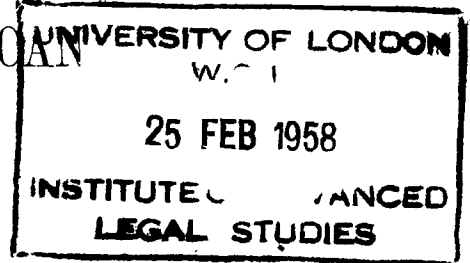


3, 1957

In the Privy Council.

No. 19 of 1955.

ON APPEAL FROM THE WEST AFRICAN
COURT OF APPEAL



BETWEEN

CHIEF IYEKE for himself and on behalf of the people of Anikpaku Igbodo (Defendant) APPELLANT 49821

AND

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

CASE FOR THE RESPONDENT

1.—This is an Appeal from a Judgment of the West African Court of Appeal, dated the 26th of May, 1953, dismissing an Appeal by the present Appellant against a Judgment of acting Puisne Judge Thomas in the Supreme Court of Nigeria, dated the 21st June, 1952, whereby the learned trial Judge granted to the present Respondent a declaration of title to a piece or parcel of land known as Ugboko Akumazi and an injunction restraining the Appellant from hiring out the said land to timber contractors and receiving royalties therefrom.

RECORD

10 2.—The action was commenced by Obi Osagie II, who is hereinafter referred to as the Plaintiff, for himself and on behalf of the people of Akumazi. He died in January, 1953. By an Order dated the 20th April, 1953, the present Respondent was substituted for the Plaintiff. The Appellant is hereinafter referred to as the Defendant. p. 57, l. 20

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

THE PRESENT SUIT

claiming a declaration and injunction as aforesaid and an account of all royalties received in respect of the said land and payment over to the Plaintiff of whatever might be found due to him.

p. 2, l. 10

On the application of both parties the suit was later transferred to the Supreme Court of the Warri Judicial Division.

p. 7, l. 21

p. 7, l. 25

4.—By his Statement of Claim dated the 14th July, 1949, the Plaintiff pleaded (*inter alia*) that the land in dispute was known as Ugbokoissa and had been part of Akumazi land from time immemorial; that the Akumazi people had been in undisturbed possession of the said land which they used as farm land from time to time; that the town of Igbodo was on the land of Akumazi; that Igbodo was a recent settlement founded since the advent of the (British) Government and comprised of strangers from Onitsha-Ugbo, Uteh and Obior and that the portion allowed to Igbodo to settle, which was not in dispute, was about seven miles from the disputed area. The pleading continued as follows :—

p. 8, l. 1

p. 8, l. 4 to 17

“ About four years ago Plaintiff received information that
 “ certain labourers of the United Africa Company were making
 “ a timber camp on the land in dispute and so he quickly caused
 “ an enquiry to be made as to how they came there. The Inquiry
 “ revealed that the Defendant had leased the land to the United
 “ Africa Company Limited as a timber concession.

“ The Plaintiff sent messengers to the Defendant and pointed
 “ to him that he had no land there and offered to meet him on the
 “ spot for him (the Plaintiff) to show him his boundaries. On the
 “ appointed day the Defendant failed to turn up. The Plaintiff
 “ then reported the matter to the District Officer, Agbor, who
 “ advised him to sue.

“ The Defendant has no right to lease the said land in dispute
 “ or any part thereof to the United Africa Company Limited or
 “ anybody else.”

p. 9, l. 10

p. 9, l. 23

5.—By his Statement of Defence dated the 9th August, 1949, the Defendant denied that the land in dispute was or had ever been part of Akumazi and said that the land was from the time of immemorial part of the land of Igbodo and known as “ Ugboko-Igbodo ” or “ Ugboko-Iyarra.” He further denied that the town of Igbodo was on the land of Akumazi or that it was of recent settlement founded since the advent of the British Government and said that Igbodo had existed long before such advent and that the land on which he and his people lived was their own land. He admitted that a few families from Igbodo came from Uteh and Obior and said that the Plaintiff and his people came from Mbiri after the people of Igbodo had settled at Igbodo. He further pleaded that the land in dispute was leased to Isaiah Iyasere in 1944 by the people of Igbodo who were the owners of the land; that the Plaintiff's father who is the paramount head of Akumazi was aware of the lease and the royalty that was being paid to Igbodo; that the Plaintiff's father died in 1947 and that up to the time of his death no claim was made on the land by the Akumazi.

p. 9, l. 41

6.—That at the hearing which began on the 17th December, 1951, the Plaintiff himself gave evidence including the following passage—

RECORD

10 “ Through the land in dispute is a pathway starting from the
 “ Mbiri side to Onitsha-Ugbo side ; the path passing through
 “ Udumeje Ugboko. There was once a railway path cut North
 “ and South and that is now used as a pathway. There are
 “ numerous pillars along this track. There is a juju pot and an
 “ Abosi tree on the Eastern side on the Onitsha-Ugbo and Ewohimi
 “ boundary. The juju pot is called Nemo-Onitsha. This juju
 “ pot has been there from time immemorial. The pot is buried
 “ in the ground. At Ekpon there are trees forming the boundary
 “ viz. Ezeogba and Nkata. On the Mbiri side there are some
 “ trees viz. Efuma and coming East Akpu. I can't remember
 “ any other identification marks on the line. From the juju pot
 “ coming South along the Eastern boundary there are Igedu
 “ trees and Efume tree. On the land in dispute our people make
 “ farms. The land is forest land and rich in timber. Before this
 “ dispute the Defendant and his people have never been on this
 “ land. I first heard in 1946 that the Defendants were coming
 20 “ on the land, after the death of my father. My father was ill for
 “ about two years before his death. It is the duty of the Clan head
 “ to protect communal lands. When in 1946 I heard that the
 “ Defendants were trespassing on the land I collected my people
 “ and had a meeting. I sent many messengers from my Clan
 “ about four times to ask the Defendant if he had land there. The
 “ messengers were oral. No satisfactory reply was given. I went
 “ with my council to the District Officer and laid a complaint
 “ before him and acting on his advice we brought this action.
 “ There are still people on the land in dispute, put there by the
 30 “ Defendant. These people are farming and cutting timber.
 “ They have erected buildings on the land.”

pp. 15, l. 43 to
 p. 16, l. 21

Four other witnesses called on behalf of the Plaintiff gave evidence to the same effect.

7.—The Defendant deposed (*inter alia*) that he was the Eighteenth Obi of Igbodo and that the Anikpeku first got to Igbodo. The Akumazi people were not there then. In fact there was no one on the site. He further deposed that Isiah had been granted permission by himself and the elders of Igbodo about 8 years previously to live on the land in dispute and cut timber. p. 34, l. 24

40 Nine other witnesses were called on behalf of the Defendant.

8.—On the 29th March, 1952, the learned acting Judge accompanied by the parties and Counsel visited the land in dispute. According to the note of his visit Isiah's house was a modern storey building and Moselis p. 44, l. 11

RECORD

house was the usual wattle and mud hut plastered with red clay. It was quite true that Moselis might have been on the land about 20 years. Apart from Moselis' farm on the land in dispute and close to his house the Judge saw no other Igbodo farm in the area or adjacent areas. On the contrary he was shown Akumazi farms by Aju and two or three ancient wells dug by his father and still in use. He pointed them to the Judge in the presence of the "Obi Igbodo" (the Defendant) who did not dispute the fact. This area was about 100 yards from the beginning of the area of the land in dispute as agreed by both parties.

33 p. 44, 1.

The learned Judge further recorded that the Defendant did not show him any intervening land claimed by them between Igbodo settlement and the land in dispute. 10

p. 51, 1. 1

9.—In the course of his judgment the learned acting Judge stated that he was satisfied that the Plaintiff's land formed a continuous whole from the Akumazi land to the land in dispute. There was no partition of any sort and up to about 100 yards or so, and within view of the land in dispute, the Plaintiff showed him his farm and wells dug by his father to the hearing of Chief Iyeke and he was not contradicted. In contrast the Defendants had nothing to show the Court on the land.

p. 51, 1. 13

The learned Judge was further satisfied that much of the Igbodo land as shown to him did not form a continuous whole with the land in dispute. He was satisfied that other people owned and occupied the land between their settlement and the land in dispute. The judgment then proceeded as follows :— 20

p. 51-52, 1. 17-1. 7

" I am satisfied that Obi Iyeke's evidence about this land is unreliable. He is not a witness of truth.

" He sat in solemn Judgment and decided as follows in Exhibit ' 6 ' which is a native Court Record of proceedings conducted at Igbodo on the 8th February, 1944 in suit between Chief Asolu Odogu of Idumbior Igbodo versus Osigiobu Agbonigimona of Ilabor. 30

" " The bush in which the palm nuts were cut by the accused is for Id. Obior Igbodo quarter and not for accused's quarter Ilabor. The accused's quarter Ekbor has no right to enter the bush to farm or to cut palm fruits. It is ordered from date that no Ilabor person should enter to any portion of bush owned by Id. Ibior-Igbodo people, to make farm or to cut nuts without prior permission from the Id. Obior Village Council. When at any time that Ilabor village shall become a complete member of Igbodo Clan, they shall have power to enter bushes without payment of any kind. Finding guilty on all the counts and discharged with warnings to pay ' 5s. cost. ' 40

“ This Judgment of the Defendant is quite in contrast with his testimony in this Court with reference to the people of Ilabor. It is rather in keeping with the evidence of Okia Ikede a native of Igbodo who testified for Plaintiffs.

10 “ The Defendants showed me his palace and pointed to a tree about 10 feet from the building and told me that the Plaintiffs were claiming up to that tree as part of their land. The Plaintiffs would not have the nerve to put up such a Claim except there was some truth in it. It is inconceivable that the Igbodo people who according to the Defendant’s evidence, first arrived in the area—a no man’s land as it were clung to the small area where they now lived and allowed others to spread out over a wide area between their very tiny settlement and the land in dispute and have failed to show their farms in the adjacent areas leading to the land in dispute on their plan or to show them to me during my visit.

“ For the above reasons and on account of what I saw on the land and the dubious evidence by their witnesses, I disbelieve their story and accept that of the plaintiffs.

20 “ If the Defendant had a very good case they would not be so strained that they would call a man like the Obi of Mbiru who though not a Defendant came to Court and said that the land in dispute belonged to him and the Defendants.”

The learned Judge further declared himself satisfied from the evidence and from what he had seen on inspection that the land in dispute was so situate with respect of the people of Akumazi that it might quite well be their bush as they called it. Section 45 of the Evidence Ordinance clearly makes provision for such inference (the text of the Section 45 annexed hereto). He therefore granted the declaration and injunction prayed for as aforesaid.

30

10.—The principal judgment in the West African Court of Appeal was delivered by Foster Sutton P. who referred to the learned trial judge’s finding of fact that the Akumazi people were the first to settle on the land and that the Plaintiffs land formed “ a continuous whole from Akumazi Town to the land in dispute,” and that the Defendant and his people did not own any of the land between Igbodo Town and the land in dispute. Another matter which seemed to him to support the Plaintiffs’ claim was the uncontradicted evidence given by his third witness that a juju known as Nemonicha situate at the North Eastern end of the land in dispute was placed there by the Akumazi, Onitsha Ugbo and Ewohimi people. The Plaintiff had also led evidence that this Juju had been placed there “ in ancient times,” and that his people and others, but not the Defendants, worshipped there. None of this evidence had been disputed by the

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RECORD

Defendant nor did he offer any explanation as to how a juju established and worshipped by others came to be upon the land claimed by him to be his property.

The learned President then proceeded as follows :—

p. 61, l. 24

“ The evidence in this case presented a direct conflict of oral 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. 10

“ 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.”

p. 61 l. 40

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

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p. 62, l. 21

11.—Final leave to appeal to Her Majesty in Council was granted by an Order dated the 15th February, 1954.

12.—The Plaintiff submits that this appeal should be dismissed with costs for the following amongst other

REASONS

1. BECAUSE there were concurrent findings of fact in the Plaintiffs' favour in the Courts below.
2. BECAUSE there was ample evidence to support such findings of fact.
3. BECAUSE the West African Court of Appeal were right in holding that the trial Judge had not fallen into error and that, since the question was one of credibility, they should not disturb his findings. 30
4. BECAUSE on the evidence the learned trial Judge was entitled to arrive at his conclusion that he disbelieved the Defendants story and accepted that of the Plaintiffs.
5. BECAUSE the Judgments of the Courts below were right and should be upheld.

DINGLE FOOT.

F. R. McQUOWN.

40

ANNEXURE

THE EVIDENCE ORDINANCE (CAP. 63 OF LAWS OF NIGERIA, 1948)

Facts relevant in Special Circumstances

45. Acts of possession and enjoyment of land may be evidence of ownership or of a right of occupancy not only of the particular piece or quantity of land with reference to which such acts are done, but also of other land so situated or connected therewith by locality or similarity that what is true as to the one piece of land is likely to be true of the other piece of land.

Acts of possession
and enjoyment
of land

In the Privy Council

No. 19 of 1955.

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COURT OF APPEAL.

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.

CASE FOR THE RESPONDENT

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Solicitors for the Respondent.