Privy Council Appeal No. 49 *of* 1962

(1) Nnaegbo Ekweze and others – – – – – – *Appellants*

v.

Ajana Enwelum and another – – – – – – *Respondents*

and

(2) Uzodigwe Madika and others– – – – – – – *Appellants*

v.

Nwanwuba Asiegbu and others – – – – – – *Respondents*

and

(3) Ajana Aduaka and others – – – – – – – *Appellants*

v.

Vincent Ekwealor – – – – – – – – *Respondent*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JULY, 1964

Present at the Hearing:
LORD MORTON OF HENRYTON.
LORD COHEN
LORD DONOVAN.
[*Delivered by* LORD DONOVAN]

Though the record in this case indicates that there are three appeals, there are in fact only two, and those two are consolidated. The third apparent appeal, between Ajana Aduaka & ors. and Vincent Ekwealor, is not effective. The plaintiff in that cause was successful in the High Court in Eastern Nigeria, but unsuccessful in the Federal Supreme Court, and does not appeal to the Board.

The litigation concerns the proper boundaries between land in Eastern Nigeria occupied by the Agbudu and the Abube peoples. It raises, therefore, a question which is predominantly one of fact, and the decisions of the High Court of the Eastern Region and of the Federal Supreme Court in Nigeria have been adverse to the Abube people. There are thus concurrent findings of fact which the Board cannot, consistently with its practice, disturb, unless they are vitiated by some error of law. For the Abube people, who are the present appellants. it is alleged that such is the case.

The facts must be briefly summarised.

The land in question lies in the Onitsha Province of Eastern Nigeria. The plan Exhibit A was produced in the courts below by the Agbudu family, purporting to show the land owned by each of the Abube and Agbudu peoples. Another plan was put in by the Abube people, showing what land they claimed. That is Exhibit B, and this exhibit comprised practically the whole of the land in dispute. There have been apparently many boundary disputes before in this area, some of which were settled, at least for a time, by the District Officer back in 1917. On part of the land he caused boundary pillars to be put up. Somebody later on removed them.

In or about 1956 the Abube people caused a school to be built on land claimed by the Agbudu, and this precipitated the present litigation. In

February 1957, an action was begun between representatives of the Agbudu people, as plaintiffs, and representatives of the Abube people, as defendants. It will be convenient to call this Suit No. 1.

The Agbudu people claimed a declaration of title to the land now in dispute, damages for trespass and an injunction. The Abube people filed a lengthy defence denying the plaintiffs' claim. Not content with this, the Abube people in March 1957 apparently for reasons connected with prestige, began their own action, claiming damages for trespass by the Agbudu on land called by a different name in their statement of claim, but being, as their Lordships were informed, virtually the same land as in Suit No. 1, and this second suit may be called Suit No. 2. Not surprisingly, in these circumstances, Suits Nos. 1 and 2 were later consolidated.

Then, also in March 1957, a third action was begun, this time on behalf of the Umuawa people, as plaintiffs, and the Abube people, as defendants. In this action the Umuawa people claimed title to certain land in the same vicinity as the land in dispute in Suits 1 and 2. They also claimed damages for destruction of boundary pillars and an injunction. In this suit, which their Lordships will call Suit No. 3, the Abube people were eventually successful in the Federal Supreme Court of Nigeria, and the Umuawa people have, as already stated, not appealed. But Suit No. 3 was also consolidated with Suits Nos. 1 and 2, and this is one of the matters now complained of in the present appeal by the Abube people. The reason will presently appear.

In Suit No. 1, the Agbudu people, as plaintiffs, were successful in the High Court of Eastern Nigeria and also in the Federal Supreme Court. In Suit No. 2 they were likewise successful as defendants. Thus the Abube people were unsuccessful in both suits, and they now appeal to the Board.

In Suit No. 1 the learned trial judge, Mr. Justice Reynolds, found that the Agbudu people were owners of all the land they claimed, such land being verged pink on Exhibit A, less a small portion which their Lordships must mention separately hereafter. The learned judge also awarded the Agbudu people damages for trespass and an injunction.

In Suit No. 2 the learned judge found that there was no evidence of trespass by the Agbudu people and dismissed the claim by the Abube people for damages for trespass and an injunction. An appeal to the Federal Supreme Court by the Abube people in relation to Suits Nos. 1 and 2 was dismissed.

The grounds upon which the Federal Supreme Court's judgment in Suits Nos. 1 and 2 in favour of the Agbudu people is now said to have been erroneous are these: First, that the three suits should not have been consolidated; second, that a document, Exhibit C, put in at the trial was wrongly admitted; and third, that another document, Exhibit D, put in at the trial, was also wrongly admitted.

Two other matters have been canvassed, with which their Lordships will in due course deal; but, taking the foregoing grounds in order and dealing first with consolidation, it is obvious that Suits Nos. 1 and 2 were properly consolidated, and the contrary is not seriously argued. The real complaint is that Suit No. 3 was brought into the consolidation as well. Seeing that the Abube people were eventually successful in this suit, it is not at first sight apparent why they should complain; but it is said that the consolidation of Suit No. 3 was prejudicial to them in Suit Nos. 1 and 2, inasmuch as the order of proceeding enabled witnesses in Suit No. 3 to be asked leading questions in cross-examination to the prejudice of the Abube family in respect of Suits Nos. 1 and 2. But the order of proceedings was agreed to on behalf of the Abube family without any reservation being made about the cross-examination of particular witnesses, and the present complaint is made in very general terms with no condescension as to particulars.

Consolidation is dealt with by Order II, Rule 7, of the Eastern Region High Court Rules of 1955. This provides: " 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 ".

In the Federal Supreme Court the appeals were heard by Chief Justice Sir Lionel Brett, Federal Justice Unsworth and Federal Justice Taylor. The last named delivered the leading judgment, with which his colleagues agreed. Dealing with the matter of consolidation, Federal Justice Taylor, after referring to the fact that the parties in all three suits were descended from one Ikenga who had left all his lands between his three sons, observed that all three actions were to decide the boundaries of the three branches of the family; that it was desirable to order consolidation to save time and costs, there being a common question of fact running through all three suits; that there was no ground for saying that the discretion of the trial judge had been exercised wrongly, and that as regards the cross-examination of witnesses he was not prepared to say that any injustice had been occasioned. Nothing has been urged before their Lordships which leads them to a contrary conclusion.

Their Lordships therefore pass to Exhibit C, said to have been wrongly admitted. This is a record produced from proper custody, dated the 7th April 1917, referring to a land dispute between the Agbudu and the Umuowo peoples, the latter being the Umuawa people differently spelt. After the history of the matter is set out, there is an agreement signed by representatives of the two peoples and a representative of a neighbouring one—the Igbariam—to accept the boundaries between their several lands set out in a sketch accompanying the document. This sketch is now missing. The agreement is countersigned by P. J. Gardner, the then District Officer, and dated 7th April 1917. There is a note added by another District Officer, Mr. Lawton, dated the 1st November 1917, referring to certain incursions by a branch of the Abube people into the land and recording that they had been told to abandon all their houses built beyond the boundary. The note concludes: " As this boundary is artificial and is covered with farms and buildings, cement pillars must be put up at corners ". This document, exhibit C, was admitted by the trial judge. It is now said that this was wrong for the following reasons: First, if it were an agreement, the Abube people were not a party to it; second, the instrument was not registered, and, third, it was tendered as an arbitration award: the judge held it was not, and should not have admitted it as an agreement. Their Lordships think it would be convenient to deal with these objections after dealing with Exhibit D.

This again is a document produced from proper custody dealing with a boundary dispute between a branch of the Abube people and the Agbudu and is also dated the 7th April 1917. It contains an agreement by both peoples as to the boundary between them. A sketch map is attached to the document showing *inter alia* a triangular piece of land which is shaded. This is stated in the agreement to have been ceded to the Abube village of Enuyi as blood money for the murder of an Enuyi man. A further note says the Abube do not agree, for they claim the shaded portion as of right. Therefore, continues the note, this passes to Agbudu and Igbariam, i.e., families on the flanks of this shaded land. (In parenthesis it may be said the learned judge at the trial found this note to have been made *ex post facto* and held it did not deprive the Abube people of this shaded portion.) There is a later note dated the 17th July 1918, signed by the Acting District Officer, Mr. Lawton. It refers to constant friction over the boundaries and to " summonses galore " in the native court. The note goes on to refer to the placing of boundary posts in the shape of concrete pillars at points marked I, II and III on " the big map ", which are said to make the boundaries now perfectly clear. These points are shown on the sketch map attached to Exhibit D.

The Abube people were a party to the agreement contained in Exhibit D. It is said, however, to have been wrongly admitted on three gounds: (1) it was not registered under the Land Registration Ordinance; (2) the sketch map was not signed as it should have been under the Survey Ordinance, and (3) the sketch map left the boundaries uncertain.

The decision of the Federal Supreme Court in the matter of Exhibits C and D may be summarised thus. Although the Abube family were not parties to the agreement contained in Exhibit C, they were parties to the agreement contained in Exhibit D. These two agreements were made on the same day

and ought to be read as one. They were evidence admissible as memoranda of past acts and oral transactions relating to ownership of Ikenga land. Exhibit C refers to admissions made by the Warrant Chief of Abube to the District Officer in open court. The two exhibits C and D were made with a view to their use in the native courts, and to shut them out when they have been acted upon for the last forty years would work more injustice than would be prevented.

With these views their Lordships agree. They may add that a witness before the trial judge, one Enewelum, for the Agbudu people, said that Mr. Gardner, the District Officer, stayed in the vicinity for some two weeks settling the boundary disputes. The Agbudu people sat on one side, the Abube on another and the Umuawa on a third. The meetings were held in broad daylight, and, when Mr. Gardner went to blaze the boundaries, all these groups went with him and witnessed it. The record does not disclose any cross-examination on this specific point.

With regard to the objection based on the Land Registration Ordinance, it is provided by section 23 of that Ordinance as follows: " No instrument other than a will required by this ordinance or by any enactment repealed by this ordinance to be registered shall be pleaded or given in evidence in any court unless the same shall have been registered ". An " instrument " is defined in section 2 of the ordinance as follows: " ' instrument ' means document conferring, transferring, limiting, charging or extinguishing, or purporting to confer, transfer, limit, charge or extinguish, any right title or interest in land in Nigeria, and includes a will, and a power of attorney under which any instrument may be executed, but does not include a judgment or order of the court on any statutory enactment ".

Neither Exhibit C nor D can in their Lordships' view be regarded as " an instrument " within that definition. The documents simply record an agreement as to boundaries, and, for all anyone knows, they involved no cession or disposition of land on anyone's part for the boundaries may have corresponded to existing rights.

As regards the objection to Exhibit D based on the Survey Ordinance, Section 23(1)(*b*) thereof provides as follows: " No map, plan or diagram of land, 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 ".

In the first place, it would seem to be very debatable whether the sketch attached to Exhibit D is a map, plan or diagram of land within the scope of the Section; but, if it is, the court still has a discretion to admit it for good cause. The point as to inadmissibility on this ground was not taken in the High Court, but it is now said that the court had no power to admit it unless good cause were first shown. The Federal Supreme Court said that the trial judge could have admitted it for good cause, meaning that good cause existed.

In the circumstances it seems to their Lordships, with respect, to be a somewhat barren technicality now to insist that good cause should have first been shown. If this point were to be taken, it should have been taken before the trial judge, when the matter could if necessary have been regularised, and not taken for the first time in the Federal Supreme Court.

As regards the objection to the admission of Exhibit C on the ground that it was tendered as evidence of an arbitration award but admitted as evidence of an agreement, their Lordships do not understand the substance of this objection and cannot sustain it.

On the sketch map attached to Exhibit D there is a shaded portion already referred to as belonging to the Abube people. It is now urged that, as this shaded portion cannot be defined so as to mark the boundaries, the consequence follows that the adjacent land claimed by the Agbudu family

likewise cannot be defined and that their claim should therefore fail. As to this, it is to be recalled that in Exhibit D there is a reference to points I, II and III being marked on the " big map ". On the sketch attached to Exhibit D, these marks are reproduced along the path to Achalla, which is the topmost boundary of the shaded portion. At the bottom point of the shaded land there is a reference on the sketch map to a boundary post. It is contended that this boundary post was non-existent, but the learned trial judge said this about this particular argument, " A surveyor would, in my opinion, experience no difficulty in inserting that area on the plan Exhibit A nor in actually marking it out on the land ".

The Federal Supreme Court dealt with the matter in greater detail (see the judgment of Federal Judge Taylor) and arrived at the like conclusion, no doubt on the footing *id certus est quod certum reddi potest*. But, taking the sketch in Exhibit D as the starting point, one knows where the northern boundaries of this shaded portion are, and one knows the area. One can see moreover, that the western boundary comes down at an angle to join the Igbariam boundary at a point below the source of the Ezuku stream. It seems clear to their Lordships that with these data a competent surveyor could delineate the area with sufficient exactitude. The alternative is to say that the whole claim of the Agbudu people to a very much larger area must fail. Apart from the extravagance of the argument, their Lordships think it unsound for the reasons given in both the courts below.

Another exhibit was put in before the learned trial judge, Exhibit E. This referred to an agreement over a boundary and was an agreement between the Agbudu people and the Amagata people. The Federal Supreme Court held it to be inadmissible, as it was irrelevant, and Federal Judge Taylor commented that the trial judge apparently took the same view for he made no mention of it in his judgment and placed no reliance upon it in arriving at his decision. It was urged upon their Lordships that the exhibit may nevertheless have had some latent effect upon the trial judge's decision; but this is pure conjecture.

In their Lordships' view none of the objections urged before them invalidate the decision of the Federal Supreme Court, with which they respectfully concur. They will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs.

(90575) Wt. 8069/113 90 10/64 Hw.

In the Privy Council

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(1) NNAEGBO EKWEZE AND OTHERS

v.

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and

(2) UZODIGWE MADIKA AND OTHERS

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and

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VINCENT EKWEALOR

DELIVERED BY
LORD DONOVAN

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