit F had been over the amount of the price, and Exhibit G represented a compromise about that. The parties had regarded Exhibits F and G as a conveyance of the land, and in Exhibit J2 the Diobu chiefs and people had acknowledged Exhibit G. The words of Exhibits F and G did not, in the view of the learned President, operate as a transfer of the land, but the two agreements constituted a binding contract for sale, of which there had been part performance. The Appellants were not entitled to any relief. They held the land (except that covered by Exhibit H) as trustees for the Governor, and were bound to execute a conveyance to him if required to do so. The appeal should be dismissed with costs.

pp. 66–70

pp. 66–69

p. 69, ll. 14–17

p. 69, ll. 17–21

p. 69, ll. 29–44

p. 69, l. 47–
p. 70, l. 9

12.—The Respondent submits that by framing their action as they did the Appellants undertook the burden of proving that the land in question belonged to them. The two important documents, Exhibits F and G, were put in by them, and if they wished to establish that for some reason or other these documents were not effective according to their tenour it was for them to prove it. The pleadings originally contained an allegation of fraud, but the Appellants themselves before the hearing withdrew the allegation and substituted for it the allegation that the parties were not

" ad idem." One witness named Otoko, the third Appellant, suggested that the marks of the Chiefs on Exhibits F and G were forged, but this allegation was dismissed by the learned Judge.

13.—The learned Judge rejected the contention that the parties to the documents had not been " ad idem," and the learned Judges of the Court of Appeal agreed with him ; so that on this point there are concurrent findings of fact in the Respondent's favour.

14.—By virtue of the above-mentioned Crown Lands Ordinance, Section 30, the averment that the land described in Exhibits F and G (except the land granted to Chief Wobo by the indenture which is Exhibit H) is Crown land constituted proof that it is so unless and until the Appellants prove otherwise.

15.—Apart from the question whether the parties to Exhibits F and G were " ad idem," the Appellants argued three points in the Court of Appeal. According to their Petition for special Leave to appeal, they do not now rely upon these three points. They ought not, in the Respondent's respectful submission, to be allowed at the hearing of this Appeal to raise any argument not raised in the Court of Appeal. Should it be necessary, however, the Respondent would submit that the other arguments indicated in the Appellants' petition are without foundation.

16.—It would appear from the petition that the Appellants now wish to argue that inasmuch as the Chiefs (with one exception) were illiterate, the law imposes on the Respondent the burden of proving that the Chiefs understood the documents, in particular Exhibits F and G, and that the Chiefs and the Government were " ad idem." This contention does not appear to have been raised by the Appellants in either Court and is not mentioned in the judgment of either Court and in the submission of the Respondent is not now open to the Appellants. Apart from this, however, the Respondent submits that the contention is unfounded and the law does not impose any such burden on the Respondent. Further, apart from any question of onus, it appears from the documents which were put in by the Appellants and from the subsequent conduct of the parties (e.g. from the contents of Exhibit J2) that the Diobu Chiefs and Headmen who executed Exhibits F and G understood the language of those documents.

17.—The Respondent does not admit that Exhibits F and G either had to be registered or would have been void if not registered within a certain time. Further if, as the Appellants alleged, these documents do not constitute grants of land, then neither the Land Registration Ordinance of Southern Nigeria (No. 15 of 1907) nor the Land Registration Ordinance (Laws of Nigeria 1948 Chap. 108) apply. In any case, both documents bear endorsements of registration which are apparently regular and must be presumed to be regular if the contrary is not proved. The Appellants themselves gave these documents in evidence and there was no evidence to suggest that the registration of them was defective in any respect whatever.

Similarly, as to sufficiency of execution, Exhibits F and G appear on their face to be duly executed by the parties and the Appellants have failed to show that the execution was in any way defective. Further, as to the allegation of the Appellants that the Chiefs and Headmen who entered into the agreements exhibits F and G were not or may not have been empowered to bind the whole people of Diobu, the Respondent submits that the evidence does not justify such an allegation and that the onus of proving it would rest on the Appellants and they have not discharged this onus. Jibowu, J. in fact was not satisfied on the evidence that native law and custom would have forbidden the sale of the land and this finding was not challenged in the Court of Appeal. The Respondent respectfully submits that argument on native law and custom ought not now to be admitted, both for the above reason and because it is a topic on which the opinion of a learned Judge of the Supreme Court of Nigeria ought not, save in most exceptional circumstances, to be disturbed. Furthermore, since the Diobu Chiefs and Headmen entered into the two agreements Exhibits F and G and accepted money thereunder, and since Chief Wobo acting on behalf of the Chiefs, Headmen and people of Diobu accepted from the Government a grant back of part of the land covered by the two said agreements, the Appellants are now estopped from disputing the validity of the agreements under native law.

18.—The Respondent respectfully submits that the view of Jibowu, J. that Exhibits F and G constituted a conveyance is to be preferred to the view of the Court of Appeal, that they constituted only a Contract of Sale. On neither view, however, in the Respondent's submission, are the Appellants entitled to any relief.

19.—The Respondent respectfully submits that the Order of the West African Court of Appeal was right and ought to be affirmed for the following (amongst other)

REASONS

1. BECAUSE the land in dispute belongs to the Crown and the Crown is entitled to possession of it.
2. BECAUSE the Appellants' evidence did not prove any title to or any right to possession of the land.
3. BECAUSE there are concurrent findings of fact in favour of the Respondent.
4. BECAUSE Exhibits F and G are regular and valid documents and effective in every respect.
5. BECAUSE the grant of the land to the Crown did not offend against native law or custom.
6. BECAUSE of other reasons set out in the judgments of the two African Courts.

FRANK GAHAN,
J. G. LE QUESNE

In the Privy Council.

No. 18 of 1953.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

CHIEF JOSEPH WOBO & ORS.
APPELLANTS

AND

THE ATTORNEY-GENERAL OF NIGERIA ... ... RESPONDENT.

CASE FOR THE RESPONDENT

BURCHELLS,
68, Victoria Street, S.W.1,
Solicitors for the Respondent.

GEO. BARBER & SON LTD., Printers, Furnival Street, Holborn, E.C.4, and Cursitor Street, Chancery Lane.
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