

~~PC~~
~~G.H.T. G.J.~~

Judgment
11/1964

IN THE PRIVY COUNCIL

No. 7. of 1962

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N:

- 1. OSELE (m) of ONICHA
- 2. UGBE (m) of ONICHA
- 3. ACHI (m) of ONICHA
- 4. EMESOLU (m) of ONICHA
- 5. OYEMIKE (m) of ONICHA
- 6. ONYEIDU (m) of ONICHA
- 7. OLO (m) of ONICHA
- 8. OFIWE (m) of ONICHA

UNIVERSITY OF LONDON
 INSTITUTE OF ADVANCED
 LEGAL STUDIES
 22 JUN 1965
 25 RUSSELL SQUARE
 LONDON, W.C.1.

78512

(For themselves and on behalf
 of the people of Onicha-Ibabu) (Defendants)
Appellants

- and -

- 1. OLISEDOZIE NWOKELEKE
- 2. OKALAFOR ANIBEMA
- 3. OYEM EBIMUM

(For themselves and on behalf
 of the people of Iselegu) (Plaintiffs)
Respondents

C A S E FOR THE APPELLANTS

Record

1. This is an Appeal from a Judgment and Order of the Federal Supreme Court of Nigeria (de Lestang Ag. F.C.J., Abbott F.J. and Coussey Ag. F.J.) dated the 24th February, 1958, allowing with costs an Appeal in part from a Judgment of Onyeama Ag. J. (now Onyeama, J. of the Lagos High Court) dated the 30th April, 1956, given in the High Court of Justice, Western Region, Warri Judicial Division, whereby he dismissed with costs the claim made by the Respondents as Plaintiffs (referred to hereinafter also as the Iselegu people) in an action against the Appellants, Defendants (referred to hereinafter

pp.39-46

p.26 L.24-
p.34 L.31.

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also as the Onicha-Ibabu people) for:-

p.8.L.37-
p.9.L.4;
p.26.L.37-
p.27.L.16;

(a) a declaration of title to certain land called Mbuboagbala;

(b) £50 damages for various acts of trespass committed on the said land by the Onicha-Ibabu people;

(c) forfeiture of the possession originally granted to Olo, Ofiwe and Onyeugu who were respectively cited as the 9th, 10th and 11th of the Defendants (hereinafter referred to "as the said three Defendants");

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(d) injunction to restrain the Onicha-Ibabu people their servants, agents, heirs and successors from entering in the said land and making use thereof without the permission of the Iselegu people.

p.47.
LL.10-25.

2. By their said Judgment and Order the Federal Supreme Court allowed the said Appeal of the Iselegu people. So far as their said claim (a) for a declaration of title to the said land was concerned and ordered that Judgment be entered for them accordingly, and, as regards their said claim for (b) trespass and (d) injunction, ordered that their appeal be dismissed and as regards their said claim (c) for forfeiture against the said three Defendants ordered that it be remitted to the Court below for investigation and decision.

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p.33.L.45-
p.34.L.29.

3. The learned trial Judge concluded his said Judgment by saying as follows:-

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"I have considered the evidence proffered by the Plaintiffs in this case. In this Court, Akezuwa states he has a cocoa plantation and the Surveyor says he saw signs of Akezuwa's cocoa trees destroyed by the Defendants. In the 1953 case" (this refers to certain previous proceedings between the parties referred to in paragraph 4 below) "(just three years ago) Akezuwa made no mention of any cocoa trees. He then talked of a palm plantation. I consider that this witness was discredited under cross-examination and that I cannot rely on his evidence.

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"The only other evidence before the Court therefore is the evidence of the first Plaintiff. He has not called his neighbours with whom he has boundaries or any other of his tenants on the land, apart from the unreliable Akezuwa.

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"Before the Plaintiffs can get a declaration of title in their favour they must prove acts of ownership numerous and positive enough and of sufficient duration to warrant the inference that they are exclusive owners:

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EKPO v. ITA/XI N.L.R. 68

"From the evidence before me all I can say is that both parties are in occupation of portions of the area in dispute and farm the area. The evidence by the first Plaintiff alone has not satisfied me that his people are exclusive owners of the land in dispute or that the Defendants or some were his tenants or trespassers.

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"The Plaintiffs having failed to discharge to my satisfaction the onus placed on them, I dismiss, the claim with costs assessed at 20 guineas."

4. The Respondents had contended that they were entitled to rely upon certain findings of fact in the previous proceedings hereinbefore referred to. These proceedings were two consolidated actions numbered respectively W/16/53 and W/18/53 which had been commenced in different Native Courts and had been transferred to the Supreme Court. (Warri Judicial Division). In W/16/53 the Onicha-Ibabu people had claimed against the Iselegu people a declaration of title to certain land, damages, and an injunction: In W/18/53 the Iselegu people brought an action against the said three defendants personally, claiming against them a sum of damages and an injunction.

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pp.51-57.

p.57.L.36-
52 L.4;
p.29.LL.
19-21.

p.52.L.
46-p.53
L.2;p.

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5. Mbanefo J. (now C.J. of the Eastern Region of Nigeria) who tried the said consolidated actions dismissed the action W/16/53 of the Onicha-Ibabu

p.57
LL.30

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with costs and in regard to the action W/18/53 of the Iselegu people against the said three Defendants personally he awarded to the Iselegu people the sum of £5 damages, as well as granting them an injunction, against each of the said three Defendants personally.

pp.58-62.

6. An Appeal was brought by the Onicha-Ibabu people and the said three Defendants against the said Judgments and Orders made and given against respectively by Mbanefo J. as aforesaid to the then West African Court of Appeal, which dismissed the Appeal of the Onicha-Ibabu people, but allowed that of the said three Defendants respecting the said claim of the Iselegu people made against them personally.

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p.32 L.8-
p.33 L.44.

7. The learned trial Judge in the action herein concerned dealt with the said contention of the Respondents so far as is material as follows:-

"I consider that the issues were dealt with in the 1953 case, namely (1) had the then Plaintiffs proved enough to get a declaration in their favour; (2) were the named Defendants in the cross action trespassers. The learned Judge, on the evidence before him answered the first in the negative and the second in the affirmative.

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"It is clear that in refusing a declaration to the then Plaintiffs, he had not and could not have conferred it on the present Plaintiffs since they had not counterclaimed for title; Ntiaro and another v. Akpam 3 N.L.R. 10. If the present Plaintiffs wish to get their title to the land declared, it appears to me that they have to prove their title in full, and that findings of fact at some other hearing cannot avail them, unless these facts are admitted by their adversary.

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"The onus of proof is no less on them now than it was on the Defendants in 1953. It is not open to the Plaintiffs to import into this case, evidence given before another Judge by witnesses who have not

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testified before me; nor can it be right that I should be bound, at first instance, by findings of fact by another Judge based on his impressions of the credibility of witnesses who are not before me.

10 "I therefore hold that the Plaintiffs cannot rely on the findings of fact by the learned Judge in the 1953 case as establishing more than that the then Plaintiffs had not proved their claim to title. Counsel for the Plaintiffs tried another line of attack. He argued that although the Appeal Court in 1953 case allowed the Appeal in respect of damages for trespass, it did so because it had been proved that the Defendants were allowed on the land by the Plaintiffs and that they were tenants of the Plaintiffs and not trespassers. In other words, this specific finding by the learned Judge had, far from being upset, been
20 actually upheld on appeal.

"It followed, argued Counsel, that the present Defendants (or some of them at any rate) were estopped from denying their tenancy.

"I consider that this argument is ingenious and attractive, but that it is contrary to the authorities.

30 "The learned author of Spencer Bower on Res Judicata at page 34 of paragraph 45 of the book states the law on the point as follows:-

40 'When a judicial tribunal of competent original jurisdiction had granted or refused the relief claimed in an action or other proceeding, and an appellate tribunal reverses the judgment or order of the Court of first instance and either refuses the relief granted below, or grants the relief refused below, as the case may be, the former decision till then conclusive as such, disappears altogether, and is replaced by the appellate decision, which thenceforth holds the field, to the exclusion of any other as the res judicata between the parties.'

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"An Indian case applies even more exactly to the present issue. It is the case Nilvaru v. Nilvaru (1881) 1.L.R. 6 Bom 110 digested at page 151 of Volume 21 English and Empire Digest; footnote r.

'When the judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceased to be res judicata and becomes res sub judice and if the appellate Court declines to decide that issue, and disposes of the case on other grounds, the judgment of the first court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of Appeal.'

"In view of these authorities, I hold that the effect of allowing the appeal in Suit W/18/53 was to wipe away the findings of fact and decisions on the law by the Court of first instance. In the words of Spencer Bower 'the former decision.....disappears altogether.'

"In the case before me the issues are, in my view, at large, and no estoppel operates against the Defendants."

p.44.
LL.8-17

8. In the said Judgment of the Federal Supreme Court delivered by Abbott F.J. in which the other members of the Court concurred he said this:-

"Mr. Ikpeazu" (Counsel for the Respondents) "contends that the learned trial Judge erred in the application of these authorities (the correctness whereof cannot be contested) to this present case. Counsel submits that the reversal by the West African Court of Appeal of Mbanefo's decision in Suit W/18/53 (the cross-claim by the Iselegus) not only did not wipe out the findings of fact in that Suit, but in fact, reinforced them. It seems to me that Mr. Ikpeazu is on solid ground in that submission."

The judgment goes on to say, which the Appellants respectfully submit is clearly wrong and would further observe is somewhat surprising, as follows:-

"A careful perusal of the judgment of the West African Court of Appeal shows that the Court found difficulty in understanding why Mbanefo J. awarded damages for trespass to the Iselegus in respect of the entry on and occupation of the land by the Ibabus" - (The Appellants would here respectfully observe that, as is pointed out in paragraph 4 above, the action was against the said three Defendants personally only and, the Judgment given by Mbanefo, J. which the West African Court of Appeal reversed was against them personally) - "When he had come to the conclusion that the Ibabus were on the land by the permission of the Iselegus. That was the ratio decidendi of that part of the Appeal Court's judgment which reversed Mbanefo J's decision in Suit W/18/53.

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p.44:LL.
17-29.

"Therefore it seems to me that Mr. Ikpeazu's submission is correct.

In their said Judgment the Federal Supreme Court also say this:-

"I am in agreement with Mr. Kaine," (Counsel for the Appellants) "that in the absence of the evidence provided by the 1953 litigation, and had this been the first attempt of either party to obtain a declaration of title to the land, the evidence adduced by the Iselegus before Onyeama J. might well have failed to discharge the onus lying upon them as claimants to title. But when one takes the 1953 decisions into account, the position is greatly changed.

p.44.L.43-
p.45.L.5.

"Concurrent findings by two Courts, that the Ibabus are tenants of the Iselegus, is very cogent evidence indeed of the ownership."

What is so stated is not, the Appellants submit, an accurate interpretation or the effect of what was decided by Mbanefo J. and the West African Court of Appeal which reversed his Judgment in the Suit W/18/53.

The said Judgment proceeds, however, thus:-

p.45.LL.5-9

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"A very large part of the onus is in my view, discharged by these decisions and such additional evidence as the Iselegus desired to adduce need have been little (if anything) more than formal."

This is an odd way, the Appellants would very respectfully observe, in which to describe an estoppel per rem judicatam - for nothing less could in law have the effect of what the Federal Supreme Court is attributing - to the evidence it is to be noted and not the decision itself - to the judgment of Mbanefo J. in the Suit W/18/53 against the said three defendants personally, and its reversal by the West African Court of Appeal. An estoppel per rem judicatam, it is submitted, constitutes in law a final determination and adjudication respecting the matters in issue between the parties, and, in its nature and effect, is such that the description, as given in the said Judgment of the Federal Supreme Court, namely, "A very large part of the onus is.....discharged....." is entirely outside its effective operation or application and is, indeed, the very negation of it. Nor, it is further submitted, would any additional evidence of any kind be it "little" or "formal", such as is indicated in the statement in the Judgment of the Federal Supreme Court, namely,

"..... such additional evidence as the Iselegus desired to adduce need have been little (if anything) more than formal."

in proof of a claim being made in an action other than the Judgment as constituting the res judicata, itself and no more, be necessary for its effective establishment.

9. It is respectfully submitted that the Judgment of the Federal Supreme Court is wrong and that this appeal should be allowed and the said Judgment set aside and the Judgment of the trial Judge restored for the following among other

REASONS

1. BECAUSE the issues before the learned trial Judge (Onyeama Ag.J.) were at large, and no estoppel operated in regard thereto.

2. BECAUSE there being no res judicata arising in consequence of the Suit W/16/53 and/or Suit W/18/53 in anywise the Respondents could not rely upon the evidence given therein or any of the findings thereon by Mbanefo J. in proof of their claim against the Appellants, before Onyeama J.
- 10 3. BECAUSE the Respondents by the evidence called by them before the learned trial Judge (Onyeama Ag. J.) failed to prove their claim.
4. BECAUSE for the reasons given therein and for other good and sufficient reasons Judgment of the learned trial Judge (Onyeama Ag. J.) was right.
5. BECAUSE the Suit W/18/53 and the Judgment therein was against the said three Defendants personally and the said Judgment was moreover reversed by the West African Court of Appeal.
- 20 6. BECAUSE the Federal Supreme Court erred in law in holding that the onus of proof upon the Respondents could be, or was in a very large part, or could in anywise be discharged by the decision in suit W/18/63 of Mbanefo J. and the reversal thereof by the West African Court of Appeal.
- 30 7. BECAUSE the Federal Supreme Court misdirected themselves and erred in law in holding that the onus of proof could in anywise be discharged by means of any of the evidence given, before ~~the~~ Mbanefo J. in Suit W/18/53 or his findings therein.
8. BECAUSE the Federal Supreme Court respecting the question of the discharge of the onus of proof by the Respondents by means of the evidence given in Suit W/18/53 before Mbanefo J. or the reversal thereof by the West African Court of Appeal and/or likewise in the Suit W/16/53, since there was no res judicata regarding the same, was wrong.

S.N. BERNSTEIN

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL SUPREME COURT
OF NIGERIA

BETWEEN:

1. OSELE (m) of ONICHA
2. UGBE (m) of ONICHA
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1. OLISEDOZIE NWOKELEKE
2. OKALAFOR ANIBEMA
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(Plaintiffs)
Respondents

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