In The Supreme Court of Nigeria

On Friday, the 19th day of November 1965

Before Their Lordships

Adetokunbo Ademola	.....	Chief Justice of Nigeria
Charles Dadi Onyeama	.....	Justice, Supreme Court
Michael Oguejiofo Ajegbo	.....	Justice, Supreme Court

SC. 633/1964

Between

Ogugua Ukwa Nwogbo Okafor Nnameke Okafor *(for themselves and on behalf of Ezi-Awka, Awka)*	.....	Appellants

And

Awka Local Council Edward Nwimo Oyeoka Agbata Nweke Nwanna Lawrence Anwuna	.....	Respondents

Judgment of the Court

Delivered by

Charles Dadi Onyeama. J.S.C.

This is an appeal from the judgment of Betuel, J. in the High Court of Eastern Nigeria at Onitsha dismissing the claim of the plaintiffs. The plaintiffs, who are the appellants and represent the people of Ezi-Awka, had claimed title to and recovery of possession of an area of land called Eke Odenigbo; £3,100 as damages for trespass to the land and an injunction to restrain the defendants from entering into or remaining upon the area in question.

The respondents who were defendants below are the Awka Local Council and four named members of it.

At the conclusion of the case of the appellants at the trial the respondents through their counsel stated that title was not disputed and that original ownership was in the appellants.

The relevant facts found at the trial are that between 1928 and 1936 a portion of the land in question was granted by the plaintiffs to the people of Awka for the purpose of building a town hall. About 1939 an additional portion was granted for a central market called Eke Odenigbo for the people of Awka. The site of Eke Odenigbo market was not popular with sections of Awka, notably Agulu and Amikwo, and as a result another site was chosen southwest of it and a market established there in 1949; this new market was called Eke-Awka market and it became the central market. It was larger than Eke Odenigbo and appears to have eclipsed it. In 1952, the Awka Local Council began to administer the area of Eke Odenigbo although the central market had been moved elsewhere; it made grants of portions of it and collected rents from the grantees.

The case of the appellants was that when the Eke Odenigbo market was abandoned in favour of Eke-Awka, the Ezi Awka people resumed dominion over it and demarcated its boundary with adjoining areas granted to the people of Awka with a line of Ogilisi trees. The respondents, however, interfered with the rights of the Ezi Awka people over the land by letting portions of it and felling five iroko trees on it.

The respondents' case was that in 1936 the whole people of Awka agreed to have a meeting place and for that purpose the area in question was surrendered by the Ezi Awka people to the entire Awka community; the village hall was then built. as a result of a scheme of development prepared by one Mr Udeozo; in 1945 more land adjoining the area in question was given up to the Awka community and on this area the Eke Awka market was established and the Igwebuike Grammar School built; the area was laid out in plots and let out to tenants, and three iroko trees were felled.

It would appear from the Statement of Defence that the wide expanse of land surrendered as a result of Udeozo's development scheme is wholly outside the area in question in this case, which was itself "surrendered" to the people of Awka at their request long before Udeozo launched his ambitious development plan.

The evidence in support of the respondents' case on this point, however, is at variance with the Statement of Defence. The evidence is to the effect that the area in question and the adjoining area were surrendered as a result of the meeting of Udeozo and the elders of Awka.

However that may be, it is clear that the area of Eke Odenigbo verged yellow on the plan No MEC/51/6l (which was marked Exhibit 1) and red on plan No L/D69 (which was marked Exhibit 2) is the area in dispute and that the first question which had to be decided was whether the appellants or the respondents were entitled to possession of it. The learned trial judge put the question in this way:

> " ... the question arises, did this new creation lead to the abandonment of Eke Odenigbo as a market?"

His answer was

> "I would arrive at the conclusion, in this respect, therefore, that, qua market there has never been a sufficient abandonment of the Eke Odenigbo to destroy its character as such."

In his argument on this appeal, Mr Onyiuke, for the appellants dealt with this aspect of the case thus:

> "Who gave the land in dispute and for what? The land was used as a market and no more; when land is dedicated to public use there is no question of losing radical title; when the public no longer used the land for the purpose for which it was dedicated, in this case a market, the original title revives."

The learned trial judge appears to have over-looked the evidence regarding the use to which the respondents put Eke Odenigbo after the new central market had been established. The first defence witness who was the financial secretary of the Awka Local Council said:

> I know the land called by plaintiffs Eke Odenigbo ... We are in possession of that portion of land . . . In 1953, I was in my present job. I was shown this area of land, and have leased portions of the land to tenants, who pay their rents to the Council. . . "

The second defence witness, Lawrence Modekwe, in answer to questions put to him in cross-examination said:

> "Eke Odenigbo is no longer a market place; Mr Hill, A.D.O. ordered that the market be taken inwards in about 1946, so the place was used as a motor park; it was abandoned for use as a market; the market was moved to its present site at Eke-Awka, on a site granted for use as a market, by Ezi Awka, Agulu and Amikwo."

The third defence witness gave evidence of allocation of portions of Eke Odenigbo to sundry tenants for rents to be paid to the Council. The fifth defendant Lawrence Anwuna said:

> "whole place at one time called Ekpe-Egbu; in 1962 the land adjoining the road was called 'Motor Park'; the land at the back is particularly called the Awka layout which includes the whole thus killing Eke Odenigbo. In 1960, the whole land was called Awka layout by the Council and the people;"

and, further on, in his answers to questions put in cross-examination:

> "Eke Odenigbo was used by Ezi Awka as a market long ago; perhaps, round about 1939, because other sections of Awka had other markets, it ceased as a market but I cannot remember the date."

The fifth defence witness testified on the issue of the continued existence of Eke Odenigbo as a market as follows:

> "Awka people do not call the portion of land Eke Odenigbo; there was a market on the land called Eke Awka, but it was shifted away from the road later; the place where the market formerly was, was used as a motor park."

Throughout the respondents' case it appears to be agreed that Eke Odenigbo was abandoned as a market and that a new market, Eke Awka, was established some distance away from the main road; Eke Odenigbo was then used as a motor park.

We think that the learned trial judge was mistaken when he concluded, in the face of all the evidence, that the area in question had not been abandoned as a market. The area was used as motor park and was laid out in building plots which, as the respondents themselves say, were let out to tenants.

The learned judge next considered whether, assuming the area had been abandoned by the respondents, the appellants had resumed possession; he decided that the appellants had not resumed possession because

> "since its inception, the Council, in respect of this market, has been collecting stallage fees and rents."

There appears to us to be some want of clarity in this reasoning; if the market was abandoned in 1949 and the Council administered the land from 1952, the Council could not collect stallage fees; for there would be no market stalls in use for which stallage fees would be payable. The evidence that several people have been allocated plots on which they have built

houses and for which they pay rents to the Council strengthens the evidence that the area was no longer being used as a market.

We do not think the question is whether the appellants resumed possession, for, in our view, their right to recover possession revived when the area was abandoned in respect of the use for which it was originally given unless the grantors made a fresh grant or agreed to the land being used for some other purpose.

The appellants further submit that the Council could not inherit land from its predecessor in view of section 235 of the Eastern Region Local Government Ordinance (No 16 of 1950) and section 221 of the Eastern Region Local Government Law (E.R. No 26 of 1955) which enact that when a Council is established, lands held by a previous Council or Native Authority constituted within the area of authority of the new Council would be vested in the Regional Authority or Minister, who shall thereafter allocate the lands by way of free grant to the new Council. The learned judge, in effect, upheld this contention, but did not give effect to it because it had not been pleaded that the Council had acted illegally in dealing with the land in question in the way it did.

The learned judge, after saying that the Council had

> "embarked on a voyage wholly beset with acts *ultra vires* of their powers, if any,"

continued:

> "I know that I would not allow an obvious illegality to be perpetrated for want of pleading but where it is of a constructive nature, as in this case, and pleadings have been ordered the proper course to be taken, is to ignore it."

And further:

> "To allege that a Council has acted *ultra vires* in one or more transactions, is an allegation of illegality, in that, it has exceeded its power by Statute ... "

With all respect to the learned judge we do not agree that an act *ultra vires* the power of the Council is necessarily illegal in the sense in which illegality is used in the law of contract; namely, contrary to public policy or the clear prohibition of a Statute. The words "*Ultra Vires*" and "*Illegality*" represent totally different and distinct ideas. An act may have both defects; or it may have one without the other.

In the present case the acts of the Council were acts it could perform if it had proper authority; they were not against public policy or prohibited by any statutory enactment.

The case which the appellants set out to establish, however, was not that the Council was acting *ultra vires* but that it and the other respondents unlawfully entered upon the land in question and made grants of portions of it to various people; also that the respondents felled five iroko trees on the land and appropriated them.

The respondents' answer was that the appellants stood by for a long time while they were using the land in the manner complained of, thereby giving the impression that they acquiesced in the arrangement made by the entire people of Awka that the respondent Council do manage the area in question as part of the entire area which was being developed in line with Mr Udeozo's scheme.

The learned trial judge considered the effect of the appellants' conduct on the case and said:

> "I think that it is the defendants' contention that the portion of land called Eke Odenigbo is not to be treated separately but as a part of the land granted to them and their predecessors:-
>
> (1) For building a town hall,
>
> (2) for the setting up of the Eke Odenigbo market,
>
> (3) ditto for the Eze Awka market,
>
> (4) for the model layout and,
>
> (5) for development and public purposes generally.
>
> It appears to me that when the factual and documentary evidence is adverted to, that this contention has more substance than the so-called abandonment, resumption of possession and the like of a mere part urged by the plaintiffs.
>
> But even if I am wrong, again and, the conduct of the plaintiffs does not amount to laches or acquiescence in spite of their reversionary title, if any, they may be estopped, illegality apart, from asserting any claim to any recovery of possession *(Oloto v Williams (1943)17 N.L.R. 27)*

> I say this because it is clearly shown that for many years the Council has been managing the land in dispute and its market, collecting dues, making grants of portions of it to Ezioka people and strangers until 1960, without let or hindrance from the plaintiffs or for that matter anyone else, and they can point to many acts of possession in respect thereof."

He found that the appellants were estopped by their conduct from asserting their title.

With all respect to the learned trial judge we do not agree that in the case under consideration the appellants were estopped by their conduct from asserting their title. The doctrine of laches is that a person entitled to land should not stand by and allow another person who thinks the land is his to make improvements, and then assert his right to the land; he wants to take the improvements and cheat the other man of the expense he is making.

In this case there is no evidence that the Council spent any money before the appellants' eyes. It divided the Eke Odcnigbo area into plots and gave them out to people to build on upon a charge of rent; but we do not see how any wrong is done to the Council if the tenants of the plots are told that they should now pay rent to the true owners of the land since, as we have pointed out, there is no evidence that the Council had changed its position for the worse or taken any irrevocable step which would make it inequitable to permit the appellants to assert their title and dominion over the land in dispute.

For these reasons we think that the learned trial judge should have declared the title of the appellants to the land in dispute and granted the injunction sought.

The claim for damages is on a different footing. The learned trial judge found that for many years the Council had been managing the land in dispute and its markets; collecting dues, making grants of portions of it to the appellants' people and strangers until 1960, without let or hindrance from the appellants. The appellants clearly acquiesced in the Council's management of the land in question, and cannot now complain of trespass by reason of the very fact of such management.

In the result we are of the view that this appeal should be allowed.

It is ordered that the appeal from the judgement of the High Court of Eastern Nigeria, Onitsha in Suit 0/87/60

Between

Ogugua Ukwa
Nwogbo Okafor
Nnameke Okafor
(for themselves and on behalf of Ezi-Awka,Awka)

And

Awka Local Council
Edward Nwimo
Oyeoka Agbata
Nweke Nwanna
Lawrence Anwuna

be allowed; the judgment including the order for costs is set aside and a judgment that the plaintiffs are entitled to ownership and recovery of possession of the land Eke Odenigbo (edged in yellow on plan MEC/51/61 marked Exhibit I) situate in Awka, and to an injunction restraining the defendants and by their servants and agents from further entering and or remaining upon or in any way interfering with the plaintiffs' ownership and possession of the land be substituted.

The appellants will have the costs of this appeal assessed at 50 guineas.

The order made as to costs in the court below is hereby set aside. The plaintiffs will be entitled to costs in that court which are assessed at 200 guineas.

Counsel

F. R. A. Williams ……. For the Appellants
with him
G. C. M. Onyiuke

A. N. Aniagolu ……. For the Respondents