

1, 1958

No. 28 of 1956.

# In the Privy Council.

UNIVERSITY OF LONDON W.C.1. 24 JAN 1958 INSTITUTE OF ADVANCED LEGAL STUDIES
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## ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL  
(NIGERIAN SESSION).

52053

BETWEEN

CHIEF EKE OJA CHIEF OGWO OBU and NJAGHA OBASSI	}	for themselves and as representing the people of Asaga <i>Defendants-Appellants</i>
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AND

CHIEF KANU UKPAI and CHIEF KANU EKPEZU	}	for themselves and as representing the people of Biakpan <i>Plaintiffs-Respondents.</i>
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## Case for the Appellants

RECORD.

1. This is an appeal from the Judgment and Order of the West African Court of Appeal dated the 28th May, 1954, confirming the Judgment of the Supreme Court of Nigeria (Dove-Edwin, J.), dated the 14th July, 1953, in favour of the Plaintiffs, the present Respondents. p. 37.  
p. 42.  
p. 30.

2. The Suit giving rise to this Appeal was brought by the present Respondents, hereinafter referred to as "the Plaintiffs," against the present Appellants, hereinafter referred to as "the Defendants."

The Plaintiffs' claim was for a declaration of title to a certain piece of land and consequential reliefs. p. 37, l. 25.

The learned Trial Judge granted the declaration prayed for and gave judgment for the Plaintiffs. The Defendants appealed to the West African Court of Appeal which Court dismissed the appeal. p. 37, l. 29.  
p. 33.

3. The Plaintiffs suing in their representative capacity as representing the people of Biakpan brought

### THE PRESENT SUIT

30 in the Supreme Court of Nigeria on the 15th September, 1952, against the Defendants sued in their representative capacity as representing the people of Asaga. p. 4.

p. 2.  
p. 1.

4. The Plaintiffs filed their Plaintiff in the Native Court of Ubaghara on the 21st June, 1951. The said Plaintiff was transferred to the Supreme Court of Nigeria by an order of the Assistant District Officer of the Arochuku District.

On the 15th September, 1952, the Plaintiffs filed their Statement of Claim in the Supreme Court of Nigeria.

As stated by the learned Trial Judge

p. 30, l. 40-  
p. 31, l. 3.

“ The Plaintiffs base their title on ownership. They claim that “ they occupied the land in dispute beyond living memory when “ it was a virgin forest and that several of their ancestors have 10 “ lived on it and used it as their own without interference. That “ they occupied the land when they migrated from Ebe Otu in the “ Calabar District and that they Defendants who came from Ibeku “ in Umuahia in Bende Division of the Owerri Province settled “ on what is known as Asaga a considerable distance from the “ land in dispute.”

p. 37, ll. 31-33.

The boundaries of the land in dispute are set out in paragraph 2 of the Statement of Claim and are shown on the Plan (Exhibit A) produced by the Plaintiffs. The land in dispute is edged pink on that plan.

p. 6.

5. The Defendants filed their Statement of Defence on the 20 5th November, 1952.

As stated by the learned Trial Judge

p. 31, ll. 4-17.

“ The Defendants on the other hand claim that the Plaintiffs “ are their tenants, that they gave them land to live on when they “ were driven away by the Ikuns who first harboured them when “ they left Calabar District. That they gave them what is now “ known as Biakpan village and further east right up to the river “ but kept a place called Ikama in the East for themselves as it “ was a fishing pond. They also pleaded estoppel and *res judicata*.

“ No details of the estoppel or *res judicata* on which Defendants 30 “ relied was given but during the conduct of the case it transpired “ that this defence centred around Exs. E and F alleged to be “ proceedings under the Inter-Tribal Boundaries Ordinance.

“ There appears to have been an order under the Inter-Tribal “ Boundaries Settlement Ordinance No. 49 of 1933 and two District “ Officers one from Bende and one from Afikpo were sent to go into “ the boundary dispute.”

6. The relevant sections of the Inter-Tribal Boundaries Settlement Ordinance (No. 49 of 1933) Chapter 95 of the Laws of Nigeria, 1948 Edition Volume III are Sections 2, 3, 6, 7 and 9. 40

7. It is respectfully submitted that a dispute between two tribes as to the boundary between two villages is a dispute which can be judicially decided only in accordance with the provisions of the Inter-Tribal Boundaries Settlement Ordinance No. 49 of 1933 and no other Court is competent to entertain such a dispute and therefore neither the Native Court nor the Supreme Court is competent to entertain such a dispute.

8. Exhibit " F " is a Joint Report of the Assistant District Officer of the Afikpo Division of the Ogoja Province in which lies the Plaintiffs' village of Biakpan and the Assistant District Officer of the Bende Division of the Owerri Province in which lies the Defendants' village of Asaga. This Joint Report was given on the 22nd October, 1937.

p. 55.

p. 56, l. 43.

9. From that Joint Report there was a Review by the Resident of the Ogoja Province in accordance with Section 6 of the Inter-Tribal Boundaries Settlement Ordinance. The decision on the Review is Exhibit " E " dated the 24th April, 1938.

p. 57.

p. 57, l. 9.

10. The final Joint Report, Exhibit " F " arose out of proceedings under the Inter-Tribal Boundaries Settlement Ordinance which are sufficiently described in the Report on the Review Exhibit " E " as follows :—

" On 3rd November, 1936, Mr. T. G. Connell, Assistant District Officer, Afikpo Division, was appointed to hold an enquiry under the Ordinance and to determine a boundary between Eziafo and Biakpan. On 16th November, 1936, Mr. Connell gave a decision which he duly promulgated. The Biakpans were satisfied with this decision—but the Eziafos had referred it to the people of Asaga (they two being of one clan) and in January, 1937, representations were made to the effect that the Connell boundary had given to Biakpan certain lands over which the Asagas claimed to have rights.

p. 57, ll. 10-33.

" 2. The upshot of this was that on the 30th March, 1937, Mr. C. T. C. Ennals Assistant District Officer Bende Division was appointed to hold a further enquiry and to decide a boundary not only between Biakpans and Eziafo section of Asaga but also between Biakpan and Asaga. On 24th April, 1937, Mr. Ennals gave his decision.

" 3. The Ennals' decision departed from the Connell award in so far as concerned the Biakpan-Eziafo section, and in fact it took away from Biakpan an area of land which had been assigned to Biakpan by Mr. Connell. The Biakpans, not unnaturally, petitioned against this new decision.

" 4. Correspondence ensued between the Residents of the two Provinces and eventually it was agreed that the best way to handle the matter would be for Messrs. Connell and Ennalls to meet on the land and to submit a joint report which either would confirm one or other of the boundaries already made (i.e., as to Biakpan-Eziafo) or would suggest an amendment."

11. The Joint Report Exhibit " F " was given upon Instructions from the Resident of Owerri Province wherein lies the Defendants' village of Asaga and from the Resident of Ogoja Province wherein lies the Plaintiffs' village of Biakpan.

p. 55, l. 8.

The reasoning of the Joint Report is as follows :—

" 7. *Biakpan-Asaga Boundary.* We proceeded from point E1 to point E2. It is evident that Asaga have established effective

p. 56, ll. 7-20.

“ occupation of land adjoining (A). The old Biakpan–Asaga path (B) The Biakpan–Asaga road up to the boundary proposed by Mr. Ennals. No Biakpan complaints viz. : that they claim land as far as to Ivetum river were investigated in view of the fact that Mr. Connell had seen the aforesaid effective occupation when he made his map, and of the fact that no complaints had been made by either side previous to his inquiry as Settlement Officer. Therefore no amendments are proposed.

“ 8. It should be mentioned that since the inquiry was held into this boundary, members of the Amafia family have established plantation houses on a site which would be bisected by the proposed boundary. An Order has been already made that the occupants, the majority of whom are Addas employed by the inhabitants of Amafia-Asaga, should quit.” 10

12. The demarcation of the boundary in the Joint Report is as follows :—

p. 56, ll. 21–46.

#### “ DESCRIPTION OF BOUNDARY.

##### “ PROPOSED BIAKPAN–EZIAFOR–ASAGA BOUNDARY.

“ 9. From Boundary Pillar B.E.1 Ubara River in a Northerly direction on a bearing of 15° via boundary Pillars B.E.2 to 6 to boundary Pillar B.E.7, thence on the same bearing 15° until the plantation road is met at point EC.1. Thence in a north easterly direction in a straight line to a point on the Biakpan–Eziafor Road marked EC.2. Thence along the Biakpan–Eziafor until a point E.1, at the junction of the Biakpan–Eziafor road with the old Biakpan–Asaga path is reached. 20

“ Thence in a northerly direction on a bearing of 16 degrees until the Biakpan–Asaga Road is reached at a point approximately 350 yards on the Biakpan side of the stream Eba Isiogogo No. 2. Thence on a bearing of 16 degrees until the River Iyi Atama is reached. Thence along the left bank of the river to its source. Thence on a straight line approximately due north until the Biakpan–Ufiele path is reached. Thence along the Biakpan–Ufiele path in a westerly direction until the Atani–Isiogogo is reached. 30

“ *Ubara River* :—The Biakpans must not fish the Ubara River above B.P. No. B.E.1, nor the Eziafors below it.

“ (Sgd.) T. G. CONNELL,  
“ Assistant District Officer,  
“ Afikpo. 40

“ 22nd October, 1937.

“ (Sgd.) C. T. C. ENNALS,  
“ Assistant District Officer,  
“ Bende.”

13. The Resident of Ogoja Province, Mr. O'Connor, reviewed the proceedings which led to the said Joint Report (Exhibit F) and set aside the said joint decision of the said Assistant District Officers by an Order dated the 24th April, 1938, Exhibit " E. " p. 4, l. 12.  
p. 57.

As correctly held by the Court of Appeal a Resident cannot exercise outside the limits of his Province the powers conferred upon him by Sections 3 and 5 of the Inter-Tribal Boundaries Settlement Ordinance No. 49 of 1933 therefore the Resident acted *ultra vires* and the Order made by him is a nullity. p. 41, l. 4.

10 14. On the 29th June, 1953, the Trial Court heard the Addresses of Counsel for the parties. p. 28.

The Plaintiffs' Counsel submitted that— p. 29, l. 11.

(1) there is really no defence to the action ;

(2) there are no facts in the pleadings as to the plea of estoppel ;

(3) there are no facts in the pleadings as to the plea of *res judicata* ;

(4) the Inter-Tribal Boundaries Settlement Ordinance No. 49 of 1933 is purely for administrative purposes in fixing boundaries and does not confer judicial powers ;

20 (5) the question to be decided upon is what is the boundary and this is the first time the right of the parties is being tested in Court.

The Defendants' Counsel submitted that— p. 29, l. 2.

(1) no one could claim a declaration of title in view of the Resident's Order under the Inter-Tribal Boundaries Settlement Ordinance No. 49 of 1933 ; alternatively

(2) the Order of the Resident Exhibit " E " is *res judicata* as the decision of a Tribunal.

30 15. The Judgment of the Supreme Court was delivered on the 14th July, 1953, by Dove-Edwin, J. p. 30.

The learned Trial Judge held—

(1) the real dispute between the two parties could be said to be—What is the boundary between these two villages ? Is it at the stream Ivetim which lies to the west of the Plans and which the Defendants have to cross if they have to go on the land in dispute or is it at Iyi Atama to the east of the land in dispute ? p. 30, l. 24.

35 (2) the Inter-Tribal Boundaries Settlement Ordinance does not confer on the District Officer or Resident powers to confer title so as to prevent tribes from having their title to lands gone into by the Courts and decided. It is a useful administrative weapon and that is all ; p. 32, l. 27.

(3) " Both Assistant District Officers were appointed under the Ordinance by their respective Residents (A) of the Ogoja Province p. 32, ll. 19-24.

and (B) of the Owerri Province. Biakpan is now in Arochuku District of the Calabar Province. I doubt whether the Resident Ogoja Province acting alone could make an effective order under the Ordinance about boundary on land between two Provinces.”

p. 32, l. 24.

(4) accordingly, the Order of the Resident Exhibit “ E ” cannot operate as *res judicata*.

16. The learned Trial Judge having rejected the Defendants’ submissions as to the law applicable to the case accordingly considered the oral evidence and held in favour of the Plaintiffs and gave Judgment for the Declaration prayed for. 10

p. 33.

17. From that Judgment the Defendants appealed to the West African Court of Appeal.

p. 37.

The Judgment of the Court of Appeal was delivered on the 28th May, 1954.

The Court of Appeal held—

p. 40, l. 22.

(1) the decision of a District Officer acting under Section 3 of the Inter-Tribal Boundaries Settlement Ordinance is a decision of a judicial tribunal and is conclusive upon the issue determined by him, subject always to the right of review under the Ordinance ;

p. 40, l. 39.

(2) the Resident in his decision on review Exhibit “ E ” stated 20 as clearly as possible that no boundaries need be fixed and he did not fix any boundaries, and accordingly if the decision is that there is no dispute about boundaries any decision or order purporting to be given under the provisions of the Boundaries Ordinance is *ultra vires* ;

p. 41, l. 4.

(3) a Resident cannot exercise outside the limits of his province the powers conferred upon him by the Boundaries Ordinance, and accordingly his decision on review Exhibit “ E ” is *ultra vires* ;

p. 41, l. 18.

(4) Exhibit “ E ” is a nullity.

The learned Judges having rejected the Defendants’ submissions as to 30 the law applicable to the case concurred with the findings of fact of the learned Trial Judge based upon the oral evidence.

The appeal was accordingly dismissed.

18. The Appellants respectfully submit that this appeal be allowed with costs throughout, the Order of the West African Court of Appeal dated the 28th May, 1954, and the judgments of both Courts below be set aside and the Plaintiffs’ claim be dismissed for the following among other,

## REASONS

BECAUSE a dispute between two tribes as to the boundary between two villages is a dispute which can be judicially 40 decided only in accordance with the provisions of the Inter-Tribal Boundaries Settlement Ordinance No. 49 of

1933 and no other Court is competent to entertain such a dispute and therefore neither the Native Court nor the Supreme Court is competent to entertain such a dispute.

Alternatively,

10 BECAUSE the dispute between the Plaintiffs and the Defendants as to the boundary between the village of Asaga and the village of Biakpan which is the real dispute between the parties in the present suit was directly in issue in the previous proceedings under the Inter-Tribal Boundaries Settlement Ordinance No. 49 of 1933 and was finally adjudicated upon between the same parties by the Joint Report Exhibit "F" and that decision operates as *res judicata* in the present dispute.

~~S. P. KHAMBATTA.~~ ANDREW CLARK  
~~J. PLATTS MILLS.~~ DAVID OGWU

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**In the Privy Council.**

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  } representing the people  
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  } *Defendants-Appellants*

AND

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  } of Biakpan  
  } *Plaintiffs-Respondents*

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**Case for the Appellants**

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