Privy Council Appeal No. 32 *of* 1963

Dr. Esin Anwana Esin (for himself and as representing the Esin Family of Eyo Abasi) – – – – – – – *Appellant*

v.

Atang Edem Abasi and others – – – – – – *Respondents*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD JUNE, 1964

Present at the Hearing:
LORD EVERSHED.
LORD GUEST.
LORD UPJOHN.
[*Delivered by* LORD UPJOHN]

This is an appeal by leave from an order made on the 24th May 1963 of the Federal Supreme Court of Nigeria whereby certain proceedings in the High Court of Nigeria Eastern Region culminating in a judgment of Kaine J. on 30th October 1959 were set aside as a nullity.

The problem before their Lordships is purely one of procedure and does not touch on the merits of the case.

To understand the difficulties that have arisen it is necessary to set out some historical facts.

On the 17th July 1952 the Crown served a notice in the prescribed terms under the Public Lands Acquisition Ordinance 1917 (as subsequently amended) (which will be referred to as the Lands Ordinance) to acquire just over $10\frac{1}{2}$ acres of land at Oron for the purpose of building a Customs House thereon. The Crown duly entered on to this land and has ever since been in occupation thereof. This land will be referred to as the Crown land.

At once each of two families, the Esin family and the Abasi family, disputed the ownership of the greater part of the Crown land and therefore the right to the compensation payable for its acquisition; it is regrettable that 12 years later this dispute has not yet been resolved. However in these circumstances on 2nd February 1954 the Lieutenant-Governor Eastern Region issued a summons under section 10 of the Lands Ordinance making representatives of these families respondents and asking for the determination of the amount of rent payable annually in respect of the Crown land. He offered to pay an annual rent of £50.

On 26th April 1954 Mr. Justice Brown made an order in these terms:—

> " Order amount of rent payable annually to be £50 as offered by the Lieutenant-Governor and is now payable to the persons entitled as landlords ".

In order to determine who were entitled as landlords, on the 7th July 1954 the Esin family began proceedings in the Native Court at Oron (bearing the case number 563/54) against the Abasi family. The parties appeared without professional advisers and the plaintiffs' action was dismissed by the Judge.

It is common ground that in so far as this action related to the Crown land the proceedings in the Native Court were misconceived and a nullity.

On the 29th January 1955 an Assistant District Officer purporting to act under section 28 (1) (*b*) of the Native Courts Ordinance set aside the judgment of the Native Court and ordered a retrial in the Supreme Court of Nigeria as it was then called. Under recent Constitutional revisions that is now the High Court and it will be convenient so to describe it to avoid any confusion. The formal order embodying his decision was dated 31st January 1955 and it stated that one of the reasons for ordering a retrial was that the land in dispute was Crown land.

One of the substantial issues in this case is whether that order for retrial was validly made.

During 1955 the action so ordered to be retried received a new serial number C/2/1955 in the High Court and pleadings were delivered. Later by leave of the Court amendments were made by addition of parties. Then the action became dormant for about four years but ultimately was heard by Kaine J. in September and October 1959 and he delivered judgment on 30th October 1959.

There have since been changes of parties by death but nothing turns thereon. The plaintiffs in the action are the appellants and the defendants are the respondents before their Lordships.

It is not now in question that in the proceedings before Kaine J. the land in dispute related to an area of rather over 19 acres divided, for the purpose of establishing title, into four plots, A, B, C, D. The Crown land was just over $10\frac{1}{2}$ acres of which 8 acres were within the four plots A–D and a little over $2\frac{1}{2}$ acres were outside this area and were not claimed by the plaintiffs in the action.

Kaine J. held that the plaintiffs established title to plots B, C, and D, but failed to establish title to plot A. The action was fought on the footing that the freehold of the Crown land remained in the landlords and having regard to the form of order made on 26th April 1954 this was probably right and no objection to declaration of title thereto could properly be made, but their Lordships have some difficulty in seeing how it could have been proper to grant injunctions relating to the Crown land which is and ever since 1952 has been in the exclusive possession of the Crown; however that is not an issue before their Lordships.

The defendants appealed to the Federal Supreme Court both on the actual merits which had been the subject of the decision of Kaine J. and also on the ground that the proceedings before him were a nullity.

The Federal Supreme Court dealt with the latter point as a preliminary issue and by a majority upheld the submission and, as already mentioned, set aside the proceedings C/2/1955 as a nullity. In these circumstances they did not hear the appeal on the merits.

Before reviewing the grounds on which the Federal Supreme Court came to this conclusion it will be convenient to set out the relevant part of section 10 of the Lands Ordinance on which so much hinges.

> " If separate and conflicting claims are made in respect of the same lands the amount of compensation due, if any, and every such case of disputed interest or title shall be settled by the Supreme Court, which Court shall have jurisdiction to hear and determine in all cases mentioned in this section upon a summons taken out by the Chief Commissioner or, if the lands are situated in the Colony, the Chief Secretary, or any person holding or claiming any estate or interest in any lands named in any notice aforesaid, or enabled or claiming to be enabled by the Ordinance to sell and convey the same ".

The majority of the Federal Supreme Court decided that the action C/2/1955 was a nullity on the ground that the proceedings in the Native Court related to the Crown lands and, as their Lordships read the judgment of Bairamian F. J. who delivered the leading judgment, with which Brett F. J. concurred, related only to such lands; those proceedings were therefore a nullity. Therefore, the order of the District Officer purporting to order a retrial in the High Court was invalid and the proceedings before them were a nullity.

It was put succinctly by Bairamian J. thus: "A summons was taken out by the Lieutenant-Governor (the successor of the Chief Commissioner); there was already a dispute between Dr. Esin and Atang Edem Abasi, and both were respondents to the summons. The Supreme Court had jurisdiction to hear and determine their dispute *upon a summons taken out under that Ordinance;* it had no jurisdiction to hear it in a suit between Dr. Esin and Abasi brought in the Native Court contrary to law and invalidly ordered to be retried in the Supreme Court ".

It is clear from the dissenting judgment of Taylor F. J. that he agreed with the principles thus enunciated but he dissented on the ground that in his view the proceedings in the Native Court related not merely to the Crown land but to the whole of the disputed area of 19 acres. In his judgment he carefully analysed the claim made in rather elementary terms in the Native Court and shewed that in his opinion that claim in fact related to the whole area of 19 acres. Before their Lordships it was conceded that the area of dispute in the Native Court extended beyond the Crown land.

Taylor F. J. then rightly pointed out that it could not be and had not been contended that the Native Court had no jurisdiction over the larger area of land. Therefore he proposed to excise from the area of dispute in action C/2/1955 the Crown land and to let it continue as to the remainder i.e. as to rather over 11 acres.

If it be right that the order of retrial was a nullity as to so much of plots A–D as was Crown land their Lordships can see no answer to this proposal, inconvenient though it might be in practice.

Before their Lordships an additional point not expressly taken in the Court below, though clearly based on the passage in the judgment of Bairamian F. J. already quoted, was to the effect that to determine a dispute as to title, when the Crown invokes the powers of the Lands Ordinance to take land, the jurisdiction of the Court could only be invoked by a summons issued under section 10. Then having regard to the mandatory terms of section 29 of the Lands Ordinance it was argued that such summons must be in the form prescribed in Schedule F, that is a summons entitled " In the Matter of the Public Lands Acquisition Ordinance " and so on and the present proceedings not being so initiated were incompetent. However it was conceded that having regard to the very wide terms of section 10 not only could the summons be taken out by a party other than the Lieutenant-Governor but that he was not in every case an essential party even as respondent.

On the main point that the order of retrial was a nullity their Lordships regret that they are unable to agree with the view which formed the basis of the decision of all the Judges of the Federal Supreme Court.

The decision of the Native Court was a nullity in so far as it related to the Crown land. That was one good reason for setting it aside in order that judicial records should be cleansed of invalid orders; but there were other good reasons stated in the Order of 31st January 1955 for setting aside the order of the Native Court not only in relation to the Crown land but as to the remainder and their Lordships do not see how that Order can possibly be challenged so far. Then the powers conferred upon the District Officer by section 28 (1) of the Native Courts Ordinance are perfectly general; their Lordships do not think it necessary to quote the section for nothing turns upon its exact wording, but the District Officer is clearly empowered when setting aside an Order, to order a retrial in the High Court under sub-paragraph (*b*) or a transfer to the High Court under sub-paragraph (*c*) of section 28 (1); no doubt sub-paragraph (*b*) was directed to the case where there had been a judgment in the Native Court (as in this case) and sub-paragraph (*c*) to the case where the action was still pending.

Such an order for retrial would (apart from the argument that proceedings must be initiated in the High Court by summons in the form of Schedule F) have been perfectly valid if it had been made for one of the other reasons given and their Lordships do not see why the order is invalid because one of the grounds for ordering a retrial was that the proceedings were a nullity as to the Crown land.

In their Lordships' opinion when an order of retrial by, or transfer to, the High Court is made the jurisdiction of that Court is in no way fettered by any absence of jurisdiction in the Native Court whose order has been set aside. The High Court entertaining these proceedings has all the powers and authorities conferred upon it by section 11 of the Supreme Court Ordinance just as though the proceedings had originated in the High Court itself.

Apart altogether from authority their Lordships cannot see how such a proposition could be doubted unless there are some restrictive provisions in the Statute which authorises the retrial or transfer (and there are none) but in fact authority is not wanting. In *Ababio v. Ackumpong* 6 W.A.C.A.173 the West African Court of Appeal on appeal from the Gold Coast decided that on a transfer from the Native Court, the Divisional Court (in that case) could exercise all the powers conferred upon it by section 14 of the Courts Ordinance relating to the Gold Coast which is in similar terms to section 11 already mentioned. The correctness of that decision has not been challenged before their Lordships.

It is interesting to observe that in certain interlocutory proceedings in this case in 1955 and in 1956 both Brown J. and Palmer J., relying on this authority, held that the action was properly directed to be retried in the High Court.

It is true that both judges treated the matter as one of transfer under paragraph (*c*) rather than retrial under paragraph (*b*) but their Lordships can draw no distinction between these paragraphs for any relevant purpose.

Their Lordships regret that *Ababio's* case does not appear to have been cited to the Federal Supreme Court. Apart from the point to which their Lordships will now turn they cannot see anything in the Lands Ordinance which precludes the High Court from entertaining an action ordered to be retried by it if that action could have been validly entertained by proceedings originating by way of a writ of summons in the High Court.

The point then is whether upon the true construction of the Lands Ordinance proceedings relating to land being acquired by the Crown under that Ordinance can only be instituted in the High Court in the form of a summons as prescribed in Schedule F.

Their Lordships do not accept this submission. The Ordinance provides for a summary procedure by way of originating summons to determine the amount of compensation and questions of title. But there is nothing in sections 10 or 29 of the Lands Ordinance on which so much reliance was placed, to exclude the general jurisdiction under section 11 of the Supreme Court Ordinance to determine questions of title in actions begun by writ of summons under Order II of the Rules of the High Court of Nigeria. It is familiar law that where by Statute or Rules of Court the Court is empowered to determine questions by a special summary procedure that does not preclude their determination in actions begun by writ (though questions of costs may be involved) unless it is clear that the procedure so laid down is intended to be exclusive and to oust the normal procedure. In their Lordships' opinion the Lands Ordinance intended to lay down only a speedy and convenient procedure for simple cases. It did not intend to oust the jurisdiction of the High Court in complicated cases to hear actions begun by writ where pleadings would be desirable in order to define the real issues between the parties. This case seems to their Lordships just such a case.

Therefore their Lordships can see no reason to deny to the Esin and Abasi families the right to litigate their disputes as to title even in relation to the Crown land by writ of summons or upon an order for retrial from the Native Court. Their Lordships are glad to be able to reach this conclusion as, having regard to the stage which this action has reached this seems the most convenient and inexpensive course to the parties; it would be lamentable if, as the defendants contend, the whole matter had to proceed *de novo* by summons under section 10.

It is conceded by both sides that when the rights of the parties have been finally determined in action C/2/1955 some further application must be made to the Courts under section 10 of the Lands Ordinance to which the

Lieutenant-Governor will be a necessary party in order to apportion the rent of £50 per annum among the various owners of the Crown land, and this seems unavoidable unless all persons interested in the whole of the Crown lands can agree. While the Lieutenant-Governor will not technically be bound by the ultimate decision in this action there is no reason to suppose he will not be prepared to abide by it in so far as it does decide matters in dispute between the Esin and Abasi families in relation to the Crown land or some part thereof.

Their Lordships will therefore humbly advise Her Majesty to allow the appeal; to set aside the Order of the Federal Supreme Court dated the 24th May 1963 with costs and to restore the judgment dated 30th October 1959 of Kaine J. The pending appeal from that judgment to the Federal Supreme Court will then proceed for hearing on the merits.

The respondents must pay the costs of this appeal.

(90028) Wt. 8052/97 100 6/64 Hw.

In the Privy Council

DR. ESIN ANWANA ESIN (FOR HIMSELF AND AS REPRESENTING THE ESIN FAMILY OF EYO ABASI)

v.

ATANG EDEM ABASI AND OTHERS

DELIVERED BY

LORD UPJOHN

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