

17/1/1962

O N A P P E A L

FROM THE FEDERAL SUPREME COURT OF NIGERIA

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
STUDIES
29 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N :

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1. NWUBA MORA
 2. NWANGENE
 3. OIWUAGHLASI OKELE
 4. MMANEKE on behalf of
themselves and the people
of Awka (Defendants)

68153
Appellants.

- and -

1. H. E. NWALUSI
2. OKOYE OKONGWU
3. NWONU ORAEKIE
4. PATRICK OGWU for themselves
and all others the people
of Amawbia (Plaintiffs)

Respondents.

CASE FOR THE APPELLANTS

RECORD

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1. This is an appeal from a judgment of the Federal Supreme Court of Nigeria dated the 18th March, 1957, dismissing an appeal from a judgment of the Supreme Court, Onitsha, dated the 28th April, 1954, granting to the Respondents a declaration of title in respect of a certain piece of land, damages for trespass and an injunction.

p. 121.

p. 87.

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2. The principal questions which arise for consideration on this appeal is as to whether the Courts below correctly applied the law, as laid down in the decided cases, first as to the onus of proof which rests upon the plaintiffs in a claim for a declaration of title to land and secondly as to whether the plaintiffs are estopped from pursuing their claim by virtue of the previous proceedings

referred to and set out in paragraph 5 hereof.

3. The suit was instituted by the Respondents (hereinafter called "the Plaintiffs") on behalf of the people of Amawbia, by a Civil Summons dated the 1st July, 1949, in the Native Court of Mbailinofu. The original Defendants were one Nnebe Nwude and the second, third and fourth Appellants, who were sued as representatives of the people of Awka. The suit was transferred to the Supreme Court, Onitsha, by Order of the Acting District Officer dated the 19th July, 1949. Pleadings were ordered on the 13th March, 1950. A Statement of Claim dated the 26th July, 1950, and a Defence dated the 14th October, 1950, were filed. On or about the 4th November, 1951, the said Nnebe Nwude died, and the first Appellant was substituted in his place by Order of the Supreme Court made on the 27th October, 1953. The Appellants are hereinafter called "the Defendants".

p. 1.

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p.15, 1.9.

p.16, 1.10.

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4. The land in dispute is called Agu Norgu and is part of a larger area of land known by the same name. The contest between the parties, as raised by the pleadings and the evidence, (apart from the question of estoppel by res judicata) was stated by the learned trial judge (Hurley J.) to be as follows:-

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p.87, 1.24
p.88, 1.22

"The land in dispute under the name of Agu Norgu in this action is part of a larger tract which is also named Agu Norgu. The larger Agu Norgu is the former territory of the Norgu people, who in the traditional past were driven away from it by war, and I shall refer to it as the Norgu territory. On the south east the land in dispute adjoins the land of the Plaintiffs, the Amawbia people (which I shall call Amawbia land), where the Plaintiffs live and farm and have, according to themselves, lived and farmed from time immemorial. On the north east the land in dispute, according to Plaintiffs' plan, adjoins land of the Defendants, the Awka people; according to the Defendants themselves, this land on the north east is part of the Norgu territory. The Plaintiffs' case in this action is that they were neighbours of Norgu at the time of the war, took part in the war in alliance with other peoples (including Awka) against Norgu, acquired the land now in dispute as their share of the conquered territory and remained in

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10 undisturbed possession and enjoyment of it
from then until recently, when in 1941 the
Defendants surveyed it in connection with a
land dispute between them and a third party,
and in 1948 and 1949 trespassed on it again
and more seriously. In fact, the land in
dispute between the Defendants and the third
party was another portion of the Norgu terri-
tory, and the Defendants' claim to it was
asserted for the purpose of enforcing part
of their general claim to the whole Norgu
territory. The Defendants say that the
Plaintiffs trespassed on the land in 1948
and the Defendants resisted them, being
themselves in possession as owners; the
Plaintiffs were never in possession or
enjoyment of the land, had no right or
interest in it whatever, took no part in the
20 Norgu war, were not on Amawbia land at the
time of the war, and are not owners of
Amawbia land or indeed of any land, but were
put on Amawbia land, which is part of Awka
land, by the Defendants when they, the
Plaintiffs, came as strangers after the war."

5. Prior to this suit there were several other
proceedings relating to Agu Norgu lands, including
the following:-

- 30 (i) In 1922 the people of Awka claimed damages p.374
for trespass on what was described as "our
general land Agu Norgu by name" against the
people of Osunagidi, Case No. 353/22 in the p.375.
Native Court of Awka. They obtained judgment
in default of appearance.
- (ii) In 1932 the people of Awka sued the p.217.
people of Umuodo Okpuno "to show cause why you
should not quit from our land Agu-Norgu", suit
No. 95/32 in the Native Court of Awka. The
contest in this suit was as to ownership of
the land and the Court gave judgment for the
40 people of Awka, although subsequently this p.230
judgment was annulled by a decision of the p.234.
Acting District Officer.
- (iii) In 1936, the people of Awka claimed p.368.
rent from Osunagidi people for farming Agu-
Norgu land, Case No. 84/36 in the Native Court p.370.
of Awka. They obtained judgment on the
defendants failing to appear at the trial.
- (iv) In 1941 the people of Awka brought an p.133
action for a declaration of title to land

RECORD

- p.188.
p.262. known as Agwu Aralla, forming part of the larger area of land known as Agu Norgu, against the people of Okpuno, Suit No. O/13/1941 in the High Court of the Enugu-Onitsha Division. The people of Awka succeeded both in the High Court and in the West African Court of Appeal.
- p.324. (v) In 1943 the people of Awka claimed rent in respect of "Agu-Nawgu" land in four suits against the people of Osunagidi, which were consolidated, Suits Nos. O/12-15/1943, in the Supreme Court, Onitsha. They succeeded, and the judgment of the Supreme Court was upheld by the West African Court of Appeal. 10
- pp.360,
399.
p.403. (vi) In 1946 the people of Umuleri Isu claimed against the people of Awka for alleged trespass on a portion of land within the Norgu land, case No. 22/46 in the Mbataghetete Native Court. The claim was dismissed.
- p.407.
p.413. (vii) In 1949, in four consolidated suits against the people of Enugu Agidi, the people of Awka claimed a declaration of title to "Augunogu" land, Suits Nos. O/48/1949; O/55/1949; O/56/1949; and O/57/1949 in the Supreme Court, Onitsha. Again the people of Awka were successful. 20
- p.263.
p.316. 6. Certain plans were produced for the purpose of the trial. These included the following :-
- p. 5, 1.33. (1) Plan No. GA 62/49 filed by the Plaintiffs with their Statement of Claim, purporting to show the land in dispute and surrounding lands. 30
- p.12, 1.20.
p.17, 1.28. (2) Plan No. LD 9/51 filed by the Plaintiffs pursuant to an Order of the Supreme Court made on the 22nd May, 1951. This plan purports to show not only the land in dispute but the whole of the land said to belong to the Amawbia people.
- p.21, 1.31.
p.133. (3) Exhibit "B", a plan tendered by the Defendants. This plan was used by the people of Awka in the previous proceeding between them and the people of Okpuno Suit No. O/13/1941. It was also used in two other proceedings, viz. a suit in 1946 by the people of Awka against the people of Enugu Agidi for damages for trespass in relation to another part of Norgu land, Suit No. O/10/1946 in the Supreme Court, 40
- p.311, 1.38.
p.89, 1.2.
p.263.

and the four consolidated suits in 1949 referred to above.

7. The case was heard on the 25th January, 1954, and the 4 days following, and the learned trial judge held a view of the land in dispute on the 29th January, 1954. Both parties adduced evidence both as to tradition and recent possession. The respective records in the previous suits relating to Agu Norgu land were put in. Judgment was given, in favour of the Plaintiffs, on the 28th April, 1954.
8. As regards the traditional evidence, the learned trial judge stated his conclusion about the Norgu war in the following terms:-
- "The Plaintiffs account of the war and its origin I found preferable to the Defendants' as seeming a more likely story in itself and as coming on the whole from more credible-seeming witnesses. When I say that I found Plaintiffs' account more likely I mean, principally, that the story of an alliance seemed more likely than Awka's story of their single encounter with Norgu. That was not because I had any reason for thinking, or thought, that Awka could not have undertaken such a war alone, and won it, but because it seemed to me natural that neighbouring people should ally themselves in the circumstances described, with the two-fold object, first, of enforcing respect for customary law and preserving order by exacting retribution, and secondly, of winning land out of the conquered territory. I did not feel that the balance of probability weighed very heavily against the Defendants, but it did seem to be against them. It seemed to be more against them after their witnesses had been cross-examined about the meaning of Ogu amakom....."
- The learned judge next proceeded to hold that the word "amakom" was an expression well known and well understood and was moved in consequence to infer that the Norgu war was "ogu amakom". He construed this expression as meaning "a fight in alliance" and held that the Defendants' witnesses, who said that they had not heard the expression, were lying. He attached so much importance to this point that in a later part of his Judgment the learned judge held that the "refusal" by one of the Defendants' witnesses to recognise the phrase "amakom" impaired his credit.
- pp.17-86.
p.82.
pp.18-81
pp.133-406
p.21, 1.30.
p.29, 1.18.
pp.87-104
- p.92, 11.25-46.
- p.92, 1.44-93, 1.34.
p.92.
pp.72, 74, 76,79,81.
p.102, 1.17.

RECORD

9. On the question of the actual occupation of the land in dispute, although the Plaintiffs called witnesses who stated that only Amawbia people farmed on the land in dispute, their evidence included the following:-

- p.20, 1.18. (a) The 1st Plaintiffs' witness (the first Plaintiff himself) appeared to admit that the wives and brothers of the 3rd Defendant farm on the land.
- p.26, 1.31. (b) The 2nd Plaintiffs' witness said that he farms on the land in dispute at Ojimma and has a boundary with one Nwokoye Ida of Awka, although he also said that he never saw anybody not of Amawbia farming there. 10
- p.26, 1.37.
- p.32, 1.15. (c) The 3rd Plaintiffs' witness said that he also farms on the land in dispute at Ojimma and has a boundary with one Nwokeke Adinkachi of Awka who farms there himself, but he too said that "when I farm on Agu Norgu I see no people of any other town farming there." This witness appeared to concede that there were strangers, viz. Hausas, on the land besides Amawbia people. 20
- p.32, 1.19.
- p.35, 1.32.
- p.41, 1.17. (d) The 6th Plaintiffs' witness, a native of Norgu, said that he saw Enugu Agidi and Amawbia people farming on the land.
- p.43, 1.22. (e) The 7th Plaintiffs' witness also spoke to Enugu Agidi people, as well as Amawbia, farming on the land.

It is submitted that the Plaintiffs' evidence taken as a whole amounts to no more than that certain of the Amawbia people had farmed on the land in dispute during their lifetimes, together with Enugu Agidi people and Hausas and certain of the Awka people. 30

10. On the issue of fact regarding the occupation of the land, the learned trial judge said:-

- p.102, 1.39. "The Plaintiffs have satisfied me that within living memory at least they have been in possession, disturbed only by the 1941 survey, to the exclusion of Awka until 1948." 40

It is respectfully submitted that on any view of the Plaintiffs' evidence, which the learned judge accepted, the said conclusion cannot be sustained.

11. One reason why the learned trial judge accepted the evidence of the Plaintiffs and rejected that of the Defendants appears to have been that he found the Defendants' evidence as to the boundaries of the land in dispute unsatisfactory; in this regard he said inter alia that evidence given by the 1st and 2nd Defendants' witnesses that the south east boundary of Norgu territory was the Uvunu river -

p.100, 11.
14-47.

pp. 56, 66
p.100, 1.42.

10 "is in gross contradiction of the evidence of their 1941 Plan Exhibit B."

It is respectfully submitted that examination of the Plan shows that this observation is incorrect.

12. The learned trial judge in considering the effect of the proceedings referred to and set out in paragraph 5 hereof realised that the contention made by the Plaintiffs that the Norgu war was fought by the Defendants in alliance with others including the Plaintiffs had been an issue before the Courts particularly in the 1941 proceedings set out in paragraph 5 (iv) hereof. The contention was on all occasions rejected but the learned trial judge considered (it is submitted wrongly) that he was entitled to take a different view of the issue as the Plaintiffs were not parties to any of the previous proceedings and therefore were not estopped. It is respectfully submitted that the learned trial judge also failed properly to consider and invoke the inherent jurisdiction of the Court to cease repetitive litigation or to give proper regard to the hardship suffered by the Defendants in the reagitation of matters which had been in issue in previous proceedings.

20 p.95.

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13. Further on the issue of estoppel the learned trial judge failed to consider whether the Plaintiffs had a mutuality of interest with any previous litigants with the Defendants or whether the Plaintiffs knew of any of the previous proceedings and, if so, whether they had an opportunity to attend. In particular the learned trial judge failed to take into account, or alternatively, give due weight to the knowledge by certain of the Plaintiffs' witnesses in this case of the previous proceedings in the following respects:-

1st witness (who represented the people of Amawbia as well as himself) knew about the 1941 proceedings and that some of his people gave evidence against the Awka claim

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that what is true as to the one piece of land is likely to be true of the other piece of land."

And secondly upon a proper application of the doctrine of estoppel per rem judicatam. The Federal Supreme Court, however, failed to consider the application of the said Section 45 and as regards the previous suits the Judgment appeared to confine itself to deciding that as the Plaintiffs were not parties to those suits they were res inter alios acta.

p.122, 11.8-28.

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16. The Federal Supreme Court upheld the Judgment of the learned trial judge.

17. On the 22nd May, 1957, the Defendants were granted Conditional Leave to Appeal to Her Majesty in Council, and on the 18th November, 1957, they were granted Final Leave to Appeal.

p.128.

p.132.

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18. The Defendants respectfully submit that this Appeal should be allowed with costs and that the Judgment of both Courts below should be set aside and the Plaintiffs ordered to pay the Defendants' costs in both Courts, for the following, amongst other,

REASONS

1. BECAUSE both the Courts below failed correctly to apply the law as to the onus of proof applicable to a claim for a declaration of title to land and also the law as to estoppel per rem judicatam.
2. BECAUSE the learned trial judge reached conclusions of fact, namely those mentioned in paragraphs 8, 10 and 11, which cannot be sustained on the evidence.
3. BECAUSE the Federal Supreme Court failed to correct the errors of the learned trial judge in regard to the findings mentioned in paragraphs 10 and 11.
4. BECAUSE the learned trial judge's finding in favour of the Plaintiffs' case on the traditional evidence ought not to be upheld in view of the decision of the Federal Supreme Court that there was no justification for his finding with regard to the word "amakom".

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5. BECAUSE the learned judge's erroneous finding with regard to the word "amakom" unduly weighed with him in assessing the evidence of the Plaintiffs and that of the Defendants.
6. BECAUSE the learned trial judge failed to have due regard to Section 45 of the Evidence Ordinance.
7. BECAUSE the Federal Supreme Court failed to consider the application of the said Section 45 or to have due regard thereto.
8. BECAUSE on a proper view of the evidence the Plaintiffs failed to prove their case.

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DINGLE FOOT

RALPH MILLNER