

Chief Eke Oja and others - - - - - *Appellants*

v.

Chief Kanu Ukpai and another - - - - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 20TH JANUARY, 1958**

Present at the Hearing :

LORD MORTON OF HENRYTON

LORD REID

MR. L. M. D. DE SILVA

[*Delivered by* LORD MORTON OF HENRYTON]

This appeal arises out of a suit commenced by plaint in the Native Court of Ubaghara and transferred to the Supreme Court by an Order made under section 28 (1) (c) of the Native Courts Ordinance.

Their Lordships find it convenient to refer hereafter to the respondents (who were plaintiffs in the suit) as "the plaintiffs" and to the appellants (defendants in the suit) as "the defendants".

The plaintiffs claimed, for themselves and as representing the people of Biakpan,

"(I) Declaration of title to all that piece or parcel of land known as 'Ekuot Ijoho' situate and being at Biakpan in the Calabar Province, property of the plaintiffs, the said land to be particularly delineated on the plan to be produced at the hearing.

(II) £300 damages for trespass in that in or during the year 1947, the defendants and their people and/or agents broke and entered into the plaintiffs' said land and therefrom collected palm fruits and made farms therein, and thereby disturbed the plaintiffs' quiet possession of the said land, without the leave or licence of the plaintiffs.

(III) An Injunction to restrain the defendants, their people, agents, servants and each and every one of them from any further acts of interference with the plaintiffs' right, title, interest in, and possession of the said land. Dispute started since 1947."

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

By their Defence dated the 5th November, 1953, the defendants, for themselves and as representing the people of Asaga, admitted the representative nature of the action and said that the true name of the land in dispute was "Ali Ukwu". They 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. They 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.

At the hearing of the suit in the Supreme Court of Nigeria before Dove-Edwin J. 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. These 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.

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. He gave judgment for the plaintiffs for the declaration sought and for the injunction sought, but gave no damages for trespass.

The defendants appealed to the West African Court of Appeal, and de Comarmond C.J. delivered a judgment dismissing the appeal, with which Foster Sutton P. and Henley Coussey J.A. concurred.

The learned Chief Justice said

"I do not consider that the appellants can succeed in this appeal to have the judgment set aside on the ground that it cannot be supported having regard to the weight of evidence or that it is unreasonable.

The important question that falls to be decided is whether the learned Judge was right in rejecting the plea of estoppel or *res judicata* raised in paragraph 8 of the Asagas' statement of defence." He then dealt with, and rejected, the defendants' plea of estoppel or *res judicata* and continued

"The last ground of appeal, which is that the decision is unwarranted, unreasonable and not supported by the weight of evidence, must also fail because it cannot be said that there was not sufficient evidence to support the trial Judge's decision. I am satisfied that the learned Judge spared no effort in analysing and weighing the evidence, and I see no reason for disagreeing with him."

Faced with the concurrent findings of Dove-Edwin, J., and the Court of Appeal, Sir Andrew Clark for the defendants naturally felt unable to contend that their Lordships should take a different view of the evidence which had been held to establish the title of the plaintiffs to the land in dispute. He contended however that neither the learned Judge nor the Court of Appeal had jurisdiction to decide the plaintiffs' claim. In support of this contention he put forward three submissions:—

(1) The present action is, in substance, a claim to have the boundary between two tribes fixed by the Supreme Court, and that Court has never had any jurisdiction to fix such a boundary.

(2) If the Supreme Court ever had jurisdiction to decide such a claim as is now put forward by the plaintiffs, that jurisdiction was ousted by the Inter-Tribal Boundaries Settlement Ordinance (No. 49 of 1933) and has not existed since the 30th November, 1933, when that Ordinance came into force.

(3) Alternatively, the Ordinance just mentioned excludes the jurisdiction of the Supreme Court to give a judgment the effect of which is to alter an inter-tribal boundary, once such a boundary has been fixed by a decision under the Ordinance: and the boundary between the people of Biakpan and the people of Asaga has been fixed by a joint decision of two Assistant District Officers, Mr. T. G. Connell of the Alikpo Division of the Province of Ogoja, and Mr. C. T. C. Ennals of the Bende Division of the Province of Owerri, dated the 22nd October, 1937.

It is to be observed that Sir Andrew did not rely upon any estoppel, and the alleged decision upon which he relies is not the same as the alleged decision upon which the defendants relied in the Supreme Court and the Court of Appeal. In these Courts they relied upon an alleged decision of the Resident of the Province of Ogoja, Captain D. O'Conner, dated the 23rd and 24th April, 1938, but the Court of Appeal held that this document was a nullity, and Sir Andrew did not seek to challenge that decision.

The result is that counsel for the defendants rely upon three submissions which were not put forward in either of the West African Courts: but as these submissions challenge the jurisdiction of the Supreme Court and the Court of Appeal their Lordships feel bound to express their opinion on them.

In support of his first submission, already stated, Sir Andrew cited a number of decisions in England as to the fixing of boundaries by the Court, including *The Parish of St. Luke v. The Parish of St. Leonard*, 1 Bro. C.C.40; *Wake v. Conyers*, 1 Eden 331, and *A.G. to Prince of Wales v. St. Aubyn*, Wightwick 167 at pp. 229-230, 231, 235, and one case in Nigeria, *Ovat Ehenyam v. Ayigo*, 16 Nigerian L.R. p. 30.

Their Lordships would have thought it regrettable if they had to decide whether or not the Supreme Court has jurisdiction to fix a boundary between two tribes, without the assistance of any discussion of the matter by that Court or by the Court of Appeal. In their opinion, however, the plaintiffs in the present suit did not claim to have a boundary fixed between two tribes. The claim and defence in the suit have already been set out with some particularity. They show that the plaintiffs simply claimed ownership of a piece of land, defined by the plan Exhibit A, and the defendants contested this claim. In their Lordships' view the decision of such a claim is clearly within the jurisdiction of the Supreme Court, on transfer from the Native Court, by the joint effect of the Native Courts Ordinance and the Supreme Court Ordinance. They would observe that the jurisdiction of the Supreme Court to decide upon such a claim does not appear to have been questioned in any case in the Supreme Court of Nigeria or in the West African Court of Appeal, and these Courts have frequently decided cases of this nature. See for instance *Okon Owon v. Eto Ndon*, Selected Judgments of the West African Court of Appeal, Volume 12, page 71, and *Mosalewa Thomas v. Preston Holder* at page 78 of the same Volume.

Sir Andrew Clark's second submission depends upon the true construction of the Inter-Tribal Boundaries Settlement Ordinance already mentioned. This Ordinance came into force on 30th November, 1933, and was amended by No. 6 of 1935 and No. 38 of 1938. Section 2 of the Ordinance defines the expressions "District Officer" and "tribe", and section 3 provides "any District Officer may, with the approval of the Resident in charge of the Province, enquire into and decide any dispute

between two or more tribes as to the boundaries between the lands of such tribes". Section 4 provides "that in any inquiry under section 3 the District Officer may, if he thinks fit, be assisted by assessors", and section 5 provides "that no legal practitioner shall appear for or act for or assist any party in any inquiry held under this Ordinance unless he is a member of one of the tribes which are parties to the dispute, is personally interested in its settlement and receives no remuneration for his services in the inquiry". Sections 6, 7 and 8 deal with the review of decisions of the District Officer by the Resident in charge of the Province or the Governor, and section 9 provides that "for the purposes of any inquiry under the Ordinance the District Officer or Resident in charge of the Province, as the case may be, shall have all the powers of a magistrate in connection with any civil cause in respect of enforcing the attendance of witnesses and compelling the production of documents". Section 10 provides "that any decision or order given upon an inquiry or a review under this Ordinance shall be recorded in writing and shall be signed by the Officer giving the same and shall be registered and preserved by the Resident in charge of the Province". Section 11, upon which Sir Andrew particularly relied, is as follows:—"Any person who acts in disregard or defiance of any decision which may be in force under this Ordinance or without due authority, removes, damages or defaces any boundary or other mark erected during the course and for the purposes of any inquiry under this Ordinance or erected in connection with any decision or order given under this Ordinance, shall be guilty of an offence and shall be liable to a fine of £50 or to imprisonment for six months or to both such fine and imprisonment".

Their Lordships are quite unable to hold that this Ordinance deprived the Supreme Court of jurisdiction to hear and decide claims such as the claim of the plaintiffs in the present action. In the first place, they think that if the Ordinance had been intended to have any such striking effect, the intention would have been made plain by an express provision in the Ordinance to this effect. There is no such provision. Secondly, it is to be observed that section 3 of the Ordinance does not give any tribe a right to have a dispute decided. The section might have been construed as conferring such a right but for the words "with the approval of the Resident in charge of the Province" but these words, in their Lordships' view, make it clear that the Resident has a discretion to give or withhold his approval to a suggestion by the district officer that he should inquire into and decide any particular dispute. Moreover, sections 4 and 5 of the Ordinance make it clear that the decision under the Ordinance need not be based on any principles of law.

Their Lordships cannot think that a jurisdiction of this kind was intended to take away the *right* of any tribe to have its claim to ownership of a defined piece of land decided by the Supreme Court on legal principles, after hearing legal argument by persons skilled in the law.

As to the third submission on behalf of the defendants, already stated, their Lordships are of opinion that the alleged joint decision of the two Assistant District Officers did not decide anything, and was not intended to be a decision under the Ordinance. The document in question is headed "A Joint Report by T. G. Connell, Esqr., and C. T. C. Ennals, Esqr., Assistant District Officers, on the Inter-Tribal Boundary Settlement between the Village of Biakpan, Afikpo Division Ogojo Province and the Eziafor and Asaga Villages of the Bende Division of Owerri Province." The events leading up to this Report are as follows:—On the 3rd November, 1936, Mr. Connell was appointed to hold an enquiry under the Boundaries Settlement Ordinance to determine the boundary between Eziafor and Biakpan. The Asagas and the Eziafors belong to the same clan. On the 16th of the same month Mr. Connell gave his decision. The Biakpans were satisfied but the Eziafors were not and they brought in on their side the present defendants. Objections were raised against the boundary fixed by Mr. Connell, and, as a result, Mr. Ennals was appointed to hold a further inquiry. He was instructed to fix the boundary between the Biakpans on the one side and the Asagas and

Eziafors on the other. The boundary was so fixed, on 24th April, 1937, and it differed in certain respects from the boundary fixed by Mr. Connell. This decision did not satisfy the Biakpans and they petitioned against it. It was as a result of these events that the joint Report of Messrs. Connell and Ennals came into existence. The Report begins "In accordance with instructions received from the Resident, Owerri, and Ogoja Provinces in their Memoranda"—then the numbers of the Memoranda are given—"the above-mentioned Officers proceeded to the area in dispute on the 22nd October, 1937, accompanied by Representatives selected by each of the three villages."

The instructions there mentioned were not before their Lordships, but reading the Report as a whole they think it is clear that the two Assistant District Officers did not purport to make any decision under the Boundaries Settlement Ordinance. After describing their investigations they "recommend" an amendment of the Biakpan-Eziafor boundary. Then after stating certain matters of history, and of the allegations of the respective disputants, they go on to say, in paragraph 5 of the Report, "The amendment in paragraph 2 above is put forward because"—and then they go on to give the reasons why the amendment "recommended" in paragraph 2 was "put forward". Paragraph 6 is as follows:—"Ikama Pond: Fishing Rights Ubarar. No amendment of Mr. Connell's decision is proposed." In paragraph 7 they deal with the Biakpan-Asaga boundary and after stating certain matters they end the paragraph "therefore no amendments are proposed". Finally there is a portion of the Report headed "Description of Boundary. Proposed Biakpan-Eziafor-Asaga Boundary", and they then go on to state the "proposed" boundary.

Their Lordships think it is impossible to construe a Report so worded as being a decision under the Boundaries Ordinance. The words "decision" or "decide" are not used in any part of the Report. On the contrary, as the quotations already set out show, the two gentlemen use the words "recommend", "put forward" and, in three different places, "proposed". Moreover there is a striking difference between the concluding part of this Report and the concluding part of the decision by Mr. Ennals already mentioned. The latter document is divided into two parts, each part being signed by Mr. Ennals on the 24th April, 1937. The first part is headed "Report" and takes the form of certain recommendations and proposals as to the Biakpan-Eziafor boundary and the Biakpan-Asaga boundary respectively. The second part is headed "Decision" and is in imperative terms. The earlier decision by Mr. Connell is not before their Lordships, but they cannot believe that if Mr. Connell and Mr. Ennals intended their joint Report to be a decision under the Boundaries Ordinance it would have taken the form already described. The document was merely a report intended to assist higher authority to review the two differing separate decisions of Mr. Connell and Mr. Ennals.

For these reasons their Lordships are of opinion that there has never been any decision under the Boundaries Ordinance as to the boundary between the lands of the plaintiffs and the lands of the defendants. Counsel on both sides agree that neither Mr. Connell alone nor Mr. Ennals alone could decide this boundary, since in so doing he would have decided also the boundary between the Province of Ogoja and the Province of Owerri, which he had no power to do; and, as has already been stated, the alleged decision of Captain O'Conner is no longer relied upon. Thus their Lordships are not called upon to decide as to the effect, if any, of a decision under the Boundaries Ordinance upon the jurisdiction of the Supreme Court to decide the present case, or to consider the decision of the West African Court of Appeal in the case of *Nnamene Anjoku v. Ivube Nwa Nnamani*, Selected Judgments of the West African Court of Appeal, Volume 14, page 357.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondents' costs of this appeal.

In the Privy Council

CHIEF EKE OJA AND OTHERS

v.

CHIEF KANU UKPAI AND ANOTHER

DELIVERED BY
LORD MORTON OF HENRYTON

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