

GH 43-2 3, 1957

No. 19 of 1955.

# In the Privy Council.

## ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

UNIVERSITY OF LONDON  
25 FEB 1958  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

49822

BETWEEN

CHIEF IYEKE for himself and on behalf of the  
people of ANIKPAKU IGBODO . (Defendant) *Appellant*

AND

10 B. OSAGIE substituted for OBI OSAGIE II for himself  
and on behalf of the people of AKUMAZI (Plaintiff) *Respondent.*

### Case for the Appellant.

RECORD.

1. This Appeal is from a Judgment of the West African Court of Appeal dated the 26th May, 1953, dismissing an Appeal by the Appellant against a Judgment of the Supreme Court of Nigeria dated the 21st June, 1952, whereby the Plaintiff Obi Osagie II for himself and on behalf of the people of Akumazi was granted a declaration of title to a certain parcel of disputed land and an injunction restraining the Appellant from hiring out the said land to timber contractors and receiving royalties therefrom. pp. 60-61. pp. 48-52.

20 2. The issue which arises for determination on this Appeal is whether the Courts below were right in deciding that the Plaintiff was entitled to a declaration of title to the said land.

3. By a Civil Summons dated the 7th August, 1947, in the Native Court of Akumazi the Plaintiff commenced pp. 1-2.

#### THE PRESENT SUIT.

30 By his said summons the Plaintiff claimed a declaration of title to a parcel of land described therein as Ugboko Akumazi, an account of royalties received in respect of the said land and payment to him of whatever might be found due to him and an injunction to restrain the Appellant from hiring out to timber contractors the forests on the said land and receiving royalties therefor. p. 1, ll. 24-27. p. 1, ll. 28-30. p. 2, ll. 1-3.

4. By Order made on the application of both parties the suit was transferred to the Supreme Court of the Warri Judicial Division and subsequently a plan and pleadings were ordered in the Supreme Court. p. 2. p. 3.

p.p. 7-8

5. By his Statement of Claim dated the 14th July, 1949, the Plaintiff alleged, *inter alia*, as follows :—

p. 7, ll. 21-24.

(A) That the land in dispute is part of Akumazi land and has been so from time immemorial ; that it is known as Ugbokoissa.

p. 7, ll. 25-26.

(B) That the Akumazi people have been in undisturbed possession of the land which they use as farm land from time to time.

p. 7, ll. 33-36.

(C) That the town of Igbodo where the Appellant and his people live is on the land of Akumazi and that Igbodo is a recent settlement founded since the advent of the Government and 10 comprising of strangers of Onitsha-Ugbo, Uteh and Obior.

p. 8, ll. 1-2.

(D) That the portion allowed to Igbodo to settle is about seven miles from the area in dispute.

p. 8, ll. 4-9.

(E) That the Plaintiff had received information that labourers of the United Africa Company were making a timber camp on the land in dispute and that an Inquiry revealed that the Appellant had leased the land to the United Africa Co. Ltd. as a timber concession.

p. 8, ll. 15-16.

(F) That the Appellant has no right to lease the land or any part thereof to the United Africa Co. Ltd. or anybody else. 20

pp. 8-10.

6. By his Statement of Defence dated the 9th August, 1949, the Appellant pleaded, *inter alia*, as follows :—

The Appellant—

p. 9, ll. 10-13.

(A) Denies that the land in dispute is or has ever been part of Akumazi land and says that the land is and has from time immemorial been the property of Igbodo people by whom it is called “ Ugboko-Igbodo ” or “ Ugboko-Iyarra.”

p. 9, ll. 14-16.

(B) Denies that the Akumazi people are owners or have ever been in possession of the land.

p. 9, ll. 23-31.

(C) Denies that the town of Igbodo is on the land of Akumazi 30 or that it is a recent settlement founded since the advent of the British Government comprising strangers from Igbodo Uteh and Obior ; he says that Igbodo has existed long before the advent of the British Government and that the land on which the Appellant and his people live is their own land ; he admits that a few families from Igbodo come from Uteh and Obior and says that the Plaintiff and his people come from Mbiri (roughly to the north-west of the land in dispute) after the people of Igbodo had settled at Igbodo.

p. 9, ll. 34-38.

(D) Denies that Igbodo was allowed any portion of the land to settle and says that he and his family had been in occupation of 40 Igbodo land long before the Akumazi people came from Mbiri ; that the land in dispute is about six miles from the residential area of Igbodo.

p. 9, l. 41-p. 10, l. 3.

(E) Says that the land in dispute was leased to one Isiah Iyasere in 1944 by the people of Igbodo and that the Plaintiff's

father who was then the paramount head of Akumazi was aware of the lease and the royalty which was being paid to Igbodo ; that up to the time of the death of the Plaintiff's father in 1947 no claim whatever was made on the land by Akumazi.

(F) Says that he has every right to lease the land to whomever he likes. p. 10, ll. 9-10.

7. There was an abortive hearing in the Supreme Court *coram* C. W. Reece, J., on the 17th, 18th and 19th December, 1951. On the 25th March, 1952, a fresh hearing began *coram* S. P. Thomas, Ag. J., and evidence was heard on the 25th, 26th, 27th and 28th March, 1952. pp. 14-21.  
pp. 22-43.

8. The Plaintiff called evidence in support of his case including the following :— pp. 22-32.

(1) The Plaintiff himself stated—that the land in dispute belongs to the Akumazi people ; that there is on the land a juju pot at which Ewohimi, Akumazi and Onitsha Ugbo people worship ; that the juju pot has been there from time immemorial ; that the Akumazi people farm on the land in dispute and cut trees therefrom with which to build their houses ; that there is a timber camp on the land built by Isiah and that the Plaintiff first saw it in 1947. In cross-examination he was asked about a Church Missionary School (hereinafter referred to as C.M.S.) at Igbodo and stated that the Akumazi gave the C.M.S. the land to build their Church and School ; he admitted however that at the previous abortive hearing he told the Court that he knew that the people of Igbodo gave the land to the C.M.S., though he said in re-examination that when he said Igbodo he meant Elabor people. He further stated in cross-examination as follows :— p. 23, ll. 5-6.  
p. 23, ll. 13-16.  
p. 23, ll. 28-29.  
p. 23, l. 30.  
p. 24, ll. 21-26.

“ I know Mosieli. He is an Igbodo. I do not know that he has a house near Isiah's camp. I know Ziemife an Igbodo man. I do not know that he has a house there. I know Agbonta, he is an Akumazi man and has a house there. I knew that he had a house there only in 1947. I did not give him any land. I do not know a Forest Guard living near Isiah's Camp.” p. 25, ll. 8-10.  
p. 24, ll. 31-36.

(2) Ajei Josiah Ofo the head of Akuku Akumazi stated that he knows the land in dispute and that it belongs to the Akumazi people. With regard to Igbodo people living on the land in dispute he said as follows :— p. 25, ll. 26-27.

“ I know Moseli and Zemife who is related to me by marriage. They have been on the land in dispute about six years now. They went there to cut Timber. Moseli, Zemife and the Obi of Igbodo gave the land to Isiah. I know Agbonta. He is a native of Akumazi. He was there before Isiah. The late Obi of Akumazi placed him there. Agbonta is a native of Akumazi though I do not know what quarter he comes from.” p. 26, ll. 21-27.

In cross-examination he further stated as follows :—

“ Q. Why have you not sued Zemife and Moseli ?

p. 26, ll. 33-47.

A. Because Iyeke is their head. Zemife is from Ndogu. Some part of Ndogu come from Mbiri. All the people of Ndogu

come from Mbiri and not merely just a part. Anipaku people come from Onitsha Ugbo. Zemife comes from Ndogu. Moseli comes from Ndogu. I said that Zemife, Moseli and Iyeke gave Isiah land. I do not know whether they gave the land to Isiah. My father was alive then and was the head of Akuku Akumazi. Obi Osagie I placed Agbonta on the land to watch it so that none would cut Timber there unknown to us."

p. 27, ll. 21-22.

This witness also stated (in cross-examination) that Elabor and not Igbodo gave land to the C.M.S.

pp. 28-29.

(3) John Ifejioku, a native of Onitsha Ugbo, gave evidence 10 in support of the Plaintiff's case regarding the boundaries of the land in dispute.

pp. 29-30.

p. 30, ll. 41-42.

(4) Okia Ikede, a native of Igbodo, also gave evidence in support of the Plaintiff. In cross-examination he stated that he did not know who gave land to the C.M.S.

p. 31.

(5) John Iyase, Chief of Ekpon, gave evidence in support of the Plaintiff with regard to the northern boundary of the land in dispute.

p. 32.

(6) A District Clerk of Agbor produced a report of the statement of an Inter Tribal Boundary Dispute by Mr. H. 20 Spottiswoode, District Officer, dated 7th July, 1949.

pp. 33-43.

9. The evidence called by the Appellant included the following :—

(1) The Appellant himself stated as follows :—

p. 34, ll. 21-26.

" I know the bush in dispute. I am the owner. It belongs to Igbodo and not to Akumazi. We have a C.M.S. Church built at Igbodo. Self and the Igbodo people gave the site to the Mission. The Mission has been there for about forty years. I am the 18th Obi of Igbodo, Anikpaku people first got to Igbodo. The Akumazi people were not there then. In fact there was no one on the site."

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\* \* \* \* \*

p. 34, ll. 31-40.

" Our people live in that bush. I can name them (1) Mozele Zemife, Kwhodu, Iroro, Ozu Onitsha Eneke, Agbonta and others. They have lived there now for about forty years. Agbonta is a native of Akumazi but he sought refuge there. He is living with Mosiele who is his relation. I know Isiah. He lives on the land in dispute and has built a house there. He cuts timber there. Self and elders of Igbodo granted him permission to live there and cut timber. This was about eight years ago. Royalties in respect of Timber cut on the land were paid to us on two occasions before the Akumazi took action."

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p. 35, ll. 41-43.

And in cross-examination the Appellant stated that the C.M.S Church is built on Ndobu land and not on Elabor land, that the first one was built on Igbodo land between Elabor and Ndobu and that Elabor live on Igbodo land.

(2) Godfrey Aslekwa, a native of Mbiri (people whose land lies roughly north-west of part of the land in dispute) stated that the land in dispute does not belong to the Akumazi but "It belongs to the Igbodo people and the Mbiri people. My portion of the land ends on the boundary." p. 36-37.  
p. 36, ll. 15-17.

(3) Justin Obi Nwoko II, Obi of Idumje Ugboko, stated that he knows the land in dispute and the parties and that the land in dispute belongs to Igbodo. p. 37, ll. 25-27.

(4) Moseli Abohu gave evidence as follows :—

10 " I am a native of Igbodo. I am a Farmer. I know the land in dispute. I have been farming on this land and live there. I have lived and farmed there for about 40 years. I know Isiah's Camp. Isiah came and met me there. The distance from my house to Isiah's is about the distance from this Court to the Rest House (100 yards). Zamife lives on the land also my son Ozo, Kufudo Iroro, Agbonta came and joined us there. He is a native of Akumazi. I gave him land to stay. None of us have ever paid rent to Akumazi. We have never paid them tribute. Akumazi people have never disturbed me on the land." p. 38, ll. 24-32.

20 And in cross-examination—

p. 38, ll. 38-40.

" Agbonta came there 27 years ago. He is an Akumazi man. He met me there, Igbodo people farm in that area."

(5) Agbonta, a native of Akumazi, gave evidence as follows :—

30 " I am a native of Akumazi. I am a Farmer. I live in Moseli's Bush. This is Moseli (previous witness identified by witness). I have been there about 27 years. Zemife was already there when I got there. My three wives there so I left my home. I know Isiah Iyase. He came to meet us in the bush where he is cutting timber. After I had built my house, I told Moseli that I would go and pay my tax at Akumazi. He said that one pays his tax where he lives. That the land belongs to Igbodo and that I should pay my tax to him. Obi Osagie did not send me to the bush to look after the interest of the Akumazi people. I suffered at home and so I went there." p. 39, ll. 10-25.

Cross-Examined :

40 " I come from Isu-Ibe quarter of Akumazi. I lost three wives and many children at birth. I was related to Moseli and I was looking for someone to help me with my motherless children and so I went to Moseli. Moseli's wife is alive. He told me that the land belonged to Igbodo people."

(6) Ukakeke Esimoya gave evidence as follows :—

p. 40, ll. 9-18.

" I am a native of Umunede living at Idumuobo Village of Umunede. I am over sixty years of age. I am a Farmer. I am Chief and a Court Member. I know Obi Iyeke. I know Obi Akumazi. I know the land in dispute between the parties. The

land is called Ugboko Igbodo. I know this land because we the people of Idumoba in Umunedo go and farm on this land. Obi of Igbodo that is Iyeke permits us to farm on the land. We give him annual tribute of 25 yams and a pot of Palm wine. We have never been disturbed there by Akumazi people and have never paid tribute to Akumazi. I have never heard that the land belonged to Akumazi."

p. 41, ll. 1-14.

(7) Justus Omo gave evidence as follows :—

"I am a native of Elabor Igbodo. I am a Chief and Farmer. I know the land in dispute. It is called Ugboko Igbodo. It 10 belongs to Igbodo people. My ancestors came from Uku and were given our present land by Igbodo people. This was quite a long time ago. Our forefathers told us the story. I know where the C.M.S. have their Church and School. I am a Lay Reader of the C.M.S. Church. I am the Pastor's Warden of the Church. The land was given to the Mission by Obi Iyeke and the Elders of Igbodo. The former School was close to the Palace of the Obi and was moved to a site that can still be seen from the Obi's Palace. Obi Iyeke and the Elders gave this new site to the C.M.S. I have never heard that the spot belong to Akumazi." 20

p. 42, ll. 1-14.

(8) Isiah Iyasere, a native of Igbodo, stated as follows :—

"I am a Contractor (Timber) for U.A.C. I know the land in dispute. It is known as Ugboko Igbodo. I cut Timber in that bush.

Q. Who gave the land to you ?

A. Obi Igbodo and the Elders.

Q. When did you go on the land ?

A. I went there in 1944.

Q. Was any one on the land when you got there ?

A. Yes. One Mosele, Zemife and Agbonta. They are all 30 natives of Igbodo with the exception of Agbonta who is a native of Akumazi. I have a Camp on the land in dispute. Mosele and others live and farm on the land."

p. 44.

10. On the 29th March, 1952, the learned trial Judge visited the land in dispute in company with the parties and Counsel for both the Plaintiff and the Appellant. His notes of the inspection include the following :—

p. 44, ll. 11-15.

"Isiah's house is a modern storey building and Moseli's is the usual wattle and mud hut plastered with red clay. He has Kola trees, pear trees (Native) and some citrous fruit trees. It is quite true that he might have been on the land about forty years. 40 He showed me his farm about a quarter of a mile from his house."

\* \* \* \* \*

p. 44, ll. 21-25.

"Apart from Moseli's farm on the land in dispute and close to his house I saw no other Igbodo farm in the area or adjacent areas.

On the contrary I was shown Akumazi farms by Aju and two or three ancient wells dug by his father and still in use. He pointed them to me in the presence of the Obi Igbodo who did not dispute the fact.”

\* \* \* \* \*

“The Defendant pointed to a tree about 10 feet from his palace saying that the Akumazi people claimed land up to that point. p. 44, ll. 32-35.

The Defendants did not show me any intervening land claimed by them between Igbodo settlement and the land in dispute.”

10 11. The Judgment of the Supreme Court was delivered on the 21st June, 1952. After referring to the evidence and to his visit to the land in dispute the learned trial Judge stated that he disbelieved the story of the Appellant and accepted that of the Plaintiff. The latter was granted the declaration of title and the injunction mentioned above. pp. 48-52. p. 52, ll. 1-3. p. 52, ll. 37-40.

12. The Judgment contained no finding with regard to the issue of fact as to who gave land to the C.M.S.

With regard to the matter of certain of the Igbodo people occupying part of the land in dispute the only comment contained in the Judgment is the following :—

20 “I do realise that Moseli, Isiah and others occupy some portion of the land in dispute but it is a comparatively small area. p. 52, ll. 8-12.

The Defendants cannot found a claim on the fact of such occupation when it is realised that their non-continuous settlement at Igbodo is about eight or nine miles distant from the land in dispute.”

Referring to his inspection of the land in dispute, the learned Judge stated (A) that in his opinion the Plaintiff’s plan was more in conformity with the facts in dispute than that of the Appellant, (B) that the Plaintiff’s land forms a continuous whole from Akumazi town to the land in dispute and “there was no partition of any sort,” (C) that the Plaintiff’s witness Aju showed the judge his farm and wells dug by his father and was not contradicted by the Appellant, and (D) that the Plaintiff’s witness Obi Nwoke II showed the Judge a farm alleged to be his and outside the land in dispute that this was challenged by the Appellant’s people present. The learned Judge stated that he was satisfied that the Plaintiff’s land forms a continuous whole from Akumazi town to the land in dispute, that he was satisfied that much of Igbodo land as shown to him does not form a continuous whole with the land in dispute as indicated on the Appellant’s plan and that he was satisfied that other people own and occupy land between the Igbodo peoples’ settlement and the land in dispute. 30 40

13. The Appellant’s Grounds of Appeal against the Judgment of the Supreme Court included the following :— p. 53-55.

“1. Verdict Is Against Weight Of Evidence Generally And Particularly. p. 53, ll. 26-35.

(A) Plaintiff and his witnesses contradicted themselves in material particulars in regard to the Traditional evidence of the origin and ancestry of the Defendant, and the traditional evidence as to the origin and ownership, by Plaintiffs of the Land in dispute—if any—is thin and scanty.

(B) Plaintiff himself, it is respectfully submitted was an unreliable witness and perjured himself and admitted that he did so in court, upon material issues, while he gave evidence.

\* \* \* \* \*

p. 54, ll. 20-30.

(C) The learned trial Judge in his judgment referred on more than one occasion to his being satisfied on several issues 10 from what he saw during his inspection of the land in dispute and it is submitted with great respect that what the learned trial Judge saw during the inspection do not by themselves constitute evidence from which any inference can legally be drawn unless there is testimony in regard to the objects observed and seen by the learned trial Judge, in accordance with and in the manner provided for by the Evidence Ordinance and the Common Law rules of Evidence ; and in this regard there was no sworn testimony of parties in regard to what was observed at the *locus in quo*. 20

p. 54, l. 31.

“ Misdirection :

\* \* \* \* \*

p. 55, ll. 5-25.

“ (B) (Non-direction).—The learned trial Judge failed to direct himself upon the subjoined facts :—

(a) Agbonta, alleged to have been placed on the Land in dispute by the Plaintiffs as a custodian was called by and gave evidence at the instance of, the Defendants whom he testified placed him on the land in dispute as their tenants over 30 years ago.

(b) That Moseli’s and Zemife’s families and buildings both of whom were indicated on Defendant’s Plan have been on 30 the Land in dispute for over forty years and that Moseli gave evidence to that effect.

\* \* \* \* \*

(d) That within the portion of land described in the judgment to be continuously owned by Plaintiffs up to the land in dispute, the Defendants established in evidence that they allocated the site now occupied by them to the Church Missionary Authorities.”



The Appellant submits that for the reasons stated in the said Grounds of Appeal the Judgment ought not to be allowed to stand.

14. By Order made on the 20th April, 1953, the present Respondent <sup>p. 56.</sup> was substituted for the Plaintiff who died in January, 1953.

15. In the Court of Appeal (Foster Sutton, P., Verity, C.J., and <sup>pp. 60-61.</sup> Coussey, J.A.) the principal Judgment was pronounced by the learned President. Dealing with the matter of complaint set out in the above-mentioned Grounds of Appeal the learned President stated as follows:—

10           “ Learned Counsel for the Appellant reviewed the evidence in <sup>p. 61, ll. 11-23.</sup> some detail and strongly urged that the Judgment was against the weight of the evidence. He, correctly I think, stressed the point that several of the Defendant's people have been settled upon the land for a considerable period. The trial Judge thought that one Moseli Abohu who gave evidence that he had lived and farmed upon the land for about forty years without paying rent or tribute to Akumazi may well have been on the land for the period stated. When dealing with this question the trial Judge said, ‘ I do realise that Moseli, Isiah and others occupy some portion of the land in dispute but it is a comparatively small area.’ The Defendants  
20           cannot found a claim on the fact of such occupation when it is realised that their non-contiguous settlement at Igbodo is about eight or nine miles distant from the land in dispute.”

The Appellant submits that in the said passage the learned President failed to correct the error of the learned trial Judge as indicated in the said Grounds of Appeal. The conclusion arrived at in the said Judgment was stated in the following terms:—

30           “ The evidence in this case presented a direct conflict of oral <sup>p. 61, ll. 24-36.</sup> testimony on an issue of fact. In all cases this Court has a duty to exercise jurisdiction as a tribunal of appeal on facts as well as on law, a jurisdiction which we never hesitate to exercise when we are satisfied that the Court below has erred on a question of fact. Where, however, as in the present instance, the question is one of credibility, where either story told may be true and where the personal motives and interests of the parties cannot but affect their testimony, this Court has always been reluctant to differ from the Judge who has seen and heard the witnesses, unless it can be clearly shown that he has fallen into error.

40           In this case I am not satisfied that the trial Judge did err. On the contrary, I am disposed to the view that I would have come to the same conclusion as that arrived at by him.”

Verity C.J. and Coussey J.A. concurred.

16. By Order dated the 15th February, 1954, final leave to appeal to Her Majesty in Council was granted.

17. The Appellant submits that this Appeal should be allowed with costs and the Judgment of the Court of Appeal and that of the Supreme Court reversed for the following amongst other

### REASONS

- (1) BECAUSE the judgment of the Supreme Court is against the weight of evidence.
- (2) BECAUSE the learned trial Judge based his judgment *inter alia* upon unsworn statements made to him during his inspection of the land in dispute.
- (3) BECAUSE the Judgment of the Court of Appeal failed 10 to correct the errors of the judgment appealed from and is itself against the weight of evidence.
- (4) BECAUSE the errors of the learned trial Judge and of the Court of Appeal amount to a miscarriage of justice.

RALPH MILLNER.

In the Privy Council.

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ON APPEAL  
*from the West African Court of Appeal.*

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BETWEEN

**CHIEF IYEKE** for himself  
and on behalf of the people  
of **Anikpaku Igbodo**  
(Defendant) . . . . *Appellant*

AND

**B. OSAGIE** substituted for  
**Obi Osagie II** for himself  
and on behalf of the people  
of **Akumazi** (Plaintiff) . *Respondent.*

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**Case for the Appellant.**

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