In The Supreme Court of Nigeria

On Thursday, the 12th day of July 1909

Before Their Lordships

Sir Willoughby Osborne	.....	Chief Justice
Packard	.....	Justice, Supreme Court
Winkfield		Justice, Supreme Court

Between

D.W. Lewis & Ors ..... Appellant

And

Bankole & Ors ..... Respondent

Judgement of the Court

Delivered by

Sir Willoughby Osborne. C.J.

Chief Mabinuori died in 1874, leaving a family of twelve children, the eldest of whom was a daughter. He was possessed of three piece of land: on one, the family compound, he lived with his wives and some of his children and domestics; on another he built houses for his eldest daughter and two of his sons; whilst the third was dedicated to the worship of the family fetish.

In 1905 an action was brought by certain of Mabinuori's grandchildren, including the issue of the children for whom separate houses were built, against certain of the occupants of the family compound who were daughters of Mabinuori and children of a deceased younger son.

The claim was for a declaration

(1) that the plaintiffs were entitled, as grandchildren of Mabinuori, in conjunction with the defendants, to the family compound, and

(2) that the family compound was the family property of Mabinuori deceased.

On the case coming on for trial before Acting Chief Justice Speed, the learned judge directed the issue to be tried whether the plaintiffs had received an amount which disentitled them to any share in the property in question, and after hearing the evidence delivered the following judgment on the 18th November, 1908: -

> This is a case of very considerable importance not so much from the nature of the property in dispute or the magnitude of the interests concerned as from the fact that perhaps for the first time the Court is asked to make a definite pronouncement on the vexed question of the tenure of what is known as family property by native customary law, and the principles upon which that law should be enforced.
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> It is of course well known that the Colony of Southern Nigeria is under the sovereignty of the British Crown, and the law applicable to the Colony and in force within the jurisdiction of this Court is the Common Law of England, the Doctrines of Equity, and the Statutes of General Application which were in force in England on the 1st day of January, 1900. This is enacted by the 14th section of the Supreme Court Ordinance.
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> But by subsequent sections an important modification is introduced. By section 18 it is provided that law and equity are in all cases to be administered concurrently and that in case of conflict the rules of equity shall prevail over the rules of the common law, and by section 19 it is provided that the Court may observe and enforce the observance of any law or custom existing in the Colony and Protectorate subject to its jurisdiction, such law or custom not being repugnant to natural justice, equity and good conscience nor incompatible with any enactment of the legislature, and it is further provided that such laws and customs shall be deemed applicable particularly as between natives and natives and *inter alia* in causes and matters relating to the tenure and transfer of real and personal property.
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> It is clear therefore that this is a case in which the Court is entitled if not actually directed to observe and enforce the observance of native law and custom and it must not be forgotten that the native law and custom which the Court is empowered or directed to observe must have two essential elements: it must be existing native law or custom and not the native law or custom of ancient times, and it must not be repugnant to natural justice, equity or good conscience.

Now as to the first essential, native law or custom must be existing native law or custom and not the law or custom of a bygone age. It is perfectly well known that by strict ancient native law all property was family property and all real property was inalienable, and it is equally well known that a very large portion of the land upon which this town is built is now owned by individuals and that family ownership is gradually ceasing to exist. In a progressive community it is of course inevitable that this should be so.

The institution of communal ownership has been dead for many years and the institution of family ownership is a dying institution and it is idle to expect this Court at this time to make use of a power which was given to it in order to avoid or mitigate the individual hardship and injustice which would necessarily be incidental to the abolition of a primitive native system and the immediate substitution of modern methods, in order to perpetuate or bolster up what is at the best only an interesting relic of the past.

I do not wish for a moment to be understood to be speaking with any disrespect of the customs of your ancestors. There was much that was admirable and much which I hope will be retained for many years in the family system which they evolved, but it can hardly be denied that their ideas as to ownership of property were utterly unsuited to modern requirements, that these ideas have been dying a more or less natural death ever since the people of this country entered into commerce with European nations, and that sooner or later either the legislature of the Colony or this Court in the exercise of its equitable jurisdiction will have to give the *coup de grace* to the whole system.

As to the second essential I am not sure that I know what the terms " natural justice and good conscience" mean. They are high sounding phrases and it would of course not be difficult to hold that many of the ancient customs of the barbaric times are repugnant thereto, but it would not be easy to offer a strict and accurate definition of the terms.

But with regard to equity the case is quite different. The rules of equity are, or ought to be, perfectly well known to this court and if a native law or custom is found to be repugnant to the fundamental rules of equity it is absolutely the duty of the Court to ignore it. I have over and over again expressed the opinion in this Court and I repeat it with all the emphasis which I can command that any attempt to revive an obviously stale claim, to constitute a state of affairs which has been openly or tacitly abandoned by all concerned, to upset a settlement which has been acquiesced in by all parties for a long time and upon which all parties have by mutual even though tacit consent acted for a number of years, is repugnant to the fundamental rules of equity and should not be countenanced by this Court on the ground that it is in accordance with native law or custom, however harmless, nay, however admirable, that native law or custom may be.

So much for general principles and now for the facts of this case.

The property in dispute is a block lying on the north side of Bishop Street between the Marina and Broad Street known as Mabinuori's Compound.

Together with many properties in the vicinity it was many years ago acquired by Mabinuori and has ever since been occupied by members of his family.

An attempt was made, I don't quite know for what purpose, to show that the land originally was Oshodi's land, but be that as it may it was granted by the Crown to Mabinuori in January, 1869, on which date also a crown grant to the same Mabinuori was issued for another property lying south of the premises now occupied by Messrs. Gottschalck on the other side of Broad Street which is referred to throughout these proceedings as Fatola's compound.

Mabinuori was a man of wealth, influence and position and had a large family for whom from time to time he made provision as occasion arose by placing them in possession of houses or rooms erected on one or other of his properties.

His eldest son was one Fagbemi who also won a position of wealth and influence in the community, who in fact before his father's death was probably the wealthier and more influential of the two.

In any case it appears on one occasion he paid the old man's debts and he certainly obtained a crown grant for a considerable property in Bishop Street behind Messrs. Gottschalck's premises which was in all probability originally part of the Mabinuori's estate as early as August, 1868, or a few months before the issue of the crown grants for the properties above mentioned to Mabinuori himself.

Fagbemi then, it is clear, however he acquired this property, whether, as is alleged in evidence and as I am much inclined to believe, by gift from Mabinuori or in any other way, had attained an independent position before the father's death and upon the death of Mabinuori which took place in 1874, was recognised as the unquestioned head of the family.

As to the other members of the family the defendants or their ancestors were all settled on the property in dispute. Fatola, Oduntan and Odubi were settled on what is known as Fatola's compound. Fagunwa was settled elsewhere on

a property which was originally purchased by Layemi, who was one of the Mabinuori's wives, either on her own account or as a member of the family, and for which a crown grant was issued to her in 1869.

This was the position at Mabinuori's death. Now I have no hesitation in saying that Mabinuori never intended his property to devolve in any other way than in accordance with the ordinary native custom and it is quite possible that had they thought fit to do so all his descendants or their representatives might have claimed and made good their claim to share in the whole inheritance at his death.

But what actually happened? With the exception that Fagbemi was the recognised head of the family instead of Mabinuori and as such took the usual part in the performance of the family duties and no doubt being a wealthy and influential man occasionally assisted his less fortunate relations with his purse, everything went on as before.

No attempts were made to re-allot the dwelling houses but each branch of the family continued to occupy the premises assigned by Mabinuori or acquired before Mabinuori's death.

This is a substantially accurate description of the position at Fagbemi's death also, though there is evidence of isolated acts of ownershin exercised or attempted to be exercised by certain members of the family outside the limits to which they were apparently generally content to be confined. For instance Fagbemi himself for a time occupied certain portions of the compound in dispute as a salt and spirit store, though it is by no means certain that this occupation did not commence before Mabinuori's death, and it is clear to my mind that it never was intended or understood to involve a claim to ownership on Fagbemi's part. Similarly David Lewis tried once to build on the property but was restrained by his own mother Fatola, and James Lewis had a horse, a few fowls and a few empty cases on the premises at a recent date. Fagbemi died in 1881 and after his death Ben Dawodu became if not the recognised head of the family at all events the most influential member. Still the position remained unchanged.

Still the same people or their representatives continued to occupy the same premises and still no attempt was made to re-allot or in any way interfere with the occupation.

Certain differences of opinion did arise between the occupants of the property in dispute and Ben Dawodu, but there was nothing to show that there was any desire or any intention on the part of any of the family to alter existing arrangements. And so the situation continued up to the commencement of this action.

Now to these facts I am asked to apply strict native law and custom and to declare that the property has always been the family property of Mabinuori's family and that defendants who have been in undisputed occupation for upwards of 30 years should now be told that they are only joint owners with the rest of the family. I am asked to throw the property into the melting pot of an acrimonious family feud. I have no doubts that plaintiffs have native law and custom on their side. I mean native law and custom as it was understood and possibly applied 40 years ago, but I decline to say that it is existing native law and if it is I am confident that it is my duty to decide that it is repugnant to the principles of equity and to refuse to enforce it.

On the ground therefore that by tacit mutual arrangement and acquiescence of all parties extending over a number of years these various properties have been separated and come to be considered as separately owned, I find on this issue in favour of the defendants and as this finding is necessarily fatal to plaintiffs' claim, I give judgment on the whole action for the defendants with the costs of the hearing before me. I say nothing about the previous hearing because it was in my opinion not completed.

The costs I assess at 50 guineas.

Against this judgment the plaintiffs appealed.

Williams Ajasa for the appellants.

Shyngle and Foresythe for the respondents.

On the 15th May, 1909 judgment was delivered in the Full Court.

In this action the claim of the plaintiffs was for a declaration that they are entitled as grandchildren of Mabinuori deceased in conjunction with the defendants to all that piece or parcel of land situate and lying between the Marina and Broad Street in Lagos being the property of the late Mabinuori deceased and also that the said property be declared the family property of the said Mabinuori deceased.

The wording of the first part of the claim would seem to imply that the plaintiffs claim a declaration that they are entitled to the joint ownership of the land in dispute as tenants in common in equal shares with the defendants, and this is evidently the view that was taken by the learned judge whose decision is now appealed against. Yet at an early stage of the proceedings before the late Chief Justice Nicoll, defendants' counsel informed the court that the only point then in dispute was who was to be head of the house, and it was not until one of the plaintiffs had insultingly declined to accept the advice of the chiefs nominated by the court to advise the family in their election that the defendants seem seriously to have claimed that the land in dispute was their separate property to the exclusion of the other members of the family. A

protracted trial before Chief Justice Nicoll was unfortunately interrupted by his death, and fresh proceedings were started before Acting Chief Justice Speed. The defendants then admitted that the land in dispute was Mabinuori's property, but claimed that the plaintiffs were not entitled to any share therein because they or their ancestors had already received all the shares to which they are entitled.

The court then directed an issue to be tried whether the plaintiffs had received an amount which disentitled them to any share in the property in question. On the ground that by tacit mutual agreement and acquiescence of all parties extending over a number of years the property in dispute, together with the other properties of Mabinuori had been separated and had come to be considered as separately owned, the court found on this issue in favour of the defendants, and grave judgment for them on the whole action.

It is contended that this finding was against the weight of evidence, and with that contention I agree. Three properties are admitted to have belonged to Mabinuori at the time of his death, viz; Fatola's compound, the Oke Popo property, and the land in dispute. It is certainly the fact that Fatola, Odubi and Oduntan, all children of Mabinuori, have continuously occupied Fatola's compound; but the crown grant of the land was taken by Mabinuori, who placed them on the land, in his own name, only five years before his death; and the deed was retained by the head of the family, and not by Fatola, until somewhere about 1888, when it was eventually, after a short period of custody in the hands of Layemi, Fatola's mother, who unsuccessfully claimed part of the land in dispute for herself, handed over for safe keeping to one of the Lagos chiefs together with the crown grant of the land in dispute. Moreover, the possession of Fatola, Odubi, and Oduntan, and their children is not possession adverse to the family of whom they form part.

The property at Oke Popo was evidently not treated as separately owned, for a portion of it was sold to meet some family expenses. There is to my mind abundant evidence to negative the conclusion that the compound in dispute was ever looked upon as separately owned by the defendants. The present occupiers include besides the defendants themselves a daughter of Fatola and sister of the plaintiff Lewis who lives in one of the largest dwellings in the compound, formerly the habitation of her grandmother Layemi; a son of Odubi, whose family are also amongst the plaintiffs; one of Mabinuori's wives; and two of his domestics. There are stores on the land which Fagbemi, Mabinuori's elder son, and head of the family, made use of for trading up to the time of his death in 1881, without paying any rent, and which was subsequently used for some time by Ben Dawodu, his eldest son, who was looked on as the head of the family, also without payment of rent. When these stores were let to European firms in Ben Dawodu's lifetime it was he, and not the defendants, who entered into the agreements in his own name, and for a while collected the rents of both, though a year or two before his death in 1900 it was arranged that the defendants should take the rents for the Broad Street store. Fagbemi also built a store on the land, and brought Docemo, one of Mabinuori's children, to reside on the land, and had actually collected the materials for building in the compound houses for his sisters Faleye and Apotun, two of the defendants, when he died. I can find as against these facts no evidence to show that the land as a whole was ever looked on as the sole property of the defendants, though their right of occupation, which again is not adverse to the plaintiffs, has always been acquiesced in. I do not, however, consider that the plaintiffs have proved their claim to the relief asked, and had that claim been for absolutely equal ownership rights as tenants in common with the defendants, entitling them to disturb the defendant’s possession, I would have bad no hesitation in following the learned judge in the court below, and finding that the application of such a native law would be inequitable. But before this Court the extent of the claim has been very considerably modified, and the plaintiffs now admit that by native custom they are not entitled to disturb the defendants in their rights of occupation; they still, however, claim a right to occupy any part that falls vacant, a right of ingress and egress, and, what is really the cause of all these proceedings, a right to be consulted before alienation, and to share in the proceeds.The value of the site of the land at the present time is considerable, and is likely to increase with the expansion of Lagos. Plaintiffs' counsel could only assert their rights in a general way, and defendants' counsel disputed the correctness of their pronouncement of the native law. There is no evidence, and nothing on the pleadings, to show what are the exact rights claimed by the plaintiffs to be exercisable by native law or custom, and these must be definitely ascertained and they must fall within the provisions of section 19 of the Supreme Court Ordinance before this Court can give effect to them. A Court of Appeal cannot be expected to take the evidence, and I am of opinion that the best course to ensure the determination of all the matters in dispute between the parties will be to remit the action to the court below to complete the hearing by taking evidence as to the native law or custom, if any, governing the circumstances of the case, and to pronounce judgment on the whole claim after consideration of the applicability of such native law or custom if any, under section 19 of the Supreme Court Ordinance.

Judgement of Winkfield, J
Read by Packard, J.

This is an appeal from the judgment of the Divisional Court of the Western Province.

The plaintiffs who represent the children of Fatola, Fagbemi. Odubi, Oduntan and Fagunwa, children of Mabinuori deceased, claim a declaration against the defendants, children of Mabinuori deceased and the children of Soni Dosunmu deceased a child of Mabinuori, that the children of Fatola, Fagbemi, Odubi, Oduntan and Fagunwa are entitled in conjunction with the defendants to a piece of land between the Marina and Broad Street, Lagos, being the property of Mabinuori, deceased, and also that the said property be declared the family property of the said Mabinuori deceased.

The defendants contended in the court below and before this Court that Fatola, Fagbemi Odubi, Oduntan and Fagunwa received parts of Mabinuori's property from him and are thereby precluded from claiming any interest in the property in

question. From the evidence it appears that Mabinuori acquired some time ago — probably about 1851 — the property in dispute and certain other properties in the vicinity.

He built a house upon the land in dispute and resided there with his wives, children, and domestics.

His eldest son Fagbemi gained a position of wealth some time before the father died and occupied a piece of land at Bishop Street with his wife and some of Mabinuori's domestics. He acquired several pieces of land. Among them he acquired the piece at Bishop Street as his own property. The crown grant dated the 20th August, 1868, was made out in the name of Ben Dawodu, a name by which he was also known.

Fagunwa was placed by Mabinuori on a piece of land which was subsequently expropriated by the Government. Fagunwa then went to reside on a piece of land at Balogun Street which was owned by his mother, Layemi; Layemi paid for the land and the crown grant was made out on her name. Fagunwa died at Balogun Street. His children lived there at the commencement of this action. Upon another piece of land Mabinuori built houses for his daughter Fatola and his sons Odubi and Oduntan. There is no evidence to show that he intended that they should be the owners of the land. I consider that they had the right only to occupy the land as members of Mabinuori's family.

For this piece of land Mabinuori obtained a crown grant in his own name in 1869.

I do not consider that the fact that Mabinuori provided houses for his children disentitled them to interests in the land in dispute.

At Mabinuori's death the piece of land which he owned became family property. The defendants, as his daughters, or their fathers or mothers as his children were entitled to reside on the land in dispute subject to and in accordance with native law and custom.

After Mabinuori's death, Fagbemi became head of the family. Fagbemi died in 1881. While head of the family he used two stores on the land and paid no rent for them. He was recognised by the members of the family as their head. After Fagbemi's death, Ben Dawodu assumed the headship. His position was not challenged. He used the stores as his father Fagbemi had done, and also did not pay rent for them. He repaired Mabinuori's house on the land in dispute and, generally, acted as a head of a family when circumstances required. It would seem that both Fagbemi and Ben Dawodu used the stores in pursuance of their rights as heads of the house. When Ben Dawodu was head, he received the rents of one of the stores, and used them for his own purposes.

He was charged with wasting the family property, and an arrangement was made under which the defendants or some of them received the rents. Ben Dawodu died in 1900 and after his death the defendants who are daughters of Mabinuori assumed the management of the land in dispute. They received the rent of a shed and a blacksmith's shop. In 1906 they entered into an agreement with a European firm for the lease of one of the stores on the land. James Dawodu, a son of Fagbemi, objected. In July, 1905, a family meeting was held at which the defendants claimed the land as their property. The writ of summons was issued on the 19th December, 1905. When Ben Dawodu died in 1900 no head of the family was elected. To the fact that there was no head of the family the dispute which had arisen between the members was no doubt due.

When the case first came on in the court below, the Court was informed by counsel for the defendants that the only matter in dispute was the question who should be head of the family. This was on the 24th April, 1906. When the case next came before the Court for trial on the 27th December, 1906, the defendants then asserted that the land was theirs. The defendants have no doubt occupied the land in dispute for many years but in my opinion they have been in possession as members of the family of Mabinuori in accordance with and subject to native law and custom. They have not been in possession adverse to the rights of the other members of the family.

Under native law the plaintiffs have joint interests on the land with the defendants. I can find no reason, based upon any law or the principle of equity, why native law should not be applicable in this case. The defendants have the right to occupy the land in dispute subject to and in accordance with native law but they cannot alienate the land without the consent of the chief member. In my opinion the judgment of the court below should be reversed and judgment entered for the plaintiffs.

Judgement delivered by
Packard, J.S.C

The plaintiffs' claim is twofold

(1) a declaration that they are entitled as grandchildren of Mabinuori deceased in conjunction with the defendants to all that piece or parcel of land situate and lying between the Marina and Broad Street, Lagos, being the property of the said Mabinuori deceased.

(2) that the said property be declared the family property of the late Mubinuori deceased.

Pleadings were delivered and various events and proceedings took place which it is unnecessary to specify in detail, until eventually the whole matter came for trial before the learned Acting Chief Justice. He then made an Order under Order 32 rule 2 in the following terms:

> " The first question to decide is whether the plaintiffs have received an amount which disentitled them to any share in the property in question. The Court orders that issue to be tried first."

The issue was tried accordingly and the defendants began. At the close of the defendants' evidence on this issue the following note appears upon the record:

> "The defendants' case on the issue before the Court - subject to any reference which the Court may make under section 111 of the Supreme Court Ordinance as to the native custom applicable."

Evidence was then given for the plaintiffs on this point and the learned judge on this preliminary issue found in favour of the defendants and decided that they were estopped by their own conduct from bringing this action. In his judgment he says

> "I find on this issue in favour of the defendants by tacit mutual agreement and acquiescence of all parties extending over a number of years these various properties have been separated and came to be considered as separately owned. No doubt the plaintiffs have native law and custom on their side, but I decline to say it is existing native law and if it is I am confident that it is my duty to decide that it is repugnant to the principles of equity and to refuse to enforce it"

So far as actual residence on the property by the defendants is concerned, I think there is abundant evidence to support the conclusion of fact, and I gather from the arguments of counsel for the plaintiffs that they do not - even at this stage - claim any right to eject the defendants from these portions of the property they occupy or possess as residence. But apart from the question of residence there are portions of the property which have been used or let as stores and for trading purposes and in the profits therefrom the plaintiffs claim to participate in accordance with native law and custom and it appears from the evidence that these rights have not only been asserted during the period in question, but have in fact been exercised from time to time by, at any rate, one branch of the families who are plaintiffs and that there have been constant disputes on this point which culminated in the present action. I think therefore that the finding of fact that the plaintiffs have acquiesced for a long period in the whole of the property in dispute being considered as separately owned by the defendants is against the weight of evidence.

I am also of opinion that such acquiescence as has been established in this case does not in law preclude the plaintiffs from bringing this action.

The principles upon which the rule of equity may be applied in such cases are *set* out in *Black* v. *Gale* (55 Law Journal Chancery 559) and *Chadwick* v. *Manning* (1896 Appeal cases 331). See also *Palmer v. Moore* (Law Reports 1900, Appeal cases 293). I have not been able to find any case in which this doctrine of equity has yet been carried as far as the case before us. I am therefore of opinion that this appeal should be allowed and that the defendants having failed on the preliminary issue the action must proceed, and must be remitted to the Divisional Court to try the remaining issue.

At the informal discussion yesterday on the issues raised, counsel for the appellant were good enough to indicate to us in general terms some of the benefits and obligations which under native law might possibly accrue to the parties in respect of this property. No doubt evidence will be adduced on these points in the Divisional Court and it would be premature at this stage of the proceedings without any sufficient evidence or findings of fact before us to express our opinion as to the native law or even to assume without proof that under the peculiar circumstances of the case there is any native law applicable at all.

The Full Court ordered that the judgment of the court below on the issue tried under Order 32 rule 2 be set aside, and that the cause be remitted to the court below to take additional evidence as to what native law or custom, if any, would regulate the several matters in dispute, and such further evidence as the Court may think proper, and either to pronounce final judgment on the merits, or to state a case for the opinion of the Full Court.

The case was resumed in the Divisional Court before Osborne, C.J., and conflicting evidence was adduced as to the native law applicable.

On the 29th June, 1909, the following Chiefs of Lagos were in attendance, viz: Chief Ojora, Chief Eletu Odibo, Chief Oloto, and Chief Onitano, white-capped chiefs, and Chief Ashogbon, a war chief.

The Court caused them all to be sworn and addressed them as follows:

> "You are here as expert witnesses on the native law of Lagos, and I want you to judge the cases I am going to put before you as if you were sitting to judge them in a native court. You may deliberate before giving your answers, but I shall take a separate answer from each of you, and of course that answer will be on oath."

The Court then propounded certain cases, which summarised the different views put forward, and were framed with regard to the actual facts. The first was as follows:

"Suppose a man whom we will call Ladipo was formerly a slave, but afterwards became a free man and a rich trader, and bought two pieces of land, one a large piece and the other a small piece of land. He has two wives and by them he has four children. The eldest child Layinka is a daughter, the next child, Bankole, is a son, the third is Ayodele, another daughter, and the youngest is Oke another son.

"Ladipo builds himself a big house on the part of his big piece of land, and builds a room in the compound for each of his two wives. Bankole, his eldest son, grows up and Ladipo gives him a wife, and builds him a house on behalf of the smaller piece of land. He also finds a husband for his eldest daughter Layinka, and builds her a house on the other half of the small piece of land. Then Ladipo dies. At the time of his death Layinka was living in the house built for her. Ayodele, the unmarried daughter, was living in her mother's room in the compound, and Oke, the youngest son was living in the big house with his father.

"The four children meet together after the father's funeral, and Layinka, the eldest daughter, says "I am the eldest child, and by native law I am entitled to be head of the family and to give orders in our father's compound"

"Bankole then says "You are wrong, my sister. I am the Dawodu, eldest surviving son of my father, and by native law the Dawodu is the proper person to be head of the family and to give orders in his father's compound".

"Ayodele, the youngest daughter, then says "My brother and sister you are both wrong. Our father gave you your portions in your life, and you cannot claim to share the compound with Oke and myself. I am older than Oke and the eldest child living in the compound, therefore it is I who by native law ought to give orders in the compound".

"Oke, the youngest son, then says "Sisters and brother you are all three wrong. Ayodele truly said that you Layinka, and you, Bankole, have had your portions in our father's life, and therefore cannot share in this compound. But Ayodele is a woman, and by native law a woman can only live in her mother's room, and cannot give orders in her father's compound. I, therefore, am the proper person to rule this compound".

"They disagree, and come before you chiefs to settle the case. How would you decide it?"

The chiefs asked to retire to deliberate, and were absent for about eight minutes. When they returned, Chief Ojora said,

"As your Honour has explained the position, we understand. If the parties came to us and related the matter we would go and view the houses. And when we see the one the father has given to the eldest child, and to the child following the elder, we will go and see the compound where the father was living with his two children. If we find that the house which is given to the two elder children is large enough for them, and if we find the compound where the father died just equal in size, we will tell the two children who have not been provided for in their father's lifetime to take the remaining land where the father was."

The Court explained that the father built a big house on a big plot of land for himself, and the land where he built for his children was smaller. Chief Ojora then said

"If we find that the father's land is bigger than that given to the children we will give a portion of the father's compound to the children who have not been provided for, and the other part to the children who had had houses built for them."

By Court "Should you try to make the shares equal ?

A. Yes, so that there should be no dispute, the woman sharing equally with the men.

Q. And who would be the proper person to give orders in the father's compound in such case?

A. Bankole, who is the Dawodu

Chief Eletu said

"I agree with the Ojora except on one point. If the compound is divided it will no longer be a compound, and each one will have authority in his own portion"

Q. But suppose there is a compound yard, and one well for all the compound? Who is the proper person to give orders about the well?

A. Layinka will have the authority over the well and the yard

Chief Onitano and Chief Oloto intimated that they agreed with Chief Ojora.

Chief Ashogbon said

" I say that the well will be under the authority of the person in whose share it is.

" If any row comes they should go to the eldest sister, and the Dawodu will be there also. The house will be divided, but you cannot split the eldest child (meaning that the eldest will remain the eldest and have authority as such)."

The Court then asked

"Is there any difference between the father's house and the other houses? Can it be divided up?"

To which Chief Ojora replied

"It would be divided as I have suggested. If the father has a big compound, they will leave the father's house for all the children to meet in and to discuss matters relating to the family."

The other chiefs concurred.

The Court then said:

"Now I am going to put another case about the same man Ladipo and his four children. Suppose that after Ladipo's death Bankole the eldest son was accepted as head of the family's compound without any dispute. Then Bankole dies first of the children leaving a son. Who would be the proper person to succeed Bankole to give orders in the father's compound?"

Chief Ojora replied

"Bankole's son would have no right to give orders in the house. The eldest child, in this case Layinka, would be the proper person to give orders, but Bankole's son would be consulted about the compound."

All the other Chiefs agreed with this view.

The Court then asked

"Suppose there had been no palaver at Ladipo's death, but Bankole had been accepted as head of his father's compound till he died. Layinka is then the proper person to give orders. Now in part of the compound is a shop, which Layinka wants to let to a European firm of merchants. Can Layinka let it without consulting the other members of the family?"

Chief Ojora answered

"If it has not been divided, one person cannot let it."

By Court

"Suppose Layinka and Ayodele want to let it to one firm, and Bankole's son and Oke want to let it to another firm?"

Chief Eletu:

"They will settle the matter between themselves.".

Q. "But suppose they cannot settle it between themselves?"

Chief Ojora:

"If they cannot settle it, the chiefs will go and inspect the property and partition it."

The other chiefs assented to this.

By Court:

"Can the father's house, which has been left for all the children to meet in, be let or sold ? "

Chief Ojora:

"It can't be sold, but it can be let with the consent of all the members."

To this the other chiefs assented.

Q. "Can the family sell it, if they all agree?"

Chief Ojora:

"No, they cannot sell it."

To this also the other chiefs assented.

Q. "Suppose the Government had come and taken the family house for public purposes, and given £1,000 for it, to whom will the money be given?"

Chief Ojora:

"To the children, in equal shares."

Q. "Suppose Bankole had died when the Government acquired the property, would his children share his share ?"

Chief Ojora: "Yes."

Q: "Suppose Bankole had property of his own which he acquired, and his children succeeded to that, would that be taken into account in dividing the £1,000?"

Chief Ojora:

"It will make a difference. If Bankole had got money and had become rich, it must have been through his father."

The other chiefs assented.

Q. "Suppose Ladipo in his life lost a lot of money just before he died, and mortgaged his house, and before Ladipo died Bankole paid off the mortgage. Would Bankole's children then be entitled to share in the £1,000?"

Chief Eletu:

"They would have a share in it, but not on account of the debt Bankole paid. I now say they would have no share in it."

By Court:

"Chief Ojora, what do you say?"

Chief Ojora:

"If Bankole pays his father's debt, it is through his father's influence that he became rich. But if Ladipo mortgaged the house, and Bankole redeemed it, and all the family knew, then Bankole's family would be entitled to share."

Chief Onitano and Chief Oloto agreed with Chief Ojora, but Chief Ashogbon said:

"We cannot give it to them, because their father has got his own share."

The Court then put the following case :—

" Ladipo built himself a big house in his big compound, and had built Bankole a smaller house on his small piece of land. Ladipo dies, and Bankole becomes head of the house without any palaver. Bankole marries and has ten children, and his house gets too small. Then Bankole dies and the ten children find that Bankole's house is too small. There is still Ladipo's compound left, and the greater part of it is not built upon. Have Bankole's children got a right to come and build upon Ladipo's compound?"

Chief Ojora gave the following answer, with which the other chiefs agreed:

"The aunts and uncles who remain, if they agree, will allow the grandchildren to come and build. But if they don't agree Bankole's children may not build in Ladipo's compound, and if they find their father's house too small, they must go elsewhere"

The Court finally asked the chiefs:

"Suppose that after Ladipo had died Bankole was accepted as head of the house, and then he died, and Layinka was then living with her husband outside the compound, will she still be the proper person to give orders in Ladipo's house, and be head of his house?"

Their unanimous answer was in the affirmative.

The following judgment was delivered on the 12th July, 1909:

Osborne, C.J.

This action has been remitted to this Court to take additional evidence as to what native law or custom, if any, would regulate the several matters in dispute, and such further evidence as the Court may think proper, and either to pronounce final judgment on the merits, or to state a case for the opinion of the Full Court.

It is advisable once again to recapitulate briefly the principal facts. Chief Mabinuori, once a slave, but afterwards a person of wealth and importance, died in the year 1874 leaving a large family of 12 children, 5 sons and 7 daughters. His eldest child, Fatola, was a daughter; his eldest son was Fagbemi. He is said to have died possessed of three pieces of land; one, the subject of this action, which 1 will call the family compound, is a strip between Broad Street and the Marina, where he lived himself with his wives and some of his children and domestics, and on this piece of land are two shops, one in Broad Street and the other on the Marina. On a second piece of land in the same neighbourhood, he had built houses for his eldest daughter Fatola, and for two of his sons Odubi and Oduntan. The third was a piece of land in Oke Popo dedicated to the worship of the family fetish. Fagbemi succeeded as head of the family on the death of his lather, and though he did not reside in the family compound he made use of the shops. He died in 1881, and for a while his eldest son Benjamin Charles Dawodu appears to have been accepted as head of the family, but he evidently got into financial difficulties, and towards the end of his life dispute arose between him and his aunts as to the rents of the shops in the family compound. Benjamin Dawodu died in 1900, and his brother, the plaintiff James Dawodu, now claims to be head of the family, all Mabinuori's sons having died, and he being the oldest surviving son of Fagbemi. Since Fagbemi's death, relations between the daughters of Mabinuori and his son's children have grown much more strained, and vain attempts have been made to settle matters through the intervention of the Lagos Chiefs; the principal bone of contention has always been the leasing of the shops, which have been rebuilt and improved, and the collection of the rents. Ultimately in 1905 this action was started in which the children of Mabinuori's eldest daughter Fatola, and of his sons Fagbemi, Odubi, Oduntan and Fagunwa, all of whom are now dead, claim as against the surviving daughters of Mabinuori and the children of Docemo, a deceased son, a declaration that they the plaintiffs are entitled as grandchildren of Mabinuori deceased, in conjunction with the defendants, to the family compound, and a further declaration that the family compound is the family property of Mabinuori deceased. After protracted litigation unfortunately lengthened by the death of Chief Justice Nicoll, Acting Chief Justice Speed decided against the plaintiffs on an issue that they had received in Mabinuori's lifetime an amount which disentitled them to any share in the family compound, and gave judgment on the whole action for the defendants.

This judgment has been upset on appeal by the Full Court, who have remitted the action to this Court for the purposes above stated, viz:

(1) to ascertain the native law or custom, if any, which would regulate the matters in dispute, and

(2) to pronounce final judgment on the merits, or to state a case for the full Court's opinion.

Power has been expressly reserved to this Court to take into consideration all the evidence previously given in the Divisional Court, and all matters included in the appeal records, so the evidence which has been confined to the ascertainment of the native law is applicable.

Now native customary law is always a difficult law to apply in this Court; it is unwritten, and so-called experts are usually forthcoming to bear testimony that it corresponds exactly with the views put forward by the side on whose behalf they appear. Real experts are few, and fewer are those who have made it special study, and it is not as a rule until some matter arises in which the facts are either somewhat peculiar or involved, and one of the parties is dissatisfied with the ruling of the native authorities on the facts, that the intervention of this Court is asked.

I have during thirteen years experience of West Africa been concerned in one capacity or another with several cases in which native customary law has been the subject of judicial investigation; and in nearly every case I have found that there are general underlying principles not difficult to understand, and obviously based on the primitive requirements of the community. In some instances those principles have been modified, and even departed from, as the result of contact with European methods; indeed, one of the most striking features of West African native custom, to my mind, is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individual characteristics. The great danger in applying it in this Court is that of crystallising it in such a way that it cannot be departed from in cases where expediency demands, and where natives themselves would depart from it; and I therefore preface my findings with the remark that they are intended as findings of the general principles which govern native custom in Lagos at the present day, and not as hard and fast findings of immutable native law. The evidence before me was mainly directed to two main point: —

(i) Who is the proper person to be head of a family?

(ii) What are the rights of members of a family in family property?

Incidentally, also, arose the question whether the receiving of a portion by a child in the father's lifetime precludes him from sharing in the distribution of the property after the father's death, and whether family property is capable of alienation.

Evidence has been brought by the plaintiffs from outside Lagos, in parts where Yoruba law and customs are less affected by European influence; and they also called witnesses as exponents of the old time law of Lagos; but the defendants relied on the present Lagos chiefs. 1 feel bound to give very great weight to what the white capped chiefs said in answer to the test cases put before them; their replies were given under the sanctity of an oath, and with a full knowledge of their responsibility to the native community; and though I have no doubt that the native law of Lagos has been influenced by the alteration of circumstances since the cession, I have no reason to doubt the correctness of the chief's pronouncement of the customs which exist in Lagos at the present day. Moreover, I was much impressed with the fair and business-like methods which they said they would have adopted if the case had been before them for decision. That the present Lagos customs are modifications of the original Yoruba customs there is little reason to doubt; and the evidence as to those Yoruba customs is of undoubted value, as showing how far the general principles remain intact in Lagos, and how far they have been modified to meet present requirements.

The first point for consideration is as to headship of the family, and the main question here at issue is whether or not a woman can be head. The supporters of the old school and the Yoruba witnesses deny this: but the Lagos chiefs hold a contrary view. Lagos is not the only part of His Majesty's dominions where the female sex are seeking for greater recognition of their capabilities; and seeing that a wise and great queen held sway for long years over the British Empire, there seems no reason why, on the mere ground of sex, a Lagos woman should not be capable of managing the domestic concerns of a family compound. There seems to be no importance attached in Lagos to the headship of a family, outside the family circle, and the attempts that have been made to show that a male must be head for political reasons, have not convinced me. I am moreover, satisfied that the use of the term " Arole," on which so much stress was laid to show that a woman could not be " Arole," is confined in Lagos to the heirs of chiefs. There is practically a consensus of opinion that on the death of the founder of a family the proper person to be head of the family is the "Dawodu " or eldest surviving son. This seems to be a well established rule both in Lagos and in other parts of Yoruba land. It is after the death of the Dawodu that we begin to find variations; according to the plaintiffs' witnesses, by Yoruba custom the other sons of the founder of the family are taken in turn, and then the sons of the Dawodu and other sons' sons, the headship being ever kept in the male line. One explanation of this rule is that the women on marriage go and live with their husbands; another is that a woman is only "part of a man," since a man may have several wives, but a woman can have but one husband; and Yoruba proverbs have been quoted, foretelling the disruption of a house under female rule.

On the other hand the view of the Lagos chiefs is that it is the eldest child, whether male or female, who becomes head after the Dawodu.

There is nothing inequitable in this recognition of women's rights; and the town of Lagos bears striking testimony to the honour here accorded to women in the names of the square wherein this Court house stands, and one of the principal markets, both called after women of wealth and importance in bygone days. I must accept the pronouncement of the Lagos chiefs in this matter, and I declare that the proper person to be head of Mabinuori's family is the eldest surviving child of Mabinuori, that is, the defendant Fakeye. There are certainly no reasons for making exception to the rule in her case, for the chiefs appointed by the Court to go into this matter described her as appearing to them "gentle and intelligent and capable, in fact, she should be the mother and the guiding head of this family."

The next point is to consider what are the rights of the members of a family in family property, for the effect of the judgment in the Full Court is to declare the family compound family property.

The following rights have been claimed by the plaintiffs:

(i) a right to be consulted before the family compound is leased or otherwise dealt with;

(ii) a right to share in any rents or profits accruing from dealings with the family compound;

(iii) a right to build on any unoccupied part of the family compound;

(iv) a right of ingress and egress.

The right to be consulted is in my opinion fully established, but this does not mean that each individual grandchild is entitled to participate in the consultation; the evidence goes to show that there can only be one voice and one vote for all the children of a deceased child.

The general principle which appears to govern the native custom in Lagos with respect to family property is one well known to this Court, and by which the Court is bound, VIZ: that equality is equity, and on the family council each branch is entitled to equal representation.

A further question arises as to what will happen in the event of disagreement which is incapable of settlement between the parties, and in such case, according to the evidence of the native chiefs, the property will be partitioned.

After inspection of the property in dispute, I am convinced that a partition would not be in the best interests of Mabinuori's family; the site as a whole is a valuable one, in a business quarter, with frontages on two busy thoroughfares, but if it is cut up into little pieces those that abut on the main street will be worth more than the others, and, moreover, the several little pieces would be likely to fetch less in the aggregate than the land as whole. If, after the decision in this action, the members of the family continue to disagree, it appears to me that the best course will be for the Court on application being made to it by any of the parties to settle the terms for leasing the stores and such other part of the compound as it is desired to let, and to appoint the receiver of the rents, and give such other consequential directions as may be necessary. With reference to the right to share in rents and profits arising from the leasing, sale or compulsory acquisition of the family compound, I hold that subject to shares given to children in Mabinuori's lifetime being brought into account, so as to ensure equality of division between the respective branches of the family, all the different branches will have a right to participate.

Repairs to family property must, however, be paid when necessary from rents arising from the property before those rents are divided. It is, of course, impossible for me at the present stage to say what precise share each branch of the family is to take; that depends on questions of valuation which have not yet been gone into.

1 hope, however, that the members of the family council will be able to settle this matter amongst themselves without the assistance of the Court.

The right to build on any unoccupied part of the family compound hardly becomes a matter of serious discussion, as the erection of additional buildings is obviously impossible from the point of view both of sanitation and comfort ; but I see no reason to doubt the correctness of the statement made by the Lagos chiefs that the grandchildren have no such right without the consent of their uncles and aunts.

I am unable to find sufficient support for the alleged general right of ingress and egress. There may be occasions when members of the family assemble for family purposes in the family house, and on such occasions the members of the family entitled to attend would, of course, have such rights of ingress and egress as are necessary to permit of their attendance. The members of the family council might also be expected to have a right to enter and inspect the state of repair of the family compound. But even if such rights do exist by native custom and I question whether this point has even been raised before it is clear that the exercise of the rights must not interfere unnecessarily with the quiet enjoyment of the persons inhabiting the family compound.

There is one other point to which I must allude, and that is whether by native customary law the family house can be let or sold. According to the Lagos chiefs, the present custom is that it can be let with the consent of all the branches of the family, but cannot be sold. The idea of alienation of land was undoubtedly foreign to native ideas in olden days, but has crept in as the result of contact with European nations and deeds in English form are now in common use. There is no proposal for sale before me, so it is not necessary for me now to decide whether or not a native custom which prevents alienation is contrary to section 19 of the Supreme Court Ordinance. But I am clearly of opinion that despite the custom, this Court has power to order the sale of the family property, including the family house, in any cause where it considers that such a sale would be advantageous to the family, or the property is incapable of partition.

The first claim of the plaintiffs was for a declaration that they are entitled as grandchildren of Mabinuori deceased in conjunction with the defendants to the family compound.

As was pointed out in the Full Court, the wording of the claim seems to imply absolute equality as common owners and it was only when the appeal was being heard that a claim limited to the right above specified was first put forward.

Nothing in this judgment will affect the possessory rights of those members of the family who were actually living in the family compound when this writ was issued, or who had houses or rooms which they were then entitled to occupy for residential purposes; but Akiola, Fagbemi's son, has no right to occupy the shop now used as blacksmith's forge free of rent, unless the family council so wish. Though I am unable to make a declaration in the exact terms asked by the plaintiffs in the first part of their claim, 1 have endeavoured above to indicate what I consider to be the rights given by the customary native law to the plaintiffs, as members of the family, with respect to the family compound, which I declare to be the property of the family of Mabinuori deceased.

There still remains one other matter for me to determine in accordance with the directions of the Full Court, and that is the question of the costs in the Divisional Court. There is no question that this litigation has been prolonged by two causes; the first was the refusal of the plaintiffs to acquiesce in the advice of the chiefs as to the headship of the family; the other was the contention of the defendants that the plaintiffs had no interest whatever in the family compound, a contention which they have failed to uphold. Acting Chief Justice Speed awarded the defendants 50 guineas as costs of the issue tried before him, and as his decision was upset that award must be rescinded. Inasmuch, however, as both parties are somewhat to blame for the extent of the litigation which must have been a serious strain on their finances and inasmuch also as neither party has been completely successful in establishing their contention before this Court, I think that the fairest arrangement is to leave each party to bear their own costs.

I reserve to all parties general liberty to apply in case further disputes or questions of difficulty arise or further assistance is required from the Court, but I venture to hope that both sides will in future be able to combine in managing the affairs of the family in a friendly manner without further legal proceedings.

Counsel

Williams Ajasa	.....	For the Appellants
Shyngle and Foresythe	.....	For the Respondents