Privy Council Appeal No. 6 of 1959

Chief Fagbayi Oloto for himself and on behalf of the other members of the Oloto Chieftaincy Family since deceased substituted by Chief Immam Ashafa Tijani – – – *Appellant*

v.

The Attorney General – – – – – – – *Respondent*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JUNE 1961

Present at the Hearing:
LORD DENNING.
LORD MORRIS OF BORTH-Y-GEST.
LORD HODSON.
[*Delivered by* LORD HODSON]

This is an appeal from a judgment of the Federal Supreme Court of Nigeria dated the 16th December, 1957 dismissing the appellant's appeal from a judgment of the Supreme Court of Nigeria whereby the appellant's claim against the Government of Nigeria was dismissed.

The appellant is chief of the Olotos having succeeded the late chief who instituted these proceedings on behalf of himself and the other members of the Chieftancy.

The proceedings began by a statement of claim (analogous to a petition of right) delivered on the 14th September, 1948, the Governor having given his fiat unconditionally, pursuant to the Petitions of Right Ordinance (Cap. 167 of the Laws of Nigeria).

The claim as originally presented was for £630,000 claimed as compensation to the Oloto family for the user by the Government of Nigeria of lands said to have been owned by the Olotos from time immemorial.

The claim in its entirety has never been formally abandoned although the evidence called on behalf of the appellant was insufficient to support it on any view of the case. In the case placed before their Lordships it was submitted that compensation for user of the lands should be based on their present value meaning their value at the date of the institution of proceedings. This was according to the evidence of a witness called by the appellant something of the order of £227,000 the lands now being used for public purposes having upon them law courts, barracks, botanical gardens, training schools and railway tracks. According to the evidence of a surveyor called on behalf of the Government of Nigeria the value of the lands at the date of acquisition was about £1,890.

The lands are ten in number and described in paragraph 6 of the statement of claim, one being on the island of Iddo and the other nine on the mainland nearby at Ebutte-Metta. All the lands were acquired by the Government of Nigeria under the Public Lands Ordinance of 1876 (No. 8 of the Colony of Lagos). Notices of acquisition were given between 1891 and 1903 and certificates of title were received by the Colonial Secretary between 1910 and 1927.

Section 10 (1) of the ordinance provided:—

> " The Certificate shall not be questioned or defeasible by reason of any irregularity or error or defect in the notice, or the want of notice, or of any other irregularity, error, or defect in the proceedings previous to the obtaining of such Certificate."

Section 3 of the ordinance provided for the payment of reasonable compensation in respect of land acquired by the Government and section 7 gave jurisdiction to the competent courts to adjudicate on questions of compensation or of disputed ownership.

The claim for user was never sustainable for no evidence was ever put forward to show that the Government had ever used the lands before acquisition. After acquisition no user by the Government who had become owners of the property could give rise to any claim by anyone else for payment by the Government for the use of their own land.

When the case reached the Federal Supreme Court it was pointed out to counsel for the appellant that the claim could not succeed once it was admitted, as it was, that the lands had been acquired by the Government who held certificates of title thereto.

Counsel had already expressly stated that the action was not for compensation under the Public Lands Acquisition Ordinance, thus taking the same course as his predecessor in the court below, and had gone on to point out that his claim rested on user since the date of acquisition.

When this impasse was reached in the Federal Supreme Court counsel sought and obtained leave to amend the claim in order to try and show cause of action where none had existed before.

The material parts of the statement of claim then read as follows:—

> " (3) That the landed properties hereinafter described form part of the land owned by the family from time immemorial.
>
> (4) That the Government of Nigeria are now using, having acquired the same under the Public Lands Ordinance, the said landed properties and no compensation has been paid to the family either for the said acquisitions or for the usage of the said properties by the same Government of Nigeria.
>
> (5) (*a*) In the circumstances set forth in paragraphs 1 to 4 and in the circumstances that the defendants failed or neglected to provide compensation for the plaintiff pursuant to the Public Lands Ordinance, 1876, at or within a reasonable time after the acquisition of the several properties mentioned in paragraph 6 below, an implied contract arose to pay the plaintiff compensation for the deprivation of the use of the said lands."

After this amendment had been made the latter state of the appellant's case was no better than its earlier condition. His claim was still for user and no contract could be implied.

Compulsory acquisition as Nageon de Lestang F.J. pointed out is the antithesis of agreement and compensation can only arise by virtue of the Public Lands Ordinance. The learned Federal Justice cited the language of Lord Dunedin in the case of the *Attorney-General* and *de Keyser's Royal Hotel Ltd.* [1920] A.C. 508 at page 522 which as he said puts the position very clearly in these words:—

> " It (one argument) was that the Crown should pay a reasonable sum for use and occupation of the premises upon the ground of an implied contract . . . . The simple answer to this argument is that the facts as above recited do not permit of its application. In any case of implied contract there must be implied assent to a contract on both sides. Here there was no such assent. There was no room for doubt as to each party's position. The Crown took as a right, basing that right specifically on the Defence of the Realm Act. The Receiver did not offer physical resistance to the taking, and was content to facilitate the taking. He emphatically reserved his rights, and gave clear notice that he maintained

that the Crown was wrong in its contention, and that no case for taking under the Defence of the Realm Act had arisen: in other words, that the Crown had, under the circumstances, according to their proposals, unlawfully taken. To spell out of this attitude on either side an implied contract is to my mind a sheer impossibility."

Their Lordships concur in the view expressed by Federal Justice Lestang that this was the end of the case as it had been presented to the Court of First Instance and to the Court of Appeal.

As is shown by the case of the *Sisters of Charity of Rockingham* v. *The King* [1922] 2 A.C. 315 the appellants are entitled to their statutory right to compensation or nothing. In the words of Lord Parmoor who delivered the judgment of the Privy Council " Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is " injuriously affected ", unless he can establish a statutory right." The appellant in addressing their Lordships through his counsel recognized this position at the outset and discarded the claim as it had hitherto been presented limiting himself to a claim for compensation under section 3 of the Public Lands Ordinance 1876.

This claim had never previously been made and no application for further leave to amend was sought but an argument was put forward on the basis that the statement of claim stated sufficient facts in that it was alleged that the Government had acquired the lands without compensation having been paid to the family for their acquisition.

On this footing no attempt was made to seek compensation on any other basis than the value at the date of acquisition that is to say £1,890.

Counsel for the respondent rightly pointed out that this was an entirely new case which raised for the first time the question of how and within what time a claim for compensation should be dealt with under the ordinance and further that this matter had never been considered by the Government of Nigeria or by the courts below. He contended that it was contrary to established practice for such a departure to be permitted at this stage. He also pointed out again rightly that it is not to be supposed that if the matter had been presented to the Governor in this way in 1948 he would necessarily have given the fiat which enabled the proceedings to be launched, especially having regard to the long interval which had elapsed between the acquisition of the lands and the application for the necessary fiat.

It appears to their Lordships that this submission is sound and that there is no sufficient reason for the appellant now to be permitted to put forward an entirely fresh claim.

Notwithstanding this opinion their Lordships have considered the evidence and the judgments appealed from on the basis that the appellant's claim is a claim for compensation under paragraph 3 of the ordinance of 1876.

There is a presumption made the stronger by the lapse of forty years between the dates of acquisition and the institution of proceedings that everything was done regularly in pursuance of the statute that is to say that upon acquisition of the lands reasonable compensation was paid to the persons entitled thereto.

In order to make good his claim to compensation he has to show that the Olotos were the owners of the lands at the time of their acquisition, that no reasonable compensation was paid in respect of the acquisitions and that the lands acquired were occupied: for, if they were unoccupied, no compensation was payable. In the case of several of the lands the Crown was able to prove that compensation had been paid.

In respect of the acquisition of the piece of land on the island of Iddo the Chief of the Olotos received £70. This is land 6 (a) in the statement of claim. In respect of the acquisition of lands 6 (e), (f), (g) and (k) compensation was proved to have been paid to other persons. It appeared from the evidence

that much of the land previously owned by the Olotos had been sold to others long ago. In the case of the five other lands 6 (b), (c), (d), (h) and (i) there was no evidence of compensation having been paid to anyone for their acquisition. In case of lands 6 (c), (d), (h) and (i) the appellant failed to prove ownership at the dates of acquisition.

As to land (b) it is true that the trial Judge accepted the evidence of the appellant that the Olotos were owners of the land at the time of acquisition and it may be inferred that he accepted that no compensation had been paid and that the land was occupied by the family. In the Appeal Court this finding was not accepted since there was a palpable error in dates but in any event the evidence in support of this finding was tenuous in the extreme. It was the evidence of one witness only, the present appellant, who was 66 years of age at the time of the hearing of the case in 1953 and was thus a child of tender age at the time of the acquisition and relied mainly on the traditions of his family and not to any extent on his own personal recollection.

Their Lordships see no reason to dissent from the judgment of the Court of Appeal in so far as it reversed the finding of fact made by the trial Judge in favour of the appellant as to land (b).

In their Lordships' opinion the presumption of regularity is strong as to all the lands. They would adopt the language of Knight Bruce, V.C. in *Delarue* v. *Church* (1851) Law J. Rep. (N.S.) Equity 183 at page 185 when speaking of a grant of annuity made in 1817 under an Act of Parliament passed in 1816: " It is sufficient to say that almost anything ought to be presumed, after such a length of enjoyment, capable of supporting the grant ". It was contended on behalf of the appellant that this authority was distinguishable since although the acquisitions here were regularly made in each case such acquisitions would take place independently of and before compensation had been agreed or assessed. It was said accordingly that there was no ground for presuming that reasonable compensation had been paid in accordance with the ordinance. Their Lordships are not prepared to accept this argument and regard the presumption that the acquisitions were followed by compensation as of strong force and effect. There was a paucity of evidence adduced by the appellant to rebut the presumption and support even the restricted claim he now seeks to establish.

It is thus unnecessary to consider the further question which occupied much time in the Courts of Nigeria whether or not the claim of the appellant is time barred by the Limitation Act 1623 (21 Jac. 1.C.26) or whether if the Limitation Act does not apply the claim is in any event barred by laches.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the respondent's costs of the appeal.

(82870) Wt. 8233/71 100 7/61 Hw.

In the Privy Council

CHIEF FAGBAYI OLOTO FOR HIMSELF AND ON BEHALF OF THE OTHER MEMBERS OF THE OLOTO CHIEFTAINCY FAMILY SINCE DECEASED SUBSTITUTED BY CHIEF IMMAM ASHAFA TIJANI

v.

THE ATTORNEY GENERAL

DELIVERED BY LORD HODSON

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