

Chief J. M. Kodilinye and another - - - - - *Appellants*

v.

Philip Akunne Anatogu and another - - - - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY, 1955

Present at the Hearing:

VISCOUNT SIMONDS
LORD OAKSEY
LORD TUCKER
LORD SOMERVELL OF HARROW
MR. L. M. D. DE SILVA

[Delivered by LORD TUCKER]

This appeal from the West African Court of Appeal concerns a dispute between two tribes (or perhaps it is more accurate to describe them as two families) as to the title to part of an area of land called Ugborimili which is bounded in the west by the river Niger and lies between the Ndende stream in the north and the river Idemili in the south. These two tribes or families are hereinafter referred to as the Onitshas and the Obosis. The Onitshas (the respondents to the present Appeal) were the plaintiffs in a representative action brought by them against the Obosis (the present appellants) claiming a declaration of title to the disputed land and an injunction. They were successful at the trial before Manson, J., whose judgment was upheld on appeal.

The dispute arose in the following circumstances. In 1882 certain land (including that now in dispute) was granted by one Orikagbue to the National African Company Ltd. The grant was evidenced by the production of a certificate dated 8th October, 1884 confirming the grant of 1882. This document was Ex 53 in the case. The National African Company Ltd. was subsequently merged in the Royal Niger Company who succeeded to their title in the land. On 26th October, 1896 a further grant of a portion of the land included in the 1882 grant was made by Orikagbue and 4 others to the Niger Co. This was Ex 54. These grants expressly reserved certain farming, fishing and occupancy rights to which it will be necessary to make more detailed reference hereafter. In 1916 the Niger Lands Transfer Ordinance (Cap 86) was passed vesting in the Governor and his successors in office in trust for His Majesty as from 1st January, 1900 the lands belonging to the Niger Company specified in the first schedule thereto. Certain portions of such lands were, however, reserved to the Niger Company and are referred to in the fourth schedule. Included in the list of agreements in the first schedule are instruments No. 72 and No. 40 which are Exs 53 and 54 referred to above. The date 1894 in instrument 72 is a mistake for 1884.

Between 1882 and 1945 it appears that a number of persons entered on the land in dispute and built houses thereon. This had given rise to numerous legal proceedings as to their rights or as to the payment of rent or tribute. The Onitshas, through their legal advisers, protested to the Government with regard to their failure to prevent such encroachments since the land had become vested in them in 1916. In 1945 by Ord. No. 22/1945 the 1916 Ord. (Cap. 86) was amended. Section 4 empowered the Governor by Order to abandon all the right title or interest vested in him by the 1916 ordinance in the whole or any part of the lands called the "Vested trust lands." Under this authority the Governor made an order (No. 29/1948) dated 11th December, 1948 abandoning as from 1st January, 1949 all the right title or interest in a part of the vested trust lands specified in instruments 72 and 40. The portion abandoned is the area south of the green line running east and west on Ex 10 which is the plan put in evidence and showing the area now in dispute. Section 14 of Cap 86 (as amended by Ordinance Nos. 22 and 61/1945) provides as follows with regard to the effect of such divesting order:—

"Where the Governor abandons all the right, title or interest in him by virtue of this ordinance in any vested trust lands or part thereof in accordance with the provisions of this ordinance then such abandonment shall have effect as if such vested trust lands or part thereof had never been included in the instrument agreement or document, as the case may be, by which the same were originally transferred to the Company."

A perusal of the pleadings, evidence, arguments of counsel and judgments in this case make it abundantly clear that the only issue before the Court was who were the lawful owners to whom the title in the lands in dispute reverted on the abandonment by the Crown on 1st January, 1949.

The Onitshas based their Claim on traditional evidence as to the migration of their tribe from Benin and their conquest of the Ozeh people who were driven out by them. They said that having thus acquired the land Orikgbue on their behalf transferred it to the National Africa Company and the Niger Company by the instruments Exs 53 and 54 and that the ownership of the land reverted to them on 1st January, 1949.

It is interesting, having regard to the appellants' case as presented to the Board, to see what has been their attitude to this document Ex 53 at various stages of the proceedings. By their defence and at the trial they denied that Orikgbue was an ancestor of the respondents. They said he was an Obosi man residing at Onitsha where he was practising as a native doctor and that he contracted for himself and the Obosi people. This issue having been decided against them by the trial Judge who accepted the evidence *inter alios* of Orikgbue's own son that his father had no connection with the Obosis and that he and the four other signatories to Ex 54 were all members of the Ogbo family (i.e. Onitshas), the appellants subsequently contended that Ex 53 was inadmissible and should never have been received in evidence. This was Reason No. 2 in their Case. On the hearing of this appeal this contention was abandoned but at one stage it was suggested that Ex 53 had been annulled by the later agreement Ex 54. Ultimately it formed the basis of their submission that it was a vital piece of evidence recognising their usufructuary title to the land with regard to which the trial Judge had so misdirected himself as to require that the case should be sent back for a new trial.

The trial occupied 11 days and 36 witnesses were called. The Judge (Manson, J.) in a careful and lucid judgment decided the issue of fact as to who were the lawful owners of the land in dispute in favour of the respondents (the Onitshas) and granted them the declaration asked for viz. "a declaration of title to all that piece or parcel of land known as Ugbozimili situate at Onitsha in the Onitsha Division". No formal order appears to have been drawn up. This, it seems, is not necessary under the rules of the Supreme Court of Nigeria unless specifically applied for.

the minute of the judgment taking the place of the formal order or decree. The area to which this declaration relates is the area shown on Ex 10 below the green line.

On appeal to the West African Court of Appeal the judgment of the trial Judge was upheld, the Court merely stating that the evidence fully supported his findings.

On this issue there are accordingly concurrent findings of fact as to which it is conceded there are no grounds which would warrant their review by the Board.

The trial Judge, however, not only made the declaration already referred to but granted an injunction. He said:—"I also grant the injunction sought." The injunction sought was as follows:—

"An injunction to restrain the defendants and their people of Obosi from interfering with or disturbing the plaintiffs' ownership and possession of the said land."

The learned Judge went on to say:—

"The defendants must in no way interfere with the beneficial enjoyment by the plaintiffs of the above area. The defendants are occupying many houses and other buildings on the land. The plaintiffs do not ask for an order of ejection of defendants. If they want an order they must apply for it. In the meanwhile the defendants are liable to pay to the plaintiffs rent for the use and occupation of the plaintiffs' land. If plaintiffs demand rent, the defendants must pay it unless they remove their buildings and vacate the plots."

Here again no formal order seems to have been drawn up, but the language used by the Judge coupled with the reference to "possession" in the injunction asked for might well be interpreted as going far beyond the only issue in the action, viz. the ownership or radical title to the land.

Unfortunately the Judge was not asked to modify the form of order or to clarify the position. Nor was this matter ever raised in the Court of Appeal.

None the less their Lordships having had their attention drawn to this point feel compelled to make some observations with regard thereto.

The only issue having been as to ownership nothing could or should have been decided which would in any way affect the usufructuary rights, if any, of individuals or of families or tribes to the land in dispute or any portions thereof, or as to whether any such rights are or are not conditional upon payment of rent or tribute. All such matters can only be decided in proceedings in which such issues are properly raised.

The appellants relied on Ex 53 which states "He (i.e. Orikagbue) asked that the Abutshi (i.e. Obosi) people might be allowed to use the land for raising yams, corn, etc., and to fish from those parts of the bank which were not in the occupation of the Company, . . . he also asked that if any of his sons or daughters wished for a portion of the land for farming purposes that they should be allowed and that these requests were acceded to." They contended that this was evidence of recognition of a previous grant to the Obosi people under which they would at any rate be entitled to occupy the land in dispute even if the ownership reverted to the Onitshas. They further relied on several passages in the evidence of the plaintiff's witnesses and in their pleadings to the like effect.

Their Lordships express no view on these matters, which may require consideration in the light of further evidence directed to these issues and to questions of native law and customs if and when they arise in proceedings in which they call for decision. They do, however, consider that it is right that they should express their view as to the proper construction of Section 14 of the Niger Lands Transfer Ordinance as amended (which

now appears as Section 15 of Cap. 149 of Laws of Nigeria, 1948 Edition) which has been set out above. In their opinion this section only deals with the title to ownership of the land and is not to be construed as compelling the Court to disregard all events which have happened in the period between 1882 and 1949 in so far as they may affect any rights of use and occupation in respect of such land as may have been acquired or have accrued by acquiescence or otherwise during those years.

No case has been made out for a new trial but their Lordships consider that the form of the injunction and the language used by the learned Judge in connection therewith require that the order for the injunction should be varied so as to follow the declaration by omitting the words "and possession" in the injunction sought and granted by the Judge.

Their Lordships would stress the desirability—whatever the rules may permit—of a successful party obtaining a formal order embodying the precise language of the relief granted to them by the Judge in cases in which a declaration of title and/or an injunction has been granted.

For these reasons their Lordships will humbly advise Her Majesty that the order for an injunction granted by the Judge, be varied by omitting the words "and possession," but save as aforesaid the judgment do stand.

The appellants must bear their own costs of this appeal and pay to the respondents one half of their costs.

In the Privy Council

CHIEF J. M. KODILINYE
AND ANOTHER

v.

PHILIP AKUNNE ANATOGU
AND ANOTHER

[DELIVERED BY LORD TUCKER]