

Judgment
40/1964

IN THE PRIVY COUNCIL

No. 33 of 1963.

O N A P P E A L

FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N :

ADERAWOS TIMBER COMPANY LIMITED

Defendants/
Appellants

- and -

- 1. BALE ADEDIRE
- 2. AWE ADENIJI
- 3. SAMUEL ADETUNJI
- 10 4. EMMANUEL ADEYEMO
- 5. E.T. ADEWOYIN
- 6. S. GIWA
- 7. B.F. SHOBALOU

Plaintiffs/
Respondents

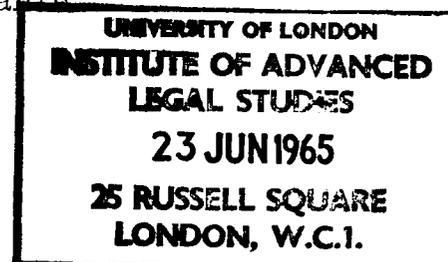
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- and -

THE CARETAKER COMMITTEE OF
THE IFE DIVISIONAL COUNCIL

Defendants/
Respondents

Pro Forma



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CASE FOR THE APPELLANTS

1. This is an Appeal from the judgment and order of the Federal Supreme Court of Nigeria dated the 28th January, 1963, allowing with costs the appeal of the Plaintiffs/Respondents against the order of Kester J. sitting in the High Court of Justice, Western Region of Nigeria at Ibadan, dismissing the Plaintiffs/Respondents' claim. p.55 1.21

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2. In this action the Plaintiffs/Respondents claimed (a) an order to set aside a Deed of Concession dated the 6th January, 1954, made between the Ife District Native Authority and the Second Defendants/Appellants; (b) against the Appellants, an account of all profits derived p.3 1.1.

by the Appellants from the Concession conferred by the Deed and an order that the sum found due should be paid into the Ife Divisional Council Treasury; and (c) an injunction to restrain the Appellants from further exploiting the Concession.

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3. In their Statement of Claim the Plaintiffs/ Respondents alleged that they were members of the Ife Community and sued as such members and taxpayers at Ife; that the forest area the subject matter of the Concession was the communal property of the Ife Community and was held on trust for this community by the Ife District Native Authority, the successor of rights and duties of which were the pro forma Respondents/First Defendants; that at the material time Sir Adesoni Aderemi, the Oni of Ife, was the trustee of Ife Communal lands and also the principal member of the Appellant Company; that in 1954 Sir Adesoni Aderemi, then as Oni and Council "on behalf of the Ife District Native Authority" granted the Concession to the Appellants and concluded the instrument on behalf of each side of the contract, purporting to act in a dual capacity; that in the circumstances the Deed should be set aside; and that the Appellants had since 1954 made substantial profits from the Concession and had refused in collaboration with the pro forma Respondents to release the concession to the Ife Community.

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4. By their defence the pro forma Respondents denied every allegation in the Statement of Claim and claimed that the Plaintiffs' claim to relief was barred by Section 62 of the Native Authority Ordinance (c.140) and/or Section 242 of the Local Government Law 1957. The Appellants in their

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defence denied every allegation in the Statement of Claim and further alleged that the forest area comprised in the Concession was duly constituted a Forest Reserve under the Forestry Ordinance; that the Plaintiffs had no right in or over the area of the land in dispute; and that the Deed of Concession was duly made under the powers vested in the Native Authority by law.

5. The principal issues arising in this appeal are -

(i) Whether the Plaintiffs/Respondents had a sufficient interest to maintain the action;

(ii) Whether the Deed of Concession dated the 6th January, 1954 was valid; and

(iii) Whether the Plaintiffs/Respondents' action was statute barred.

6. The only evidence in the case was given by the First Plaintiff. He said he was Adedire Ogunleye, the Bale of Adedire Agbedegbede Compound Ile-Ife and a member of the hunters' guild at Ile-Ife. His ancestors' name was Ogunleye. He was a native of Ile-Ife and a taxpayer of Ile-Ife. He was born and bred in the forest and hunted and farmed some portions of the forest. The action was by the whole community of Ife and he was the leader of the people who owned farms in the Forest Reserve. (At this stage the judge ruled that he would not allow evidence to be given that the action was a representative one, nor would he allow an amendment to the title of the case to make it a representative action.) Some of the members of the Ogunleye family still hunted and farmed in the Forest Reserve.

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7. In his judgment, the learned trial judge first overruled an objection by the Defendants that the action could not be maintained because the First Defendants had been wrongly named. He agreed that there had been a misnomer, but thought it right to amend the title and Statement of Claim by substituting the words "Ife Divisional Council" for the name of the First Defendants. No point is taken as to this issue by the Appellants.

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The judge next rejected the argument for the Plaintiffs/Respondents that since the Oni of Ife signed the Deed of Concession in a dual capacity both as the Sole Native Authority for Ife and as one of the only 2 members of the Appellant Company, the agreement was voidable in equity. The judge dealt with the question of trusteeship as follows:-

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"By their Statement of Claim the Plaintiffs aver that the forest area the subject matter of the concession is communal property of the Ife Community, and that at all dates material Sir Adesoji Aderemi the Oni of Ife was the trustee of Ife Communal lands. The 1st Plaintiff the only witness called by the Plaintiffs, did not give any evidence as to whether the "concession" is or was ever communal property. However, Mr. Ayoola, Counsel for the Plaintiffs, in his address drew the attention of the Court to a passage in the Deed, Exhibit A, where it is stated:-

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"In witness whereof the Oni of Ife and Council for and on behalf of the Ife District Native Authority and as the traditional Authority on behalf of the communal owners....."

Counsel submitted that the Defendants are estopped from denying the ownership of the property by the Ife Community. The agreement Exhibit "A" is according to the recital, one between the Ife District Native Authority and the Aderawos Timber Trading Company Limited, and I cannot understand why it was not only signed on behalf of the parties, but also on behalf of the communal owners. "Who are the communal owners?" Although the Plaintiffs claimed as members of the "Ife Community" there is no evidence before the Court as to what constitutes this community. The identity of the "communal owners" is not clear or certain. Apart from the 1st Plaintiff there is no evidence about who the other Plaintiffs are. No evidence whatever about their identities. Paragraph 1 of the Statement of Claim was denied by the Defendants. In the circumstances, therefore, I am unable to hold that the words "communal owners" in Exhibit "A" refer to the unidentified class of persons described as "Ife Community" which the Plaintiffs claim they belong and by which right they have brought this action. I do not agree that any estoppel arises.

The next question to decide is whether the Oni is the Trustee of the concession the subject matter of this action and whether his interest and the Trust conflicted. In view of the provisions of Section 27 of the Forestry Ordinance and in the absence of evidence by the Plaintiffs to show who the owners of the forest were before it was constituted into a Reserve, I am unable to hold that the Oni of Ife was a trustee in respect of the Forest Reserve or that the Plaintiffs are beneficiaries.

The submission that the Oni of Ife was the Sole Native Authority at the material time is in my view not correct. The Schedule to W.R. Public Notice No. 6 of 1952 shows that members of the Ife District Council constitute the Ife District Native Authority."

The judge went on to reject a submission by the Defendants that rights of action against the Native

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p.31 l.26

Authority were no longer kept alive and enforceable against Local Councils. This argument was abandoned before the Federal Supreme Court and will not be raised by the Appellants on the hearing of this appeal.

The learned judge dealt with the remaining points and concluded his judgment as follows :-

10 "On behalf of the 1st Defendants, it was submitted by Counsel that the action is statute barred. Mr. Ayoola for the Plaintiffs replied and said that so long as the Deed of Concession Exhibit "A" is still in force time does not begin to run. Chief Rotimi Williams said that time begins to run from the moment there is a cause of action. According to Lord Esher M.R. in Read v. Brown (1888) 22 QB 128, a cause of action accrued as soon as every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to judgment has happened or occurred. In the present case a cause of action accrued against the Native Authority and the 2nd Defendants from the time the Deed Exhibit "A" was executed in 1954. The action was not brought until 1959. I hold that Plaintiffs' action is statute barred.

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30 Another point raised by Counsel for the Defendants is about the Deed of Concession Exhibit "A" being validly made in accordance with the Forestry Ordinance Cap. 75/L/N and the Regulations made thereunder. The deed Exhibit "A" was made in respect of the area within the Ife Native Authority Forest Reserve. The Reserve was constituted under Section 22 of the Forestry Ordinance Cap. 75 (Order No.1941 as amended by W.R.L.N.2 of 1954 - Exhibits D-E). The deed was empowered to be made in exercise of the powers conferred upon the Ife District Native Authority by Rule 40 of the Forestry (litten (sic) Powers Native Authorities) Rules 1943 as amended by Native Authority Public Notice No. 58 of 1948 page 482 of Laws of Nigeria 1948/49. Rule 40 reads:-

40 "40. The owners of protected areas, with the approval of the Governor, may grant licences conferring on the holders the exclusive right to the timber within an area of or areas defined in such licence."

To decide if the deed Exhibit "A" was validly made under the Rule it must be shown that the trees in a reserve are "protected trees" and that the Native Authority is the owner of such trees. I must confess that the Forestry Ordinance and the Regulations made thereunder are not clear or helpful on the point. But taking Rule 40 together with Section 27 of the Forestry Ordinance which extinguished every right in or over land within the reserve save such rights as are specifically excepted in the Order constituting the Reserve, and Section 33 of the Ordinance which vests a Native Authority with the protection, control and management of a native Authority Forest Reserve, the Ife District Native Authority can be held to be the "owners of protected trees"; and that by the power to control and manage the Reserve they are expected to grant exclusive licence to exploit the forest for timber. In my opinion the deed Exhibit "A" was and remains valid.

In conclusion I find that the Plaintiffs have failed to prove their right to bring this action, and that they have failed also to prove that the concession area, the subject matter of Exhibit "A" belong or ever belonged to the Ife Community. In addition I hold that Plaintiffs' claim is statute barred, and that the Ife District Native Authority had the power to grant to the 2nd Defendants exclusive licence to exploit the Reserve for timber and that the deed Exhibit "A" was validly made. I dismiss Plaintiffs' claim and enter judgment for the Defendants."

p.34 1.22 8. The Plaintiffs/Respondents appealed to the Federal Supreme Court on the grounds inter alia that the trial judge erred in law and on the facts in holding that the agreement was not voidable in equity; that the present Appellants were stopped from denying that the land the subject matter of the agreement was not the communal property of the Ife Community; that the Oni of Ife was in a position of trust in respect of the grant of the concession; that the judge erred in considering the defence raised by the present Appellants that the area of the concession was a Forest Reserve when the Appellants did not claim the area by virtue of its being such; that the applicability of the Statute of

Limitations was not established by the present Appellants; and that the present Appellants did not establish the power of the first Defendants to make the concession under Rule 40 of the Forestry Rules of 1943.

9. The Federal Supreme Court allowed the Appeal of the Plaintiffs/Respondents and ordered that the Deed of Concession should be set aside; that an account of all profits derived by the Appellants by virtue of the Deed as from the 6th January, 1954 to the date of the judgment be rendered by the Appellants within 90 days; that all profits found to have been made should be paid into the Ife Divisional Council Treasury and that an injunction be granted restraining the present Appellants from further acting under the Deed. They ordered the Appellants to pay 60 guineas costs of the hearing before the Federal Supreme Court and £290 costs in the Courts below. The expenses of the taking of the account were to be borne by the present Appellants. p.55 1.21

10. The judgment of the Court was delivered by Taylor F.J. He first considered whether the Plaintiff/Respondents had a locus standi. He found that the first Plaintiff/Respondent had shown sufficient interest: p.47 1.17

"As I have said, only the first appellant gave evidence and on his own showing, coupled with the reservation of certain rights to his family of farming, and of hunting rights to a guild of which he is a member, it is beyond doubt that he has certain rights over portions of the conceded area, both as head and as member of the Ogunleye family. In this case on appeal, the 1st appellant as the head of the Ogunleye family is the person in whom by established Native Law and Custom, is vested the management and control of family property. Had exhibit "A" [i.e. the Deed of Concession] dealt only with rights of cutting timber, the argument might be put forward that the plaintiffs' rights of hunting, fishing and farming would, in no way be affected by the felling of logs, but Clause 1b gives the 2nd defendants the following additional rights over the whole area:- p.49 1.4

"to make such roads, railways and bridges, and to erect such buildings as are necessary within the Concession Area for the felling conversion and extraction of all such logs, timber and firewood." p.50

In my view, the 1st appellant has in his own right shown that he has an interest in portions of the conceded area, and that the 2nd defendants have been granted rights of felling timber, making roads, railways, bridges, and erecting buildings where required over the whole area conceded."

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He next considered whether the Oni of Ife acted in a dual capacity. He said that the exhibits showed that the Oni was one of the only two members of the Appellant Company and the largest shareholder and that in 1957 he became director. He also found that the Oni executed the Deed in the capacity of one of the grantors. 10

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He next considered the effect of such a transaction in equity. After referring to the cases of Regal v. Gulliver 1942 1A.E.R. 378 and in Re Thompson 1930 1Ch. 203 he held that the position of the Oni and Council vis-a-vis the first Plaintiff/Respondent was covered by two cases mentioned. The Ife District Native Authority, by virtue of their powers of management and control over the reserve under Section 33 (i) of the Forestry Ordinance, must exercise their rights or powers in a way that was not inconsistent with or detrimental to the rights and interests reserved in favour of persons referred to in the second schedule of the Forestry Rules. One of these persons was the first Plaintiff/Respondent. 20

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Equity would not therefore allow the Oni to put himself in a position in which his interests as the major Shareholder of the Appellant Company would be or might be in possible conflict with the duties imposed on him and his Council. He was placed in a quasi-fiduciary position. 30

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The fourth issue was whether the claims of the first Plaintiff/Respondent were barred by Section 62 (i) of the Native Authority Ordinance. He considered the argument raised by Counsel for the Plaintiff/Respondents that the Section did not apply because an act in breach of a trust cannot be one done in the execution of a duty. He referred to Halsbury's Laws of England (3rd Edition) Vol. 23 at pp.343 and 696 to the effect that a defendant setting up the statute must have acted in good faith. He also referred to the cases of Sharpington v. Fulham Guardian 2Ch. 449 and a passage from Lord Buckmaster's judgment in Bradford Corporation v. Myers 1916 A.C. 242 at 247. He concluded his findings as follows :- 40

10 "As I have said earlier, the Oni of
Ife in particular and the respondents in
general did not choose to give evidence at
the Court of Trial. On the other hand, the
appellants have shown that the Oni of Ife
is benefited, as the substantial shareholder
in the 2nd Respondent Company, by the contract
entered into between the respondents. Equity
looks upon such a contract with disfavour in
the words of Clausen J. to which I have already
referred, equity does not allow questions to be
raised as to the fairness of the Agreement for
the inability to contract depends not on the
subject matter of the Contract, but the relation-
ships of the parties. In my view, the Native
Authority Ordinance does not protect an act
such as this, done not in execution of an
Ordinance, but in pretended execution of an
Ordinance. The Ordinance was never meant to
20 allow a member or members of a public Authority
through whom such Public Authority acts to put
on the cloak provided by such Ordinance in
order to enter into private contracts to the
benefit of such member or members. I therefore
hold that the defence does not avail the 1st
respondent body, and it is not necessary for
me to consider the other two points raised by
Learned Counsel for the appellants."

30 11. It is respectfully submitted that the Federal
Supreme Court erred in holding that the First
Plaintiff/Respondent had any locus standi in the
action. The rights given to the Appellants by the
Deed were given in terms which prevented the rights
given from derogating from whatever rights the
First Plaintiff/Respondent had. The substantive
rights granted to the Appellants were expressed to
be "subject to the provision of the Forestry
Ordinance....." By Section 27 of that Ordinance
40 the rights set out in the order constituting the
Forest Reserve were expressly preserved and the
rights relied on by the First Plaintiff/Respondent
were set out in the Second Schedule of the Forest
Reserve Order of 1941 (as amended in 1953). There-
fore the rights given by the Deed were subject to
those set out in the Second Schedule, and the First
Plaintiff/Respondent was not affected by the Deed.

p.59 11.7-10

50 12. It is further submitted that no estoppel could
arise against the Appellants by reason of the words
"as the traditional Authority on behalf of the
Communal owners of the land" appearing in the
testimonium of the Deed, to prevent the Appellants
denying that they were trustees for the

p.64 1.30

Plaintiffs/Respondents. The Plaintiffs/Respondents were not a party to the Deed and no representation was made to them. Further no evidence was given as to who the communal owners referred to were, or how the Plaintiffs/Respondents were linked with them.

13. It is also submitted that the Federal Supreme Court erred in holding that the pro forma Respondents were in any fiduciary or quasi-fiduciary relationship to the Plaintiffs/Respondents. No such relationship could be inferred from the fact that the Native Authority had to exercise their rights of management and control over the Forest Reserve without detriment to the rights of the Plaintiffs/Respondents preserved by the Forestry Ordinance and the Forest Reserve Order of 1941 (as amended).

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14. It is further submitted that the Deed was not void or voidable in equity. The Oni of Ife did not sign the Deed in a dual capacity and the fact that he was one of the only two shareholders in the Appellant Company did not make him a party to the Deed as grantee. The Cases of Re Thompson 1930 1Ch. 203; and Regal (Hastings) Ltd. v. Gulliver (1942) 1 A.E.R. 378 and Aberdeen Railway Co. v. Blaikie 1854 1 Macq. 460 do not cover the transaction in question in the present case. In addition the Deed was approved by the Lieutenant Governor of the Western Region in his absolute discretion as was required by the Forestry Regulations (Rule 40). In the premises it is submitted that the transaction must be assumed to have been a proper one.

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15. It is further submitted that the Federal Supreme Court erred in holding that the action was not statute barred. In the first place the learned trial judge was right in holding that all the facts giving rise to the action were present in 1954 and time began to run from that date. Nor was any evidence given of any loss suffered by the Plaintiffs/Respondents or that any damage suffered was continuing. Secondly the onus was on the Plaintiffs/Respondents to show that the Native Authority was not acting from an honest desire to execute their statutory duty and that the transaction of the Deed was entered into only in "pretended" execution of their statutory powers. No evidence was given to discharge this onus and even if contrary to the Appellants' submission the onus lay on the Defendants in the case, the

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signature of the Lieutenant Governor was some evidence of good faith. Thirdly it is submitted that the decision in Bradford Corporation v. Myers 1916 LAC 242 does not cover the facts in this case. Here the Native Authority acted under the statutory powers of management conferred by Section 33 of the Forestry Ordinance and the case of Griffiths v. Smith 1941 A.C. 170 shows that the pro forma Respondents were entitled to rely on Section 62 (i) of the Native Authority Ordinance as replaced by Section 242 of The Local Government Laws of 1957.

16. Final leave to appeal to Her Majesty in Council was granted on the 24th June 1963.

17. The Appellants submit that the judgment and Order of the Federal Supreme Court were wrong and should be set aside and the judgment and order of Kester J. should be restored for the following amongst other

REASONS

- 20 1. BECAUSE the Plaintiffs/Respondents had no locus standi in the action.
2. BECAUSE no estoppel can be relied on by the Plaintiffs/Respondents that the Deed of Concession was entered into on behalf of the Communal owners of the land; nor was any evidence given to connect the Plaintiffs/Respondents with such Communal owners.
- 30 3. BECAUSE no fiduciary or quasi-fiduciary relationship existed between the pro forma Respondents and the Plaintiffs/Respondents.
4. BECAUSE the Deed was not void or voidable in equity.
5. BECAUSE the action of the Plaintiffs/Respondents was statute barred.
6. BECAUSE the pro-forma Respondents were empowered to make the Deed under Rule 40 of the Forestry Rules 1943.
- 40 7. BECAUSE the judgment of the trial Judge was right.

DICK TAVERNE.

