

15/1964

IN THE PRIVY COUNCIL

No. 38 of 1962

O N A P P E A L
FROM THE FEDERAL SUPREME COURT OF NIGERIA

FAWEZE MOUKARIHM

-v-

ABOLADE OLATUNJI COKER

- and -

JOHNSON AINA and
IBADAN DISTRICT COUNCIL

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

22 JUN 1965

25 RUSSELL SQUARE
LONDON, W.C.1.

78566

CASE FOR THE APPELLANT

HATCHETT JONES & CO.,
90, Fenchurch Street,
LONDON, E.C.3.

O N A P P E A L
FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N

FAWEZE MOUKARIHM

Defendant/Appellant

- and -

ABOLADE OLATUNJI COKER

Plaintiff/Respondent

10

- and -

JOHNSON AINA and
IBADAN DISTRICT COUNCIL *PRO FORMA*

Defendants/Respondents

CASE FOR THE APPELLANT

RECORD

1. This is an appeal from an order of the Federal Supreme Court of Nigeria dated the 15th March 1961 setting aside the judgment of the High Court of the Western Region of Nigeria, Ibadan Judicial Division dated the 22nd April 1960 and ordering that the first Respondent's action against the Appellant be dismissed with costs and the second and third Respondents be dismissed from the suit.
- 20
- p.58 1.27
p.38 1.16

RECORD

2. The principal questions arising in this appeal are:

(a) whether the trial Judge rightly found that the persons from whom the first Respondent claimed to derive his title to certain land in dispute were not proved to have had any interest in the land;

(b) whether on the basis that the judgment of the trial Judge contained material misdirections a new trial should have been ordered by the Federal Supreme Court, or whether they rightly substituted an order for judgment for the first Respondent. 10

p.2 1.1 3. In his Statement of Claim the first Respondent alleged that the land in dispute originally belonged to the Ibikunle family who sold it to one Rosiji in 1950; Rosiji reconveyed the land to the Ibikunle family in 1952, who conveyed it to the first Respondent on the 27th March 1957. Before the original conveyance to Rosiji the Ibikunle family had exercised acts of ownership on the land for over 100 years by planting vegetables on it and giving it out to tenants to sell planks. 20

p.3 1.33 4. The Appellant in his Defence stated that he was a lessee of the land in dispute from the second Respondent and had been in possession since 1953. The second Respondent had derived his title in 1951 from the Olubadan and Chiefs of Ibadan in whom the land was vested under customary tenure. The Olubadan and the Chiefs had through the then Ibadan Native Authority Council reclaimed the area of which the land in dispute was a part many years ago for development purposes and the Council had reallocated several plots in the area to several people for development. 30

p.5 1.1 The second Respondent, who was joined as
p.7 1.12 Co-Defendant with the third Respondents, stated in his Defence that the Ibadan Native Authority in September 1951 placed him in effective possession of the land in dispute under an agreement whereby the Olubadan was to convey the land to the second Respondent in fee simple. The Ibadan Native Authority, the predecessors in title of 40

the third Respondents, were the former owners of the land and had for at least 35 years before 1951 been in effective possession of it and had continuously exercised acts of ownership over it. The Appellant was the second Respondent's lessee. He also pleaded that the first Respondent had been guilty of laches and acquiescence.

10 The third Respondents in their Amended Statement of Defence stated that they or their predecessors in title were the owners of the land and had been in possession since 1916; that it was a well known custom throughout Yoruba land and particularly in the Ibadan Districts that lands were held at the disposal of the head and superior Chiefs in accordance with Native Law and Custom and that one Bale Fajinmi became seised of the land in accordance with this custom. The third Respondents became seised of the lands by acquiring part of the interest of one Seidu Williams and by reclamation. Seidu Williams had derived his title from one Kasumu Alli who derived his title from Bale Fajinmi. The second Respondent was the lessee of the third Respondents. Further they pleaded laches, stale claim and acquiescence.

p.8 1.23

5. Evidence given on behalf of the first Respondent included the following :-

30 (a) The first Respondent himself identified the land in dispute and stated that it originally belonged to the Ibikunle family. Before 1953 people were setting boards on the land and paying rents to the family. Others planted vegetables on the land. In 1957 he saw that the Appellant had fenced it. He gave evidence of the subsequent conveyances as pleaded by him. Cross-examined he said he was a friend of the Ibikunle family and their surveyor. He knew all the lands claimed by that family. He assisted his brother, who had made a plan for the purpose of a suit in 1949 between that family and the third Respondents. In 1953 the third Respondents built walls to stop a certain stream from rushing into the land.

p.10 11.13
-20
p.10 1.26
p.10 1.20
p.11 1.21
p.11 1.46
-12 1.2

In re-examination he said he would locate the land he claimed in the present case

RECORD

on the spot shown on the plan used in the 1949 suit as land belonging to the Alapinti family.

- p.12 1.32 (b) Salami Eniaiyewu said he obtained a grant
-13 1.1 of the land in dispute from the Ibikunle family
about 50 years ago and planted sugar cane on it,
p.13 1.15 also vegetables. Cross-examined he admitted
that the land was marshy sometime ago and was
used as a rubbish dump by the public. It was
p.13 1.17 reclaimed after he had left the land. It was
the Sanitary Authorities who burnt the rubbish
and reclaimed the lands. 10
- p.13 1.37 (c) Raji Oduola said he was a great grandson
-14 1.15 of Balogun Ibikunle who had acquired the land
by conquest. Since then no one had disputed
his family's right. A portion of the family's
land had been given to the Alapinti family.
p.14 1.29 The second witness planted vegetables and sugar
cane on a portion of the family land, but this
was a different portion to that now in dispute.
- (d) Raji Dare Alapinti, a member of the 20
p.16 1.6 Alapinti family, also said the land in dispute
belonged to the Ibikunle family. Cross-examined
p.16 1.18 he said that Alapinti family land had not been
granted to them by the Ibikunle family. He has
p.16 1.30 never heard of any such tradition and they had
never paid tribute to the Ibikunle family. He
p.16 1.33 knew that some time ago people sold planks on
the land in dispute.
- (e) Josiah Agbe said the land had been leased
p.17 1.5 to him by the Ibikunle family for 25 years 30
before 1954 and he sold planks on it. He used
to give the family a bottle of gin and a bottle
p.17 1.31 of beer yearly. Cross-examined he said that
p.17 1.42 up to the time he left the land it was marshy
and it had not been reclaimed. Refuse used to
p.18 1.1 be thrown on the land. About 10 years ago the
Ibikunle people sued him for tribute while he
was away.
- p.18 1.24 6. The Appellant gave evidence on his lease
from the second Respondent dated 1953. It was
to commence in 1951, at which time he built a
concrete wall near the stream to stop water
coming on the land. Nobody obstructed him when
doing so. It was when he started building a
petrol station at the end of the previous year 40

that the first Respondent sued him.

10 The second Respondent produced a deed of conveyance from the third Respondents dated the 8th December 1958, but there had been an agreement that he should obtain the land from the Ibadan Native Authority in 1951. Before it was granted to him in 1951 the land was vacant. It was granted to him in exchange for another piece of land over which he had sued the third Respondents' predecessors. p.20 1.12 p.19 1.22 p.20 1.29 p.20 1.35

Further witnesses for the defence included:

20 (a) Daniel Tayo Akinbiyi, who was a Councillor of the Ibadan Native Authority from 1936 to 1952 and was also a Judge of the Native Court. He gave evidence of the traditional land tenure in Ibadan as pleaded by the third Respondents. In 1937 the Ibadan Native Authority acquired land including that in dispute. A man was sent by the Native Authority to ring a bell and to announce that the land was being acquired. A Notice was also placarded on the site and published in the official bulletin of the Native Administration of which he was Editor. He produced a bulletin dated July 1937 containing notice of the acquisition of certain land. As a result of the notice several claims were made. Before the notice the land was reclaimed by the Authority in 1934. It had been swampy. p.22 1.36 p.22 1.40 p.23 1.13 -23 1.31

30 Cross-examined he said there were records which would show that people laid claims, but he could not say if any compensation was paid. Nobody occupied the land at the time it was acquired. Between 1937 and 1952 he saw plank sellers on Onireke Street (bordering on the land in dispute). He did not know who put plank sellers on the land. The acquisition by the Authority in 1937 was for public purposes. p.24 1.2 p.24 1.37 p.24 1.42 p.25 1.4

40 (b) Issa Akangbe Williams, the son of Seidu Williams. He produced a conveyance dated 1902 between Kasumu Ali and Seidu Williams. His father had later taken a lease from the Native Authority of a portion of the land covered by the conveyance. Part of the original land which was sold to his father by Kasumu Ali was later acquired by the Native Authority for making a road, p.25 11.27 - 40 p.26 1.2

RECORD

which is now Onireke Street. The remaining portion of the original land was still his.

- p.26 1.32 Cross-examined he said that part of his father's land had been leased to the Appellant's father and one other. There were houses built on his land. In about 1952 Rosiji had approached him concerning the land in dispute. He wanted to know if the witness had any interest in the land and he said yes. After inspecting the land in dispute he asserted that all of it was his property. 10
- p.27 1.1
- p.27 1.6
- p.28 1.4 (c) Sule Summola Brimoh, a Technical Assistant employed in the Survey Section of the third Respondents, who had been employed in that department since 1933. In his possession was a record of the land in dispute. In 1937 the Native Authority decided to acquire all lands between Onireke Street and Ogunpa Stream, which had been diverted and claimed certain family lands. Notices were posted to warn owners to put forward their claims. Many did so, including Seidu Williams. The latter was not paid compensation because he had already surrendered his claim to the Native Authority and had taken a lease in respect of part of his former land. 20
- p.28 1.39
- p.29 1.10 Cross-examined, looking at the first Respondent's plan of the land in dispute he said "that the portion of the land edged red is the land in dispute about 75% of that land was surrendered by Seidu Williams to the Ibadan Native Authority that portion faces the stream and the Street" (sic). The Council had no record of any claim laid by the Ibikunle family to the land in dispute although there was a record of a claim by the family to other land. In 1937 the Alapinti family were one of those who claimed. Some of the families were paid compensation. The plot in dispute was part of the land reclaimed by the Sanitary Authority. 30
- p.29 1.29
- p.30 1.9 (d) Samuel Babajide Olorode who was a member of the Wondo family. The land in dispute had originally belonged to the Wondo family, who granted it to the Olubadan. 40
- p.30 1.16
- p.36 1.7 7. The learned trial Judge Quashie-Idun said that on the basis of an inspection carried out

RECORD

by the Court there was no doubt that the land appeared to have been reclaimed with much difficulty. He said the evidence that vegetables had been planted on the land was unsatisfactory. He reviewed the evidence which had been given and stated that he accepted the evidence of the acquisition of the land in dispute by the Council. He also found that the land in dispute was a portion of that unsuccessfully claimed by the Ibikunle family in 1949 in their suit against the third Respondents and that the first Respondent must have been aware at the time he bought the property that it was part of the land that had already been disputed in litigation. The onus was on the first Respondent. On the evidence before him he was not satisfied that the Ibikunle family had any interest to convey to the first Respondent. He accordingly dismissed the action with costs.

10

20 8. The Federal Supreme Court, whose judgment was delivered by Taylor F.J. held that the judgment of the trial Judge contained two material misdirections. Firstly they held that the Judge misjudged the evidence when he accepted the fact that the land in dispute had been acquired by the third Respondents. In their view the evidence of Issa Williams showed that the whole of the land in dispute was his while the area acquired by the Respondent Council was the area to the west which was used to construct Onireke Street. Secondly they held that the Judge was at fault in holding that the land in dispute had been part of the land which had been the subject matter of litigation in 1949 between the Ibikunle family and the third Respondents. (It is not contended by the Appellant that this finding of the learned trial Judge can be supported.) The Federal Supreme Court held that these were material and substantial misdirections and that the only point for consideration was whether a new trial should be ordered, or whether judgment should be entered for the first Respondent. The Court considered that since all the facts were before them, including the documents on which the parties relied as their root of title they had to determine whether on the evidence the first Respondent was entitled to judgment in his favour.

30

40

p.36 1.28

p.37 1.23
-38 1.18

p.49 1.18
-52 1.10

p.52 1.11
-53 1.29

p.52 1.29

p.54 1.28

RECORD

They held that the passage in which the

p.54 1.40 Judge said that he was not satisfied that the
Ibikunle family had any interest in the property
to convey to the first Respondent at the time
they purported to do so, implied that the
Ibikunle family had some interest at some time

p.55 1.16 before 1957. Accordingly the onus would then
shift to the Appellant and the second and third
Respondents to prove an acquisition by the third
Respondents' predecessors in title. Further an 10

p.55 1.22 inference favourable to the first Respondent
-56 1.4 could be drawn from the traditional evidence of
the Ibikunle family's ownership of adjoining
land and also from the evidence of Josiah Agbe
who had sold planks on the land in dispute from
1929 to 1954 with the leave and permission of

p.56 1.5 the Ibikunle family. As against this the plans
-57 1.18 produced of the area originally conveyed to
Seidu Williams and the areas later surrendered
by him did not show that these areas were 20
identified with the land in dispute. Accordingly

p.58 1.11 they gave judgment for the first Respondent with
costs.

9. It is respectfully submitted that the
misdirections of the trial Judge were not
material to the decision which he reached.
Firstly the evidence of Issa Williams, although
to some extent inconsistent with the other
evidence for the third Respondents, also denied 30
the title to the land of the Ibikunle family.
Secondly the first Respondent himself admitted
that the land now in dispute was shown on the
plan concerning the subject matter of the 1949
action as land belonging to the Alapinti family.
He further admitted that he had assisted his
brother in making out this plan. Thirdly the
evidence of Daniel Akinbiyi and Sule Brimoh was
clear evidence of acquisition of the land by the
Council, which evidence was stated to be confir- 40
med by the trial Judge by his inspection of the
land, which showed that it had been reclaimed
with much difficulty. Fourthly the evidence
for the first Respondent was contradictory in
a number of respects: Raji Oduola's tradition-
al evidence of the acquisition of the neighbour-
ing land was contradicted by Raji Alapinti and
that of Josiah Agbe was inconsistent with the
clear evidence that the land had been reclaimed
before 1954. Fifthly the Supreme Court erred

in holding that the plans produced by the Appellant and third Respondents did not identify the land conveyed to Seidu Williams with the land in dispute.

In the premises despite any misdirections or errors by the trial Judge his decision should have been affirmed.

10 10. In the alternative the Appellant submits that the Federal Supreme Court erred in not ordering a new trial. They had no grounds for saying that the judgment of the trial Judge implied that the Ibikunle family had originally owned the land in dispute. Further for the reasons already given the evidence for the first Respondent was unsatisfactory. There was no means of telling to what conclusion the Judge might have come after hearing the witnesses if he had not been guilty of the misdirections and errors referred to by the Federal Supreme Court.

20 11. The Appellant respectfully submits that this appeal should be allowed with costs and the judgment of the trial Judge should be restored or a new trial should be ordered for the following among other

R E A S O N S

1. BECAUSE on the evidence the judgment of the trial Judge was right.
2. BECAUSE if the misdirections and errors of the learned trial Judge were material and substantial a new trial should have been ordered.

DICK TAVERNE.

IN THE PRIVY COUNCIL

No. 38 of 1962

O N A P P E A L
FROM THE FEDERAL SUPREME COURT OF NIGERIA

FAWEZE MOUKARIHM

-v-

ABOLADE OLATUNJI COKER

- and -

JOHNSON AINA and
IBADAN DISTRICT COUNCIL

CASE FOR THE APPELLANT

HATCHETT JONES & CO.,
90, Fenchurch Street,
LONDON, E.C.3.