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Judgment
36/1964

IN THE PRIVY COUNCIL

No. 49 of 1962

ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA

HOLDEN AT LAGOS

B E T W E E N

(1) NNAEGBO EKWEZE & OTHERS
Defendants/Appellants

v.

AJANA ENWELUM & ANOTHER
Plaintiffs/Respondents

and

(2) UZODIGWE MADIKA & OTHERS
Plaintiffs/Appellants

v.

NWANWUBA ASIEGBU & OTHERS
Defendants/Respondents

and

(3) AJANA ADUAKA & OTHERS
Defendants/Appellants

v.

VINCENT EKWEALOR
Plaintiff/Respondent

CASE FOR THE APPELLANTS

HATCHETT JONES & CO.,
90, Fenchurch Street,
LONDON, E.C.3.
Solicitors for the Appellants.

IN THE PRIVY COUNCIL No. 49 of 1962

ON APPEAL
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HOLDEN AT LAGOS

B E T W E E N:

(1) NNAEGBO EKWEZE
CHINWEZE EJIOFOR and
UZODIGWE MAKIDA
(For themselves and on behalf
of People of Abube Nando) Defendants/Appellants

-and-

AJANA ENWELUM and
ROBERT NWEKEZE
(For themselves and on behalf
of People of Agdudu Nando Plaintiffs/Respondents

-and-

(2) UZODIGWE MADIKA
UDOLI IGWEZE
NNELI ANEKWE and
EGWUONWU EGBILI
(For themselves and on behalf
of Abube Nando) Plaintiffs/Appellants

-and-

NWANWUBA ASIEGBU
IFEDIORA AGBAZINUO
EMESIN ENENDU
ONAEFUNA ONYEKWE and
OBIDIGWE UYAMEDU Defendants/Respondents

-and-

(3) AJANA ADUAKA
ONWUEGBUKE EGENTI
EGWUONWU EGBILI
NNELI ANAKWE
EKWEOBA ARINZE
UDOBU IGWEZE and
OGUGUA UGBOAJA
(For themselves and on behalf
of the Abube Ibinagu family
of Nando) Defendants/Appellants

-and-

VINCENT EKWEALOR (For himself
and on behalf of the Umuawa
Family of Nando) Plaintiff/Respondent

CASE FOR THE APPELLANTS

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pp.112-124 1. This is an appeal from a Judgment and Order of the Federal Supreme Court of Nigeria (Brett Acting C.J., Unsworth and Taylor F.JJ) dated the 30th June, 1961, dismissing with costs the appeal of the Appellants (hereinafter referred to as the "Abube People") from a Judgment and Order of Reynolds J. given and made in the High Court of the Eastern Region of Nigeria, Onitsha Judicial Division, dated the 13th April, 1960, respecting two of three consolidated actions, being respectively suit No 0/19/57 brought by the first-named Respondents (hereinafter referred to as the "Agbudu People" against the Abube People, and suit No 0/31/57 brought by the Abube People against the Agbudu People whereby the learned trial Judge in suit No 0/19/57 granted in favour of the Agbudu People a declaration of title of the land delineated and verged pink on plan Exhibit A with the exception of the portion shaded and shown in Exhibit "D", and furthermore awarded the sum of £50 damages against the Defendants representing the Abube People and the injunction prayed for in suit No 0/31/57 and dismissed the claim of the Abube People against the Agbudu People for damages for trespass and an injunction.

pp 95-101

pp.99 L.47 – p 100 L 32

p 100 LL 33-38

2. The principal questions for determination in this appeal are :-

(a) Whether the consolidation of the said suits 0/19/57 and 0/31/57 and a third suit 0/32/57 wherein the second-named Respondents (hereinafter referred to as "the Umuawa People") brought an action against the Abube People, was rightly made.

(b) Whether Exhibit C was rightly and justly admitted in evidence.

(c) Whether Exhibit D was rightly and justly admitted in evidence.

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(d) Whether Exhibit E having been held by the Federal Supreme Court to be inadmissable they should not have allowed the Abube People's Appeal.

(e) Whether the shaded area shown in the sketch attached to Exhibit D not being defined the area granted to the Agbudu People by the learned trial Judge, in finding that they (the Agbudu People) are owners of all land verged pink in Exhibit A was not also undefined — p 99 LL37-p 100.L2

3. In the said suit No 0/19/57 the Agbudu People claimed against the Abube People -

(a) Declaration of title to all that piece and parcel of land known and called "Agu Okpu Ani" situate at Nando.

(b) £200 damages for trespass on the said land

(c) Injunction to restrain the Defendants their Servants or Agents from further trespass

4. In the suit No 0/31/57 the Abube People claimed against the Agbudu People the sum of £400 damages for trespassing into their land known and called "Ofia Abube" and for cutting therein iroko trees and tapping palm trees therein. — p.12.LL3-14

5. In the suit No 0/32/57 the Umuawo People claimed against the Abube People - — p 21 LL4-14

(a) A declaration of title and possession in and over Odo-Ubiri or Okpobiri land.

(b) £100 damages for the wrongful destruction of certain boundary pillars.

(c) An injunction to restrain the Abube People their privies and agents from further acts of destruction of the boundaries and land marks on the land.

6. The action No 0/32/57 was dismissed by the Federal Supreme Court in the said appeal by the People of Abube thereto. — p 123 LL 7-9

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p 15 L15 - p 16 L39

7. The application made on behalf of the Agbudu People for the consolidation of the suit No 0/19/57 with the suit No 0/31/57 was opposed on behalf of the Abube People as was also the application made on behalf of the Umuawa People for consolidation of the suit No 0/32/57 with suits Nos 0/19/57 and 0/31/57.

p 115 L7

8. In the Judgment of the Federal Supreme delivered by Taylor F.J. in which the other members of the Court concurred he said :-

"The first of both sets of grounds of appeal attack the order for consolidation of the three suits. Chief William for the Appellants contended that consolidation should not have been ordered for the following reasons :-

1. That the cases were not such that each cause of action could properly have been on the same writ

2. That the Plaintiff in one action was the same person as the Defendant in the other

3. That the order was prejudicial to the Appellants for it was exercised in such a way as to enable opposing Counsel to ask leading questions from witnesses testifying favourably to that party and against the Appellants.

4. That consolidation was wrong in principle

By Order 11 r. 7 of the Eastern Region High Court Rules 1955 it is provided that :-

'Causes or matters pending in the same court may by order of the Court be consolidated, and the Court shall give such directions as may be necessary with respect to the hearing of the causes or matters so consolidated.'

This rule is substantially the same as Order 49 r. 8 of the Rules of the Supreme Court of England.

The general principal, if one can say that such exists for Slesser L.J. in Bailey v. Curzon of Kedleston, 1932 2 K.B. 392 at 401, quotes from the 1932 Yearly Practice of the Supreme Court to the effect that the cases disclose no principle, may be found in the judgment of Scrutton L.J. at page 399 of the same report where he says that :-

> 'Much greater latitude is allowed in making these orders, with the object of avoiding multiplicity of actions and, where various interests in one common subject matter are involved all the parties concerned, within reasonable limits, may now be joined as parties so that the Court may adjudicate upon their various rights and interests. Consequently Lee v. Arthur has ceased to be a binding authority, together with a number of other cases which decided that certain parties and causes of action could not be joined in the same Writ.....'

The same principle is stated in similar terms in the 1961 edition of the Annual Practice at page 1185 as follows :-

> 'The main purpose of consolidation is to save costs and time, and therefore it will not usually be ordered unless there is "some common question of law or fact bearing sufficient importance to the rest" of the subject matter of the actions "to render it desirable that the whole should be disposed of at the same time." '

In the matter before us I would refer to some paragraphs in the pleadings in all the suits as showing that it was desirable in order to save time and costs that consolidation should have been ordered, and that there was a common question of the fact running through all these three suits. It is averred in paragraphs 4 and 5 of the Statement of Claim in 0/19/57 as follows :-

> 'The Plaintiffs and Defendants are children of Ikenga Nando who had three children,

> Agbudu, Umuawo, and Abube. Of all of the three children Agbudu was the eldest and took the first share of the Ikenga land.' The plan filed by the Plaintiffs in this action correctly shows the portions of Ikenga land acquired by the three children of Ikenga.

It will be seen from these paragraphs, the parties to this appeal whether as individuals or groups derive their interest from their common ancestor Ikenga. Paragraphs 9 & 10 as amended, and 11 and 12 shows that from 1917 there have been disputes between all three branches of this family as to the area of Ikenga land rightly owned by them. The Abube people in their Statement of Defence admit that all the three parties are descended from Ikenga and they also refer to the disputes between them. Much the same facts are pleaded in 0/31/57 and I would here refer only to paragraph 10 of the Statement of Claim of Abube people which states that :-

> 'Quite recently, i.e. early this year, the Defendants (Agbudu) acting in concert with Umuawu conspired with the Plaintiffs tenants Achalla Nteje to dispossess the Plaintiffs of the greater part of their land.....'

The same averment is contained in the Statement of Defence of the Abube people in 0/32/57. These actions in my view were to decide the extent of the boundaries of each of the three branches of this family and in my view no grounds have been shown for saying that the trial Judge exercised his discretion wrongly.

Chief Williams further contended that the procedure adopted by the trial Judge after consolidation was prejudicial to the Aopellants for the reason already stated. I have given this matter the full consideration it deserves and can find nothing in the cross-examination by Umuawu of the witnesses of Agbudu that could be said to have in any way

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been prejudicial to the interests of the Appellants. As I have remarked earlier Counsel agreed to the procedure to be adopted and it should be noted that throughout the case for Agbudu no objection was raised to the cross-examination of Agbudu people by Counsel for Umuawu. It was when Umuawu called their witnesses (two in number) that Counsel for Abube raised objection and then asked for their earlier cross-examination of witnesses for Agbudu to be deleted from the record. My remarks about there being no prejudice to the Appellants from the cross-examination of Agbudu applies equally to the cross-examination of Umuawu by Agbudu I do concede that the procedure adopted by the trial Judge in this matter was wrong. The proper procedure was to have directed that the parties whose interests were not in conflict, that is the people of Agbudu and Umuawu were not entitled to cross-examine each other's witnesses, but must adopt them as their own witnesses, if they wished to put questions to them, and to allow the Abube people only, a right to cross-examine the witnesses of both Agbudu and Umuawu. As it is, considering the proceedings as a whole, I am not prepared to say that any injustice has been occasioned thereby and this ground of appeal must be dismissed."

9. It is respectfully submitted that having come to the view as he did (and in which the other members of the Court concurred) Taylor F.J. in saying :- p.117 L46-p.118 L46

"I do concede that the procedure adopted by the trial Judge in this matter was wrong. The proper procedure was to have directed that the parties whose interests were not in conflict, that is the people of Agbudu and Umuawu were not entitled to cross-examine each others witnesses, but must adopt them in their own witnesses, if they asked to put questions to them, and to allow the Abube people only, a right to cross-examine the witnesses of both Agbudu and Umuawu."

The Federal Supreme Court should have allowed the appeal of the Abube People inasmuch as the nature

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of the consolidated proceedings and the conflicting and divergent issues arising therein were such that the prejudice that the Abube People were bound to, and did, suffer, as illustrated by what is said by Taylor F.J. and the Federal Supreme Court were wrong in taking the view as thus stated by them -

> 'As it is, considering the proceedings as a whole, I am not prepared to say that any injustice has been occasioned thereby.....'

Exh "C" p. 37 L22-p.39 LL 1-8; Exh "D" p.41 L p.42 L2; p42 LL 7-10; Exh "E" p.42 LL 23-26

10. The objection taken to the admissibility of each of the said Exhibits "C" "D" and "E" on behalf of the Abube People was overruled by the learned trial Judge.

11. In regard to the reception as admissible of the said Exhibits "C" "D" and "E" by the learned trial Judge Taylor F.J. in the said Judgment of the Federal Supreme Court said as follows :-

p 118 L12 - p 120 L25

> "The second ground of the additional grounds alleges misdirection by the trial Judge in admitting exhibit "C" as an agreement between the parties because (1) such agreement did not comply with s. 23 of the Survey Ordinance; (2) the people of Abube were not parties to it; (3) it did not comply with the Land Registration Ordinance and finally, because reliance was placed on it by the people of Agbudu in their Statement of Claim as an arbitration according to the Native Law and Custom. The first and third objections are also taken to the admission of exhibits "D" and "E" in grounds 3 and 4 of the additional grounds and it would be convenient to deal with these points at once in respect of all these documents. In the case of Exhibit "E", there is nothing in the wording of the deed to show or indicate that there was any transfer of land or interest in land to bring it within the definition of an instrument as defined in s. 2 of the Land Registration Ordinance Cap. 108. The words used clearly indicate that the document was no more than a written expression of a boundary demarcation made by the District Officer on the 7th April 1917 and an agreement by the parties to be bound by such demarcation. But be that as it may, all these documents should be read together. They are all made on the

7th April, 1917 with the exception of the 2nd folio to exhibit "D" which was made some fifteen months later by T.G. Lawton, another District Officer, confirming the boundary struck on the 7th April, 1917. These documents were also made by the same District Officer Mr. Gardner. These two District Officers, on the notes of the trial Judge as to the admissions made by Counsel, are out of Nigeria and the parties to the documents, on the evidence of Ajana Enewelum in 0/19/57, are all dead. The documents are evidence of transactions which, like most dealings in land under Native Law and Custom at the time of their making were made orally are admissible as memoranda of the past acts and oral transactions between the parties recorded by responsible officers relating to the ownership of Ikenga land dating back to 1914. Some of these documents bear references to Native Court cases and in one instance to admissions made by the warrant Chief of Abube before the District Officer who prepared the documents. They were all made with a view to their user in the Native Courts and to shut them out when they have been acted upon for the past 40 years would in my view work more injustice than prevent injustice. However, as I have said earlier, they were in law admissible for the reasons given. There is, however, a further objection raised to these documents for Counsel urged that the plans or sketches contained in "D" and "E" do not comply with the Surveys Ordinance and are therefore inadmissible in evidence. The relevant section of this Ordinance is 23 (1) (b) and it provides that :-

> (1) No map, plan or diagram of land -
>
> (b) If prepared, in the case of land in the Eastern or the Western Region, after the 20th day of October, 1897 or, in the case of land in the Northern Region after the 16th day of May 1918, shall save for good cause shown to the Court, be admitted in evidence in any Court, unless the map, plan or diagram.....is prepared and signed by a surveyor and countersigned by the Director of Surveys.

I am not here expressing an opinion that these sketches do come within this section of the Ordinance, but that if they do then the trial Judge

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has a discretion in the matter by the use of the words I have outlined above. I am of the view that if this objection had been taken in the lower Court the trial Judge could for good cause shown, admit the sketches on the documents. The good cause is the matters I have already dealt with when dealing with the admission of the documents themselves.

I shall now deal with the separate matters raised in these three grounds, which are not common to all of them. In ground (2) c it was argued that the Abube people were not parties to Exhibit "C", but, as I have said, Exhibits "C" and "D" should be read together for the matter on appeal relates to the boundaries between these three related villages or groups. There is no substance in this ground or in 2(a) which alleges, in effect, that the ground on which the trial Judge admitted exhibit "C" is different from that relied on in the Statement of Claim. The document was pleaded and the facts therein contained were also pleaded. For the reasons I have given as to the admissibility of this document, this ground of appeal no longer serves any useful purpose and it is dismissed. This also applies to ground 3 (b). Finally, it is urged that Exhibit "E" is irrelevant and should not have been admissible. With this I must agree and so it would appear did the learned trial Judge, for no mention is made of it in his judgment and therefore no reliance was placed on it in arriving at his decision.

12. In regard to the said question in paragraph 2 (e) hereof the Federal Supreme Court in their said Judgment said :-

"the remaining grounds deal with the appeal against
p123 L33 to p124 L34 the judgment in favour of Agbudu. Ground 6 complains of the following portion of the judgment of the trial Judge which reads thus :-

> 'With regards to the Agbudu claim (O/19/57) I find that they are owners of all land verged pink in Exhibit "A" with the exception of the shaded area shown in the sketch attached to Exhibit "D"!"

It was argued that the area shaded in Exhibit "D" was not defined, with the result that the area granted to the Agbudu people is also undefined. I had at first thought that this award must suffer the same fate as that of the Umuawa people, but on further consideration and a closer scrutiny of the sketch on exhibit "D" it is clear that the triangular shaped and shaded piece of land is demarcated by pillars at its three corners. There are two

pillars on the path to Achalla which formed the northern boundary of the shaded area at the points marked 'I' and 'II' and there is a further pillar at the southern tip of the land. This becomes clearer still when one looks at the record made by the District Officer, Mr. Lawton on the 2nd folio of Exhibit 'D' which reads thus:-

> 'On 19.7.18 I went with representatives of Agbudu, Enuyi, Umuawo, Igbariam, Amagu and put in concrete pillars supplied by Agbudu at the points marked, I, II, and III on the big map. The boundaries of Abube Enuyi in this part are now perfectly clear.....'

These three points all lie on the Achalla road between the two streams shown on Exhibit 'D'. Matthias Chukwura, the Licensed Surveyor for Agbudu, having identified the northern boundary of the shaded area with the southern boundary of the area edged yellow in Exhibit "A". I would agree with the trial Judge that a surveyor could demarcate this area either on the plan Exhibit 'A' or on the land in dispute. This ground of appeal must also fail.

13. The Abube People respectfully submit that the Judgment of the Federal Supreme Court is wrong in both or either of the said actions 0/19/57 and 0/31/57 and that the said Judgment should be reversed and set aside and that Judgment should be given in favour of the Abube People on both or either of the said actions with costs or that a new trial should be ordered for the following amongst other

R E A S O N S

1. BECAUSE the parties in the said consolidated actions and the issues therein arising between them in their separate claims against one another being so essentially different and divergent the said consolidation of the said actions was wrong and such that the Abube People were bound to and did suffer injustice and the said Order should never have been made.

2. BECAUSE the consolidation of the said actions was wrongly made.

3. BECAUSE the said Exhibits C and D were inadmissible on the grounds taken as to their admissibility on behalf of the Abube People and their objection taken thereto should have been upheld and the said Exhibits rejected.

4. BECAUSE Exhibit E had been held by the said Judgment to be inadmissible.

5. BECAUSE the area shaded shown in the sketch attached to Exhibit D not being defined, the result was that the area granted, namely, all land verged pink in Exhibit A, by the learned trial Judge to the Agbudu People, is also undefined.

6. BECAUSE the Judgment of the trial Judge and the Judgment of the Federal Supreme Court respectively are wrong, and should be set aside.

S.N. BERNSTEIN

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