

(A)

IN THE HIGH COURT OF JUSTICE, WESTERN STATE OF NIGERIA  
IN THE EKITI JUDICIAL DIVISION  
HOLDEN AT ADO-EKITI

BEFORE THE HONOURABLE MR. JUSTICE EBENEZER BABASANYA CRAIG  
- JUDGE  
FRIDAY THE 7TH DAY OF JULY, 1972

Suit No. AK/33/63

BETWEEN:

Oba William Adewusi  
The Onirun of Irun for himself - -Plaintiff  
and on behalf of Irun people

Vs.

Chief Adeyeye, Onimesi of Imessi  
Lashigidi for himself and on - Defendant.  
behalf of Imessi people

Parties present.

Chief Adeyefa, Olagunju with him for Plaintiff.  
Fagbemi, Ojuolape with him for the Defendant.

J U D G M E N T

The plaintiff in this suit is the Onirun of Irun and he has instituted this action against the Defendant on behalf of himself and the people of Irun. His claim is for:

- " (i) Declaration of title to a piece of farmland situated at Igbolufin Surulere in Irun District.
- (ii) Injunction restraining the defendant his servants and agents from further trespassing into the said farmland."

The Defendant, who is also the Onimesi of Imessi Lashigidi agreed to be sued as representative of his people.

This case has had a long and chequered history. The plaintiff's writ was filed in the old Akure Judicial Division on the 9th of August 1963, and was later transferred to the Ekiti Judicial Division when the Division was created in 1968. Because of various administrative difficulties, it was not possible to hear the suit until January 1971. There were altogether 12 hearing days and when Court sittings ended on the 29th of June 1971, a total of 23 witnesses had testified in the case. By this time the annual High Court vacation was near at hand, and judgment was adjourned sine die. Regretably, it has not been possible since then to deliver the judgment - again because of more administrative difficulties and other pressing judicial duties.

Before reviewing the evidence, I shall state at this juncture what I consider to be the background to this case. The parties to this action are two neighbouring communities and the writ is concerned with the piece of land lying in between their two towns (Irun and Imessi Lashigidi).



Irun is in Akoko Division of the Western State whilst Imessi Lashigidi is within the Ekiti Division. Counsel for the Defendant in his address sought a short cut to the whole case when he submitted that by virtue of Public Notice No. 99 of 1951 (Exhibit 13) the Gyinmo River was made the boundary between the two Divisions and that therefore all lands lying to the West of this River should properly belong to the Defendant. Chief Adeyefa in reply, argued that boundaries made by Government are for administrative purposes only and that these boundaries could not create new rights or extinguish old ones which had remained vested in well established communities.

I have considered the submissions of both Counsels and it seems to me that these arguments do not adequately state the correct position. I, of course, agree with Chief Adeyefa that administrative divisions cannot by themselves alone establish title to land, unless it is so expressed in the Instruments creating the Divisions. It is well known that sometimes these divisions are changed from time to time depending on political expediency or administrative reforms, and in this respect not much reliance can be placed on Divisional boundaries as such. But I also appreciate that no Government instrument would place a town in one Division and locate the land owned by that town in another Division several miles away. The land owned by a town is reasonably expected to be within its immediate vicinity. Where, however, as in this case, the two towns are in two contiguous Divisions it becomes even more difficult to say which of the parties owns the land in between unless there is a Government Map or Instrument making this clear beyond any doubt. In the case on hand, Imessi Lashigidi has been said to be within the Gboyin District Council of the Ekiti Division, whilst Irun is in Akoko Division. In his address, the Defence Counsel submitted with a lot of emphasis that since the land in dispute is within the immediate vicinity of Imessi Lashigidi, it should be held to be within the Gboyin District Council. Reference was made by Counsel to W.N.L.N. No. 21 of 1962 - the Instrument creating the Council. In paragraph 3 of this Instrument it is provided that:

"3. The area of authority of the Council shall be Ode, Imessi-Lashigidi, Agbado, Ijan, Aisegba, Iluomoba and Egbe."

I observe that in no part of the Instrument is the extent of each of the towns constituting the Council given. I cannot also forget that the land in dispute is also within the immediate borders of Irun town. Consequently it is impossible to say from this Instrument whether the land in dispute is part of Imessi land or part of Irun. In such contiguous and doubtful cases such as these, it is my view that the onus is on the Plaintiff to show by satisfactory traditional evidence or by positive and numerous acts of ownership that he is entitled to the land which he claims.

I would also like to say that I have not derived much help either from the Gazette Notice (Exhibit 13) or the Government Map of Ondo Province (Exhibit 2) tendered by the Defendant.



For one thing I find that whereas the Notice was promulgated in 1951 the Map was produced in 1958, some 7 years afterwards and there was nothing to show that the Plan was drawn with reference to the Gazette Notice Exhibit 13. In this respect it would be observed that several details mentioned in the Notice are not to be found on the map - for example, the starting Survey Beacon No. C.P. 905 is not shown, nor were the towns, Edda, Ufe, Odo, Uro, Iworo mentioned in the Gazette Notice as being on the eastern boundary, indicated in the Map Exhibit 2.

In consequence, I am unable to hold that the Gazette Notice Exhibit 13 has established the title of the Defendant to the land.

I shall now consider the Plaintiff's claim. His claim to the land in dispute is adequately set out in his Statement of Claim. In it, the Plaintiff averred that the land has belonged to the Irun people "from time immemorial" and pleaded further

- "5. It is part of the land first settled upon by the first Onirun Obata and his followers when they migrated from Ife in the olden days.
6. The first Onirun settled at the present site of Irun and directed one of his followers the Olufinmi (Onirun's younger brother) to settle on the land in dispute and cultivate it.
7. During the Atianro tribal wars the Olufinmi moved from the land in dispute and settled permanently with the Onirun at Irun.
8. After the said tribal wars the land in dispute continued to be cultivated by the Olufinmi his family and the people of Irun in general."

The plaintiff then averred in paragraphs 14 - 16 that the undisputed land lying west of the land in dispute was granted by Onirun Osho Shishimoga to one Lashigidi to settle on. Later one Yaya migrated from Imessi Olojaoke and was permitted by the Onirun Shishimoga to settle with Lashigidi on the said undisputed land. Yaya later became the first Onimessi of Imessi Lashigidi. The Plaintiff then pleaded that

- "17. Sometime ago, the Defendant and his people crossed the the western boundary of the land in dispute and unlawfully entered therein."

On the part of the Defendant he pleaded that his ancestors settled on the land in dispute and that they have from time immemorial performed acts of ownership on the land. (See paragraphs 4, 5 and 8 of the Statement of Defence.) The Onimessi gave evidence to this effect and called a witness Chief Onieri 3rd P.W. who confirmed the evidence of the Settlement. When the Plaintiff, Oba Adewusi testified he gave a different version of the historical details and of how the Defendants (Imessi people) came to be on the land in dispute. This is what he said during his examination-in-chief:



"Ajayi Olufimi asked Obata for permission to settle on the present land with his (Ajayi's) people. Ajayi and his people settled there and continued to live on the land. Some years later, one Lashigidi came from Oyo and asked to settle with Ajayi. Ajayi took him to his brother, Obata, who agreed with the proposal. Both Ajayi and Lashigidi continued to live on the land in dispute. Some years later, during the Atianro tribal war, the Nupe tribe invaded Ajayi and Lashigidi on this land. Ajayi sent to Obata for aid. Obata sent some warriors and these helped to repel the attack. After the conquest, Ajayi joined Obata in Irun town, but Ajayi and his people continued to cultivate the land in dispute. Lashigidi however remained on the land in dispute permanently. Lashigidi and his people were also cultivating the land. Irun people and Lashigidi people planted cocoa kola nuts and palm trees on the land in dispute.....  
.....  
Eventually Lashigidi died and Yaya became the first Chief of the land in dispute. He was called Onimessi of Imessi Lashigidi."

It will be seen that the Plaintiff's account of the settlement shows that both the Irun people and the Imessi people jointly settled on the land in dispute and cultivated it in common. This bit of his evidence shows a marked departure from his pleadings where he had averred that the Imessi people were allowed to settle on a piece of undisputed land lying west of the land in dispute. Now it is a well known principle of Law that a party is bound by his pleadings and is not allowed to set up a case different from what has been pleaded. See

Sir Adesoji Aderemi v. Adedire 1966 N.M.L.R. 398.

In the case of National Investment and Property Co. Ltd. vs. The Thomson Organisation Ltd. Suit No. S.C. 192/67 of 11th April, 1969 (unreported), Sir Ian Lewis J.S.C. declared that if such evidence is given without objection, the Court is entitled to treat the inadmissible evidence as if it had never been admitted.

After the Plaintiff had thus testified, the Court was adjourned till the following day. At the resumed hearing, another witness Chief Audu Aruwa 4th P.W. was called to give evidence of the settlement, and understandably, he attempted to repair the



damage done to the Plaintiff's case by the Onirun the day before. He stated that 20 years after Atianro war the Defendants asked for land and were allowed to settle on the land lying on the Western side of Oromosoke stream. This evidence accords with the facts pleaded in the Statement of Claim but I am unable to place much reliance on it because it is clearly in conflict with the evidence of the Plaintiff himself and because I am unable to say that if this witness had given evidence on the same day as the Plaintiff, he would not have stated the same historical details as did the Plaintiff. The position now is this: that the Plaintiff's evidence on traditional history is contrary to his pleadings and also contradicts that of his witness (4th P.W.). In the face of these conflicting stories, it is difficult to ascertain what is the true account: yet if traditional history is to be relied on, it is important that the Court should be able to say which of the two versions it accepts. I note that the Plaintiff is the traditional Ruler of Irun, whilst the 4th P.W. is an elderly chief under him. I appreciate that these witnesses have spoken of events which took place over hundred years ago, and therefore outside their own personal knowledge. In such cases, their demeanour is little guide to the truth. - See Kojo II vs. Bonsue 1957 1 W.L.R. 1223.

After giving due consideration to the traditional evidence given for the Plaintiffs, I find it unreliable and unsatisfactory and I accordingly reject it.

In spite of this, however, I would like to observe that the traditional history given by the Defendants was itself a bare statement that their ancestors had settled on the land. Again, as these witnesses did not testify from their personal knowledge, it is difficult to say what the truth of the matter is. In this respect, I do not find the bare assertion of settlement of the defendants quite convincing. I note that when cross-examined on the point the Onimesi (traditional Ruler of Imessi) said that he got these historical details from some documents in the National Archives, but he did not produce the said documents.



It is of course true that the Defendant has not counter-claimed and the onus is on the Plaintiff to show by satisfactory evidence that he is entitled to the claim which he makes, if he fails in this respect the weakness in his adversary will not avail him.

In the case of T. A. Kojo II vs. O. K. Bonsue and anor. supra the Privy Council has suggested that when it is difficult to say which of two competing stories is true, the best way of resolving the conflict is:

"To test the traditional history by reference to the fact in recent years as established by evidence and by seeing which of two competing histories is the more probable."

See also Mumuni Abudulai v. Ramotu Manue 10 W.A.C.A. 172 @ 174.

If one were to give a strict interpretation to the words "competing histories" in Kojo's case, supra, one is bound to hold that since the history given by the Plaintiff has been rejected, there is in fact nothing left to compete with the Defendant's history. However, it must be emphasised that the Court is not concerned merely with the legal technicality of the matter but in seeking to discover the truth and in reaching the heart of the matter. Since I am not satisfied with the traditional history given by either side, I shall now consider the acts of ownership pleaded by the two parties. In the Statement of Claim the Plaintiff relies to a large extent on the following acts:

1. That they have cultivated the land and planted cocoa, kolanut and other food crops on it - paragraphs 8 and 10 of Statement of Claim.
2. That they placed tenants on the land and collected yearly tributes from them - (paragraph 9).
3. That the ruins of the old settlements of the Plaintiffs are on the land - (paragraph 12).
4. That the shrines worshipped by the Plaintiff's ancestors are on the land. - (paragraph 13).

The Defendant also avers that after his ancestors had settled on the land, they cultivated it and granted portions of it to several tenants.



Altogether nine witnesses testified for the Plaintiff. Of these six gave evidence relating to any acts of ownership by the Plaintiffs. They are the 4th, 5th, 6th, 7th, 8th and 9th P.Ws. The only tenant called by the Plaintiff was the 5th P.W. Chief Sunmonu Ojomo. According to him he begged for some land at Igboolofin and has been there for 28 years. He is still on the land and has kolanuts, cocoa and coffee on it. The witness did not give the name of his village nor is his own name shown on the Plan Exhibit 2, but he stated that it consists of 18 huts and there are 14 Karam farmers and 30 Ikares near there. However, when cross-examined he said that his farm is about 1½ miles to Otaloke Village; ~~XX~~ and relying on the Plan Exhibit 2, this would mean that the farm of this tenant is on eastern side of the land in dispute. The 4th P.W. Chief Aruwa, 6th P.W. Yesufu Ojikutu and 7th P.W. Talabi Pelemo, are all Irun people and they all stated that they have farms at Igboolofin within the land in dispute. They all planted cocoa and other cash crops on the land. The 6th P.W. said that his father Ojikutu established the village named after him and that his farm is near Oyinmo River - again this is on the eastern boundary of the land in dispute. In the case of the 7th P.W., he farms at Afufu bush and has been there for 28 years.



Now Afufu bush is not shown on the Plaintiff's plan Exhibit 2 (Although Afifu Hill is indicated in the West) and when the witness was pressed to say where his farm was, he said it was about one mile from Ojikutu Village - this again puts his farm on the eastern side of the land in dispute. Chief Aruwa 4th P.W. said that his farm is at Itaoloke. Neither the name of this important witness nor his farm is indicated on the Plan (although he took the Surveyor round the land), but I assume that Itaoloke farm should be the area around Otaloke Village or Otaloke Rock as shown on the eastern boundary of the land in dispute. The witness also said that the Iruns gave land to several tenants from Ikare, Erusu and Ikaram, but he did not tell the Court who these tenants were and where they farm, nor were the tenants indicated on the plan. One of these tenants was said to be Alhaji Ejigbo to whom Chief Aruwa's father gave some land to Oromosoke. (Oromosoke stream is shown on the western side of the land in dispute but Alhaji Ejigbo's name is not indicated therein nor was Ejigbo himself called to give evidence. Lastly, Chief Aruwa said that he showed the Surveyor the various old shrines established on the land, but no witness was called to tell the Court who keeps the shrines, what is done on them or when and why it has gone into disuse. I would also have liked to know whether new shrines were set up in place of the old ones and where these are today.

However, the other two witnesses (8th and 9th P.Ws.) who gave evidence touching acts of ownership were officials of the Akoko West Provisional Authority at Irun, but their evidence did not advance the case of the Plaintiffs much further than the evidence of the 4th - 7th P.Ws. The evidence of the 9th P.W. Samuel Ade-osun was that he, as a Timber Inspector, had been working in Irun bush since 1956 and has approved the felling of timber in this bush. According to him the trees covered by Exhibits 3 - 6 were felled in Awuru bush across Oyinmo River and at Otaloke. According to the witness Awuru bush "is across Oyinmo River on Ipesi Lashigidi side".



This description sounds confusing, as Oyinmo River is on the North-East, whilst Awuru Stream is in the South and Imessi is on the Western side of the land in dispute. However, the confusion was soon resolved; for, when cross-examined, the witness said as follows:-

"I have been to Awuru bush. I do not know how big it is. Awuru bush is near Otaloke Village. This is the nearest village to Awuru bush."

Again, this would mean that all trees felled in "Irun bush" were those near the eastern border of the land in dispute. But the evidence of the 8th P.W. Falolu, the Secretary/Treasurer of the Council, made it clear that the Council does not bother itself to investigate the title to any land before granting permits to fell these trees.

On the part of the Defendants the 3rd 10th D.Ws. gave evidence of sufficient acts of ownership which can be said to extend over a good part of the whole land in dispute. The Defence called five tenants who pay tributes to the Onimessi. Of these, only the 10th D.Ws' farm at Oke-egan is not within the land in dispute. The farm of the first tenant 4th D.W. is at Alhaji Village (on the eastern side of the land in dispute) and he has been there for 40 years. That of the second tenant 7th D.W. is near Awuru Stream and Otaloke rock (this is on the South and South-East of the land in dispute) and he has been there for 40 years. The third tenant 8th D.W. has his farm at Eluju Elefon near Ose River (on the South-West) and he has been there for 36 years. The fourth is Zaccheus Onishakunmi 9th D.W. whose father established the Shakunmi Village on the western side of the land in dispute. When cross-examined, the witness gave evidence about how the Villages of Oke-ede and Balogun were established by colleagues of his father. (These two villages are on the eastern side of the land in dispute).

In addition to these tenants the Defendant also called three Imessi farmers - the 3rd D.W. farms near Oyinmo River close to Alhaji village (on the North-East of the land in dispute), the 5th D.W. farms at Ota Oresin near Shakunmi on the western



and the 6th D.W. the Oloka has a farm at Okatedo on the South-East of this land.

After giving due consideration to all the evidence led, I accept the evidence of the Defence witnesses that they have carried out the various farming activities stated by them on the land. I am satisfied that in the past, both the Iruns and the Imessi people have jointly cultivated the land in dispute. In fact the evidence of the Plaintiff himself was that the "Irun people and Iashigidi people planted kolanuts, cocoa and palm trees on the land in dispute." On the evidence before me, I find that the Imessi people have established themselves over a large portion of the land in dispute as indicated on their Plan. Indeed, so firmly have they established themselves that even one of the Plaintiff's witnesses 8th P.W. was able to say that the village of Okatedo (in the east) is now in Gboyin District Council of which Imessi is a part - See W.N.L.N. No. 21 of 1962. I also find that the Irun people have been on the land and cultivated parts of it, but the evidence shows that their activities were confined to the immediate borders of their town, on the eastern side of the land in dispute.

In the case of Ekpo v. Ita 11 N.L.R. 68 it is said that:

"In a claim for a decree of declaration of title, the onus is on the Plaintiff to prove acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that the plaintiffs were exclusive owners."

In my view, the Plaintiffs in this case cannot be said to be exclusive owners, since in my judgment, they jointly cultivate the land in dispute with the defendants.

I have already noted earlier on in this judgment that the land in dispute lies in between the two towns, Irun and Imessi and it does not appear that there has been any defined boundary between them. In consequence farmers from both sides have entered into vacant portions of it and cultivated it.



I think that a lot of profitless litigation would be prevented if the question of the boundary between the two towns were referred to the Boundary's Commission for adjudication. I hope that Counsel for the parties will explain the full implications of this step to their clients.

Be that as it may, I am unable to hold on the evidence before me that the Plaintiffs are the exclusive owners of the land in dispute, and in consequence, their claim for title fails and it is accordingly dismissed.

For the same reason, the injunction sought will be refused.

(Sgd.) (E. B. CRAIG),  
J U D G E .

7th July, 1972.

CERTIFIED TRUE COPY

*[Handwritten signature]*  
SENIOR REGISTRAR

55 folios Q 1712  
= 9.35.

