

1, 1958

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.

No. 28 of 1956. JAN 1959

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

ADVANCED
STUDIES

52052

BETWEEN

CHIEF EKE OJA, CHIEF OGWO OBU and NJAGHA
OBASSI for themselves and as representing the people
of Asaga DEFENDANTS/APPELLANTS

AND

CHIEF KANU UKPAI and CHIEF KANU EKPEZU for
themselves and as representing the people of Biakpan
PLAINTIFFS/RESPONDENTS.

CASE FOR THE RESPONDENT
CHIEF KANU UKPAI

RECORD

1.—This is an Appeal from a Judgment of the West African Court
of Appeal (Nigerian Session) dated the 28th of May 1956 whereby that
Court unanimously dismissed the Defendants' appeal from the Judgment p. 42
of the Supreme Court of Nigeria (Aba Judicial Division) given on the
14th July, 1954, in Suit No. A/105/1951.

2.—Suit No. A/105/1951 was a suit transferred from the Native Court
of Ubaghara to the Supreme Court of the Aba Judicial Division (being p. 1
a division of the Supreme Court of Nigeria). In that suit the Plaintiffs
(Respondents to the present Appeal) claimed from the Defendants
10 (Appellants in the present Appeal) damages for trespass to land, an pp. 2-3
injunction restraining such trespass, and a declaration of title.

3.—By their Statement of Claim filed on 15th September, 1952, the
Plaintiffs pleaded that the land in dispute was situate at Biakpan in the p. 4
District of Arochuku, Calabar, was known as " Ekuot Ijoho " and was

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and had been from time to time immemorial the property of the Plaintiffs by virtue of first occupation and the exercise of maximum acts of ownership by the Plaintiffs and their ancestors. They further alleged that while certain lands lying between the Plaintiffs' village of Biakpan and the Defendants' village of Asaga had been treated as the common property of both villages, the effective occupation and user and exclusive possession of the land in dispute by the Plaintiffs and their ancestors were always recognised by the Defendants and their ancestors, who were strangers to the land in dispute, until 1947 when the Defendants and their people started to invade the land in dispute and to make farms and collect palm fruits thereon thereby trespassing on the Plaintiffs' property and causing them damage. 10

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4.—By their Defence dated the 5th November, 1953, the Defendants admitted the representative nature of the action, said that the true name of the land in dispute was "Ali Ukwu" and averred that the Defendants were the real and true owners of the land in dispute by virtue of inheritance from their ancestors and the exercise of maximum acts of ownership thereover. The Defendants pleaded that the Plaintiffs enjoyed the land whereon they now lived by virtue of a grant from the Defendants and that until recently the Plaintiffs had always acknowledged the Defendants as their landlords. The Defendants denied the trespass and damage alleged in the Statement of Claim, and pleaded (1) Estoppel, (2) *Res judicata*. The Defendants did not plead any matters relied on in support of the pleas of estoppel or *res judicata* nor did they plead either common ownership or common user of the land in dispute. 20

5.—At the hearing of the suit in the Supreme Court of Nigeria it appeared that the parties were in substantial agreement concerning the location and precise boundaries of the land in dispute, the said land being more particularly delineated on two plans (Exhibits A and B) put in evidence by the Plaintiffs and Defendants respectively. The said plans are substantially identical save that Exhibit A refers to all physical features by Biakpan names and includes more frequent reference to physical features associated with the Biakpan people than to those associated with the Asaga people. In the same way Exhibit B refers to all physical features by Asaga names and includes more frequent reference to physical features alleged by the Defendants to be associated with the Asaga people. 30

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6.—From an examination of Exhibits A and B, it is apparent that the final question in the suit was in the words of Dove-Edwin, J., "What is the boundary between these two villages, is it at the stream Ivetim which lies to the west of the Plans and which the Defendants have to cross if they have to go on the land in dispute or is it at Iyi Atama to the east of the land in dispute?" 40

7.—On that issue the Plaintiffs and the Defendants both called a number of witnesses to testify as to the prior occupation and continuous user of the land in dispute by the party by whom the said witnesses were called. The learned trial Judge considered the Plaintiffs and their witnesses to be reliable and accepted their evidence and in terms said that he considered the Defendants and their evidence as unreliable. The learned trial Judge found that “the acknowledged boundary has always been the Ivetim stream and not the Iyi Atama stream” and it is submitted that there was ample evidence on which he could so find. In the West African Court of Appeal the Appeal against the learned Judge’s decision on the ground that it was unwarranted and unreasonable having regard to the weight of the evidence was unanimously dismissed, de Comarmond Ag. C.J. saying, “it cannot be said that there was not sufficient evidence to support the trial Judge’s decision. I am satisfied that the trial Judge spared no effort in analysing and weighing the evidence and I see no reason for “disagreeing with him.” It is submitted that on the issue of whether or not the Plaintiffs had proved their title to the land in dispute, apart from any question of estoppel or *res judicata*, the decision of the learned trial Judge and of the West African Court of Appeal constitute concurrent findings of fact in respect of which the Board will decline to review the evidence for a third time and moreover that this issue concerned manners and actions peculiar to the country from which the case comes in respect of which the Board will always be reluctant to depart from its practice in relation to concurrent findings of fact.

8.—Accordingly it is submitted that the only ground of appeal which the Board will entertain is whether or not the West African Court of Appeal was right in upholding the decision of the trial Judge that there was nothing in the evidence before him which estopped the Plaintiffs from proving their title either by reason of a previous agreement between the parties as to the ownership of the land in dispute or *per rem judicatum*.

9.—On those issues, the Defendants by their Defence gave no indication of the matters which would be relied on as constituting either estoppel or *res judicata* but at the hearing before Dove-Edwin, J. it appeared that the Defendants were relying upon a review made in April 1938 by Mr. O’Conner the then Resident of Ogoja Province of a joint Report made by Messrs. T. G. Connell and C. T. C. Ennals, Assistant District Officers for the Afikpo Division of Ogoja Province and for the Bende Division of Owerri Province, both the said Review and the said Joint Report purporting to be made under the Provisions of the Inter-Tribal Boundaries Settlement Ordinance 1933, c. 95 of the Laws of Nigeria.

10.—The history of the proceedings under the said Ordinance is set out in full in the Judgment of de Comarmond Ag. C.J., in the West African Court of Appeal as follows :

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“ Exhibit E shows that on the 3rd November 1936 Mr. T. G. Connell
 “ A.D.O. Afikpo Division was appointed to hold an enquiry under the
 “ Inter-Tribal Boundaries Settlement Ordinance (hereinafter called the
 “ Boundaries Ordinance) to determine the boundary between Eziafo and
 “ Biakpan. On the 16th of the same month Mr. Connell gave his decision.
 “ The Biakpan people were satisfied but the Eziafos were not and they
 “ brought in on their side the Asaga people (Defendants-Appellants in the
 “ present suit). It is necessary to point out here that the Asagas and
 “ Eziafos belong to the same clan and that the Eziafos were given their
 “ land, which abuts on part of the western boundary of the land in dispute 10
 “ by the Asagas.

“ Objections were raised against the boundary fixed by Mr. Connell
 “ and as a result another A.D.O. (Mr. Ennals) was appointed to hold a
 “ further inquiry. Mr. Ennals was A.D.O. in Bende Division. He was
 “ instructed to fix the boundary between the Biakpans on the one side and
 “ the Asagas and Eziafos. The boundary traced by Mr. Ennals did not
 “ satisfy the Biakpans and they petitioned against the decision.

“ In paragraph 4 of the review made by Resident O’Conner (Exhibit E)
 “ it is stated that the Residents of the two Provinces looked into the matter
 “ and agreed that the two A.D.O.’s should go on the land and arrive at 20
 “ a joint decision confirming one of the decisions already arrived at.

“ The decision arrived at by the two A.D.O.’s was to alter the Connell
 “ boundary. . . .

“ The Resident of Ogoja Province, Mr. O’Conner then took up the
 “ matter for review. The result of his intervention was the setting aside
 “ of the joint report of Messrs. Connell and Ennals which he was reviewing
 “ (he stated that the previous separate reports were merely interlocutory
 “ proceedings). Mr. O’Conner then ordered that all the land lying between
 “ the villages of Biakpan, Eziafo and Asaga should be owned in common
 “ by the three villages.” 30

11.—The material provisions of the Inter Tribal Boundaries Settlement Ordinance (Chapter 95 of the Revised Laws of Nigeria) are as follows :

“ 3. Any district officer may, with the approval of the Resident
 “ in charge of the province, inquire into and decide any dispute between
 “ two or more tribes as to the boundaries between the lands of such tribes.

“ 6. The Resident in charge of the province may, if he thinks fit,
 “ review the proceedings of any inquiry held under this Ordinance by
 “ a district officer and may, in his discretion, affirm, set aside, or vary the
 “ decision of the district officer or may, if he thinks fit, order the district
 “ officer or another district officer to hold a further inquiry.” 40

12.—In his Review of the joint Connell-Ennals Report the Resident said, *inter alia* :

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“ 14. There had, too, been the other element so frequent in all disputes
 “ of this nature—the presence of strangers and—having regard to all other

“ points shown to me, I was confident that this importation of strangers
 “ was the sole cause of the dispute. An area of communal land or no
 “ man’s land is a very usual feature between villages and everything goes
 “ on happily until one side or other brings in strangers from whom of course
 “ a satisfactory rent is obtained.”

“ 15. Having discussed the whole matter at considerable length and
 “ being convinced in my own mind that in the past there never had been
 “ any question of boundaries I suggested that the three villages should
 “ consult and should say whether a boundary really was desired.

10 “ 16. In a thoroughly friendly spirit the villages acted upon my
 “ suggestion and in due course they returned to say that they were
 “ unanimous in their view that no boundary was desired but that all the
 “ land lying between the three villages should be ‘ communally ’ owned by
 “ the villages due regard being paid to existing farms of all persons of the
 “ villages. There being not one voice raised in dissent I informed the
 “ meeting that the decision would be adopted and would be duly registered.”

13.—At the hearing of the suit before Dove-Edwin J. it was contested
 for the Defendants that the order made by the Resident in 1938 that
 “ all land lying between the villages of Biakpan, Eziafo and Asaga shall
 20 “ be owned in common by the three villages ” was a judgment of a competent
 Tribunal which made the issue of title between the parties in respect of the
 land in dispute *res judicata*. Alternatively it was claimed that the reference
 in paragraph 16 of the Resident’s Review to the unanimous view that all
 the land lying between the three villages should be “ communally ” owned
 amounted to an agreement between the parties to the present suit which
 estopped the Plaintiffs from asserting title to the land in dispute.

14.—In his Judgment in the Supreme Court of Nigeria, Dove-Edwin J.
 said of these submissions :

“ From the date of that order in 1938 neither the Defendants nor the p. 32
 30 “ Plaintiffs took any notice of it, and certainly did not act on it and
 “ from the evidence before me the Defendants seem to have got quite a
 “ totally different idea of the order. The Defendants do not rely upon this
 “ order as their case as would be seen from the Pleadings and the evidence
 “ but Counsel for the defence has rested upon it as a possible line of defence
 “ if all else fails.

“ It is as well that I give my view on the effect of this Order. Could
 “ it be treated as an estoppel or *res judicata* ? In support of his contention
 “ that it is an estoppel learned Counsel quoted the case of *Francis O.*
 “ *Wemambu and Others versus Okediachi Jideaku and Others*, Suit No.0/21/1938
 40 “ W.A.C.A. No. 10/8 decided on the 2.11.39 by W.A.C.A. when the Court
 “ held that a document signed by the representatives of all five quarters
 “ of Asaga placing the disputed area of land under one quarter was held
 “ to be an estoppel. The present case in my view is not on all fours with
 “ the one quoted. Both Assistant District Officers were appointed under
 “ the Ordinance by their respective Residents (a) of the Ogoja Province

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“ and (b) of the Owerri Province. Biakpan is now in Arochuku District of
 “ the Calabar Province. I doubt whether the Resident Ogoja Province
 “ acting alone could make an effective order under the Ordinance about
 “ boundary on land between two Provinces. Even if this could be done
 “ I hold that the Resident’s order was merely an Administrative convenience
 “ to keep the peace and that it cannot act as either an estoppel or *res*
 “ *judicata*.

“ In my view the Inter-Tribal Boundaries Settlement Ordinance was
 “ designed only for what it purports to be that is to settle boundary disputes
 “ between tribes. It does not confer on the District Officer or Resident 10
 “ powers to confer title so as to prevent tribes from having their title to
 “ lands gone into by the Courts and decided. It is a useful Administrative
 “ weapon and that is all.”

15.—In the West African Court of Appeal the Defendants/Appellants
 contended that the passage from the Judgment of Dove-Edwin J. referred
 to above was wrong in law and that the learned Judge ought to have
 held that the Plaintiffs/Respondents were estopped from proving their
 title either by the agreement referred to in paragraph 16 of the Resident’s
 Review or *per rem judicatam* by reason of the Resident’s Review.

16.—In the West African Court of Appeal, the leading Judgment was 20
 delivered by de Comarmond Ag. C.J., who reviewed the evidence and said :

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“ From the evidence just reviewed, it is clear that Defendants/
 “ Appellants never agreed that the land in dispute should be owned
 “ in common. They cannot therefore say that the Plaintiffs are estopped
 “ from claiming the said land because there was an agreement to treat it
 “ as owned in common. In other words, the Resident purported to approve
 “ an agreement which did not in fact exist.

“ The question that arises next is whether the Resident’s decision
 “ constitutes an estoppel *per rem judicatam* (whatever the Defendants
 “ thought about it). 30

“ In the case of Nnamena Anjoku of Obunaw Akpugo, Appellants,
 “ and Ivure Nwa Nnameni (Respondent) W.A.C.A. 178/53 decided on
 “ 5th November 1953, this Court held that ‘ District Officer acting under
 “ ‘ Section 3 of the Inter Tribal Boundaries Settlement Ordinance is
 “ ‘ a person vested with judicial authority to hear and determine a class
 “ ‘ of disputes by the provision of a statute and that, when so acting, he
 “ ‘ is a judicial tribunal and his decision, subject to the rights of review
 “ ‘ thereof provided by the statute, is conclusive upon the issue so determined
 “ ‘ by him.’

“ When Dove-Edwin J., gave his decision in the present case, this 40
 “ Court had not yet decided the appeal No. 178/53 above mentioned.

“ The learned trial Judge was in error when he held that a decision
 “ given by a D.O. or Resident under the Boundaries Ordinance ‘ is a useful
 “ ‘ administrative weapon and that is all,’ but this does not necessarily

“ mean that the order or decision given by Resident O’Conner was such as
 “ to constitute *res judicata*. I am of opinion that the Resident did not
 “ decide any dispute between two or more tribes as to the boundaries
 “ between the lands of such tribes ’ (see Section 3 of Cap. 95).

“ The Resident stated as clearly as possible that no boundaries need
 “ be fixed and he did not fix any (see paras. 15 and 17 of Resident’s report
 “ in Exhibit E).

10 “ What the law empowers a district officer (or a reviewing officer)
 “ to do is to inquire into and decide any dispute between two or more
 “ tribes as to the boundaries between the lands of such tribes. If, therefore,
 “ the decision is that there is no dispute about boundaries, any decision
 “ or order purporting to be given under the provisions of the Boundaries
 “ Ordinance is *ultra vires*. I might add, in order to clarify my meaning,
 “ that if the lands of two tribes are not coterminous there can be no boundary
 “ dispute between them.

20 “ Moreover, I am of opinion that Mr. Resident O’Conner (Resident
 “ of Ogoja Province) was not acting *intra vires* the Boundaries Ordinance
 “ when he purported to review the proceedings of inquiries made under
 “ that Ordinance in two different Provinces: Ogoja and Owerri. It is
 30 “ clear from Sections 3 and 5 of the Ordinance that a Resident cannot
 “ exercise, outside the limits of his Province, the powers conferred upon
 “ him by the Boundaries Ordinance. It is equally clear from Exhibits E
 “ and F that the people of Asaga (the Appellants) reside in the Afikpo
 “ Division of Ogoja Province whereas the people of Biakpan (the
 “ Respondents) reside in the Bende Division of Owerri Province. As a
 “ matter of fact, the Residents of these two Provinces did at one stage of
 “ the dispute appreciate the difficulty because they agreed to appoint one
 “ officer from each Province to decide the boundary dispute. When
 30 “ subsequently, the Resident of Ogoja Province purported to review the
 “ proceedings of the joint inquiry, he acted *ultra vires* and the order made
 “ by him is therefore a nullity.

“ I am of opinion, therefore, that the first two grounds of appeal fail.”

Foster Sutton P. and Henley Coussey J.A. concurred in the Judgment
 delivered by de Comarmond Ag. C.J.

17.—The Respondent Chief Kanu Ukpai humbly submits that the
 Judgment of the West African Court of Appeal is correct and should be
 affirmed and that this Appeal should be dismissed with costs throughout
 for the following among other

REASONS

40 1. BECAUSE the Respondents had sufficiently proved their
 title to the land in dispute.

2. BECAUSE there are concurrent findings of the trial Judge and the West African Court of Appeal on the issue of fact, namely whether or not the Respondents had sufficiently proved their title to the land in dispute and because this issue concerned manners and customs peculiar to Africa.
3. BECAUSE there was no agreement estopping the Respondents from proving their title to the said land.
4. BECAUSE there was no estoppel *per rem judicatam* such as would disentitle the Respondents from proving their title to the said land. 10
5. BECAUSE the Review by the Resident of Ogoja Province is not such an order as could in law amount to *res judicata* between the parties to this Appeal and in respect of the land in dispute in this Appeal.
6. BECAUSE the Review by the Resident of Ogoja Province was *ultra vires* and void.
7. BECAUSE the decisions of the trial Judge and of the West African Court of Appeal were right and should be upheld.

L. G. SCARMAN.

A. S. TRAPNELL. 20

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CASE FOR THE RESPONDENT
CHIEF KANU UKPAI

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