~~P.C.~~
~~3444 of 62~~

Judgment
14/1964

IN THE PRIVY COUNCIL

No. 15 of 1962

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF NIGERIA

BETWEEN:

AMINU AKINDELE AJANI OJORA
AKINWUNMI ESUROMBI ARO
OKE ESUROMBI ARO — Appellants

- and -

LASISI AJIBOLA ODUNSI — Respondent

CASE FOR THE APPELLANTS

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(1) This is an appeal from an Order of the Federal Supreme Court dated the 8th June 1961 allowing the Respondent's appeal with costs from the judgment of Bennett J. sitting in the High Court of Lagos dated the 21st September 1959 dismissing the Respondent's action. p.132 p.117 l.5

(2) In his Statement of Claim dated the 29th March 1956 the Respondent claimed that he was the Chief Ojora, approved by the Oba and duly capped in accordance with native law and custom; that the Appellants had taken upon themselves to deal with family properties without the consent of the Respondent; and asked for an injunction to prevent the Appellants from dealing with the family properties without his consent, for an account from them of all monies received for all family property leased or sold and for payment over of all monies found due. p.2 l.11

(3) By their Statement of Defence dated the 25th April 1956 the Appellantsalleged that the 1st Appellant was the head of the Ojora Chieftaincy family and the President of the family council which was the trustee of the family property in accordance with the terms of a settlement recorded in suit No.11 of 1947; that the 1st Appellant had been elected and installed Chief Ojora by more than 90% of those having the right to elect and install him in accordance with native law p. 3 l.20

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and custom; and that the Respondent was not a member of the family council nor recognized by it as Chief Ojora.

(4) The principal questions arising in this Appeal are:-

(a) Whether the capping of the Respondent by the Oba was contrary to native law and custom and the practice and usage of the Ojora Chieftaincy family and therefore void and of no effect as regards conferring on the Respondent any right to manage the family property.

(b) Whether the terms of settlement recorded in suit No.11 of 1947 are binding on the Respondent and are a good answer to the Respondent's claim.

The way the issues were finally settled before the trial judge was described by him as follows:-

(i) Was the Respondent properly appointed Chief Ojora in accordance with native law and custom?

(ii) If he was is he compelled to administer the affairs of the family in conjunction with the Family Council as constituted in the Terms of Settlement, that is, are these Terms of Settlement perpetual?

(5) In the course of the cross-examination of
p.14 l.12 - p.18 l.1 the Respondent objection was taken to questions directed to showing that he was not properly appointed as chief in accordance with native law and custom on the grounds that the Court had no jurisdiction to determine the Respondent's title. The trial judge ruled against this contention, citing the
p.18 l.7 - p.20 l.30 case of Onitolo v. Bello (1958) F.S.C. 53 as an authority that where he had to decide the fact of the Respondent's Chieftaincy before he could grant the Respondent the relief sought, he had jurisdiction to decide the lawfulness of the Respondent's appointment.

(6) The findings of fact of the trial judge were not challenged by the Respondent before the Federal Supreme Court except in so far as native law and custom is a fact.

In general the learned trial judge regarded

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the evidence of the Respondent and the witnesses called on his behalf as unreliable, whereas he found the Appellants' witnesses to be truthful. His conclusions were as follows (his references throughout to "the plaintiff" being to the Respondent):-

"I have indicated in the course of my consideration of the evidence what I thought of the plaintiff's appointment; it was, in my view, engineered by a small minority of the Ojora Family, led by Jackson, whose right to play such a part is extremely doubtful, who got the support of one or two leading members of the family who are White Cap Chiefs. They in their turn obtained the support of all the White Cap Chiefs who persuaded the Oba, somewhat, I think, against his will, to approve the capping of the plaintiff as a White Cap Chief. He was then recognised by the Governor-General as an Idejo White Cap Chief, for the purposes of the Lagos Local Government Law, 1953, which merely means that he can be appointed as a traditional member of the Lagos Town Council; it has nothing whatever to do with the headship of the Ojora Family or the administration of its property. p.115 l.33 - p.117 l.4

Before the plaintiff was capped the Oba and all the Chiefs knew that the leading members of the Ojora family opposed the plaintiff. They quite arbitrarily rejected their protests. The Oba did not even follow what he said was his procedure in the case of chieftaincy disputes. He did not listen to both sides and select a candidate. That was because according to him there was no other except the plaintiff.

That was an entirely mistaken view. It is clear from his own evidence and from the evidence of other witnesses for the plaintiff that there were other candidates.

That the family were unable to decide as between these candidates at that time was, in my view no justification for foisting the plaintiff on them.

It has, as I have said earlier, been long established that a family can, through its Council or Committee of Elders under the Head of the family, continue to administer its affairs without its White Cap Chieftaincy

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being filed. Aromire v. Cresanya, XIV N.L.R. 116 is a case in point. There Graham Paul J. set that out quite clearly at page 118, (3). There was, I consider, an unseemly haste about this whole affair and the reason is not difficult to find. Ojora lands are booming in value and the Faro faction which supports the plaintiff has long sought absolute control over them, without success.

I repeat one portion of the Oba's evidence which I have referred to before. He said:-

'If the majority of a family do not want a particular chief they cannot be forced to have him.'

Other witnesses for the plaintiff agreed with that opinion but unfortunately that is exactly what has been attempted in this case; to force the Ojora Family to have the plaintiff as their Idejo White Cap Chief against the wishes of the majority, certainly of the leading members of the family.

In my opinion the capping of the plaintiff was contrary to Native Law and Custom, and therefore void and of no effect, in so far as the administration of the Ojora Family property is concerned. I express no opinion on the plaintiff's social status as a member of the Oba's Council of Chiefs."

(7) In so far as these conclusions were findings of native law and custom or facts relevant thereto, they were based on the following evidence, as found by the learned trial judge:

p.10 l.36- p.11 l.2 (a) The Respondent agreed that the Ojora Chieftaincy family is a composite family of three chieftaincies owning the land in equal shares. He also p.13 ll.1-5 agreed that the election of a Chief is the right of the Family by native law and custom and that he himself was presented as Chief by his own side only.

(b) The Chief Olumegbon, a white cap Chief who capped the Respondent, said that if there is p.23 l.41 - p.24 l.2 disagreement in the family before capping, they go to the Oba who listens and tells them to go and agree, and if they fail to agree no Chief will be p.24 ll.3-6 appointed. Disputes are referred to a Council of White Cap Chiefs who settle on the rightful person and if necessary cap him without agreement from the family. (This procedure the judge described as

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arbitrary and contrary to native law and custom). p.98 l.34
To call a White Cap Chief Idejo meant that the Chieftaincy owns land and the appointment of a Chief p.24 l.27
rests with the family. If it is shown that a family have appointed a Chief he would be an Idejo Chief. p.24 l.30
Recently a member of the Oloto family Council was selected Chief Oloto, and was Chief Oloto though he p.25 ll.2-7
had never been capped. There was an interregnum in the witness' own family between the death of his own p.26 ll.35-47
10 predecessor in 1936 and his own selection in 1952, during which he and a family Council administered the affairs of the family without the appointment of a White Cap Chief.

One of the conclusions drawn by the judge from this witness' evidence was that the Respondent's p.101 l.14 appointment was made with undue haste and that there was nothing whatever in native law and custom to prevent the family Council from continuing to administer the affairs and property of the family under
20 the Chairmanship of the oldest member as Head of the family, until the majority of the family were prepared to put forward a new Chief for capping.

(c) The Respondent's third witness was the Chief Onikoyi, another White Cap Chief. He said the Chief was the sole arbiter in the family and must not p.38 ll.24-29 be fettered in any way, but admitted that a sale by himself of his family's property without the consent of the family was set aside by the Court. On being shown a document he agreed that in it he had accepted
30 that the management of family affairs should be under- p.203 ll.30-taken by the executive members appointed by the family 38 and confirmed by the Supreme Court.

(d) The Oba gave evidence for the Respondent of native law and custom in the selection of a Chief. p.32 ll.5-20 This is done by the grown up members of the Family if they agree upon one; if they do not agree, they submit to him, through the Chiefs, the names of the several candidates the several sections of the Family have agreed upon. Then he and the Chiefs hold meetings
40 with the different branches, listening to each side, and, after going through the merits and demerits of each, they select a candidate.

He said only a Chief, who was all in all, p.33 l.8
could let family land; yet later he admitted that the p.35 l.39
Chief could not dispose of family property without the consent of the leading members of the family. In cross-examination he made an admission which the judge described as most significant:-

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p.35 l.12 "It is the Family to decide on land administration with the Chief. If the majority of the Family do not want a particular Chief, they cannot be forced to have him."

p.106 l.34 The judge concluded from his evidence that the Oba was rushed into this capping by the Chiefs who misled him into believing that the Respondent was the Chief Ojora, properly presented by his family.

(e) The first witness for the Appellants, Onisemo, told of the selection of the 1st Appellant as Chief in accordance with the custom of the Ojora family and of his capping in accordance with this custom. According to him, in the Ojora Family, the capping is done by the Family and there is no doubt that for very many years Chief Bakare Faro wore a white Hausa Cap, as the Chief or Head of his family, and administered the affairs of his family for all those years before he was capped as a White Cap Chief.

p.59 ll.11-17
p.60 ll.1-40
p.112 ll.40-47

(f) Chief Asajon gave evidence at length on custom and was described by the judge as a truthful witness. If the family Council and the majority of the family did not want a candidate, the Oba could not force them to accept him. He said that it would be correct in Native Law and Custom for the Family and the "Olotu" or family Council to choose a Chief - that is the majority of the Family and the "Olotu". He said that the practical value of the capping by the Oba is social. Unless a Chief is capped he cannot go to the Iga or mix with the Chiefs or accompany the Oba anywhere but nevertheless he remains Head of his family.

p.114 l.32
p.74 l.8
p.75 l.17
p.75 ll.39-40

(g) The substance of the evidence of the 3rd Appellant was that the Respondent was appointed Chief and capped, against the wishes of the family, or the majority of the Ojora family, whereas the 1st Appellant was selected and capped in accordance with Ojora family custom, with the support of the majority of the principal members of the family.

p.78 l.1 - p.85 l.42

(8) The learned trial judge, after finding that the capping of the Respondent was of no effect as far as the administration of the family property was concerned, went on to consider the effect of the terms of settlement, although this was not strictly necessary to his decision. He accepted the findings of both the Court of first instance and of the

p.116 l.45 - p.117 l.2
p.117 l.13

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Federal Supreme Court, in the case of Aro v. Bakare Faro, that the settlement was not intended to be restricted to Bakare Faro's lifetime, but was perpetual. He dismissed the Respondent's claim with 1000 guineas costs. p.118 l.44

(9) The Respondent appealed against the judge's decision, inter alia on the following grounds:- p.119

(a) That the judge erred in law in assuming jurisdiction to inquire into the appointment of the Respondent as Chief Ojora.

(b) That the judge erred in law in holding that the terms of settlement were perpetual.

The Respondent also appealed on the ground that the judgment was against the weight of the evidence, but this was not argued.

On behalf of the Appellants (who were the Respondents before the Federal Supreme Court) it was argued inter alia that capping by, or by the authority of, the Oba had nothing to do with the validity of appointment as a Chief nor with the right to manage the affairs of the family. The Oba could not confer such right by mere capping. There was no evidence that capping was conclusive of due appointment: it only entitled the person capped to become a Councillor of the Oba. p.123 l.4

(10) The Federal Supreme Court allowed the Respondent's appeal with costs. Brett F.J. who delivered the judgment of the Court, said he did not find it necessary to consider the application of the Chieftaincy Disputes (Preclusion of Courts) Ordinance 1948 (No. 30 of 1948) and the question of the jurisdiction of the Court to determine the validity of the Respondent's appointment. Before the Supreme Court the Appellants had not disputed the Respondent's submission that the issues were: (i) What was the effect of capping? (ii) What was the effect of recognition by the Governor General (who had recognized the Respondent's position as Chief Ojora)? (iii) What was the effect of the settlement? p.131 l.38 p.128 ll.32-38

It is respectfully submitted that this statement of the issues is in some ways misleading, in so far as it obscures the fact that the Appellants still contended that the capping of the Respondent was contrary to native law and custom and of no effect as far as management of the family property was concerned. If the question of the applicability of

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No. 30 of 1948 is therefore relevant it is further submitted that the Court had jurisdiction to decide the validity of the Respondent's appointment, for the reasons given by the learned trial judge and on the basis of the decision in Onitolo v. Bello (supra).

Further, Ordinance No. 30 of 1948, having been omitted from the Revised Edition Laws of the Federation and Lagos 1958, ceased to have effect by reason of S9 of the Revised Edition (Laws of the Federation and Lagos) Ordinance No. 25 of 1958. In addition the purported exclusion of the Courts is invalid by reason of S21 (1) of the Constitition of the Federation of Nigeria.

(11) Brett F.J. went on to say that the only
p.129 l.5 question was whether the Respondent had the usual powers of a Chief: if he did, it was not contended that the family Council could dispose of family property without his consent. Therefore the terms of settlement were irrelevant.

p.129 l.27 - p.130 l.33 The learned judge then said that on the authority of the decisions in Akodu v. Omididji 8 N.L.R. 55 and Aiyedun v. Oresanya 14 N.L.R. 116 and as a matter of probability, the burden was on the Appellants to show that there could be simultaneously in one family a chief who had been capped, with no rights over family property, and another Chief who had not been capped, but who manages the family property. He could not agree with the trial judge that the Appellants had discharged that burden. They could point to no precedent, although family disputes of this kind had not been uncommon and the novelty of this submission told against the Appellants. If the capping had been over-hasty, that did not alter its effect. He did not need to consider the effect of recognition by the Governor-General.

(12) It is respectfully submitted that the Federal Supreme Court erred in the following respects:-

(i) Neither of the two cases cited in 8 N.L.R. 55 or 14 N.L.R. 116 establish that capping can make an invalid election of a Chief valid. They are therefore distinguishable. In addition a finding of native law and custom depends in each case on the evidence led before the Court.

(ii) The onus of proof that he had been validly appointed Chief Ojora and had rights over the management of family property remained throughout on the Respondent.

(iii) Irrespective of the question of onus of proof, there was ample evidence before the trial judge, which he was entitled to accept, (a) that the appointment of the Respondent contrary to the wishes of the family Council and most of the family was contrary to native law and custom; (b) that the capping by the Oba was therefore void and ineffective as regards rights of management over the family property.

(iv) The terms of settlement were not irrelevant. If, as the learned trial judge found (it is submitted rightly), they were perpetual, this would be a factor of importance to be considered in determining the Respondent's rights as a Chief since he had been capped by the Oba without the consent of the permanent family Council. Secondly, since the Respondent did not recognize the Council appointed under the terms of settlement, no action could lie against the Appellants for acting without the Respondent's consent.

(13) The Appellants submit that the Order and Decree of the Federal Supreme Court is wrong, that this appeal should be allowed with costs and the order of the trial judge be restored for the following amongst other

R E A S O N S

(1) BECAUSE the judgment of the learned trial judge was right and should be restored.

(2) BECAUSE the learned trial judge rightly held that he was not precluded by the Chieftaincy Disputes (Preclusion of Courts) Ordinance, 1948, and the Lagos Local Government Law from hearing evidence or cross-examination directed towards proving that the Respondent was not Chief Ojora and from determining the issue so raised.

(3) BECAUSE the Chieftaincy Disputes (Preclusion of Courts) Ordinance was not included in the Revised Edition Laws of the Federation and Lagos, 1958, and by reason of S9 of the Revised Edition (Laws of the Federation and Lagos) Ordinance 1958 ceased to have effect.

(4) BECAUSE the Chieftaincy Disputes (Preclusion of Courts) Ordinance must be read subject to S21 (1) of the Constitution of the Federation and in so far as it conflicts with that subsection is void and of no effect.

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(5) BECAUSE the onus of proving that he had been duly appointed Chief Ojora and had the right to administer the family property was throughout on the Respondent.

(6) BECAUSE there was evidence on which the learned trial judge could reach his conclusions as to the effect of Native Law and Custom.

(7) BECAUSE the learned trial judge was right in holding that the capping of the Respondent was contrary to Native Law and Custom and therefore void and of no effect in so far as the administration of the Ojora family property was concerned. 10

(8) BECAUSE the terms of settlement were perpetual and were a good answer to the Respondent's claim.

DINGLE FOOT

DICK TAVERNE

No. 15 of 1962

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N:

AMINU AKINDELE AJANI OJORA
AKINWUNMI ESUROMBI ARO
OKE ESUROMBI ARO — Appellants

- and -

LASISI AJIBOLA ODUNSI — Respondent

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