Privy Council Appeal No. 29 of 1962

Anachuna Nwakobi, The Osha of Obosi, and others – – *Appellants*

v.

Eugene Nzekwu and another – – – – – – *Respondents*

and

Anachuna Nwakobi, the Osha of Obosi, and another – – *Appellants*

v.

Phillip Anatogu and another – – – – – – *Respondents*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH JUNE 1964

Present at the Hearing:
VISCOUNT RADCLIFFE
LORD HODSON
LORD PEARCE
(*Delivered by* VISCOUNT RADCLIFFE)

This appeal arises out of two suits, now consolidated, in which the respondents represent the Ogbo Family of Umuasele, Onitsha, a branch of the Onitsha Community, and the appellants represent the Obosi Community. The dispute between them is a land dispute, the area in question being a part of Ugbo-Orimile land known as Otu Obosi. It is hereinafter referred to simply as " the disputed land ". The consolidated suits were tried in the High Court of the Eastern Region of the Federation of Nigeria by Betuel J., and on 12th May 1960 he gave judgment in favour of the respondents, awarding them £500 damages for trespass, recovery of possession of the disputed land and a supporting injunction. On appeal to the Federal Supreme Court his judgment was affirmed, the unanimous opinion of that Court (Sir Adetokunbo Ademola C.J., Unsworth and Bairamian F.J.J.) being delivered on 3rd July 1961 by Bairamian F.J.

Their Lordships are satisfied that the decision of the Courts in Nigeria was correct and that the appeal ought to be dismissed.

The quarrel over the disputed land has a long and somewhat complicated history. Since however the material facts relating to it are the subject of concurrent findings in the Nigerian Courts and the radical title to the land has already been decided to belong to the respondents (see the Opinion of this Board reported sub nom *Chief J. M. Kodilinye and another v. Philip Akunne Anatogu and another* [1955] 1 W.L.R. 231), the story can be set out without elaboration and without the need to refer to the evidence in any detail.

It begins in 1884 with a sale of land which included the disputed land by one Akagbue, a member of the Ogbo family, to the National African Company Ltd., to whose rights the Royal Niger Company succeeded. At that time the land was mainly bush, but there were four rent or tribute paying tenants farming on it, who were members of the Obosi community. Akagbue's grant was intended to contain a reservation of the rights of these individual tenants, but the Obosi community itself had no rights whatsoever in the land.

As from the year 1900 the Crown took over the Royal Niger Company's interest in the disputed land, and from then on until the year 1948 the radical title remained in the Crown, to the exclusion both of the respondents, who

will hereinafter be referred to as " the Onitshas ", and of the appellants, hereinafter to be called " the Obosis ". In December 1948, acting under statutory authority, the Crown disclaimed the land, which thereupon revested in its previous owners, the Onitshas. That it was the Onitshas and not the Obosis who were the previous owners was established in the *Kodilinye* suit which has just been referred to. The Opinion of the Board, which concluded that issue, was delivered in 1955, and, while it settled the question of the ownership of the radical title, it expressly left open the determination of any question as to the existence of usufructuary or other rights which might have been acquired in the disputed land during the period of Crown ownership or might otherwise be entitled to recognition.

The present consolidated suits were instituted in 1958 for the purpose of obtaining the Court's decision as to the existence of such rights, which, according to the Obosis, they possessed in the land. The trial Judge, after hearing the evidence, decided that there were no Obosi community rights; and his decision on this point was not challenged in the appeal before their Lordships. The argument presented to them, apart from an issue as to res judicata which will be referred to shortly, was confined to the proposition that, having regard to all that had happened while the disputed land was vested in the Crown, the Onitshas were debarred by the laches or acquiescence of their predecessors, the Crown, from maintaining a suit for the purpose of disturbing the possession of the Obosi community. Neither the trial Judge nor the Federal Court on appeal was prepared to uphold this equitable defence on the part of the Obosis; and their Lordships must now turn to notice the facts upon which, it is claimed, the defence is entitled to rest.

First, however, it is desirable to mention that the trial Judge held that as between Onitshas and Obosis the existence of usufructuary or possessory rights in the Obosi community had already been negatived in another suit, started in 1956, in which the Onitshas had sued one Isaac Madnegbunam Ichu. Ichu, though undoubtedly an Obosi, had been sued personally for possession of his particular holding: but in his defence he had set up and relied upon the alleged possessory rights of the Obosi community over the disputed land. Moreover, " organised bodies within the Obosi Community " had, the learned Judge found, financed and conducted Ichu's defence, had been fully cognisant of the proceedings and had participated in them. The defence had failed, and an order for possession had been made against Ichu. On these facts the Judge held that the non-existence of Obosi community rights in the disputed land was *res judicata* as between Onitshas and Obosis, applying for this purpose the familiar doctrine of " standing by ", as explained, for instance, by Lord Penzance in *Wytcherley v. Andrews* L.R. 2 P & M. 327.

The Federal Court disposed of the appeal without resort to this principle, since, whether or not there was a case of *res judicata* or " standing by " for the Onitshas to rely upon, the Court held that the Obosis had not in any event succeeded in the present suit in establishing the rights they claimed and the defence of laches was not open to them. Their Lordships will take the same course, since they are in full agreement with the Federal Court on what is really the main issue; and also, it must be pointed out, while a defence of *res judicata*, if made good, would be a complete answer to the Obosis' suit, which forms one of the present consolidated suits, it is not so clear what its bearing would be upon the Obosis' defence of laches in the other suit. Where laches is in question, the issue is not so much the question what rights a plaintiff has as whether in any event his conduct has been such as to leave him in a position to invite the Court to enforce them.

Having regard, however, to the arguments that were submitted to them on this question of *res judicata*, their Lordships think that it may be useful to observe that in their view the principle of " standing by ", while certainly a valuable one for application when circumstances demand it, does need to be confined to cases in which participation in " the battle " is proved up to the hilt. Otherwise, the distinction between suits in which plaintiffs have chosen to sue a defendant individually, though a community title may be brought in question, and those suits in which they set out to and do challenge a community title as such will be in danger of being obscured; and even a measure of assis-

tance to a defendant from other community members may give plaintiffs an advantage in all future litigation which, in fairness, there is no reason for them to enjoy.

To turn now to the facts upon which the Obosis seek to found their defence of laches. Up to the year 1928 nothing seems to have occurred to suggest that such Obosis as were found in occupation of any holding on the disputed land were anything but either rent-paying tenants of the Onitshas or trespassers: and, if the latter, steps were taken to turn them off. Sometime about 1928, under the influence of Chief Kodilinye previously referred to, claims of right on behalf of the Obosi Community began to be put forward by Obosi occupiers, coupled with refusal to pay rent to the Onitshas. Those claims were not conceded by the latter, and legal proceedings were launched for the recovery of rent. In 1934 however a step was taken by the Crown which was no doubt responsible for much of the difficulties that have since arisen. The title to the land had been vested in the Crown since 1900, and therefore for these years, despite the legal proceedings that evidently took place, neither the Onitshas nor the Obosis had any radical title to assert. But no action seems to have been taken by the Crown to establish its own position until 1934, when both parties were forbidden by the Resident, the local representative of Government, to "have any dealings with the land". The Onitshas, says the learned trial Judge, heeded the warning but the Obosis did not.

In fact what the Obosis did from that time on was to develop their settlement on the disputed land in defiance of the Crown's warning. This was very naturally objected to by the Onitshas, who saw the prospect of their own position being prejudiced without their having the power to intervene, and the record shows how vigorously they protested to the Resident asking him to take some action, if they could not. But the attitude of the Crown during this period is stated by the trial Judge to have been that, once having asserted its own ownership by issuing a warning to both parties in 1934, it did not wish to take sides in a dispute, of the rights and wrongs of which it was probably ignorant; and, having in view the abandonment of the land which ultimately took place in 1948, it was content to hold its hand. Nevertheless the Resident did give the Obosis more than one warning that their conduct was improper, and in 1944 he went so far as to institute suits against a number of individual Obosi occupiers, claiming that they had no title to possession. The suits were unsuccessful in the first Court, being defeated on technical grounds of procedure, not on their merits, and after adverse judgment in one of them the Crown for some reason discontinued them: but their institution at least showed that the Crown was far from acquiescing in the Obosi claim of title.

Nothing else calls for mention with regard to the attitude of the Crown. In 1948 came the disclaimer, and, as from that date the Onitshas have been at liberty to take their own proceedings against the Obosis. Plainly, they have not been idle since then, either in suits against individuals or in suits against the Community: nor is it part of the appellants' case that the Onitshas themselves are affected with laches or acquiescence. The whole case that they seek to make is that the Crown, if a suitor, could have been met with these defences and that the Onitshas, succeeding to the Crown's title, can be in no better position.

In their Lordships' opinion the defence of laches cannot be presented just in these terms. Laches involves essentially a personal disqualification on the part of a particular plaintiff: it cannot be treated as a stigma on the title to land which, once impressed, necessarily descends with the title and affects all succeeding owners. In this it is to be distinguished from a defence such as estoppel *in pais* which, given the words or acts upon which a defendant has relied and altered his position, bars the remedy from that time on, both in the hands of the original actor and in the hands of those who claim title through him.

Laches is not like this. It does not bite at an identifiable moment of time and it can be relied upon only when account has been taken of all the circumstances that affect both the immediate plaintiff and the immediate defendant.

Lapse of time is always one of these circumstances, and the inaction of a predecessor is not a matter to be ignored, for such inaction may itself lend some support to the defendant's equity. It may well be important from other points of view. It may itself contribute part of the positive evidence of a defendant's title, where that is uncertain: or it may constitute that type of acquiescence which, when analysed, operates as an estoppel, because it has led a defendant to alter his position on the faith of the established inaction. But these considerations are separate from laches, and it only leads to confusion to speak of one in terms of the other.

Even if attention is concentrated on the period of Crown ownership which ended in 1948, the facts found are incapable of supporting the required defence. For what has to be proved to make that good? In their Lordships' opinion there is no better description of the defence of laches than that given by Sir Barnes Peacock in *Lindsay Petroleum Co. v. Hurd* L. R. 5 P. C. 221 at 239. " The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief which otherwise would be just, is founded upon mere delay . . . . , the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the facts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

Now in their Lordships' opinion the conclusive factor in the present case is that the Obosis were at no time under any misapprehension which led them to suppose that their title to the disputed land was accepted by the other parties, Crown or Onitshas. They were not the victims of any mistake induced by the others. The findings of the trial Judge are explicit on this point. " Far from being permitted to build on the land," he says of them, " they were, as they well knew, forbidden to do so." And again, " If the Obosi Community, as they did, flooded the land in dispute with persons and buildings, in accordance with an unreasonable belief, not caring whether the land was in their possession or not, with a view to presenting everyone with a " fait accompli," enabling them to plead the hardship of being dispossessed; they cannot now complain if as a community they are now dispossessed."

The Federal Court has recorded a similar view of their conduct. " There is, I fear," said Bairamian F. J. " no merit in their conduct. There is evidence for the plaintiffs of the Resident's oral warnings to their Chief . . . . The learned Judge says that " Far from being permitted to build on the land they were, as they well knew, forbidden to do so." They built all the same; and, after the Crown gave up the land at the end of 1948, they went on trespassing. The idea of depriving the owners of their property without any return did not worry them; it was not until this appeal that they even suggested that, if they lost, they would like to be allowed to stay on and pay rent. They built up a case of hardship by wrongdoing, and wished to have their misconduct condoned by putting the blame on the Crown."

The relative positions of the two parties to the present suits appear from the facts to be as follows. On the one hand are the Onitshas who, after protracted litigation, have established themselves to be the owners of the radical title to the disputed land. In course of time, through no fault of theirs, it has been subjected to large scale occupation and building operations in the name of the Obosi Community. The Onitshas have always been vigilant to assert their rights in the land and to evict those who could not claim an interest as their own tenants. During the period when they were powerless actively to assert their rights, because the Crown would not let them, they did what they could to preserve their position by protests to the Crown. So much for the Onitshas. On the other hand are the Obosis who have failed to prove any legal rights in the land, either by way of radical title or by way of usufructuary

possession under customary law. All that their Community can say is that, with its eyes wide open to the existence and nature of the dispute, it has for years been putting people and buildings on the land, and this despite the Crown's injunction that the land was not to be interfered with.

Laches is an equitable defence, and to maintain it and obtain relief a defendant must have an equity which on balance outweighs the plaintiff's right. The Obosis have no such equity in this case.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs.

(90137) Wt. 8052/97 100 7/64 Hw.

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DELIVERED BY
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