

Adebite, The Owa-Ale of Ikare - - - - - *Appellant*

v.

Alasan Babatunde, The Olukare Odo - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 14TH JULY, 1953

Present at the Hearing:

LORD PORTER

LORD TUCKER

LORD ASQUITH OF BISHOPSTONE

THE CHIEF JUSTICE OF CANADA

(MR. T. RINFRET)

MR. L. M. D. DE SILVA

[*Delivered by* LORD TUCKER]

This is an appeal from a judgment of the West African Court of Appeal dated 12th May, 1950, allowing the appeal of one Adu Jibrilu, the Okare of Ode, against the judgment of Acting-Judge Pollard in the Supreme Court of Nigeria dated 14th October, 1949, in favour of the appellant. The nature of the action and judgment will be more specifically referred to hereafter. Adu Jibrilu has died since judgment and by Order in Council of 11th February, 1953, the present respondent was substituted in his place. For convenience Adu Jibrilu is referred to hereafter as the respondent.

By his Particulars of Claim, which were embodied in the Civil Summons, the appellant claimed a declaration that as the Owa-Ale of Ikare, he is by Native Customary Law the Natural Oba and Ruler of the whole Ikare and as such the only person entitled to wear a crown and not the respondent who is a subordinate Chief under the appellant. He alleged that the respondent had wrongfully arrogated to himself the right of wearing a crown and had been wrongly ruling the Ikare people and enjoying the privileges thereto attached. He claimed an injunction restraining the respondent from wearing a crown and performing the functions of Oba and Ruler and enjoying the privileges thereto attached, for by Native Law and Custom no Olukare of Odo can ever wear a crown or rule as Oba in Ikare.

The nature of the claim was elaborated in the appellant's Statement of Claim dated 27th August, 1948, in which he alleged that his ancestors beginning with Agba-Ode had from time immemorial reigned over the whole Ikare. That he became Owa-Ale of Ikare on the death of his father Ajiboye in 1920. That when Ikare became thickly populated the Owa-Ale created one Rotowa the first Oluika Odo, Odo being a small

quarter in Ikare. That Ajagunna the eighth Oluka-Odo was the respondent's grandfather and Momo was his father and that none of the respondent's ancestors ever wore a crown. That in 1886 Owa-Ale Ajiboye, the appellant's father, being too advanced in age to attend public functions, deputed Jagunna, the respondent's grandfather, to treat with the Europeans. He alleged that as a result the respondent's grandfather started to arrogate to himself the title of Olukare instead of Oluka-Odo which had been the title of his ancestors. That from time immemorial Oluka-Odo now known as Olukare had been a subordinate Chief under the Owa-Ale of Ikare. That on Momo's death in 1927 the Respondent became Oluka-Odo and was and still is a subordinate Chief under the appellant the Owa-Ale. Paragraphs 13 and 17 of the Statement of Claim are as follows:—

13. "Upon the 25th day of September, 1947, defendant for the first time arrogated to himself the right of wearing crown and has been wrongfully ruling the Ikare people (and this with the assistance of the District Officer who even went so far as to seize the plaintiff's crown and bugle on the pretext of inspecting it on 17th March, 1947) and enjoying the privileges and emoluments thereto attached."

17. "Plaintiff, by the assumption by the defendant of office of the ruler of Ikare and the arrogation of right of wearing crown and the seizure of his crown and bugle, has suffered great damages and has been wrongfully deprived of and ousted from his office as the Owa-Ale and ruler of the whole Ikare and consequently the privileges and emoluments thereto attached."

The respondent, who has been represented throughout by Crown Counsel, delivered a defence dated 27th August, 1949, wherein he denied the allegations of the appellant and alleged that his predecessors were the natural rulers of Iware and wore crowns from time immemorial. He further alleged that he was appointed Olukare at a public election by the majority votes of the kingmakers and people of Ikare in accordance with native law and custom and that the appellant voted for him at the election. He denied that the appellant's ancestors ever received emoluments as they were only quarter Chiefs.

Paragraphs 11 and 12 of the Defence are as follows:—

11. "The defendant avers that he is a Chief within the meaning of the Appointment and Deposition of Chiefs Ordinance (No. 14 of 1930): also that his appointment as the Olukare of Ikare was approved in 1928 by the Lieutenant-Governor, Southern Provinces, and that he is a member of the Olukare and Ikare Group Council which is a native authority subordinate to the Akoko Federal Native Authority."

12. "The defendant will contend at the trial that this Honourable Court has no jurisdiction to try this action."

By his Rejoinder of 12th September, 1949, the appellant averred that he as the respondent's Head-Chief had merely approved of the respondent's election as Oluka Odo after the people had submitted him to the appellant and that the respondent was one of several Olukas of different quarters of Ikare but was the only one who had altered his title of Oluka Odo to Olukare to make it appear that Olukare means Oba of Ikare.

On these pleadings the trial began and the question of jurisdiction was raised as a preliminary issue the onus of which lay on the respondent. On this issue he called only one witness, viz., the Assistant District Officer of Owo Division to prove the Lieutenant-Governor's approval of the respondent's appointment as Olukare as published in the Nigeria Gazette No. 38 dated 15th July, 1948. The respondent relied on Section 2 of the Appointment and Deposition of Chiefs Ordinance, 1930, which is as follows:—

2.—(1) "Upon the death, resignation or deposition of any Chief or of any head Chief the Governor may approve as the successor of such Chief or head Chief, as the case may be, any person appointed in that behalf by those entitled by native law and custom so to appoint in accordance with native law and custom and, if no appointment is made before the expiration of such interval as is usual under

native law and custom, the Governor may himself appoint such person as he may deem fit and proper to carry out such duties incidental to the Chieftaincy as it may be necessary to perform.

(2) "In the case of any dispute the Governor, after due enquiry and consultation with the persons concerned in the selection, shall be the sole judge as to whether any appointment of a Chief has been made in accordance with native law and custom."

In the course of legal argument Counsel for the appellant admitted that the respondent holds the title of Olukare and that the Lieut.-Governor approved his appointment as also did the appellant himself, but he stated that his case was that the position of Olukare is that of a subordinate Chief of one of the quarters of Ikare.

It may be observed at this stage that no question was raised on the pleadings or in argument to the effect that the Court had no jurisdiction to entertain the suit on the ground that it was a mere claim to an empty dignity not cognisable by the Courts. The sole issue was whether the action involved a dispute as to the appointment of a Chief in accordance with native law and custom as to which the Governor is the sole judge. In the course of legal argument Counsel for the respondent stated that the writ raised the question as to which of the parties is by Native Customary Law the natural Oba and Ruler of the whole of Ikare and as such entitled to wear a crown, which he contended was an issue as to Chieftaincy. He contended that the title of Olukare had been known from time immemorial and had always meant the Head Chief or Ruler of Ikare.

Their Lordships are of opinion that the respondent's Counsel correctly stated the issues involved but that this was a case where the question of jurisdiction could not be properly decided without ascertaining the facts and that it was unfortunate that the course was adopted of attempting to decide this issue on pleadings alone except for formal evidence of the respondent's appointment. It was essential to ascertain what by native law and custom is the status of Olukare. Is he a subordinate Chief of a quarter of Ikare or is he the head Chief of the whole of Ikare? If he is a subordinate Chief, his appointment not being in dispute, it would appear that, subject to the question whether the claim is only one to a title or empty dignity, Section 2 of the Ordinance of 1930, as amended in 1945, would not preclude the Court from entertaining the appellant's claim. On the other hand if the position of Olukare by native law and custom constitutes the holder the ruler of the whole of Ikare it might be necessary for the Court to give consideration to the question whether in the light of the pleadings and the evidence adduced at the trial the appellant's claim was or was not in substance a challenge to the appointment of the respondent. Their Lordships do not feel able on the material before them to express any final opinion on these matters and consider that the trial Judge was equally at a disadvantage in the absence of evidence. It is true that this resulted from the parties electing to call no evidence, with the exception already stated, on this preliminary issue, and that the respondent having accepted the onus was primarily responsible, none the less since no omission or no acquiescence on the part of Counsel can confer jurisdiction which is expressly taken away by Statute their Lordships do not consider it would be satisfactory—to this issue having been clearly raised on the pleadings—to pronounce a final judgment thereon on the material before the trial Judge when he gave his judgment on the preliminary issue of jurisdiction.

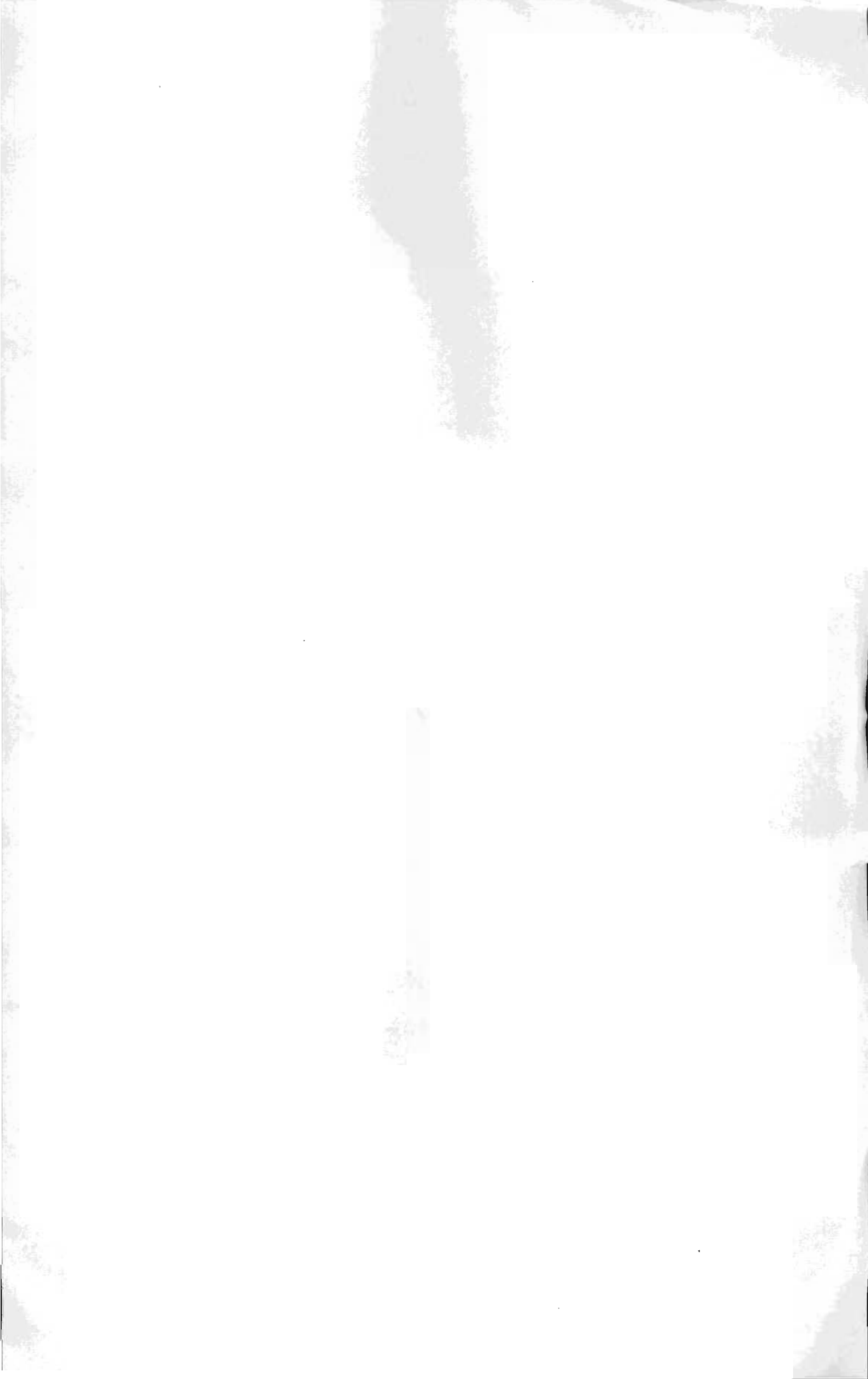
The learned Acting-Judge decided in favour of the appellant that he had jurisdiction and adjourned the further trial of the action. At this stage Counsel for the respondent withdrew from the case and took no further part in the trial. This was a second unfortunate feature of the case since his participation in the hearing could not have prejudiced his position with regard to jurisdiction. The result was that the trial Judge proceeded to hear and read evidence adduced on behalf of the appellant only and without any assistance from Crown Counsel on behalf of the

respondent. Some of the evidence dealt with matters which would have been relevant to the issue involved in the preliminary hearing. No question was raised by the Judge as to the claim relating only to an empty dignity. Accordingly the precise nature of the claim to be "a ruler" as distinct from the mere claim to wear a crown was not investigated nor was any detailed evidence given as to the privileges and emoluments alleged to be attached to the position of Owa-Ale.

The respondent appealed to the West African Court of Appeal who held (1) that Section 2 of the Ordinance of 1930 applied to the claim and ousted the jurisdiction of the Court and (2) that in any event even if this were not the case the claim was one relating to a mere empty dignity which, in accordance with the decision of the Full Court in *Adanji v. Hunvoo* 1 N.L.R. 74, following the English law as stated in *Cowley v. Cowley* (1901) A.C. 450, was not cognisable by the Courts.

Their Lordships are of opinion that the important issues involved in this case both as to jurisdiction and as to the true nature of the appellant's claim, viz., whether it amounted to no more than a claim to an empty dignity, cannot be properly decided on the present material having regard to the course of the proceedings below and that there ought to be a new trial at which all the evidence on all issues, including jurisdiction, is heard before any judgment is given.

Their Lordships will accordingly humbly advise Her Majesty that the appeal be allowed to the extent that the judgment of the West African Court of Appeal be set aside and that the judgment of the Supreme Court be also set aside and the action remitted to the Supreme Court for a new trial and that the parties be at liberty to apply to amend their pleadings if so advised. The present respondent must pay two-thirds of the appellant's costs of this appeal. The costs of the proceedings in the Supreme Court and the West African Court of Appeal will abide the result of the new trial.



In the Privy Council

ADEGBITE, THE OWA-ALE OF IKARE

v.

ALASAN BABATUNDE, THE OLUKARE ODO

DELIVERED BY LORD TUCKER

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