Privy Council Appeal No. 33 of 1963

Aderawos Timber Company Limited – – – – – – *Appellant*

v.

Bale Adedire and others – – – – – – – *Respondents*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY 1964

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD HODSON
LORD GUEST

[*Delivered by* LORD GUEST]

This is an appeal from a judgment of the Federal Supreme Court of Nigeria allowing 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.

The respondents claimed against the Caretaker Committee of the Ife Divisional Council, first defendants and the appellants, second defendants (*a*) an order to set aside a Deed of Concession dated 6th January 1954 between the Ife District Native Authority and the appellants; (*b*) against the appellants an account of all profits derived by the appellants from the concession and an order to pay the sum found due into the Ife Divisional Council Treasury, and (*c*) an injunction to restrain the appellants from further exploiting the concession.

In his judgment the trial judge amended the title and statement of claim by substituting the words " Ife Divisional Council " for the first defendants. No point arises on this amendment.

In their statement of claim the respondents alleged that they were members of the Ife Community and sued as such members and taxpayers. They further alleged that the forest area, the subject matter of the concession attacked was the communal property of the Ife Community which was held in trust for the community by the Ife District Native Authority, whose successor was the first defendant; that Sir Adesoji Aderemi, the Oni of Ife, was at the material time the trustee of Ife Communal lands and a principal shareholder of the appellant company; that Sir Adesoji Aderemi with his Council signed the concession on behalf of the Ife District Native Authority and as " the traditional authority on behalf of the communal owners of the land "; that Sir Adesoji Aderemi acted in a dual capacity as Oni of Ife and as major shareholder in the appellant company, and that the Concession Deed ought to be set aside on the ground that Sir Adesoji's interest as shareholder conflicted with his duty as trustee of Communal lands. The first defendants in their defence claimed that the respondents' claim was barred by section 62 of the Native Authority Ordinance (cap. 140) and/or by section 242 of the Local Government Law 1957. The appellants denied the allegations of the respondents and claimed that the Concession was duly made under the powers vested in the Native Authority by law.

Kester J. dismissed the respondents' claim. He held (1) that the respondents were not estopped from denying the ownership of the land by the Ife Community (2) that they had failed to prove their right to bring the action (3) that the Oni of Ife was not a trustee in respect of the Forest Reserve and therefore no question of his acting in a dual capacity arose (4) that the Concession was a valid deed and (5) that the respondents' claim was statute-barred.

The Federal Supreme Court reversed the decision of Kester J. Taylor F.J., who delivered the judgment of the Court, held (1) that the respondents had a *locus standi* entitling them to bring the action, (2) that the Oni of Ife acted in a dual capacity in relation to the Concession in that he was in a fiduciary position as Oni of Ife and a major shareholder in the appellant company and that the Concession Deed should on this ground be set aside and (3) that the action was not statute-barred. There followed an order by the Federal Supreme Court setting aside the Deed of Concession and otherwise in terms of the respondents' claim.

Only the second defendants are appellants; the first defendants, having acquiesced in the judgment of the Federal Supreme Court, were not represented.

Their Lordships address themselves first to the question of the *locus standi* of the respondents to sue this action. In order to set out the rival contentions of parties it will be necessary to examine closely the legislation under which the concession came to be granted and the terms of the Deed of Concession.

The Forestry Ordinance (1948 Vol. III cap. 75) provides in Part III for the constitution of Native Authority Reserves. By section 22 the native authority may by order made with the approval of the Governor constitute as a native authority reserve any land lying within the area of its jurisdiction. Before this is done there must be notice of the authority's intention and an inquiry into the existence of any rights claimed over the lands (section 23(1)) and by section 23(4) if the inquiry discloses the existence of any rights over the land the Resident may amend the boundaries of the reserve so as to exclude these areas. By section 27

> " Every right in or over land within an area constituted a native authority forest reserve under section 22, other than the rights set forth in the order constituting such reserve, shall be extinguished upon the coming into operation of the order, save as provided in section 23."

Any sale, mortgage or transfer of any right in or over the land within the forest reserve without the consent of the native authority is null and void (section 28). The management of a native authority forest reserve is to be undertaken under section 33 by the native authority constituting it. Part II of the Ordinance provides for the Constitution of Government Forest Reserves and Government Protected Forests. Part VII deals with Communal Forestry Areas which may be declared by a native authority at the request of a native community. All fees received under the Ordinance must be paid into the native treasury of the native authority administering the reserve (section 44(1)). Under section 46 the Governor may make regulations (6)

> " regulating the grant and prescribing the form that any licences or permits may take in any particular case—
> (*a*) to take forest produce in forest reserves or on lands at the disposal of Government, or on native lands or communal lands, and
> (*b*) to sell, purchase and export forest produce."

The Native Authority may with the approval of the Governor make rules for any of the purposes prescribed in section 46 for the general protection and management of forests and forest produce in their areas (section 48). Under section 2 of the Ordinance " Communal lands " are defined as " lands in the Colony or Southern Provinces at the disposal of a native community or of any native chief on behalf of the community ". " Forest Produce " includes *inter alia* " timber " and " trees ". " Native Community " means " any group of persons occupying any lands in accordance with and subject to native law ". " Protected tree " means any species of tree declared by the prescribed person to be protected under the Ordinance.

Acting under the powers conferred by the Forestry Ordinance the Ife District Native Authority with the approval of the Governor enacted the Ife Native Authority Forest Reserve Order 1941, under which the land described in the First Schedule subject to the rights set forth in the Second Schedule was constituted a Native Authority Forest Reserve. In 1953 the Ife District Native Authority Forest Reserve (Amendment) Order was made under which the First and Second Schedules were amended. These amendments are immaterial to the present appeal as the area affected by the Concession is included in the Ife District Native Authority Reserve as amended in 1953.

In virtue of their powers under section 48 of the Forestry Ordinance the Ife Native Authority with effect from 15th November 1943 made Rules entitled the Forestry (Southern Provinces Native Authorities) Rules. Rule 40 provides

> " The owners of protected trees, with the approval of the Governor, may grant licences conferring on the holders the exclusive right to be granted permits in Form 1 of the First Schedule for trees of particular species within an area defined in such licences. Licences so granted shall be in such form and on such terms as may be decided according to the circumstances of each case."

The term " owner " is defined in Rule 2 to include in relation to timber or forest produce " any member of a native community who is entitled by native law or custom to take timber and forest produce ".

In this complicated background of legislation their Lordships now turn to the Deed of Concession (Exhibit "A") between the Ife District Native Authority and the appellants, dated 6th January 1954. This agreement was made by the Native Authority in exercise of the powers conferred by Rule 40 of the Forestry Rules above referred to. Clause 1 provides:

> " 1. IN consideration of the due fulfilment by the Company of all the terms and conditions of this Agreement the Native Authority in exercise of the powers conferred by Rule 40 of the Forestry (Southern Provinces Native Authorities) Rules 1943 made under the Forestry Ordinance cap. 75 as amended by Native Authority Public Notice No. 58 of 1948 published in the supplement to Gazette No. 35 of 1948 hereby grants to the Company subject to the limitations and restriction hereinafter contained and to the provisions of the Forestry Ordinance and the Forestry (Southern Provinces Native Authorities) Rules 1943, as made by the Ife Native Authority exclusive permission
>
> (*a*) to enter for the purposes hereinafter stated upon fifty-three square miles of forest area described in the Schedule hereto and surrounded by a red line on the map attached as Annexure C and hereinafter referred to as the Concession Area and subject to the provisions of this Agreement to fell any tree of a girth not less than that shown for each species in Annexure B to this Agreement to convert into logs lumber or firewood any tree so felled or any naturally fallen tree and to extract such logs lumber or firewood from the forest within the Concession Area
>
> (*b*) 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 lumber and firewood:
>
> PROVIDED: (*a*) that nothing in this Agreement shall interfere with the right of any native under the jurisdiction of the Native Authority to take by permit from the Native Authority any tree he may require for his own use or for sale or barter so long as it is converted into lumber or otherwise fashioned or hollowed out for any purpose by hand power only and is not exported from the lands under the jurisdiction of the Native Authority except by the Company
>
> (*b*) that nothing in this Agreement shall interfere with the right of any native under the jurisdiction of the Native Authority to any free grant of forest produce to which he may have been

entitled previous to the signature of this Agreement and subject to the provisions of the Forestry Ordinance and the Forestry (Southern Provinces Native Authorities) Rules

(*c*) that the Native Authority on behalf of the Government of the Western Region reserves the right to take such logs lumber or firewood as are required for the essential works of the Native Authority or the Government of the Western Region if the Company cannot supply these requirements on commercial terms but the Native Authority shall only exercise this right in emergency and with the specific approval of the Lieutenant Governor."

Clause 9 provides:

" 9. The Company shall pay on demand to the Native Authority fees and royalties assessed at rates in accordance with the Tariff at the time in force under the Forestry Ordinance and Forestry (Southern Provinces Native Authorities) Rules made thereunder by the Ife Native Authority on all logs lumber and firewood felled or cut which is defined as merchantable under Annexure A or which the Company extracts from the forest or sells or uses in the forest

PROVIDED that at the end of each year fees and royalties shall be paid upon the merchantable contents as assessed by the forest officer of any tree of these species defined as merchantable in Annexure A to this Agreement and whose girth exceeds the minimum girth as laid down in Annexure B to this Agreement which is left standing or felled but not extracted from the area when felling is discontinued in an annual coupe under Clause 6."

The Schedule defines the Concession area as the lands lying within the boundaries of the Ife Native Authority Forest Reserve.

No point has been taken by the respondents at any stage of the proceedings as to the power of the Native Authority to conclude the Agreement. The contention for the appellants was that the respondents had not established a title to pursue this action to set aside the deed. Only the first plaintiff gave evidence. He stated that he was a native and taxpayer of Ife. " The action " he said " is by the whole community of Ife and I am the leader of the people who owned farms in the Forest Reserve ". Upon this evidence the trial judge held that the respondents had no *locus standi* to pursue the action. Before the Board the respondents contended that the respondents were the communal owners of the land and as such entitled to set aside the concession which affected the trees in the area of the communal lands. Reference was made to the well-known case of *Tijani v. Secretary of Southern Nigeria* [1921] 2 A.C. 399 and to the observations of Lord Haldane at page 404

" In the instance of Lagos the character of the tenure of the land among the native communities is described by Rayner C.J. in the Report on Land Tenure in West Africa, which that learned judge made in 1898, in language which their Lordships think is substantially borne out by the preponderance of authority: ' The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of this coast, and wherever we find, as in Lagos, individual owners, this is

again due to the introduction of English ideas. But the native idea still has a firm hold on the people, and in most cases, even in Lagos, land is held by the family. This is so even in cases of land purporting to be held under Crown grants and English conveyances. The original grantee may have held as an individual owner, but on his death all his family claim an interest, which is always recognised, and thus the land becomes again family land. My experience in Lagos leads me to the conclusion that except where land has been bought by the present owner there are very few natives who are individual owners of land'."

and to his later observations in *Sunmonu v. Disu Raphael* [1927] A.C. 881 at page 883

" It is very important to have clearly in mind what the native law relating to the land in Lagos really is. It is the more important; because there have been various misconceptions of that law in decisions from time to time, some of which have been cited in this case, but they were finally laid to rest by the decision in *Amodu Tijani v. Secretary of Southern Nigeria* [1921] 2 A.C. 399, 404, a decision of this Board; in the judgment the title to native lands is explained. It is stated that it is the characteristic of the native title that what has been called in native cases where similar questions arise the radical title of the Crown applies, and the right of the native is a usufructuary right, and it is a usufructuary right which extends *prima facie* to the whole family. Their Lordships are aware that it is possible by special conveyancing to confer title on individuals in West Africa, but it is a practice which is not to be presumed to have been applied, and the presumption is strongly against it. *Prima facie* the title is the usufructuary title of the family, and whoever may be in possession of the legal title holds it with that qualification."

referring with approval to the statement of Rayner C.J. referred to in the previous case. It was argued that the lands over which the Native Forestry Reserve had been constituted were communal lands and that so far as the management of the land is concerned the power to allocate the land is exercised by the Chief on behalf of the whole community interested in the land. If allocation is made to a group, then the land belongs to that family in perpetuity. If allocation is made to a stranger, the proceeds will go to the family fund. Their Lordships are not concerned in this case to dispute the validity of the above propositions so far as communal lands in Nigeria are concerned. This was said to be the reason why the Oni of Ife signed the testimonium of the Concession Deed " as the traditional authority on behalf of the communal owners of the land ". But these contentions take no account of the effect on the lands of the Constitution of a Native Authority Forest Reserve in terms of the 1941 and 1953 Orders. The result of the constitution of the Forest Reserve upon the land is that under section 27 of the Forestry Ordinance every right in or over land within the forest reserve other than the reserved rights is extinguished. The rights reserved in the order under consideration are rights to reside, rights to farm, rights of way and rights to hunt and fish granted to certain communities. But there is no trace of the reservation of a right to cut down trees except for their limited personal needs. Such a right would indeed be inconsistent with the constitution of a forest reserve. *Prima facie* it would appear that section 27 confers the right of ownership of the land within the area of the forest reserve on the native authority " if all rights in or over land " are extinguished. But the right to fell timber must at any rate be extinguished. If this be so, then the rights of the communal owners over the trees in the forest reserve no longer exist. This construction of section 27, their Lordships consider, is reinforced by reference to certain other provisions in the Forestry Ordinance. The Forestry Ordinance contemplates Communal Forestry Areas as being distinct from Native Authority Forest Reserves (section 34). A Communal Forestry Area is managed and controlled by the native community acting with the advice of the native authority (section 36). By the interpretation in section 2 " communal lands " is defined as " lands . . . at the disposal of a native community or of any native chief on behalf of the community ". It appears to their Lordships inconsistent that lands should remain communal lands

after the constitution of a native authority forest reserve under which all rights in or over the land are extinguished. Moreover in the rule making power conferred on the Governor in section 46(b) of the Forestry Ordinance applied to native authorities by section 48 a distinction is made between forest reserves, native lands and communal lands on the presumed basis that they are different areas. The pattern becomes clearer when it is found that the fees received under the Ordinance are to be paid into native treasury (section 44(1)). The revenue and funds of the native authority which would include the fees payable under the concession must under section 36(c) of the Native Authority (Amendment) Ordinance (No. 4) of 1948 be applied to the administration, development and welfare of the area of the authority and to the welfare of the inhabitants. It may be observed in passing that this is the destination of the royalties which the respondents themselves seek in their claim (iii).

Their Lordships find it quite impossible to suppose that these elaborate provisions are consistent with the view advanced for the respondents that the title to dispose of the trees is in the native authority, but that the title to the beneficial ownership of the trees is in the communal owners. They have reached the conclusion that the lands over which a Native Authority Forest Reserve has been constituted ceased to be communal lands and have passed under the administration of the Native Authority.

Their Lordships recognise that this conclusion leaves unexplained the description in the testimonium of the Concession Deed of the Oni of Ife " as the traditional authority on behalf of the communal owners of the land ". The Oni of Ife was not a party to the deed *qua* traditional authority and the description must therefore be treated as surplusage.

Apart from these general considerations their Lordships consider that there is great force in the observations of Kester J. to this effect.

> " ' 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."

They attach considerable weight to these views of the trial Judge who is more versed in native law than their Lordships. When to this is added the fact that the first plaintiff at an early stage in his evidence was refused an amendment to show that he was suing in a representative capacity, their Lordships are satisfied that there was no satisfactory proof that the first plaintiff as a native of Ife community had a *locus standi* to sue his action.

The case of *Prescott v. Birmingham Corporation* [1955] Ch. 210 was relied on by Counsel for the respondents as showing that a ratepayer may have a title to challenge unauthorised expenditure of a local authority but this case is far removed from the present case where the respondents' interest is too remote to give them a title to sue.

The *locus standi* of the respondents was supported in the Federal Supreme Court by a reference to the evidence of the first plaintiff who said his family name was Ogunleye and that he was the head of that family who still hunted in the Forest Reserve. It was argued that his membership of the Ogunleye family qualified his interest in portions of the conceded area. This was not the basis of his title to sue in the pleadings or before the High Court. But their Lordships are prepared to consider this argument as it was apparently taken without objection in the Federal Supreme Court. The only basis for the respondents' title as a member of the Ogunleye family must be contained in the Second Schedule to the Ife Native Authority Forest Reserve Order 1941 as amended by the Ife District Native Authority Forest Reserve (Amendment)

Order 1953, whereby the Ogunleye family's rights to reside, farm, hunt and fish are reserved. There are in their Lordships' opinion two answers to this contention. Firstly, the claim of the respondents to set aside the concession is based on a fiduciary duty said to be owed to the Ife community. The first plaintiff's membership of the Ogunleye family would not entitle him to challenge the deed on the ground alleged in the statement of claim. Secondly, and in any event the reserved rights of the Ogunleye under the order must be exercised consistently with the constitution of the Forest Reserve.

Their Lordships have therefore reached the conclusion that the respondents have not established their *locus standi* to bring this action to set aside the concession deed. It follows that it is unnecessary for their Lordships to consider the remaining points, namely whether there was a fiduciary duty owed by the Oni of Ife to the Ife community or whether the claim was statute barred, matters upon which they express no opinion.

The logical result of their Lordships' conclusions would be to allow the appeal and restore the judgment of Kester J. dismissing the action. Mr. Lawson, Counsel for the respondents, however, submitted that if the point on *locus standi* was the only point decided adversely to his clients there should be a non-suit. Their Lordships are not prepared to sustain this submission. This matter was not raised before the trial Judge and it would be inappropriate for their Lordships to exercise their discretion upon a matter peculiarly within the province of the trial Judge.

Their Lordships will therefore humbly advise Her Majesty that the appeal be allowed, the judgment of the Federal Supreme Court set aside with costs and the judgment of Kester J. restored. The respondents must pay the appellants' costs before the Board.

(90417) Wt. 8069/113 90 8 64 Hw.

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LORD GUEST

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