Privy Council Appeal No. 46 *of* 1934

Sakariyawo Oshodi, since deceased (now represented by Disu Akinyemi Oshodi) - - - - - - - *Appellant*

v.

Brimah Balogun and others - - - - - - - *Respondents*

FROM

THE FULL COURT OF THE SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH JULY, 1936.

Present at the Hearing:

LORD BLANESBURGH.

LORD MAUGHAM.

LORD ROCHE.

[*Delivered by* LORD MAUGHAM.]

In this case the plaintiffs (the respondents) by an action commenced on the 16th August, 1927, sought against the defendant Sakariyawo, Chief Ashodi, as head and representative of the family of Chief Ashodi Tappa, deceased, a declaration that the plaintiffs are owners in fee simple of the property lying and being at No. 16, Ajia Ijesha Court, Oshodi Street, Lagos, Nigeria. There was no counterclaim and the defendant was content to admit that he claimed the property on behalf of himself and as head and representative of the said family and to deny the title of the plaintiffs on whom the onus of establishing the alleged title must rest. The original defendant is now dead and the family is represented by Disu Akinyemi Oshodi the present appellant.

The main facts are not in dispute and may be shortly stated. The territory of Lagos was ceded to the British Crown in 1861; but the cession did not affect the character of the private native rights over the land which remained as they were before the cession. Oshodi Tappa, the then head of the Ashodi family, had been exiled from Lagos. In 1862 he and other exiles were allowed to return, and it appears that certain vacant lands at Epetedo, including that now in dispute, were granted to him as family lands. He divided the lands at Epetedo into 21 compounds, appointed a head (who was at that date a slave and who became when slavery was abolished an arota or domestic) to each compound, reserving a compound for his personal use. In 1869 the

Government issued a series of Crown grants absolute in form to the various heads of the compounds so appointed by Oshodi Tappa. These compounds have been the subject of litigation in Courts of Lagos only too frequently, and two of the cases have come before this Board. In the first (*Sakariyawo Oshodi* v. *Moriamo Dakolo* [1930] A.C. 667) the nature and legal effects of the Crown grants are considered: in the second (*Idewu Inasa* v. *Sakariyawo Oshodi* [1934] A.C. 99) the compounds and the status and position of their occupants are more fully described. No useful purpose would be served by repeating what was said by Lord Dunedin or by Lord Blanesburgh in delivering the judgments of their Lordships in these cases, and in stating in general terms the position and title according to native law and custom of their occupants. It is sufficient for the present purpose to say that a headman with such a grant has only a grant in trust, that his descendants have a right on his death to occupy his particular allotment in the compound, and that in the event of his family failing and being extinct (and in general not till then) the chief of the family has a right of reversion on behalf of the family.

In the present case the trouble arises from the circumstance that a headman (an arota) in 1913, purported of himself and without reference to the Oshodi family, to convey or transfer an absolute or fee simple interest in No. 16, Ajia Ijesha Court, part of that compound. His assignees or transferees claim to be entitled to the fee simple as the result of a subsequent acquiescence by the family which the transferees attempted to prove at the trial.

The *Dakolo* case was not concerned with any question as to the alienation of family lands. There is, however, no dispute on this matter. In olden days it is probable that family lands were never alienated; but since the arrival of Europeans in Lagos many years ago a custom has grown up of permitting the alienation of family lands with the general consent of the family; and a large number of the premises at Lagos on which substantial buildings have been erected for the purposes of trade or permanent occupation have been so acquired. These alienations in the great majority of cases have been to persons not members of the family to whom the lands had been allotted, and their Lordships see no reason for doubting that the title so acquired by these purchasers was an absolute one and that no reversion in favour of the chief was retained. In recent times the title deeds have been made out in English form and duly registered according to law, and their Lordships do not intend to express any doubt as to the validity of these titles. The respondents, indeed, do not question this view of the native law; but, as already indicated, they contend that the facts subsequent to the grants to the first respondent and his predecessors in title

justify the conclusion that the family tacitly consented to the grant, and that native law and custom cannot now be invoked to defeat the title of the respondents. The trial Judge was unable to find that the Oshodi family knowingly acquiesced in the alienation of the land. In the Full Court the Chief Justice agreed with this view. Mr. Justice Berkeley and Mr. Justice Webber, however, came to a contrary conclusion; and in the result the Appellate Court granted the declaration which the plaintiffs claimed. On this appeal their Lordships' main duty is to determine which of these views on the question of fact is to prevail.

Before detailing and commenting on the evidence relevant to the question it is necessary to point out the special position of the Oshodi family as regards No. 16, Ajia Ijesha Court. As above stated the allotment of these premises and the subsequent Crown grant in 1869 relating to, and including, them was in favour of an arota (domestic), at that time, at least in some sense, a slave. As headman he owed certain services to the chief, but no rent was payable and he could be evicted by the chief for certain acts considered according to native law and custom to be improper in a tenant. The allotment belonged in effect to the family of the headman whilst any of them were alive. He himself had no more than a right of occupancy and on his death it passed to his descendants. Upon failure of his offspring the land reverted to the Oshodi family. It is beyond doubt that the headman by himself had no right of alienation, but it seems now to be well settled in Lagos that the land could be alienated even by a domestic with the consent of the Oshodi family. It is plain that without such consent, whatever might be the position while descendants of the headman were alive, a matter on which their Lordships express no opinion, the reverter (so to describe it) to the Oshodi family could not be got rid of without their consent.

Two circumstances must then be borne in mind in considering whether the Oshodi family can be held to have acquiesced in the permanent alienation to a stranger of the premises in question. The first is that the chief and the elders of the family might well think whilst a number of children or other issue of the headman were alive that it was not worth while to object to an alienation, since if it were prevented or declared void, the reverter to the family would still be very far distant. The second is that evidence of an acquiescence in an alienation of lands in the other compounds must be regarded as evidence of very slight, if any, weight, since the circumstances as regards the respective families entitled to occupy the other premises might be very different. Nor is it easy to see why the family as a whole was not at full liberty to acquiesce in some cases and to abstain from an acquiescence in others.

In the present case the evidence of acquiescence by the family in the alienation to a stranger is, to say the least, singularly scanty. The relevant deeds are as follows:—

The Crown grant is dated the 5th May, 1869, and is duly registered. The next deed is an indenture of conveyance on sale dated the 20th March, 1912, made between Momodu Awo and Abudu Kirimu Damola who was a son of one Fayiba a domestic of Oshodi Tappa. There follows a conveyance dated the 5th October, 1912, and made between Abudu Karimu Damola and Lawami Folami described as a trader. This purports to be a sale in consideration of the sum of £25. Then there is a conveyance dated the 21st March, 1914, between Lawami Folami and the respondent Brimah Balogun also described as a trader. This was a sale in consideration of £66. Finally there is an indenture of mortgage dated the 15th October, 1924, and made between the respondent Balogun and the second respondent in consideration of a loan of £320 at 15 per cent. All these conveyances purported to deal with fee simple estates. The Oshodi family is not mentioned in any way, and it would seem that the purchase-money on each sale was taken by the person who purported to sell the property. It was the mortgage to the second respondent that led to the present proceedings. The mortgagees instructed an auctioneer to sell No. 16, Ajia Ajesha Court. The chief, Sakariyawo Oshodi, attended the sale and claimed the property. A brief correspondence in August, 1927, was followed on the 16th August by the present action.

The parol evidence at the trial so far as it related to No. 16 may now be briefly summarised. Lawani Folami deposed that he was a nephew of Ajia Ajeshi, a slave of Oshodi Tappa, and that he came to the compound with his father, who was not connected with the Oshodi family. He occupied two properties in the compound. He bought No. 16, the premises in question, for £25, and as above stated obtained the conveyance of the 5th October, 1912. He sold the premises to the respondent Balogun for £66 on the 21st March, 1914. He made, he said, no secret of the sale; but he obtained no consent and he gave no evidence that any members of the family other than arotas (domestics) knew of the alienation. A valuable house was built on the site by the respondent Balogun and anyone who came to the compound could see it. For some 20 years (roughly from 1905 to 1925) there was no installed chief of the Oshodi family, though during this period there were recognised heads of the family.

The respondent Balogun was called. The " storey house " which he built on the site cost him £1,053. When he bought the land there was only a shed on it. When he was building his house one, Rabiu Oshodi, living in the same compound, told him he ought to know that the land belonged to Oshodi, Rabiu's father. The witness, however, went on

building. Whatever one may infer from this evidence it obviously does not tend to prove acquiescence by the family.

The evidence given on behalf of the defendants corroborated the fact that for about 20 years after the death of Oshodi Tappa there had been no installed " Chief Oshodi." The original defendant Sakariyawo Oshodi, who was called as a witness, was the son of Oshodi Tappa. He had been the chief for about five years when he gave his evidence in May, 1929. He said that as chief his principal business was to manage affairs at Epetedo and to control the 21 compounds which were occupied by " slaves " of his father and their descendants. So far from consenting to any sale by any of these persons he had on divers occasions warned domestics not to deal in land in the compounds, and no actual sale or mortgage of any of such land had come to his knowledge. (This man, it must be remembered, was a party to both the cases before this Board above referred to.) A member of the family, one Alfred Ade Oshodi, was also called by the defendant. He was a moneylender and contractor, and he stated that he had lent money on mortgages of Epetedo land without consulting anyone. He said he took mortgages of Epetedo land " in ignorance," but this was probably untrue. He also asserted that when there was no chief there was no rule against selling or mortgaging Oshodi land. To their Lordships this seems to be an impossible view of native law, for there must always be some interval, sometimes a long one, between the death of a chief and the installation of his successor, and if the statement were true it would mean that when a chief dies the arotas (or in older days the slaves) in mere occupation of land could sell such land to strangers for money and leave numbers of persons, arotas of the family, unprovided with homes. The witness seems to have been more concerned to protect the security for his loans on mortgage than to support the claims of the Oshodi family or the chief who had called him as a witness. Other members of the family were called to deny that they had acquiesced in sales of land in the compounds. In the view of their Lordships it is a fact of some importance in the present case that there was no established chief during the period which included the dates of the two conveyances and the mortgage, and also the time of the erection of the substantial house by the respondent Balogun, and that as soon as there was an effective head of the family he at once objected to alienations and mortgages of lands in the compounds by the arotas in occupation without the consent of the family. The inference would seem to be that the native rights of the family were being very imperfectly protected during this species of interregnum, not that they were being given up.

On a careful consideration of the evidence as a whole, and there is really nothing of weight beyond what is above

stated, their Lordships are forced to the conclusion that it is quite insufficient to justify the finding (contrary to the view of the learned trial Judge) that the Oshodi family acquiesced after the event in the sale in question. There is, moreover, great weight in the observation of the Chief Justice that he found it impossible to believe that the members of the Oshodi family, knowing that they possessed what he described as a dormant fee simple over a large area, deliberately agreed to the family's ex-slaves selling it and pocketing the proceeds. An acquiescence in such an alienation *ex post facto* by a few individual members of the family would clearly not justify a finding that the family in general had acquiesced in a sale to a stranger of a fee simple: their inaction in the matter would not, for reasons already given, necessarily indicate anything more than that little or no benefit was likely to be derived by raising the matter and possibly involving the family in an expensive litigation. On the whole their Lordships have come to the conclusion that the finding of the trial Judge was right and that the plaintiffs in the action failed to establish that by the tacit consent of the Oshodi family as a whole, the fee simple or the absolute title to No. 16, Ajia Ijesha Court had passed to the plaintiffs.

In coming to this conclusion on the facts proved in the present case their Lordships do not desire to throw any doubt on the decision of the Full Court in the case of *Akpan Awo* v. *Cookey Gam* (2 Nig. Rep. 67) and other decisions of that character. In such a place as Lagos, where the native law is in some respects in a fluid state as the result of the pressure of the necessities of trade and of European laws and customs it may well be just and equitable, in the absence of a statute of limitation, to hold it inequitable to deprive persons of property of which they have held undisputed possession for many years, and to decide that the knowledge and acquiescence of the native family who originally owned the land may fairly be presumed, and that even though the rights of the family may appear to be remote. All that their Lordships are now deciding is that in the circumstances of the present case, and not forgetting the exceptional circumstances in relation to the chief, the plaintiffs have failed to establish a knowledge and a long continued acquiescence by responsible members of the Oshodi family sufficient to justify the decision that the plaintiffs have acquired an absolute title or in English terms a fee simple in the property. The question whether the defendants may not have some title to the property or some rights to remain in occupation of it, although they have failed in their wider claim, has not been raised in the action and their Lordships express no opinion upon it.

To prevent misconception it seems desirable to state that the present decision is not based on any doubt as to the

possibility of a title equivalent to a fee simple being obtained as the result of a sale of family lands with the general consent of the family. Lord Dunedin in delivering the judgment of the Board in the *Dakolo* case did not say anything inconsistent with this. The phrase " the paramount chief is the owner of the lands, but he is not the owner in the sense in which owner is understood in this country. He has no fee simple, but only a usufructuary title " must be read in the light of the original claim of the chief which was that he was entitled beneficially to the whole of the compensation payable by the Government in respect of family lands. The last sentence above quoted means only that the chief as contrasted with the family as a whole has no fee simple. The dispute was in fact between the chief as plaintiff and the occupants as a body as defendants. No question as to the extent of the family title arose.

Their Lordships think it right to express the opinion that the wide differences of opinion of learned Judges as to the titles to lands in Lagos disclosed in the present case and in a number of cases to which reference has been made, and the frequent actions in the Courts to which these doubts give rise, make it very desirable to deal with these questions by legislation.

In their Lordships view and on the grounds above stated the present appeal must succeed and the action must be dismissed with costs here and below. They will humbly advise His Majesty accordingly.

(30746—3A) Wt. 8136—2 90 8 36 P. St. G. 338

In the Privy Council.

SAKARIYAWO OSHODI, SINCE DECEASED (NOW REPRESENTED BY DISU AKINYEMI OSHODI)

v.

BRIMAH BALOGUN AND OTHERS

DELIVERED BY LORD MAUGHAM

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