Privy Council Appeal No. 63 *of* 1932.

Chief Azere of Anyon, since deceased (now represented by Chief Charlie Elegom of Anyon) - - - - - - *Appellant*

v.

Chief Okia of Okolomode - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF NIGERIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH MAY, 1934.

Present at the Hearing:
LORD BLANESBURGH.
LORD WRIGHT.
SIR LANCELOT SANDERSON.
[*Delivered by* LORD BLANESBURGH.]

This is an appeal from a judgment dated the 30th May, 1928, of the Full Court, reversing a judgment dated the 10th January, 1927, of the Eastern Division of the Divisional Court of Nigeria.

The appeal arises out of a suit that has been pending in the Nigerian Courts since the 29th November, 1923. The claim made by the writ, issued out of the Provincial Court, Warri Province, was, in effect, one in ejectment against a defendant in occupation. In the statement of claim delivered in the Supreme Court to which the suit was subsequently transferred the claim appears to be put forward as one in trespass. The suit, however, was apparently treated by both Courts in Nigeria, and as their Lordships think, on facts not really in debate, was rightly treated as one in which it lay upon the plaintiff to prove the title he set up. The importance—it may be the final importance—of this will emerge later.

The land in dispute is a tract of territory in Nigeria, variously described in the record as Ikwa or Edumekwa, Ekwa, and Egago.

It is of an area which in Great Britain might be regarded as extensive: in Nigeria probably as relatively small, if not insignificant. The land appears to be of little value, actual or potential. There are certainly no towns upon it now. Apparently it is cultivated only in patches. For a great part it is overgrown by jungle impenetrable in places. The area is delineated on a map or plan marked B, prepared by the direction of the Trial Judge and thereon surrounded by a red line. It will be convenient to refer to it as the "red surrounded land," when not alluded to as the area in dispute. It is unfortunate that the plan cannot be conveniently embodied in this judgment. The place, in its setting and surroundings—and these are, as will be seen, of great importance to a full appreciation of the position—lends itself to diagrammatic representation which carries a significance liable otherwise to be lost. In one important matter indeed the Full Court has been led to a conclusion which as their Lordships think could not have survived a study of the plan. But of this later.

The red surrounded land lies midway between the appellant's town of Anyon with its territory to the north-west and the respondent's territory or town of Okolomode to the south-east. To tribal rivalry between these two towns may be attributable, as is indeed hinted at by one of the witnesses, the disputes with reference to the area which have spasmodically broken out over a long term of years. It is difficult to account for these otherwise, so relatively valueless is the subject-matter of contention.

Until the present suit all the litigation depended in the native Courts. This suit is the exception, and it is comprehensive in its scope. It is representative on both sides: that is to say, the rival claims made in the names of the plaintiff and defendant, ruling chiefs, are territorial, communal, or tribal in character. They are made irrespective of any estate or interest of any individuals in any part or parts of the area. In this respect the suit differs from three which depended in the native Courts in the year 1908, to which later reference must be made. One suit, however, brought in a native Court in 1915 was, like this, representative in character, and as that suit, with its sequel, in the shape of an official deliverance and report following the judgment, enters frequently into the subsequent history, some reference to it at this stage may not be inconvenient.

The suit—which it is pointed out by the Chief Justice related like this to the same red surrounded land—was instituted by Anyon against Okolomode in the Nembe Native Council or Court, and the judgment therein runs as follows:—

> "Chief having viewed land attached proceeds of their inspection [*sic*] Judgment for defendants with costs. Plaintiff must have no more claim on land and bears costs of this case. A streamlet between Anyon and Okolomode towns henceforth must be boundary between the two towns."

On the face of this judgment there is nothing to show what and where this streamlet was. But its identity must have been understood at the time, if it be now obscure, because in 1920 complaints were made to the District Officer that the people of Okolomode were crossing the boundary fixed by the Native Council, and on the 30th December, 1920, that District Officer, Mr. Wauton by name, made the following indorsement at the end of the judgment :—

> " Both parties appeared before me to-day. Okolomode has been crossing the boundary fixed by the N.C. I have informed them again the boundary will stand as fixed by the Chiefs until such time as the District Officer may change it or not as the case may be. I have made three attempts to reach the place since the water arose. Once the launch broke down and the other two occasions she struck the banks. The boundary is to be the creek running between the two towns, Anyon and Okolomode, unless altered by D.O."

It seems to have been agreed in the Courts below that the " creek " here referred to by Mr. Wauton as the boundary is the Saka Creek, otherwise Obebon River, a very striking feature of Plan B. It seems to have been agreed also that the meaning of the memorandum was that the disputed land west of that boundary was to be regarded as belonging to Anyon. It remains, however, quite uncertain where the streamlet was situate to which the native Court judgment in terms refers. And in that matter Plan B affords no assistance. It could, however, hardly have been the so-called Origabaka stream now claimed by Okolomode and found by the Full Court to be the boundary. For, as will be seen later, that stream, if it be a stream at all, lies within two or three hundred yards of Anyon town itself, and it is difficult to see, if it were the boundary " as fixed by the Chiefs," how the people of Okolomode, with the whole of the disputed area remaining at their disposal, could ever have sought or have had any inducement to cross it.

No executive action such as was foreshadowed by Mr. Wauton was taken until October, 1923, when Mr. Cleverly, Acting District Officer, after visiting the land, made a report which the Chief Justice thus summarises in a judgment in these proceedings of the 6th March, 1926 :—

> " After stating that this dispute between these two towns had given much trouble for years past and had been the subject of numerous cases in the native Courts with varying results, Mr. Cleverly in his memorandum deals with the 1915 judgment in the following terms.
>
> (5) In 1915 the matter came at Nembe Court and a similar series of cases heard. No one apparently visited the land or the matter might easily have been settled for years.
>
> (6) In 1920 Mr. Wauton reviewed the case. Unfortunately he had no knowledge of the site of the dispute and from the consequent ambiguousness of his decision the present dissatisfaction results.
>
> He wrote :—
>
> > ' The boundary as fixed by Nembe Chiefs will stand and is to be the Creek running between the two towns.'

30/12/20.

(7) But Nembe Chiefs had not made this Creek the boundary but a small stream, running in the opposite direction and about a mile inland on the Ayon side of the Saka Creek.

(8) However both parties were apparently satisfied, Ayon looking only to the D.O.'s decision and Okolomode thinking only of Nembe Chiefs' boundary being confirmed.

(9) The conflicting meanings applied, and justifiably so I think, to this ruling by the opposite parties led to endless actions for trespass and as usual, the judgment went first against one then against the other.

(10) When I visited the spot I ascertained the divers constructions placed on this ruling and heard the original claim on its merits.

(11) Okolomode claimed the land because they had at one time sheltered the two survivors of a town called Edumeru which has been exterminated by disease and tribal warfare. This town had admittedly occupied much of the land in question. There to-day are no descendants of these survivors living.

(12) This was the main claim and the Counterclaim. Others of less importance were heard and considered.

(13) After going exhaustively into the question and inspection of all the site, I made the following recommendation.

That the decision of the Nembe Chiefs in Case 90/15 of 23/2/15 be quashed and the ruling of D.O. Wauton that the Saka Creek be the boundary between the two town confirmed.

That Okolomode be permitted to gather the fruits of the plantains in the disputed area where such plantains were planted by them for one year from 1/9/22 and thereafter to vacate the land.'"

Mr. Cleverly's proposals were approved by the Resident, and the parties were so informed. The Full Court commends the propriety of Mr. Cleverly's Report, and regrets that it feels bound to disturb it in favour of a boundary much less satisfactory. And his settlement was for some years accepted. The disputes were not again revived until the present proceedings were instituted, a course of action on the part of Okolomode with which the "hiring" of a lawyer by that town, ingenuously referred to by one of the Okolomode witnesses, Agboze, may not be entirely unconnected.

These proceedings, as it has been seen, were commenced in the Provincial Court. It is unfortunate that they were not permitted to remain there. Had they been so, a trial by a Judge, after inspection of the *locus in quo* and after personally seeing and hearing the witnesses on both sides might have been arranged. And thus this infructuose dispute might expeditiously and economically have been settled for good. But by an order of the 30th June, 1924, the suit was transferred to the Eastern Division of the Supreme Court with all attendant formality and expense, and delay.

In that Court, the answer made by Anyon to the Okolomode case was a direct traverse with further allegations that the red surrounded land had always been in the possession of the people of Anyon who had always farmed thereon and used the ponds thereon for fishing; that they were in actual possession, and that

since 1920 such possession had been undisturbed: that the Obebon River was the natural boundary between Anyon and Okolomode, and that the matter was *res judicata*.

This plea of *res judicata* was based on the 1915 judgment, and the report following it of Mr. Cleverly. The plea was dealt with by the learned Trial Judge as a preliminary defence: and in a judgment of the 12th June, 1925, he held that it was good and dismissed the action.

The respondent, however, appealed to the Full Court, and that Court in a judgment of the 6th March, 1926, delivered by the Chief Justice, and already referred to, allowed the appeal. The Court held that the decision upon which the defendant relied was not the judgment of the native tribunal of 1915, but the report of Mr. Cleverly revising it; that the judgment of the native Court did not support a plea of *res judicata*, and that the order made by the District Officer fixing a boundary favourable to the defendant in the present suit was not an order which he was authorised to make and did not sustain a plea of *res judicata*. The Full Court in effect, not then questioning the regularity of the 1915 judgment, treated the report of Mr. Cleverly, although approved by the Resident, as a nullity. Their Lordships are not now called upon to express any opinion upon the correctness of this view, and they express none. But if and when such a question again arises the exact effect of section 17 of the Native Courts Ordinance, if it still remains (as now) in force, will call for careful consideration.

The learned Chief Justice concluded his judgment on this plea as follows:—

> "It is with great reluctance that I send this case back to the Divisional Court to try issues which can only be tried satisfactorily by a Court which can try the case on the land in dispute. This case should not have been transferred to the Supreme Court, and I would suggest for the consideration of the Judge of the Divisional Court before whom the case comes for trial that he should refer all questions of fact to a Political Officer who can view the land and take the evidence of the persons living on the land."

In deference to that recommendation, the trial Judge, Mr. Justice Webber, by an order of the 25th May, 1926, which recited it, directed that Mr. Henry Maddocks, the District Officer of Brass, should undertake the duty indicated. It is to be regretted that, while Mr. Maddocks was instructed to view the land, he was not directed to report upon the evidence tendered. That evidence he was only to take and record. This he did with skill, but the result must have been as disappointing to the two tribunals already called upon to deal with the depositions as it has been to their Lordships. For they find themselves confronted with a mass of vague and largely contradictory statements set forth, in print, but with no guidance from Mr. Maddocks, who saw the deponents, as to the degree of reliance which, as a result of his observation of their demeanour and intelligence, was, in his

opinion, to be attached to their statements. In other words, Mr. Maddocks's limited powers made his intervention a very poor substitute for a trial before a Provincial Judge on the spot.

Mr. Maddocks's report of his inspection of the land in dispute is, however, open to no such qualifications. From that report, although no reference is made to it by the Full Court, great assistance in arriving at a sound conclusion can, their Lordships think, be derived.

The question upon which the report is most helpful is with reference to the alleged north-western boundary of the red surrounded land—its boundary with Anyon, already referred to. On this Mr. Maddocks's description of the *locus in quo* is a valuable commentary. He says :—

> " 9.20 a.m. Inspected Origabaka on the right of the road. Plaintiffs try to and make out that it is a stream, but it is absolutely stagnant and there is no water flowing away from it, and in my opinion it is purely a swamp and has no pretensions whatever to be called a stream.
>
> " 9.30 a.m. Arrived at Origabaka swamp across the road. There is a very slight flow across the road from left to right, but there does not appear to be any flow away from the right of the road. I am perfectly satisfied, therefore, that Origabaka is a swamp pure and simple, which is dry in the dry season. . . .
>
> " The only crops seen on the land are plantains and bananas. Origabaka is most unsuitable as a land boundary between two towns, and it is difficult to see how there can ever be an end to this dispute if Okolomode people are allowed to farm land within two or three hundred yards of Anyon town."

As to the evidence recorded by Mr. Maddocks, their Lordships have carefully considered it. It is too contradictory vague and uncertain to permit of detailed analysis. It is only possible to record general impressions of its effect. The first of these is alluded to by the Full Court. The Okolomode claim is based upon that town having sheltered the Edumera refugees, as stated in paragraph 11 of Mr. Cleverly's report, and their Lordships note, as did the Full Court, that this history has never at any time been directly challenged by Anyon. But it must also be said that, while the event is referred to by different witnesses from Okolomode, these are at hopeless variance as to the time of its happening, some of them placing it generations back ; others, quite young, claiming, apparently, personal acquaintance with actual refugees. Further, while Mr. Cleverly reported that there were then no descendants of the two refugees living, it was the confident assertion of Mr. Macaulay, appearing before Mr. Maddocks for Okolomode, that three of his witnesses were such descendants, the original refugees being no longer two, but four in number. In other words, the general impression produced by the Okolomode evidence on this subject is, that if proof of this migration to their territory is essential to their case, the proof adduced is deficient. And this impression is strengthened by the fact that, although Okolomode was represented by counsel who cross-examined Anyon witnesses supporting an entirely

inconsistent case, no question as to the migration or the reason for it was ever put to them. It would at least have been interesting to know if they had ever heard of it.

But more definite is the impression that even if the story of the migration be accepted, Okolomode failed to prove that it took to the land vacated by Edumeru—the red-surrounded land—or indeed laid any claim to it until after Anyon had long possessed it. Further, on the question of its north-west boundary, the evidence is sketchy in the extreme.

And the third impression is that not only is the Anyon plea of long possession supported by evidence apparently more direct and consistent than any evidence adduced by Okolomode, but the Anyon witnesses seem to establish two definite facts. The first, that a public road across the red-surrounded land was constructed by the Anyon people, who have since been maintaining it. In cross-examination it was stated that this road had been made as many as twenty-five years before the establishment of the Court. And the second fact was that Anyon has a number of jujus on the land far in excess of any claimed by Okolomode.

The result of the evidence, such as it is on record, in their Lordships' opinion, in short, is that the burden of proof being upon Okolomode, it was insufficient to establish title to the land or any part of it.

And this was the view of the learned Trial Judge. He had perused the evidence, he said, and he was unable to find for the plaintiff. It was for him to satisfy the Court by evidence that he was entitled to a declaration of title to the land shown on the plan, and he had not done so. The evidence pointed strongly to the natural division of the two lands as shown upon the plan, and the evidence tended to negative the existence of a stream at Origabaka. He dismissed the action.

Upon that, Okolomode appealed to the Full Court, which approached the problem from a new angle. Its judgment, delivered by Petrides, J., and concurred in by his learned colleagues, commences with a reference to the three suits of 1908 in the native Courts already referred to. It goes on to deal with the Nembe suit of 1915: it now holds, as their Lordships think rightly, that the Nembe Council had no jurisdiction whatever to entertain that suit and that its judgment cannot for any purpose be relied on. But with reference to the other three suits, it holds that the same objection does not apply, and it extracts from the judgments in two of them statements going to show that in these cases the native Court treated the now so-called Origabaka stream as the north-western boundary of the land in dispute; while it discounts a statement in the third of the suits that that boundary was a "creek," the expression applied by Mr. Wauton, for instance, to the Saka or Obebon river.

It is not quite clear to what extent Petrides, J. permitted himself to be influenced in his final conclusion in favour of the

respondent by the two first findings of the native Courts thus interpreted. Their Lordships, however, think it necessary to say that these findings should not, in this suit, have been allowed to have any influence whatever on the result. It is not suggested that these suits were, or that either of them was representative in the sense in which this suit is representative. The suits were all three apparently suits in which claims to particular parcels of property undefined in situation or area, were made by individual plaintiffs claiming the property against defendants disputing their title. In no sense were the parties to them representative in interest of the parties to the present suit. It is clear, therefore, that nothing found in any one of them can be imported into this record to supplement or contradict the evidence tendered now.

To return to the judgment. After referring to Anyon's present claim as one to the effect that Mr. Cleverly's report states the true position, the learned judge proceeds to inquire whether at any time before Mr. Wauton's endorsement in 1920, Anyon had ever suggested that the Saka River was the boundary between that town and Okolomode. For this purpose he examines the evidence tendered on behalf of Anyon in the 1915 suit, and reaches the conclusion that the " streamlet " referred to in the judgment was, in fact, a streamlet then being set up by Anyon itself as its boundary, and he goes on to say that such streamlet is apparently " in much the same position as the alleged Origabada stream which [Okolomode here] claims to be his boundary with Anyon."

Before proceeding to indicate what is involved in this finding, their Lordships think it convenient to observe that the Full Court confining itself as it did, almost exclusively as will be seen, to a consideration of the boundaries of the disputed area, missed the substantial issue between the parties, which was whether Okolomode had affirmatively established a title to any part of the area. On this issue the actual boundaries of the disputed territory are of relatively small importance. Except in the case of the boundary to the north-west, they are not in contest, and it is into the case of Okolomode only that proof of that boundary enters. As has been seen the existence, at some time, of the red-surrounded land as a separately owned territory is essential to the Okolomode case. It is on that foundation that its whole claim to the red-surrounded land is built. According to Anyon, on the other hand, the area is merely part of its own territory—land of which it has always been in possession. As to its boundary, that to the east, where it abuts on Okolomode, has so far as their Lordships can see, never been in question. It is the case of both disputants that it is the Saka or Obedon river. Anyon does not suggest that the disputed area extends further. But the Anyon claim always extended up to it. Had it not, there could not with reference to the whole red-surrounded area have been any

dispute with Okolomode either in 1915 or now. The inquiry made by the Full Court as to the time when Anyon first made its claim up to this eastern boundary seems to indicate a failure to appreciate the fact that the claim must at least have been as old as the dispute.

Again, as to the boundary on the north-west, Plan B shows very clearly that the boundary in that direction, wherever it may be, is by Okolomode recognised as a boundary between the disputed land and Anyon land beyond it. In the 1915 litigation, as in this, it is to the Okolomode case only that proof or even the existence of such a boundary is necessary. What then does the finding of the Full Court just stated import? Not that this boundary was in 1915 proved by Okolomode but that in the suit of that year—in a dispute like this about the same area—Anyon not Okolomode putting forward the Origabada stream as the boundary to the north-west, beyond which it did not claim to transgress, thereby itself set up a boundary which necessarily disposed of its claim to any part of the area in active dispute. For, whatever else be said of the Origabada stream, this at least is true that if it exists at all, it is either upon or outside and is not within the red line on Plan B.

It is this finding of the Full Court to which their Lordships have already referred as one which could not survive a study of Plan B. And it is a finding for which so far no support is to be found. All that seems certain is that the boundary in that litigation deposed to by the Anyon witnesses, whatever it may have been was not the Origabada stream: and whether or not the "streamlet" in the judgment in the 1915 suit was that stream is now immaterial. For the Nembe Court had, as has been seen, no jurisdiction to adjudicate upon that question.

But it remains to consider how far as otherwise justified the decision of the Full Court can be supported.

Its further justification is stated in the concluding paragraph of the judgment:—

> "I am further satisfied, after careful examination of all the evidence given before Mr. Maddocks and considering it in connection with the contentions of both parties in the 1908 Abua Court proceedings and at the 1915 Nembe Court trial that the plaintiff has, besides showing that portions of the land in question have been adjudicated to the people of Okolomode by the Abua Court in 1908 established by evidence that the boundary between the lands of the plaintiff and the lands of the defendant is the Origabada stream or swamp and not the Saka river and that they are entitled to a declaration that they are the owners of the land."

Their Lordships need not repeat their reasons for disagreement with this final conclusion. They have already stated in detail the impressions produced on the mind of the Board by the evidence referred to, and their grounds for thinking it insufficient to establish the respondent's case; while on the question of boundary they are struck by the omission to make any reference whatever to Mr. Maddocks's report thereon already quoted.

In their Lordships' judgment the respondent's case fails.

Their Lordships regret that they have been compelled to dispose of this appeal without assistance from the respondent, who did not appear to support the judgment of the Full Court. Their Lordships would however express their indebtedness to Mr. Casswell, the appellant's learned counsel, for the care with which he placed before the Board what he understood to be the respondent's position.

In the result their Lordships will humbly advise His Majesty that the appeal should be allowed the judgment of the Full Court discharged, and the judgment of the 10th January, 1927, of the Divisional Court Eastern Division restored.

As to costs the appellant was by the judgment of the Full Court ordered to pay to the respondent in respect of his costs of the appeal to that Court the sum of £63. It will be right that the respondent should now be ordered to pay to the appellant a like sum of £63 in respect of his costs of that appeal. There will be no order as to the costs of either party of this appeal.

In the Privy Council.

CHIEF AZERE OF ANYON, since deceased (now represented by CHIEF CHARLIE ELEGOM OF ANYON).

v.

CHIEF OKIA OF OKOLOMODE.

DELIVERED BY LORD BLANESBURGH.

Printed by
Harrison & Sons, Ltd. St., Martin's Lane, W.C. 2.

1934.