Privy Council Appeal No. 42 *of* 1961

Ikebife Ibeneweka and others – – – – – – *Appellants*

v.

Peter Egbuna and another for themselves and on behalf of the Ukwa family of Umuasele Onitsha – – – – – *Respondents*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JANUARY 1964

Present at the Hearing:
VISCOUNT RADCLIFFE.
LORD GUEST.
LORD UPJOHN.
[*Delivered by* VISCOUNT RADCLIFFE]

This is an appeal from an order of the Federal Supreme Court of Nigeria dated 24th June 1960 dismissing an appeal from an order of the High Court, Eastern Region dated 16th May 1958. The only question raised by the appeal is as to the propriety of the course taken by the trial Judge, Betuel, Ag.J., in making a declaration of title in favour of the respondents at the conclusion of his hearing of the suit. It is not argued for the appellants that he had no jurisdiction to make such an order, even though, as happened here, he decided that the respondents were not entitled to any other form of relief. It is admitted that he had a discretion whether or not to make the order; what is said is that in making it he exercised his discretion contrary to accepted legal principles. The Federal Court have rejected this argument, and it does not commend itself to their Lordships. In their view the case rests wholly upon its peculiar facts, to which the learned Judge's exercise of his discretion was related, and no identifiable issue of legal principle is involved in it. That being so, they will deliver their opinion without elaboration.

The facts are as follows. The respondents (there has been some substitution of parties owing to death) were the plaintiffs in the suit and they sued both on behalf of themselves and in a representative capacity on behalf of " the Ukwa Family of Umuasele, Onitsha ". Originally they joined sixteen persons as defendants, stating in paragraph 2 of their Statement of Claim that these persons were natives of Obosi village and were sued " on behalf of themselves and as representing the people of Obosi village ". Subsequently the names of four of these defendants were struck out, as deceased, and no substitution of new names was made. On the other hand, on the plaintiffs' application, five more persons were added as co-defendants before the hearing of the suit. These persons were joined in their personal capacity only, the plaintiffs' motion to sue them as representing " the people of Obosi town " being rejected by the Court (Savage Ag.J.) on the ground that they had not been authorised by the people of Obosi to defend on their behalf and, failing such authorisation, the Court could not admit them to the suit in any representative capacity.

The Statement of Claim disclosed a dispute as to the title of an area of land which can be called " the disputed land ". It and the reply set out a number of allegations, including decisions in other suits, which were said to establish the title of the Ukwa family and to disprove the title of the Obosi

people. It was then pleaded that the Obosi people had recently entered on the disputed land by force and violence, had begun to farm the land, to put up temporary structures and to interfere with the plaintiffs' tenants on the land. The acts of the defendants " and other Obosi people ", it was said, had deprived the plaintiffs of the benefit of exclusive user of their property. The relief claimed was a declaration of title to the disputed land, damages for trespass, an injunction against unlawful interference, and recovery of possession.

The defendants filed a Defence and a further Defence. These documents contained a large number of pleas and allegations, but it is sufficient to notice that (1) the defendants denied that they were the persons to represent the Obosi people, a Chief Kodilinye being, according to them, the proper person for this purpose, (2) they denied the plaintiffs' title as claimed and put them to strict proof of it, (3) they set up the title of the Obosi people to the land in dispute and claimed that that people had rights of ownership. Although paragraphs 13 to 19 of the Defence, which traced the origins and history of the alleged Obosi title, were withdrawn with the leave of the Court during the hearing of the suit, there is no doubt that enough remained on the pleadings to show that the defendants were actively supporting the Obosi title. Indeed the defendants' counsel, when applying for leave to withdraw paragraphs 13 to 19, stated that their real defence rested on paragraphs 3 and 4 of the further Defence, pleas which asserted that the Obosi people had a long-established right to occupy and farm the disputed land.

The suit went for trial in this state of affairs and is stated to have occupied twenty days, though not full days, in hearing. It would have been more satisfactory, having regard to the issue of representation raised by the pleadings and to the fact that the plaintiffs were seeking relief against the Obosi community, to have determined as a preliminary point whether the plaintiffs had brought the right parties before the Court to achieve their purpose. However, this was not done. Evidence was called on both sides. It is sufficient to notice two things in connection with the hearing. First, it has not been suggested in argument that the evidence for the plaintiffs was insufficient to support a declaration of their title to the disputed land, given the presence of defendants against whom such a declaration could properly be made. Secondly, the defendants' evidence did include some matter in support of the alleged Obosi title.

The learned trial Judge gave his judgment on the 16th May 1958. So far as concerned trespass, he held that not one of the defendants had been shown to have farmed or trespassed or built houses on the disputed land or been in possession of it. The trespass that was proved, he found, was a " community trespass ". But then he could not treat the defendants as representing that community: most of them, he thought, were not of the standing that would have made it likely that they would have been chosen for this purpose, although three of the more recently joined ones, who were members of the Obosi Land Council, might well have been selected for representation. In fact, however, they had not been, and the judgment proceeded as follows:—

> " The defendants deny that they have any authority to do so or do represent the Obosi Community, they claim that Chief Kodolinye was alive when proceedings were instituted and should have been sued as representing the Community. The plaintiffs say that is false, that he was dead at the time, and that the defence is mala fide, as it enables the Obosi Community by availing themselves of a procedural subterfuge, on the one hand, to allow the defendants to deny their representative capacity, and on the other hand to deny the plaintiffs' title and assert the Obosi title to the land without incurring the consequences of defending the suit communally. It is reasonably clear that the Obosi Community are aware of this suit and its implications, and are supporting the defendants and defending the suit under cover of the non-representative character of the defendants.
>
> The form of the action is a suit against the defendants in their personal capacity, but in substance it is the Obosi Community who standing behind the defendants, will accept, if it comes, a decision in their favour,

but if it goes against them, will say that it is not binding on the Community. (*Ezeaka v. Obasogwu* (1952) 14 W.A.C.A. 178. *Abuakwa v. Adana* (1957) 3 All E.R. 561).

Nonetheless I do not think that the authorities as they stand go as far as to permit me to regard the defendants as being sued in their representative capacity so as to permit me to grant the remedies prayed for against them as a community ".

After a futher reference to the attitude of the Obosi community,

" In this case the defence of title of the Obosi community is not supported by any evidence of tradition . . . As the Community hides behind the defendants in their personal capacity, so also they shift their defence in the course of the trial . . ., treating this litigation as a game of chess in order to preserve at whatever cost interest in the land in dispute ",

the Judge made a detailed survey of the evidence and then concluded in the following terms:—

" In Exhibit 75, Ademola J. as he then was expressed strong views on the attitude of the Obosi Community. I have come to the same conclusion. The Obosi Community have not only farmed on the land in dispute without permission, but since this series of litigation started and since this case was begun, have erected buildings on the land e.g. Mr. John says he saw no buildings on the land when he surveyed it there are buildings there now and have been for some time since the survey.

The Obosi Community are flooding the land with their people and putting tenants on it, and building on it, because of course they do not recognize the Onitsha Family's title, and will take any action in order to retain some interest in the land and be in a position to plead, if necessary, the hardship of being evicted.

In this case there is no proof of trespass or of being in possession by any of the defendants who are sued in a personal capacity, but as they raise in their defence the title of the Obosi Community to the land in dispute, and have failed to substantiate it, I am entitled I think to give the plaintiffs who have proved their title a declaration of title against them.

As they are not individual trespassers and deny any intention to trespass, I do not think that any injunction would or should lie; and, as they are not in possession as individuals they cannot be evicted.

In so far as the triangular portion of the land is Crown Land, I grant a declaration of title against the remaining defendants i.e. all those not struck out of the case, of the portion of land called Nkitaku, Akpriku and Okpoko, as shown in Exhibit 5, with the exception of the small triangular portion shown to be Crown Land ".

Did the learned Judge violate any legal principle in thus disposing of the suit? Generally speaking, the rules of law and practice that he had to follow were those " for the time being observed in England in the High Court of Justice " (High Court Law 1956 sections 14 and 15). These rules include the power under Order XXV Rule 5 of the Rules of the Supreme Court which enables the Court to make " binding declarations of right, whether any consequential relief is or could be claimed or not ". Much has been said in various reported judgments about the nature of the power thus vested in the Court, but none of these observations detracts from the two primary considerations, that the power to make declarations is conferred, surely not by accident, in wide and general terms, and that what is conferred is a discretion to be exercised according to the facts of each individual case.

The general theme of judicial observations has been to the effect that declarations are not lightly to be granted. The power should be exercised " sparingly ", with " great care and jealousy ", with " extreme caution ", with " the utmost caution ". These are indeed counsels of moderation, even though as, Lord Dunedin once observed, such expressions afford little guidance for particular cases. Nevertheless anxious warnings of this character appear to their Lordships to be not so much enunciations of legal

principle as administrative cautions issued by eminent and prudent Judges to their, possibly more reckless, successors. After all, it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration. " In my opinion ", said Lord Sterndale M.R. in *Hanson v. Radcliffe U.D.C.* [1922] 2 Ch. 490 at 507, " under Order XXV Rule 5 the power of the Court to make a declaration, where it is a question of defining the rights of the parties, is almost unlimited; I might say, only limited by its own discretion. The discretion should, of course, be exercised judicially, but it seems to me that the discretion is very wide ".

The circumstances in which the present declaration was made were certainly unusual. It was a declaration of title in favour of plaintiffs against defendants who, until the suit was instituted, had apparently done nothing to dispute that title. Such persons would not, prima facie, be " proper contradictors ", to use the phrase employed by Lord Dunedin in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade* [1921] 2 A.C. 438, in that they would not appear to have any true interest to oppose the declaration sought. But then, if that were really so, why did they put the plaintiffs to the proof of their title and defend the suit on the basis that they had none? The trial Judge thought that they did this because they were being used as what are sometimes called " front men " for the Obosi community as a whole; and if he, in charge of the proceedings and aided by local knowledge, formed the impression that this was so, it is not for an appellate Court, Federal Court of Appeal or this Board, to act upon any different view of the situation.

Again, if the defendants were not capable of representing the Obosi community as such, it was an exceptional action to make a declaration against them in the absence of someone who could represent the community upon a matter of title in which the community itself was primarily interested. The appellants have, naturally, dwelt upon this circumstance as showing that no declaration at all should have been made. It may certainly be conceded to them that, generally speaking, a Court is not disposed to make declarations of right about matters of law when it is apparent that the declaration asked for concerns other interested parties who are not presently before the Court. Where the judgment is inter partes, as most judgments are, persons not formally before the Court will not be bound in law by such a declaration, but it is inconvenient and, sometimes, embarrassing for them to have such declarations pronounced in their absence. In England any difficulty of this kind can normally be avoided through the exercise of the power which the Court possesses to make representation orders affecting the interests of classes of persons, even though some of them have no actual representation. In Nigeria the Court can make such orders only where the person nominated has in fact been authorised for that purpose by the persons interested. This difference between the two systems could warrant some difference in their practice and lead to a rather freer use of the power of the Court in Nigeria than in England. However that may be, there has never been any unqualified rule of practice that forbids the making of a declaration even when some of the persons interested in the subject of the declaration are not before the Court, see *L.P.T.B. v. Moscrop* [1942] A.C. 332 at 345 (" except in very special circumstances ") *N.Y. Life Assurance v. Public Trustee* [1924] 2 Ch. 101. Where, as here, defendants have decided to make themselves the champions of the rights of those not represented and have fought the case on that basis, and where, as here, the trial Judge takes the view that the interested parties not represented are in reality fighting the suit, so to say, from behind the hedge, there is, in their Lordships' opinion, no principle of law which disentitles the same Judge from disposing of the case by making a declaration of title in the plaintiffs' favour.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs.

(89278) Wt. 8052/97 100 2/64 Hw.

In the Privy Council

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DELIVERED BY
VISCOUNT RADCLIFFE

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
HARROW
1964