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30/1964

IN THE PRIVY COUNCIL

No. 35 of 1963

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF NIGERIA

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
23 JUN 1965  
25 RUSSELL SQUARE  
LONDON, W.C.1.

78619

B E T W E E N :

1. EGONEKWU DIM
2. DURU EGBUFO
3. OJARA EZEGWO
4. OKWARA IBEBUIKE (Defendants) Appellants

- and -

- 10 1. ANUSIONWU DURU
2. OKANU NNADE
3. DURU OBASSI NWECHIE
4. IBEBUIKE EZEONYEMBA
5. DIMOGUDO EZE (Plaintiffs) Respondents

CASE ON BEHALF OF THE APPELLANTS

Record

1. This is an appeal from the Judgment and Order of the Federal Supreme Court of Nigeria dated the 30th March, 1962, affirming the Judgment of the High Court of the Eastern Region (Onitsha Judicial Division) dated the 5th November, 1960. p.56  
p.63  
p.43
2. The appeal arises out of an action brought by the Respondents representing the Amanato people against the Appellants, representing the Amanano people, claiming a declaration of title and an injunction in regard to land known as "Ugwu" land.
3. The Appellants sought to meet the claim to title alleged by the Respondents by relying upon the decision in a previous suit between the same parties dealing with the same subject matter. The previous suit was instituted in the High Court of Onitsha and that Court, Waddington J., referred the matter of ascertaining the boundary put forward by the Respondents (as Plaintiffs) to

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a Referee "in the interest of finality". This was done by consent of parties. The Referee found as a fact on the evidence that there was no defined boundary between the parties. The Referee's finding was accepted by Waddington J., and Judgment given accordingly. There was no appeal from that Judgment.

4. Both the Courts below rejected the Appellants' plea of estoppel and there are concurrent findings of fact of the Courts below in favour of the Respondents as to the boundary between the lands belonging to the parties.

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5. The sole question for determination is whether the concurrent findings are vitiated by the error of law as to estoppel.

Ex. "7"  
p.67

6. On the 14th March 1944 the present Respondents brought Suit No. O/10/1943 against the present Appellants in the High Court of Onitsha for damages for trespass, and an injunction.

The action came on for hearing before Waddington J., who made an Order by consent of parties referring the matter arising in the suit to a Referee. The terms of reference were:-

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p.58.  
ll.34-46.

"TERMS OF REFERENCE

1. To take evidence and to determine whether in fact Defendants in the above-named suit have trespassed on Plaintiffs' land as alleged and if so,

2. What is the nature of the trespass, and

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3. To give an estimate of its value.

AND THE REFEREE is hereby directed to transmit to this Court, in triplicate, the proceedings held on the Inquiry and his report on his findings on the questions herein referred to him for his investigation, and on the credibility of the witnesses heard."

The Court adopted this course "in the interest of finality" with the consent of both parties.

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The Referee, Mr. Powell, Acting District Officer, found as a fact that the Appellants had not trespassed on the land and therefore no question of damages arose. Record

Referring to the boundary of the land between the parties as alleged by the Respondents then, and now in the present Suit, the Referee found that the Respondents had not established any boundary as alleged by their plan filed in the previous Suit. p.58  
11.34-46.

10 The subject matter of the previous Suit, No. 0/10/1943, is the same as the subject matter of the present Suit.

The Referee, Mr. Powell held an enquiry on the land, and his findings and recommendations were adopted and incorporated in the Judgment of Waddington J.

7. On the 1st April, 1958, the Respondents instituted p.2.

#### T H E P R E S E N T S U I T

20 in the High Court of the Eastern Region (Onitsha Judicial Division) against the Appellants claiming a declaration of title to ownership and recovery of possession of land known as Ugwu land, and an injunction.

8. On the 21st October, 1958, the Respondents filed their Statement of Claim alleging acts of ownership and possession over the land in dispute. p.3

9. On the 7th March, 1959, the Appellants filed their Statement of Defence, pleading inter alia the decision in the previous Suit No. 0/10/1943 between the same parties regarding the same subject matter now in suit. p.5

30 The relevant pleas are paragraphs 7 and 8. p.6: 1.29

10. Both parties adduced evidence in support of their allegations of ownership.

11. The Judgment of the Trial Court was delivered on the 5th November, 1960, by Betuel, J. p.43

The learned Trial Judge referred to certain other proceedings taken in the Native Courts between the parties regarding the same subject matter for a demarcation of the boundary between the lands belonging to

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the parties, and in the light of these proceedings the learned Trial Judge rejected the decision of Waddington J., in the previous Suit No. O/10/1943. He stated his reasoning in the passage following:-

p.46  
11.5-16

"In Exhibits "7" - "9", a claim for trespass, it became necessary to ascertain the boundary between the parties, the Referee appointed was unable to discover it and the Plaintiffs Amanato were non suited and the parties were advised to enjoy the land communally.

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If the Referee considered all the previous proceedings available to me, I am unable to understand how he could have come to his conclusion as to there being no boundary."

The learned Trial Judge stated his conclusion thus -

p.46 1.29  
to  
p.47 1.8.

"All I am concerned with is the land in dispute in this case, and in particular the boundary between the parties.

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It appears to me on the evidence, that the Amanato have shown that they have lived on the land in dispute for a considerable time, that they have farmed there for a long time, that they have continually sued the Amanano for entering and farming and erecting structures on the land, even going to the extent of pulling down the structures and driving them out, they have also sought to have a boundary between them demarcated, although the footpath had been fixed as a boundary in earlier cases.

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I am not unduly impressed with the support given to the Amanato by most of their neighbours, the Amanato also have received considerable support, but if the evidence is weighed, the preponderance of credible evidence favours the Plaintiffs.

It appears to me that they have established a case for and are entitled

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to a declaration of title and an injunction  
in respect of the land verged pink in Exhibit  
"16".

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Judgment was accordingly given in favour of the  
Respondents for a declaration of title and an  
injunction.

12. The Appellants appealed to the Federal Supreme Court on the 24th November, 1960. p.47.

10 13. The Judgment of the Federal Court was delivered on the 30th March, 1962, by Taylor F.J., Unsworth F.J. and Brett F.J. concurring. p.57.

The learned Judges considered the grounds of appeal under two heads:-

"The Grounds of Appeal may, however, be conveniently treated in this judgment under the following two heads:- p.57. 1.27.

(1) Estoppel by virtue of the proceedings before the Referee as per Suit O/10/1943.

20 (2) Error and misdirection in failing to take into account the inconsistencies in the evidence of the respondents in the present Suit and in Suit O/10/43, and more particularly the inconsistencies in the names and locations of places sited on the plan Exhibit "1" which was made for the purposes of the present Suit and the plan Exhibit "3" which was made for the 1943 suit."

14. As to the first head the learned Judges observed: p.58 1.6  
to  
30 p.59 1.21.

"On the first of these heads, the facts necessary for an understanding of the position may be shortly put as follows. The present Plaintiffs, who will be henceforth referred to as the Amanatos, sued the Defendants, who are the Amananos and will be so referred to, claiming £300, as damages for trespass committed on Ugwu land which comprised Alanro, Mputara, Akwu, Ibarankwu, Ebelebe, Ofor, Onunkwo and Ugwuntu. An Injunction to restrain further acts of trespass was also sought. This was Suit O/10/43. The matter was referred to a Referee on the following terms of reference:

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Record

- "1. To take evidence and to determine whether in fact Defendants in the above mentioned Suit have trespassed on Plaintiffs' land as alleged, and if so:
- 2. What is the nature of the trespass? and
- 3. To give an estimate of its value".

The Referee found as a fact that the Amananos had not trespassed on the land and that no question of damages therefore arose. As to the boundary of this land this is what he said:-

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"I could see nothing else on the land to support the boundary Plaintiffs alleged was laid down in 1911 by Acting Commissioner Crawford ... I recommended that the parties be told in view of the fact that no defined boundary between them has been discovered, and being closely related, they continue to farm all the land in dispute communally".

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When the case came back to the High Court for argument on the Referee's report, a judgment of non suit was entered against the Amanatos. Mr. Obiora for the Amananos, contended that the Amanatos are now estopped from saying that the path shown as running from Orlu in a north easterly direction to the Urashi river as shown in Exhibit "3" is the boundary between the parties to the Suit. There is no substance in this contention for the finding of the Referee did not establish that a boundary did not exist but that on the evidence before him he was unable to determine it. It is not the case of either party that a boundary does not, in fact, exist between them. The Amanatos place the boundary at this footpath, which incidentally is depicted on the plan filed by the

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Amananos, i.e. Exhibit "16", whilst the Amananos show the boundary as edged in yellow - Exhibit "16". The grounds of appeal covering this point must therefore fail and are dismissed."

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10 15. The second head covered the grounds of appeal dealing with the evidence in general, as to which there are concurrent findings of fact. The Appellants rely upon their contention as to the first head relating to estoppel and respectfully submit that the said error of law relating to estoppel vitiates the concurrent findings of fact of a boundary.

In accordance with the Judgment the appeal was dismissed with costs.

16. An Order dismissing the appeal was made on the 30th March, 1962. p.63

17. On the 6th May, 1963, the Appellants obtained final leave to appeal to Her Majesty in Council. p.64.

20 18. The Appellants humbly submit that the appeal be allowed with costs throughout for the following

#### R E A S O N

30 BECAUSE in the previous Suit No. 0/10/43 the Respondents had every opportunity to call evidence in support of their claim that the path shown as running from Orlu in a north easterly direction to the Urashi river as shown in Exhibit "3" is the boundary between the parties to the suit and they failed to call satisfactory evidence in support of their said claim and they are now estopped from relying on that same boundary in the present Suit.

S. P. KHAMBATTA.

HARRY LESTER.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL SUPREME  
COURT OF NIGERIA

BETWEEN:

1. EGONEKWU DIM
2. DURU EGBUFO
3. OJARA EZEGWO
4. OKWARA IBEBUIKE  
(Defendants) Appellants

- and -

1. ANUSIONWU DURU
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5. DIMOGUDO EZE  
(Plaintiffs) Respondents

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CASE ON BEHALF OF THE APPELLANTS

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T.L. WILSON & CO.,  
6, Westminster Palace Gardens,  
London, S.W.1.

Solicitors for the Appellants.