Privy Council Appeal No. 59 of 1946

Victor Maduka and others – – – – – – *Appellants*

v.

Ezeodumegwu – – – – – – – – *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD FEBRUARY, 1948

Present at the Hearing:

LORD SIMONDS
LORD MORTON OF HENRYTON
SIR MADHAVAN NAIR

[*Delivered by* LORD SIMONDS]

This appeal, which is brought from a judgment of the West African Court of Appeal dismissing with costs an appeal from a judgment of the High Court of Enugu-Onitsha, is concerned with the rival claims of two tribes known as the Umuoris and the Orokwus to a strip of land at or near Onitsha in Nigeria. The appellants, who were defendants in the action, are three members of the Umuori tribe and the respondent, who was plaintiff and purported to sue on behalf of the Chief Aboh of Orokwu, is a member of that tribe. The strip of land in dispute, which will sometimes be referred to as " the disputed land ", is a strip of varying width which lies to the west of a line running in a northerly direction from the road from Nobi to Adazi to the Ndide river which is coloured red on the plan being the exhibit " A " in these proceedings.

It is common ground that on the 9th October, 1942, when these proceedings were commenced by originating summons issued in the High Court of the Enugu-Onitsha Judicial Division, the Umuoris were in occupation of the disputed land and the respondent, as plaintiff on behalf of the Orokwus, brought his action accordingly. It is important to note what he claimed. His claim was in these terms: " The plaintiff claims (A) Possession of that piece of land now occupied built and farmed on by the defendants at Orokwu which said piece of land has been adjudged to be the property of the plaintiff by the High Court of the Onitsha Division in an action between the plaintiff and the people of Adazi-Awka Division: . . . .".

The reference to this judgment becomes plainer as the matter proceeds. In due course the plaintiff put in his Statement of Claim and again it is important to note what his plea was. The relevant paragraphs are as follows:—

> " 3. The land in dispute has from time immemorial been the property of the plaintiffs.

4. The people of Adazi within recent years made attempts to encroach over the boundary between the plaintiffs and the Adazis which resulted in an action in the High Court of the Enugu-Onitsha Division and a boundary demarcated by the Court the proceedings and plan in the said suit will be founded upon.

5. The defendants who with their townspeople were given a portion of land by the Adazis in settlement of a dispute between themselves and the Adazis have occupied the plaintiffs' land in dispute built houses and farmed and still farming on it."

To this pleading the defendants, now appellants, put in their defence. By paragraph 3 they denied the alleged encroachment by the people of Adazi and further said that " this is not probable since the plaintiffs' land is not contiguous with the land of Adazi. Between the plaintiffs' land and Adazi town lies the defendants' town of Umuori." By paragraph 4 they said that they were not parties to the action referred to in the Statement of Claim and that " the said action was a collusive one and was never contested it being started with a view to oust the defendants and their people from possession of their land wrongly." And they further pleaded that they had not at any time built or farmed on any land belonging to the plaintiffs and that where they built and had always farmed was Umuori land and as such had been in their possession from time immemorial, and finally they relied on " long possession, laches and acquiescence."

Thus issue was joined and, before the further course of the action is examined, the reference to the previous action and certain other facts must be explained.

Whatever might have been their respective rights at a later date in the disputed land, it is clear that at an earlier date the area which embraced it was claimed by the Orokwu and the Adazi, the territory of the former lying to the west of that of the latter, and that these tribes were in dispute as to their boundary as long ago as 1916, at which date the Adazis were suing the Orokwus in the Agulu Native Court. In settlement of this dispute the boundary was in that year settled by the native chiefs of Nobi and Agulu. In this controversy the Umuoris had no part. It was only at a later date, as the respondent sought to establish, that they crossed the Nobi-Adazi road, and squatted north of it. Having crossed it at a date and within an area which, as their Lordships think, have yet to be determined, the Umuoris eventually came into conflict not with the Orokwu but with the Adazi. In 1931 they brought an action against the Adazi, the history of which is set out in the judgment of the West African Court of Appeal in the present case. Unfortunately it does not appear what exactly was the land in dispute. It is said only that the Umuoris claimed " a declaration of title." But, whatever their claim, they were unsuccessful from court to court in West Africa and the Adazis, in celebration of their victory, raided and destroyed houses of the Umuoris on the then disputed land wherever that may have been. This led to further proceedings both criminal and civil and in a civil suit No. 0/65/34 the Umuoris were awarded damages against the Adazis amounting to £1,127 and costs. This sum the latter were unable to pay and in 1938 the parties came to an amicable agreement, creditable alike, to themselves and their advisers, under which the Adazis paid a sum of £300 and ceded to the Umuoris a strip of land to the east of the red line marked on plan A. This strip is called in the plan " Land of Adazi allowed Umuori." Part at least of its eastern limit is marked by a dotted line. As to this the Court of Appeal has said " This was allowing the Umuoris to extend considerably further east than they had ever before claimed to do. The agreement is naturally silent as to the western boundary of the Umuori's land."

During this period of conflict between the Umuoris and Adazi, nothing is heard of the Orokwu. But in 1940 the latter thought it desirable to have the boundary as between themselves and the Adazi once more determined. It is, as their Lordships think, clear that at least by 1940

the Umuoris must have penetrated to the disputed land, and this view is shared by the Court of Appeal who say that before taking action against the Umuoris for their alleged trespass the Orokwu thought it prudent to get their ancient boundary with the Adazis clearly established in the courts. It is supported also by the evidence of the respondent who remembered the action in 1940 between the Orokwu and the Adazi and said " cause of that was Umuori people coming on to our land." At any rate, whatever the reason, in 1940 the action was brought and it was a friendly enough proceeding. The claim was amended to ask for a declaration " that the boundary between the land of Otta Orokwu and the land of Adazi-Nukwu is the boundary demarcated about the year 1916 by 48 chiefs of Nobi and Agulu and marked by a red ink line on plaintiffs' plan now marked by consent exhibit ' A '." The parties agreed that an administrative officer should be appointed as referee to determinate what was the boundary demarcated in 1916. The Resident of the Onitsha Province was the appointed Referee. He investigated and reported that the boundary so demarcated was the boundary shown by a red line on plan " A ". The Referee's report was not challenged and a consent order was made in the terms of the claim as amended. That it bound the parties is beyond dispute, but it is difficult to see what bearing it can have upon the claim of the Umuoris who were not parties though they would fain have been added as parties. For, perceiving that the dispute between the Orokwus and Adazis concerned at least some land of which they claimed to be in rightful possession, they intervened by motion in the action asking that they might be added as defendants to the action in order that their rights might be determined. They alleged that in fact the Orokwu and Adazi had no common boundary, for between them lay the land of the Umuori. Unfortunately, as their Lordships think, in view of subsequent proceedings, their motion was opposed (whether by both or only one of the parties does not appear) and it was dismissed. Yet it is a judgment thus obtained which is the foundation of the respondent's present case. If the appellants sought to rest their claim to the disputed land upon a cession made by the Adazis after the 1940 action, there would be much force in the plea. But this is not and never has been the appellants' case.

Learned counsel for the respondent were constrained to admit that, upon this view of the force and effect of the judgment in the 1940 action, the judgment in the present appeal could not be supported unless it appeared that there were other adequate reasons for affirming it.

Their Lordships would not in a case of this kind, particularly where questions of native tenure have been determined by experienced judges, allow their decision to be deflected by any nice point of pleading. But it appears to them that here both the course of the trial and the judgments in the courts of West Africa have been coloured and distorted by a wrong view of the value to the respondent of the 1940 judgment.

Thus the learned trial judge said " The judgment of this court declaring the Orokwu-Adazi boundary still subsists and that boundary is binding on the parties to the action and their privies. It seems to me to be idle for counsel to criticise that suit as collusive: so long as the judgment remains it must be observed." It is true that the learned judge went on to discuss the evidence given in the case in a manner not favourable to the appellants, but his conclusion cannot fail to have been influenced by his initial error in thinking that the Umuori were in some way " privies " to the 1940 judgment and were bound by it.

So also in the Court of Appeal. At the conclusion of the narrative of facts that court said of the appellants, " They plead long possession, laches and acquiescence. The learned trial judge made two findings of fact which appear to be conclusive in the decision of the question in issue. They are (1) that suit No. 0/4/40 was not a collusive one: and (2) that the Umuori people have no rights in the land north of the main road except such as they derive from Adazi." With these conclusions of

fact the Court agreed. But the first finding of fact becomes, in their Lordships' opinion, irrelevant when it is appreciated that, collusive or not, the judgment in the 1940 action does not in any way affect the appellants. Nor can the second finding of fact be decisive. It is said by the court that this finding " disposes of one of the main contentions of the appellants, viz.: that the learned judge was wrong in applying the 1940 judgment to the present case, since by it the Umuoris become the privies of the Adazis in the 1940 action." But this cannot be. For, even if to a cession of land by the Adazis after 1940 the 1940 judgment might be successfully pleaded (a proposition to be accepted with caution and qualification), it can have no bearing upon a cession made at an earlier date. In the result their Lordships must come to the conclusion that the appellants' substantial plea of possession, laches and acquiescence has not been adequately dealt with and the present judgments cannot be sustained. They do not think it desirable to observe upon any other issue of fact in the case, since in the course of the proceedings which may hereafter be taken the facts will need to be further investigated and ascertained.

Their Lordships have felt some doubt what is the proper course to adopt in order so far as possible to do substantial justice and to end this tribal dispute. It does not appear to them right that the respondent's action should be dismissed out of court without further opportunity of investigation. Therefore, while they think that this appeal should be allowed with costs here and below and the judgments of the High Court and the Court of Appeal set aside, they are further of opinion that the respondent should be at liberty to amend his summons and statement of claim as he may be advised within such time as the High Court of the Enugu-Onitsha Judicial Division may determine and that, if he thinks fit so to do, then the appellants should similarly be at liberty to amend their statement of defence and that the action should then proceed to new trial in the ordinary way. They will humbly advise His Majesty accordingly.

(59591) Wt. 8013—20 180 3/48 D.L. G. 338

In the Privy Council

VICTOR MADUKA AND OTHERS

v.

EZEODIMEGWU

DELIVERED BY LORD SIMONDS

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