*Privy Council Appeal No. 4 of 1958*

**Idoko Nwabisi and another on behalf of themselves and the Umeleri people** - - - - - - - - - *Appellants*

*v.*

**R. A. Idigo and another on behalf of themselves and the Aguleri people** - - - - - - - - - *Respondents*

FROM

**THE FEDERAL SUPREME COURT OF NIGERIA**

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# JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1959

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*Present at the Hearing:*

LORD TUCKER
LORD JENKINS
MR. L. M. D. DE SILVA

[*Delivered by* LORD JENKINS]

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This is an appeal by the plaintiffs (now appellants), suing on behalf of themselves and the Umuleri people, from a judgment of the Federal Supreme Court of Nigeria dated the 23rd February 1957. That judgment dismissed the plaintiffs' appeal from a judgment of Hurley J. in the Supreme court of Nigeria (Onitsha Judicial Division) dated the 7th January 1955, which had dismissed a claim by the plaintiffs against the defendants (now respondents), sued on behalf of themselves and the Aguleri people, for a declaration of the plaintiffs' title to a piece of land known as Otu-Ocha situate at Umuleri in the Onitsha Division of Nigeria.

The disputed land lies on the left bank of the Anambra River which forms its north-western boundary. It is bounded on the north-east by the Emu Stream, a tributory flowing into the Anambra River from the south-east, and on the south-west by the Akor River, another tributary of the Anambra, which joins it from the south-east at a point further down stream. The south-eastern boundary consists of an imaginary line joining the two tributaries. The length of the disputed strip along the Anambra is about 2,500 yards, and its width from north-west to south-east about 1,000 yards, narrowing slightly towards its north-eastern end. It is shown surrounded by a pink verge line on a plan which was exhibit "P" in the present action. The land beyond the Emu Stream on the N.E. is admittedly Aguleri land, and the land beyond the Akor River on the S.W. is admittedly Umuleri land. The bone of contention is this strip of riverside land between the two tributaries.

The plaintiffs sought to make good their claims to ownership of the disputed strip under native customary law by evidence establishing traditional ownership of the land by the Umuleri family, and by evidence of acts of ownership and of occupation by members of the Umuleri family from which ownership of the disputed strip was to be inferred.

The traditional evidence admittedly broke down, and accordingly the plaintiffs were thrown back upon such evidence of acts of ownership and of occupation as they were able to adduce for the purposes of raising the inference that the Umuleri family were the exclusive owners of the disputed strip.

As was observed by Webber J. in *Ekpo* v. *Ita* XI Nigeria Law Reports p. 68:—"In a claim for a decree of declaration of title the onus is on the plaintiff to prove acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that the plaintiffs were exclusive owners—if the evidence of tradition is inconclusive the case must rest on question of fact".

This statement of principle is untouched by the case of *Stool of Abinabina* v. *Chief Kojo Enyimadu* [1953] A.C. 207 in cases where, as in this one, traditional evidence fails.

In the absence of traditional evidence the onus of proof is difficult to discharge, inasmuch as the native customary law does not recognise titles by prescription, and acts of ownership or occupation, relied on by a given family as referable to their ownership of a piece of land, may be shown at any distance of time to have been attributable to permission on the part of the family against whom they claim. In that case the effect of the matters relied on as evidence of ownership is destroyed, and in the absence of any law of limitation they cannot be called in aid for the purpose of founding a prescriptive title.

The action in which the present appeal arises represents the plaintiffs' third attempt (not counting an unrecorded suit in the Native Court of uncertain date) to establish in proceedings against the Aguleri their title to the disputed strip, or to a larger area of land known as Aguakor to the south-east of the disputed strip, and both previous attempts have failed. Their Lordships find it unnecessary to refer in detail to this earlier litigation, which took place in 1933 and 1935, but would observe that the 1933 proceedings seem to have been confined to the disputed strip while the 1935 proceedings claimed Aguakor, expressly excluding the disputed strip, which it might perhaps be strictly accurate to regard as part of the Aguakor area.

The complete records of the proceedings in 1933 and 1935, including the transcripts of evidence, were put in, and apparently treated as evidence, in the present suit.

It is difficult to ignore the ill success of the plaintiffs' previous attempts to establish their title in assessing the merits of their present claim, but it is fair to add that as the law stood in 1933 and 1935 it was, as shortly to be explained, impossible for the plaintiffs to succeed as regards the disputed strip, no matter how strong their evidence of occupation or acts of ownership might be. That bar has since been removed, and accordingly the present claim to the disputed strip cannot be dismissed on a plea of *res judicata* by virtue of the failure of the 1933 proceedings; and as already observed the land claimed in the 1935 proceedings did not include the disputed strip.

The history of the disputed strip is briefly this. During the last decade of the 19th century the Royal Niger Company Chartered and Limited were active in the purchase of riverside lands from the natives, and made several such purchases in the vicinity of the disputed strip. In particular by an Agreement dated the 25th June 1898, and made between the Niger Company of the one part and the Head Chief and Chiefs of the Umutshezi (who are a branch of the Umuleri) of the other part the Umutshezi "for good consideration" purported to sell to the Niger Company "all the private rights of every kind not already possessed by the Company in the land therein described," which can be taken as comprising the whole of the disputed strip as delineated on the plan exhibit "P". This Agreement contained a provision, the precise effect of which has not been explained, that the Company agreed not to disturb present tenants or their heirs who might wish to continue in personal occupation of their lands or houses from that date except at a price to be fixed by mutual agreement at the time.

It is common ground, however, that if at the date of this Agreement the Umuleri were the owners of the disputed strip it operated to transfer such ownership from the Umuleri to the Niger Company.

The plaintiffs contend that the Umuleri did own the disputed strip at the date of the Agreement, in reliance on the facts that by this date they were in physical occupation of two beaches or canoe stations within the disputed strip, whereas there was no physical occupation of any part of the disputed strip by the Aguleri before 1910; and that the Agreement itself constituted an assertion of Umuleri ownership of the whole of the disputed strip, which (as they claimed) was known to and acquiesced in by the Aguleri.

The defendants on the other hand contend that the Umuleri occupied the beaches by permission of the Aguleri as owners of the disputed strip. They disclaim knowledge of the Agreement of 25th June, 1898, and rely on a grant made by them in 1894 to the Roman Catholic Mission of a beach on the bank of the Anambra within the disputed strip, which grant was renewed in 1898.

The plaintiffs no doubt made their claim in the present action coextensive with the disputed strip as shown on plan P because they could point to an act of ownership in the shape of the Agreement of the 25th June, 1898, extending to the whole of that area.

Mr. Dingle Foot for the plaintiffs did however inform their Lordships in the course of the hearing that the plaintiffs also maintained their claim to Aguakor, although they were not pursuing that claim in the present proceedings.

Their Lordships would next refer to the Niger Lands Transfer Ordinance 1916 (ch. 149 of the Laws of Nigeria). By section 2 of that Ordinance all the lands and rights within the Southern Provinces belonging to the Niger Company on the 1st January 1900 and specified or referred to in the agreements and instruments mentioned in the First Schedule (which included as No. 110 the Agreement between the Umutshezi and the Niger Company) were vested as from the 1st January, 1900, in the Governor in Trust for His Majesty his heirs and successors. In 1945 the Ordinance was amended by inserting a new section 10, by sub-section (1) of which it was provided that where in relation to any vested trust lands (i.e. any of the lands and interests vested in the Governor in Trust as aforesaid) the Governor considered it desirable so to do, he might by order published in the Gazette declare that with effect from a date to be specified in such order he abandoned all the right title or interest vested in him by virtue of the Ordinance in the whole or any part of such vested trust lands as might be mentioned therein. By a further amendment of the same date a new section 14 was inserted in the Ordinance, stating in these terms the effect of any abandonment by the Governor under section 10 (1):—

> "Where the Governor abandons all the right, title or interest vested in him by virtue of this Ordinance in any vested trust lands or part thereof in accordance with the provisions of this Ordinance then such abandonment shall have effect as if such vested trust lands or part thereof had never been included in the instrument, agreement or document, as the case may be, by which the same were originally transferred to the company."

By an Order made under this Ordinance (No. 38 of 1950), and published in the Nigeria Gazette of the 2nd November, 1950, 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".

On the strength of this abandonment by the Crown, which reinstated the plaintiffs as owners of the disputed strip if they had in truth been owners of it before the execution of the Agreement of 25th June, 1898, the plaintiffs on the 6th November, 1950 commenced the present suit in the Native Court, from which it was later transferred to the Supreme Court.

In these circumstances the plaintiffs put their case in this way: (1) At the date of the Agreement with the Niger Company on the 25th June, 1898, the Umuleri were the owners of the disputed strip; (2) The Agreement operated to transfer such ownership to the Niger Company; (3) By virtue of Section 2 of the Ordinance of 1916 the Niger Company's

ownership of the disputed strip became in that year vested in the Governor in Trust for His Majesty as from the 1st January, 1900; (4) The abandonment of the disputed strip by the Crown under the Order of the 2nd November, 1950, made pursuant to sections 10 (1) and 14 of the Ordinance of 1916 as amended in 1945, had effect as if the disputed strip had never been included in the Agreement of the 25th June, 1898; and accordingly on the date of the Order the ownership of the disputed strip reverted to the persons (i.e. the Umuleri) to whom it would have belonged if the Agreement of the 25th June, 1898, had never been made.

It is common ground that the provisions of the Ordinance could only apply to the disputed strip on the footing that the Umuleri were themselves the owners of the disputed strip at the date of the Agreement, and so capable of transferring such ownership to the Niger Company. If the Umuleri were not the owners of the disputed strip at the date of the Agreement no interest passed under it to the Niger Company, and accordingly the disputed strip was not land belonging to the Niger Company, and was therefore outside the scope of the Ordinance.

It therefore appears to their Lordships that the whole case turns on the question whether the Umuleri were or were not owners of the disputed strip on the 25th June, 1898.

If the Umuleri were not the owners of the disputed strip on the 25th June, 1898, nothing that has happened since can have made them the owners of it, and their claim must necessarily fail.

Their Lordships have already referred to the facts and circumstances down to and including the execution of the Agreement of the 25th June, 1898, relied on by the plaintiffs as raising the inference of Umuleri ownership at that date, and by the defendants as repelling that inference.

Evidence was given on both sides of numerous later acts as raising retrospectively the inference of ownership of the disputed strip by one side or the other on the 25th June, 1898.

The main acts of ownership attributable to either side since 1898, according to the findings of the learned trial Judge, were these:—

Between 1910 and 1920 the Umuleri allowed the Church Missionary Society to build a church near the Akor apparently without objection by the Aguleri.

About 1925 or 1926 the Umuleri allowed the Church Missionary Society to build a church and a school on a new site, again without objection from the Aguleri.

In 1924 the Aguleri leased a plot to the Niger Company and the Umuleri made no objection.

From 1926 onwards the Aguleri made numerous open dispositions of parts of the disputed strip without opposition from the Umuleri. These included leases of riverside plots to John Holt & Co. Ltd. in 1926 and 1932 and to a French Company called C.F.A.O. in 1931. There were also on the part of the Aguleri a grant to the Roman Catholic Mission of a site for a school, various settlements of strangers along the water side, and a settlement of Umuoba Anam people, the Aguleri version of which appears to have been accepted by the learned Judge.

The Umuleri relied on the presence on the land of an allegedly old Ju Ju which they claimed to be theirs, and also claimed to have granted to people Umuoba Anam in 1903 permission to fish the Emu stream near the place where the Ju Ju stood. The trial Judge appears to have accepted the plaintiff's evidence as to the grant of this permission to fish, but to have rejected their claim that the Ju Ju was old, basing his conclusion on the latter point on the view formed by the District Officer who tried the 1933 action that the Ju Ju was not old when he inspected it in 1933. There was moreover some doubt whether this Ju Ju was in truth a communal Ju Ju of the Umuleri or belonged to a private individual.

The trial Judge after reviewing the evidence concerning the various acts of ownership adduced on either side said this:—

"If Umuleri were the owners, they allowed the Aguleri to put their guests the Roman Catholic Fathers there in 1894, and suffered them to remain there for nine years; and after allowing the Aguleri themselves to settle, not before 1910, they allowed them to lease four plots to firms and give a plot for a church, and settle numerous strangers on the waterfront, all within twenty years or less, and raised no objection until they saw that there was money in it which they were not getting. If Aguleri were the owners, and allowed Umuleri to settle, then after the settlement they let them bring the Umuoba Anam in to fish, and later to settle (after taking tribute themselves, they say), and afterwards on two occasions let them give plots to the Church Missionary Society. The result seems to be that neither side can convincingly say that any of these transactions on their own part (except, on Aguleri's showing, the Umuoba Anam settlement) is inconsistent with ownership of the land by the other side. Even so, the Umuleri as owners show themselves far the more complacent when compared with the Aguleri as owners, for the Aguleri dispositions are much more numerous. But the acts of ownership which are of weight in themselves and not merely by their number are, on the Umuleri side, the 1898 grant, as being a disposition of more than a mere portion of the land, and, on the Aguleri side, the 1894 grant of Ofianwagbo beach (because of its date) and the Umuoba Anam settlement, if their evidence about the latter is believed."

He repeated this conclusion at page 82 where he said, "The acts of ownership which are significant are, as I have said, the 1898 grant, the 1894 grant of the Ofianwagbo beach to the Mission (because it preceded the entry on the land of the Aguleri who were the grantors) and the Umuoba Anam settlement".

He went on at pages 82 and 83 to refer to the Aguleri evidence about the Umuoba Anam settlement in terms which appear to indicate his acceptance of it.

In the course of his judgment the learned Judge referred to an affidavit sworn by the Chiefs of the Aguleri in 1922 when the Lease of 1924 to the Niger Company was in contemplation, as a matter which told in favour of the Aguleri. The effect of this affidavit was that the Aguleri were the rightful owners of the land forming part of the disputed strip for which the Niger Company was negotiating. The deponents to this affidavit included Okoya and Onowu who were Umuleri. Objections were raised below as to the admissibility of this document and were renewed before their Lordships, who, however, see no sufficient reason for holding that it was wrongly admitted by the learned trial Judge. The original, of which it was a certified copy, was more than twenty years old at the time of the trial. No objection was taken below on the ground that the document produced was a certified copy and not the original. It appears on the face of it to have been produced from proper custody, viz., that of the District Clerk of the District Office of Onitsha by whom it is certified to be a true copy—but again no objection was taken below as to this—and it purports to have been signed by the District Officer as witness to the marks of the deponent Chiefs. Inasmuch as the document would have been admissible under section 122 of the evidence Ordinance if it had been the original, and produced from proper custody, and inasmuch as no objection was taken that it was a certified copy, or as to the custody from which it was produced, their Lordships consider themselves as justified in treating the admissibility of this document as covered by section 122.

The learned trial Judge, after a full and careful review of all the evidence, at page 84 of the Record expressed his conclusion thus:—

"The evidence afforded by the dealings with the land by the parties, and by the existence on the land of a juju now tended by the plaintiffs, in my judgment falls short of establishing the fact that the plaintiffs are owners of the land, and on this evidence, and on the case as a whole, it is quite impossible for me to find in favour of the plaintiffs, whose claim must accordingly be dismissed."

In the Federal Court Hubbard, F.J., who delivered the leading judgment, came to the same conclusion, while differing from the trial Judge's reasoning in two respects.

The learned Judge took the view that the Aguleri probably did not know anything about the Agreement of the 25th June, 1898. Hubbard, F.J., thought it probable that the Aguleri did know that some bargain had been made between the Umuleri and the Niger Company, but did not know the extent of the grant to the Niger Company which that bargain involved. Hubbard, F.J.'s, view may be said to be borne out by the fact that the only action taken by the Niger Company as grantees consisted of the erection of some small zinc houses abandoned after three years. Either view would deny to the Aguleri that degree of knowledge of the nature and extent of the bargain which would be necessary to support a case of acquiescence against them.

The other point of difference was that the trial Judge thought that the grant by the Aguleri to the Roman Catholic Mission in 1894 was more significant as an indication of Aguleri ownership when made as it was without their physical presence on the land than it would have been had they been in actual occupation at the time. Hubbard, F.J., dissented from this view, but their Lordships are not satisfied that in the context in which it was expressed by the learned Judge it was wrong. It seems to their Lordships simply to mean that a bargain with actual occupiers might be made on the facile assumption that the occupiers were owners, whereas a bargain with persons not in occupation would necessarily involve more attention to the question of ownership as distinct from mere occupation.

Hubbard, F.J., further pointed out that the Umuoba Anam settlement "took place in 1910 when the land was already Crown land"—(see Record, page 102). Their Lordships understand this as meaning "when according to the plaintiffs' contention the ownership of the land had passed from them to the Niger Company". Except in a retrospective sense, there could be no question of any transfer to the Crown before 1916, and if the ownership of the land did in fact pass from the Umuleri to the Company and through the Company to the Crown, that could only be because the Umuleri did in truth own the land on the 25th June, 1898, the date of the Agreement with the Niger Company, in which case they would have owned it to this day by virtue of the retrospective abandonment effected under the Ordinance of 1916 as amended, and would be entitled accordingly to succeed in the present appeal, which would be contrary to Hubbard, F.J.'s, own view.

Their Lordships do, however, agree with the view to be collected from Hubbard, F.J.'s, judgment as a whole that little, if any, assistance is to be found in the various acts of ownership on either side which took place between the 25th June, 1898, and the abandonment of the land by the Crown.

The essence of the plaintiffs' case is that the Umuleri, being then owners of the land, made over the ownership of it to the Company on the 25th June, 1898. They must therefore be taken as having believed from the 25th June, 1898, onwards that they had no interest in the land, and cannot rely on any acts of ownership on their part after the 25th June, 1898, as assertions of their title against that of the Aguleri. According to their own case, such acts of ownership, at the time when they took place, could only constitute assertions of their title in the first instance against that of the Company, and latterly against that of the Crown. Similarly, the acts of ownership from the 25th June, 1898, onwards relied on by the Aguleri as assertions of their title against that of the Umuleri could, according to the Umuleris' case, only amount to assertion of the Aguleris' title against that of the Company in the first instance and latterly against that of the Crown, which the Umuleri, having parted with the whole of their interest, were neither concerned nor able to contest.

The reasoning of Hubbard, F.J. is not altogether easy to follow at all points, but it appears to their Lordships that he balanced the rival claims with great care, giving full weight to all that could be said on either and if anything putting the case of the Umuleri somewhat too high. Having done so, he expressed his conclusion thus at page 103 of the Record :—

> " Upon a careful consideration of the whole appeal and of the arguments advanced by Counsel on both sides, it appears clear to me that the appellants completely failed to prove the extent and length of occupation which is necessary to ground a claim for declaration of title, and that the learned Judge was fully justified in dismissing their action."

Sir Stafford Foster Sutton, F.C.J., in a concurring judgment, thought the learned trial Judge right in placing some weight on the affidavit to which their Lordships have already referred, which he described as a declaration by Chief Okoye against the interest of his own people.

The learned Federal Chief Justice went on (at page 104) to express this conclusion :—

> " The onus of proving that they were entitled to the declaration of title to the land in dispute was upon the plaintiffs. The learned trial Judge reached the conclusion that they had not discharged that onus, and nothing that was said at the hearing of this appeal has persuaded me that he ought to have held otherwise."

The third member of the Court concurred without adding further reasons.

Mr. Quass for the defendants invited us to hold that notwithstanding differences in the reasoning of Hubbard, F.J. and the learned Federal Chief Justice there were here concurrent findings of fact which their Lordships, according to the well-settled rule, should not disturb save in exceptional circumstances which do not exist in the present case.

Mr. Dingle Foot for the plaintiffs on the other hand submitted that there was here no substantial dispute on any question of fact, and that this was not a case of concurrent findings of fact, but a case in which the two Courts below had concurrently erred in declining to draw from virtually admitted facts the inference that the Umuleri were owners of the disputed strip.

Their Lordships are content to accept as the more favourable to the plaintiffs Mr. Dingle Foot's submission that this was a case of concurrent inferences from facts rather than concurrent findings of fact. Even so, they find it impossible to hold that the Courts below were wrong in concluding as they did that the plaintiffs, on whom the onus lay, had failed to make out their claim to the declaration sought.

On the contrary, it appears to their Lordships that such evidence of ownership as existed immediately after the execution of the Agreement of 25th June, 1898, was wholly inconclusive either way, and that if and so far as subsequent acts and events are to be regarded as having any evidential value at all they do not, on balance, afford any further support for the plaintiffs' claim. As to the reliance placed by the plaintiffs on the physical occupation by the Umuleri of parts of the disputed strip before 1898, their Lordships would refer to *Omanhene Foli* v. *Chief Obeng Akesse* [1934] A.C. 340, which, in circumstances such as those of the present case, to say the least casts doubt on the evidential value of such partial occupation for the purpose of raising the inference of ownership of the whole of the area claimed.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed.

The plaintiffs must pay the costs of the appeal.

(39869) Wt. 8078—37 100 8/59 D.L.

**In the Privy Council**

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*v.*

R. A. IDIGO AND ANOTHER ON BEHALF OF THEMSELVES AND THE AGULERI PEOPLE

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DELIVERED BY LORD JENKINS

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