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IN THE PRIVY COUNCIL

No. 4 of 1958

ON APPEAL FROM
THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N :

- 1. IDOKO NWABISI, substituted for Chinweze Chidebe, and
 - 2. IFEACHO IGWEZE, substituted for Igweze Odili
- on behalf of themselves and the UMULERI people
- (Plaintiffs) Appellants

- and -

- 1. R.A. IDIGO and
 - 2. SONDI IFILI
- on behalf of themselves and the AGULERI people.
- (Defendants) Respondents

RECORD OF PROCEEDINGS

CASE FOR THE APPELLANTS

1. This is an appeal from the Judgments and Order of the Federal Supreme Court of Nigeria dated the 23rd February, 1957, dismissing the Appellants pp.96-105 appeal from a Judgment of Hurley J. in the Supreme Court of Nigeria (Onitsha Judicial Division) dated the 7th January, 1955, dismissing the Appellants pp.64-84 claim for a Declaration of Title to a piece or parcel of land known as Otu-Ocha situate at Umuleri in Onitsha Division.

The Appellants (hereinafter referred to as "the Plaintiffs") brought this action for themselves and on behalf of their people of Umuleri against the Respondents (hereinafter referred to as "the Defendants") as representing the people of Aguleri.

2. On the 25th June, 1898, The Royal Niger Company entered into a written agreement (Ex.C(P)) with the Plaintiffs' predecessors whereby they purchased for good consideration "all the private rights of every kind not already possessed by the Company the land between the boundary of Agouleri known as Apuwonfia to the Eastward to the limit of Akkor to the Westward on the left bank of the Anambra Creek and extending back from the river to a distance of One thousand yards inland."

Ex.C(P),p.117

3. By an Agreement dated the 29th February, 1904, (Ex. U(D)) Nwanne, King of Aguleri, for and on behalf of the Chiefs and people of Aguleri, purported to grant to the very Reverend Leo Lejeune, Prefect Apostolic in Southern Nigeria for the congregation of the Holy Ghost and of the Immaculate Heart of Mary, a piece or parcel of land expressed to be situate at Aguleri for the purposes of a Mission Station. It is not in dispute that the site of this grant is within Otu-Ocha.

Ex.U(D),p.120

4. By Section 2 of the Niger Lands Transfer Ordinance, which came into force on the 25th February, 1916, the land transferred by the Plaintiffs to The Royal Niger Company was vested in the Governor of Nigeria as from the 1st January, 1900.

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5. In or about the year 1920, the Plaintiffs brought an action against the Defendants in the Native Court claiming Otu-Ocha. No written record of this action was produced in the present proceedings. p.97,1.32

6. By a Deed of Lease dated the 30th June, 1924, (Ex. G(P)) the Defendants or their predecessors purported to demise to The Niger Company Limited for a term of 30 years a piece or parcel of land described as being "situate at Otoisha (Aguleri Waterside) in the Onitsha Province containing an area of 1.414 acres." Ex.G(P) pp. 125-128

7. By a Deed of Lease dated the 20th March, 1932, (Ex. H(P)), the first Defendant on behalf of the people of Aguleri quarter purported to demise to Messrs. John Holt and Company (Liverpool) Limited for a term of 20 years the piece or parcel of land described as being "situate at Aguleri Waterside in the Onitsha Province containing an area of 2548.58 square yards." Ex.H(P) pp. 131-134

8. On the 2nd March, 1933, the Plaintiffs instituted proceedings against the Defendants in the Provincial Court of the Province of Onitsha claiming a Declaration of Title to "all that piece or parcel of land known as Otu-Ocha Umuleri commencing from the Stream known as Ako to an Ant-Hill known as Nkpunwofia situate in the Onitsha Division" A witness for the Plaintiffs, Masie Ifejuka, was cross examined regarding an alleged grant by the Defendants' predecessors of a beach p.140 p.141, 11.3-6 p.145 1.31

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to the Roman Catholic Mission. He replied:
"The Mission (R.C.) went to you for a beach.
We objected-told the Mission. It disregarded
us".

p.151
ll.20, 21 The first Defendant deposed (inter alia) that the
Mission store had been burned in 1897.

pp.156-159 By his Judgment, dated 10th April, 1933, the
p.158, ll.8-10 District Officer held that the rights of the Crown
p.159, ll.1-2 did not affect the Plaintiffs claim and that they
were entitled to the Declaration prayed for. This

pp.162-165 Judgment was set aside on 13th February, 1934, by
Graham Paul J. on the ground that the Plaintiffs
had no right or title to the land after the 1898
Agreement. In the course of his Judgment he said

p.163, ll.7-10 "It should also be noted that both parties
admit that the land in question in this Suit
is precisely the same land as that covered
by the Royal Niger Company Agreement."

Ex.R(D),
pp.124-125 9. In the course of the present proceedings the
Defendants put in evidence a document (ex. R(D))
purporting to be a copy of an "Affidavit of Chiefs
of the Agoleri Native Court" stating that Chief
Idigo and the Elders of the Eziagulu Quarter of
Agoleri were the rightful owners of a piece of
land 300 feet by 200 feet (approximate) situate at
the Agoleri Waterside forming part of the land
known as Otoicha and for which the Niger Company
was then negotiating. This bore the marks of six
persons, namely, Nneli, Chimoba, Moba, Okoye,
Onowu and Paul Chibogu. The marks were witnessed

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by P.J. Gardner, District Officer, Onitsha Division. The document put in evidence appeared to be certified a true copy by M.N. Ekwerekwu, District Clerk, District Office, Onitsha. Although this document was not tendered in evidence in the 1933 proceedings a witness for the Plaintiff stated, in cross examination, that he remembered the D.O. Gardiner. asking questions about the ownership of the Otu Ocha land. p.149, ll.10-12

10. On the 17th December, 1935, the Plaintiffs instituted proceedings in the High Court of Onitsha against the Defendants claiming a Declaration of Title to "all that piece and parcel of land known as Aguakor situate at Umuleri Onitsha Province bounded as follows:- On the side towards the Anambra Creek by Otu-Ocha Umuleri, granted by the Umutchezi Umuleri to the Royal Niger Company. On the side towards Umuleri town by Ugume and Ngbago village of Umuleri. On the Aguleri side by Inyi tree, Ngu Ebenebe tree, Aro juju and Ekpe Agadinwanyi; and on the side towards Nneyi Umuleri by Akor Stream." p.173, ll.22-31

This land included the land now in dispute.

In those proceedings Okoye, whose mark purported to appear on the aforesaid Affidavit (Ex. R(D), p.124) was called as a witness for the Plaintiffs. This document was not put to him in cross examination nor was it produced in those proceedings. In cross examination the first defendant admitted that when the Roman Catholic pp.182-185 (Ex.R(D), p.124) p.209, ll.16-17

Mission wanted a beach site the Umutchezi (i.e. Umuleri) burned down the store.

pp.222-226 By his Judgment, dated the 18th March, 1936, Assistant Judge Waddington held that upon the evidence it was impossible to draw any definite conclusion. He therefore entered a Non-Suit. In the course of his Judgment he said:

p.224,l.37
to p.225,l.4.

"The ownership of the creek-strip is not in issue in these proceedings, but considerable prominence has been given to that question and evidence of acts of ownership has been brought, in order to establish the Plaintiffs' proposition stated above, that if the creek-strip is theirs, so must this land which connects it with their village be theirs also. I express no opinion on the ownership of the creek, but even if it were admitted that it belongs or formerly belonged to the Plaintiffs, it would, I think be going too far to infer from that fact ownership of some tract of hinterland adjacent to it, without clearer evidence than is before me relating to the hinterland itself."

11. By Order No. 38 of 1950 made under Section 10 of the Niger Lands Transfer Ordinance the Crown abandoned all right, title and interest in the land in dispute except for a small area edged yellow on the plan, Exhibit 'P'. Section 14 of the Ordinance provides that "such abandonment shall have effect as if such vested trust lands or part thereof had never been included in the instrument,

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agreement or document, as the case may be, by which the same were originally transferred to the Company".

12. By a Summons in the Native Court or Judicial Council of Umuigwedo, dated 6th November, 1950, the Plaintiffs instituted

THE PRESENT SUIT

claiming a Declaration of Title to the land known as Otu-Ocha. By an Order of the District Officer the suit was transferred to the Supreme Court, Onitsha. By their Statement of Claim dated 14th July, 1951, the Plaintiffs pleaded that the land known as Otu-Ocha was and always had been the property of the people of Umuchezi Ikenga Umuleri who had made the fullest use of it from time immemorial.

By their Statement of Defence dated 4th October, 1951, the Defendants pleaded that the land in dispute, known as "Otu-Ocha Aguleri", was and had from time immemorial been the bonâ fide property of the Defendants, and that many years ago some members of the Plaintiffs' family came to the Defendants' ancestors and asked for permission (which was granted) to build a ferry shed on a portion of the land in dispute known as Onu-Otu, from where to ferry people across the Anambra River to Anam. They further pleaded that subsequently the Umuoba people came over in 1910 from Anam to settle on the land in dispute near to Onu-Otu and were permitted by the Defendants to settle on the land

p.1

pp.3-5

p.3, ll.23-26

pp.5-9

p.6, ll.3-7

p.6, ll.16-24

p.6, ll.34

to
p.7, ll.4

p.7, ll.6-10
p.7, l.31 to
p.8, l.2

in accordance with native customary tenure. They averred that they did not know of the grant to the Royal Niger Company in 1898 and that the Company did not go into possession of the land in dispute as a result of the grant. In addition to the grants to the Roman Catholic Mission in 1891, to the British Nigeria Company in 1906, to the Niger Company in 1924, to John Holts & Co. (Liverpool) Ltd. in 1926 and 1931, and to C.F.A.O. in 1931, they relied upon

p.7, ll.35-37

"The grant to the Hausas, Nupes, Yorubas and other native foreigners of portions of the land in dispute to make settlements."

(Ex.R(D), p.124)
p.44, ll.30-36
p.45, ll.24-25
p.48, ll.38-45
p.18, ll.21-37
p.19, ll.1-3

13. Oral evidence was given on both sides. The Defendants called no evidence other than that of the first Defendant himself to establish that grants had been made by them to the Hausas, Nupes, Yorubas and other native foreigners. They tendered in evidence however a copy of the Affidavit of 1922 (Ex. R(D), p.124). Counsel for the Plaintiffs objected to its admission but was overruled. The first Plaintiff deposed (inter alia) that the Umuleri over 30 years before had permitted the C.M.S. to build a Church and a school on the disputed land. He also deposed that they had given the Anam people a place to live and that, after the C.M.S came, they had given land to the Defendant Idigo.

pp.63-64
pp.64-84

14. The hearing ended on 27th November, 1953, but the learned Judge did not give Judgment until the

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7th January, 1955. This Judgment included the following passage:

"In 1910 or not long afterwards the 1st Defendant came down to OTUOCHA from MBAITO, and appears to have been the first of his people to go into occupation on OTUOCHA. In this action, the UMULERI dated this event after 1920; but in the 1933 case they put the date much earlier, and at the latest about 1914. The UMULERI say this settlement was made with their permission, just as the AGULERI say the first occupation by the UMULERI in or before the '90s was with AGULERI permission."

The learned Judge then considered the various dispositions made by the parties and held that whoever the owners of the land were, they were prepared to let the other party dispose of small portions of it. In his view, the Umuleri as owners showed themselves far the more complacent as compared with the Aguleri as the "Aguleri dispositions are much more numerous". As regards the Affidavit alleged to have been sworn in 1922, the learned Judge said:

"Before I leave, for the present, the subject of the various dealings with the land by the parties, I have to refer to a connected matter which tells in favour of the AGULERI. Before they made their lease to the Niger Company in 1924 the District Officer made enquiries about the ownership of the plot and an

Ex.R(D) p.124

affidavit (certified copy Exhibit R) was sworn to, setting out that 1st Defendant and the EZIAGULU AGULERI were the rightful owners. The deponents included two of the UMUNCHEZI UMULERI, namely ONOWU and OKOYE. The latter was a Court Member. Both are dead. OKOYE gave evidence in the 1935 case, and was not cross-examined about the affidavit, which indeed was mentioned for the first time in the present action, save for reference to it and to similar enquiries in the cross-examination of the Plaintiffs' 6th and 7th witnesses in the 1933 case."

pp.79-81

The learned Judge next reviewed the traditional evidence and held that it was impossible to find anything certain or even reasonably probable from

p.81, ll.27-30

"all this traditional, legendary, or purely fictional material about genealogy and origins."

The learned Judge referred to the grant to the Royal Niger Company as follows:

p.83, ll.6-14

"The 1898 grant was the only disposition of the whole of the land in dispute, or nearly the whole, made by either party. It was made by representatives of all UMUNCHEZI, and it was made when the Company were extending their holdings up and down the ANAMBRA and may be thought to have taken some care to ascertain, and to have been in a good position to ascertain, the true ownership of the land."

p.83, ll.14-35

The learned Judge then considered whether the

Aguleri knew about the grant. He stated that all the documents were executed, and presumably the consideration in respect of each transaction was paid, at Abutshi and there was nothing to show that Abutshi was anywhere in Aguleri or near it, or even on the Anambra. He proceeded as follows :

"Besides, it is common ground that the UMULERI were in occupation on the land at the time the grant was made; the Company must have met them there, and may have looked no further. These are reasons which prevent me from being satisfied that the Defendants must have known of the grant. If they did know of it, they would probably have known that, as in the January grants by their AGULERI relatives, the rights of occupiers and their successors were protected, so that the transaction might have seemed to them to be as negligible as subsequent transactions by either side seemed to the other side.

p.83, l.36 to
p.84, l.18

The AGULERI, on the other hand, were not on the land when they gave part of it to the Mission for a beach at OFIANWAGBO in 1894, and this seems to show that the Mission looked further than the occupiers and found the true owners, which, if that were so, the Company did not do four years later. So likewise the UMUOBA ANAM, by the AGULERI's account, dealt, first with the occupiers and then had to come to a reckoning with the true owners. It

seems to me that, other things being equal, a transaction with persons not in occupation is of greater evidential value to show their ownership than one with occupiers. And the 1894 acquisition of OFIANWAGBO beach by the Mission was undoubtedly a transaction of that sort. Further, it must have been known to the UMULERI, who let it pass for some years (as later grants by either side were disregarded by the other side); and, whatever the probabilities, there is no such certainty that the 1898 grant was known to the AGULERI."

p.85

pp.88-105

15. From the said Judgment the Plaintiffs appealed to the West African Court of Appeal. The appeal was heard in the Federal Supreme Court of Nigeria by a Bench consisting of Foster Sutton F.C.J., Hubbard Acting F.J., and De Lestang F.C.J. who, by their Judgments and Order, dated the 23rd February, 1957, dismissed the appeal.

The principal Judgment was delivered by Hubbard, Acting F.J., It included the following passage:

p.101, 11, 18-41

"As I see the case, what the appellants had to show was that they were owners of the land in dispute in 1898 at the time of the sale to the Royal Niger Company. The onus was on them to show as at 1898, "acts of ownership extending over a sufficient length of time, numerous, and positive enough to warrant the inference that "they" were exclusive owners" (Ekpo v. Ita, XI N.L.R. 68 at 69). In my opinion, they

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failed to do this. Apart from this, there was some evidence of acts of ownership on the land by the respondents. I think Mr. Foot was right in contending that any of such acts, such as a lease to J. Holt & Co. in 1926, which occurred after the land had been sold to the Royal Niger Company, should not be held against the appellants. They could not have challenged them; they would have been told, as they were in the 1933 appeal, that they had parted with their ownership of the land. But there was a grant in 1894, by the respondents of the Ofianwagbo beach, which is on the left bank of the Anambra River within the area in dispute, to the Roman Catholic Mission, which the learned Judge found proved, and there was evidence to support this finding."

The learned Acting Federal Judge next considered the views expressed by the learned trial Judge that a transaction with persons not in occupation is of greater evidential value to show their ownership than one with occupiers. He expressed considerable doubt as to the soundness of this proposition stating that the Federal Court had had numerous cases before it where persons not in occupation had sold land which actually belonged to someone else. Secondly, the facts of the present case appeared to him to be against the applicability of this proposition. He proceeded as follows:

p.103,11.3-9

p.103, ll. 11-23

"Upon the land in dispute, the land in between these two boundaries, the Aguleri were admittedly nowhere in occupation, while the Umuleri were in occupation of at least some areas along the river bank. Whatever the historical reason may be, it appears that this land between the two streams was vacant land into which only the Umuleri had so far infiltrated. Now, ownership to native land is acquired by occupation. It was never suggested that the Aguleri had at any time been in occupation of the land, and it is difficult to see how they could have been the owners of any of it."

p.103, ll. 26-28

The learned Federal Judge was inclined to think that the Aguleri must have known of the 1898 grant by the Appellants to the Royal Niger Company. It could not be assumed, however, that the Aguleri

p.103, ll. 37-48

knew exactly the inland extent of the grant. All they would have known would have been that the Umuleri had made a grant to the Company, but would have no reason to suppose it extended beyond the land effectively occupied by the Appellants, which, at that date, were the two ferry stations, at one of which they had a "juju". The 1,000 yards line mentioned in the 1898 grant was relevant to the requirements of the Royal Niger Company at that date, but was no proof of occupation by the Appellants. The learned Federal Judge therefore

p.104, ll. 3-5

held that the Plaintiffs had completely failed to prove the extent and length of occupation which

was necessary to ground a claim for Declaration of Title.

Foster Sutton, F.C.J. delivered a concurring Judgment which included the following passage :

"I think the learned trial Judge was right in placing some weight on the affidavit made by the Chiefs of the Aguleri Native Court in the year 1922, since Chief Okoye, Chief of Umunchezi Umuleri was a party to it, and the deponents swore therein that the Aguleri were the rightful owners of a piece of land forming part of the land known as Otuocho which is the land in dispute in this case. p.104, ll.16-30

"Chief Okoye was the then Chief of the Umuleri (plaintiffs), the declaration was against the interests of his own people, and I think it highly improbable that their Chief would have then admitted that the Aguleri (defendants) were the "rightful owners" of a portion of Otuocho if such was not the case."

De Lestang, F.J. also concurred. p.105, l.5

16. An Order in accordance with the Judgments of the Federal Supreme Court was entered on the 23rd February, 1957 and against the said Judgments and Order of the Supreme Court, Onitsha final leave to appeal to Her Majesty in Council was granted on the 22nd May, 1957. p.105 p.106

17. Since the hearing by the Federal Court, the Plaintiffs have sought, without success, to trace the original of the Affidavit alleged to have been

Ex.R(D) p.124 sworn in 1922 (Ex. R(D)). They will crave leave to refer to an Affidavit annexed hereto sworn on the 11th day of May, 1959, by Mr. Rodney Graham Page and documents exhibited thereto, from which it appears that it is impossible to trace the original.

18. The Plaintiffs respectfully submit that this appeal should be allowed with costs throughout or alternatively that the case should be sent back for a new trial for the following amongst other

R E A S O N S

- (1) Because, as the Federal Supreme Court rightly held, the learned Judge erred in holding that the transaction with persons not in occupation was of greater evidential value to show their ownership than one with occupiers.
- (2) Because the learned trial Judge erred in holding that the Umuleri allowed the Aguleri to put the Roman Catholic Mission on the land in dispute and allowed them to remain there for nine years and because there was no or no sufficient evidence to justify this finding.
- (3) Because the learned trial Judge erred in holding that the Aguleri made numerous open dispositions of parts of Otu-Ocha without opposition from the Umuleri and there was no or no sufficient evidence to justify this finding.

- (4) Because the learned Judge erred in holding that the Aguleri made a grant of land on which the Roman Catholic Mission built a school and there was no sufficient evidence to justify this finding
- (5) Because, although submissions were made to them by Counsel for the Plaintiffs regarding the learned trial Judge's aforesaid findings, the Federal Supreme Court failed to consider whether these findings could be supported.
- (6) Because both Courts below have erred in failing to draw an inference favourable to the Plaintiffs from the fact found by the learned trial Judge that until a date after 1910 the Umuleri were in sole occupation of the land in dispute.
- (7) Because the Federal Supreme Court erred in distinguishing between the ferry stations and the site of the juju and the rest of the land in dispute since the issue between the parties throughout had been whether the Umuleri or the Aguleri were the owners of the whole of the land.
- (8) Because, even if the Federal Supreme Court did not err as aforesaid, they should have given judgment for the Plaintiffs in respect of the area covered by the ferry stations and the site of the juju.
- (9) Because the Federal Supreme Court failed to have regard to the Plaintiffs' acts of ownership.

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- (10) Because the Federal Supreme Court erred in applying the principle laid down in Ekpo v. Ita to the present case in which the land in dispute had been owned by the Royal Niger Company or the Crown for fifty-two years.
- (11) Because the copy of the alleged affidavit (Exhibit R(D)) should not have been admitted in evidence.
- (12) Because both Courts below erred in the weight which they attached to Exhibit R(D).
- (13) Because the learned trial Judge misdirected himself as to the effect of the evidence of the witness named Igbockun Oyato and the Federal Supreme Court failed to consider such misdirection.
- (14) Because the learned trial Judge erred in failing to draw an inference adverse to the Defendants for their failure to call a witness alleged by them to be the owner of the juju and the Federal Supreme Court failed to consider such error.

Dingle Foot Q.C.

R.K. Handoo.

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Respondents

CASE FOR THE APPELLANTS

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