IN THE SUPREME COURT OF NIGERIA

Suit No: FSC344/1960

Petitioner: Gabriel Madukolu & Ors (for themselves and behalf of the Umuonala Family)
And
Respondent: Johnson Nkemdilim

Date Delivered: 1962-11-12

Judge(s): Sir Lionel Brett, John Idowu Conrad Taylor, Vahe Bairamian

Judgment Delivered

This appeal from the High Court of the Eastern Region (Betuel. J. at Onitsha on 23 November, 1959) raises the questions of res judicata and turns on the application of Section 53 of the Evidence Act, which provides that

Every judgment is conclusive proof, as against parties and privies, of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action it is intended to be proved.

The questions raised in this appeal are:

(1) whether title to land was a fact directly in issue in the previous case between the parties;

(2) whether the title was actually decided by the court;

(3) whether the title appears from the judgment itself to be the ground on which it was based.

In the previous case (No. 33/56) before the Native Court of Mbatechete, the plaintiff claimed for his family yams etc., as customary rent for thirteen years under a lease given to the defendant in 1942 for building purposes, alleging that the defendant paid for two years and stopped. The defendant did not admit the claim. The plaintiff gave evidence that his family granted the defendant a piece of land to build on; that he brought them palm wine, and that they agreed on the rent, which he stopped paying after the ensuing year. The very first question put by the defendant was

\"In whose lifetime did I come to you with palm wine'\"

Thus the plaintiff was alleging a grant of land, which the defendant was denying. At the outset of his evidence the defendant said

\"The land on which I live is ours.\"

The plaintiff asked him

\"Can you swear with your brothers that his land in question belongs to you'\"

The defendant answered

\"yes\".

After the defendant\'s case was concluded, the court re-opened the hearing, and received from the plaintiff a copy of the proceedings in case No. 24/1937 as showing that his family had obtained title against the defendant\'s late father. The court eventually gave judgment for the plaintiff relying on that case as proving that \"where the defendant put up his

building belongs to the plaintiff\'; and the court gave judgment for payment of rent.

Plainly enough the dispute was on whether the plaintiff\'s family were the owners of the land on which the defendant had his house; the title was actually decided by the court; and that appeared from the judgment itself to be the ground on which the judgment for payment of rent was based.

There were proceedings on appeal which ended in a finding by the Senior Administrative officer, that the plaintiff had failed to prove title to the land on which the defendant had his house and that there was inadequate evidence to support his claim that the defendant had leased the land in dispute from him; the judgment of the Native Court was set aside and the claim dismissed; and that decision was confirmed by the Deputy Governor on 23rd January, 1957.

A year or so later, Gabriel Madukolu, who had brought the 1956 suit on his family\'s behalf, together with others sued the defendant anew in the Native Court claiming

declaration of title to a parcel of land known and called \"Aniuno-Isigwu\" where the defendant put up his compound.

The defendant denied the claim. In questioning Madukolu the defendant reminded him of the former case. When the defendant gave evidence, he began by saying that the case was res judicata in the former case No. 33/56, which he had won. The plaintiff asked him

\"Do you know whether it was title to land or rent was claimed in civil suit No. 33/56 which you said you won'\"

And the defendant answered

\"It was case for rent\".

The judgment of the Native Court was for the plaintiffs; it did not deal with the plea of res judicata.

Res judicata was included as a ground of complaint in the appeal to the County Court. The County Court observed that the former case was for payment of rent and not for declaration of title; that the appellate judgment in that case was good so far as rent was concerned, but ultra vires in regard to title. The County Court awarded the plaintiffs a reversionary title, which was upheld by the Magistrate, but reversed by the High Court; hence this appeal by the plaintiffs.

The ground of appeal argued is that

The learned Judge in the Court below is wrong in law when he held that the issue of tenancy in Mbatechete Native Court suit 33/1956 was res judicata.

It must be admitted that the judgment is not consistent. At one point it states that

The County Court did consider it (viz. the judgment of the Senior Administrative Officer in the former suit) and rightly disregarded the remark that the respondents had failed to prove title, which was not directly in issue, but the second arm, that no tenancy was proved and the dismissal of the claim for rent was not given its due weight.

If title was not directly in issue, then one of the elements of res judicata was absent. The learned Judge gives it as his view that

The judgment is not only conclusive with reference to the actual matter decided but to the grounds for the decision.

That is true provided that the ground for the decision relates to a fact directly in issue. Ultimately the judgment states that

In the circumstances of this case, if the issue of tenancy is res judicata, so is the issue of title since one is based upon the other.

That seems to say this: the plaintiffs claimed that the defendant was their tenant as a person to whom they had granted land of their own to build on and pay rent for; so the claim of tenancy was based on a claim of ownership; so the former judgment was conclusive on title as well as on tenancy by lease. In effect the learned Judge regarded title as being a fact directly in issue in the former case by necessary implication.

The argument for the plaintiffs in their appeal before us was that the claim in the former suit was for rent; that the issue there was whether the defendant owed rent; and that was what the Native Court adjudicated upon: there was no issue on title, according to the argument, and the case was not fought on that issue; the dismissal of the suit by the Senior Administrative officer decided nothing, as the suit was not for a declaration of title: further, according to the argument, if the defendant tried to raise the issue of title, he did so too late.

The rule of res judicata is derived from the maxim of nemo debet bis vexaripro eadem causa. It is the causa that matters; and a plaintiff cannot, by formulating a fresh claim, re-litigate the same causa. That is why section 53 of the Evidence Act does not speak of the claim, but of the facts directly in issue in the previous case. The previous case was in the Native Court, and as there are no pleadings, one must go by the substance as disclosed in the proceedings. The dispute was on title, and the ultimate decision was against the plaintiffs on their basic cause of action, that they were the owners and grantors of the land occupied by the defendant; nor is it true that he raised the issue of title too late. The plaintiffs were debarred by that decision from claiming a declaration of title in a fresh case based on the same cause of action.

The following authorities were cited in the course of the hearing of the appeal: on the plaintiffs\' behalf

(1) Spencer Bower on Res Judicata, which is not available in our library;

(2) Halsbury\'s Laws of England (2nd Ed,) vol. 13, paragraphs 466 and 488, which is discussed and applied in

(3) Commissioner of Lands v. Abraham and others, 19 N.L.R., 1, but that case differs from the present case;

(4) Moss v. Anglo-Egyptian Navigation Co., (1865), 1 Ch. App. Cas, which is included in a footnote in Halsbury to paragraph 488; and

(5) Dedeke and others v. Williams and another, 10, W.A.C.A. 164, which is not relevant here.

The defendant\'s counsel relied on Bell v. Holmes, (1956), 3 All E.R., 449, which is illuminating. The rule of res judicata is stated at page 454 from Ord v. Ord, (1923)2 K.B.432, in these words

If the res - the thing actually and directly in dispute - has been already adjudicated, of course by a competent court, it cannot be litigated again.

The following sentence, quoted at page 455 from Hunter v. Stewart, (1861), 45 De G.F. & J. 168, at p. 178; 45 E.R. 1148 at p.1152, is also especially worth repeating

One of the criteria of the identity of two suits, in considering a plea of res judicata, is the inquiry whether the same evidence would support both.

In both the former and the present suit in the Native Court the evidence given was on title, and the res adjudicated upon was the title of the plaintiffs to the land on which the defendant had his house.

Although the competency of the court in the former suit was not raised as a question at any stage in the present suit, or in the first argument of learned counsel for the appellants under their ground of appeal, it arose incidentally in the course

of the answer of the respondent\'s learned counsel at the hearing of the appeal, in connection with the order made by the District Officer (Mr Grisman) who heard the first appeal from the Native Court and said this

I study the record and consider that Court should have called as Court\'s witnesses the two remaining sub-families of Umuonala family. The case could be determined on the strength of their evidence without trying to compel the defendant to bring an action for title to the land in dispute. It is for the plaintiff to prove title, if anyone does. The appeal succeeds.

I set aside the judgment of the Court below and order that the case be re-opened to enable witnesses to be called from the other two sub'families of Umuonala.

(The Native Court had been of opinion that the defendant should bring an action for title: the District Officer rightly said that it was for the plaintiff to prove title.) The suggestion is that the subsequent proceedings in the Native Court were a nullity. They begin thus

The Record of proceedings in the previous hearing read and interpreted before the hearing of the bench. The District Officer\'s remarks also read.

\"Q. by Court to plaintiff: What are the names of those two families whose evidence are required in this case'

Ans.: They are known as Umuonemum and Akpoadimora.

\"1st wit. sworn states\" (He is a witness from one of the other sub'families).

Before discussing those portions of the record, I shall make some observations on jurisdiction and the competence of a court. Put briefly, a court is competent when

(1) it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and

(2) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction: and

(3) the case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction.

Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication.

If the court is competent, the proceedings are not a nullity; but they may be attacked on the ground of irregularity in the conduct of the trial; the argument will be that the irregularity was so grave as to affect the fairness of the trial and the soundness of the adjudication. It may turn out that the party complaining was to blame, or had acquiesced in the irregularity; or that it was trivial; in which case the appeal court may not think fit to set aside the judgment. A defect in procedure is not always fatal.

To revert to the portions of record quoted above. the Native Court, the instead of having a full re-hearing, had the evidence of the former witnesses read out, and heard only witnesses from the other sub-families. That was a defect in procedure; neither party complained of it in the subsequent appeals. The re-hearing was not a nullity on that account.

If it was a nullity, it would be, under condition (3) of the above statement on competence, on the ground that the District Officer\'s order, which initiated the re-hearing, was bad in law. The order was in these terms

I set aside the judgment of the Court below and order that the case be re-opened to enable witnesses to be called from the other two sub'families of Umuonala.

If that means that the re-hearing is to be confined to witnesses from those sub-families, the order is bad; if it means that there is to be a re-hearing for the sake of enabling such witnesses to be heard but does not confine it to them, it is not bad.

It may be suggested that the order is ambiguous and should be interpreted in the light of the paragraph which precedes it; but that is itself ambiguous and in my view cannot have any real weight. For my part I think that the order should be interpreted in the light of the maxim ut res magis valeat, and the second meaning which saves the order, should be adopted. Moreover, it was so understood by the Native Court to which it was addressed: at the outset that court had the former evidence read out, presumably as a method of incorporating it and of saving itself from hearing it again.

I therefore think that the re-hearing was not a nullity. At the same time I should add that as the point arose incidentally ex improvise, it was not argued at all fully and no cases were cited.

That is why I dealt with it without citing any cases. There are plenty of them, both local and English, and some day, if the point is raised in an appeal, it will no doubt be better argued and decided.

Interest reipublicae ut sit finis litium, is the reason behind res judicata. The parties have spent an inordinate amount of money over a piece of land of about 100 feet by 50 at a village, and it is time that the litigation was at an end.

The following order is proposed:

The appeal from the order of the High Court of the Eastern Region dated the 23rd November, 1959, in Appeal No. 0/35/A1959 of the Onitsha Judicial Division, is dismissed, with costs to the respondent, which will be assessed after hearing the parties.

Judgement delivered by
Sir Lionel Brett. F.J.

I have had the opportunity of reading the judgment which has been delivered by Bairamian, F.J., and I concur in the proposal to dismiss the appeal. I recognise the force of the argument that on their most natural interpretation the words used by the District Officer in ordering the case to be \"re-opened\" amount to an order which he had no power to make, and that may well be the interpretation which he intended them to bear, but I agree with Bairamian, F.J., in the view that the words are capable of bearing the meaning which the Native Court in fact put upon them and which saves the order from invalidity, and I also agree that this Court will not be departing from the accepted principles of construction in holding that that is their true meaning.

I would only add that if the order for the case to be re-opened was invalid it would follow from the decision of this Court in Ude v. Agu (1961) All N.L.R. 65, that the order setting aside the previous judgment of the Native Court was invalid also, since \"a naked power to set aside judgments is not provided for by section 40\" of the former Native Courts Ordinance. Mr Shyngle did not submit that the previous judgment constituted res judicata in his favour, and on the view which I take of the effect of the order it is unnecessary for me to express an opinion on whether the point would now be open to the appellants.

Dissenting Judgement delivered by
John Idowu Conrad Taylor. F.J

The plaintiffs sued the defendant in the Native Court of Mbateghete for a declaration of title to land known as \"Aniuno-Isigwu\". In giving Judgment on the llth August, 1958, the Court held as follows:

We have every reason to believe that the land belongs to the plaintiffs. We therefore find the land for the plaintiffs

because the title has now been proved beyond all doubts.

Against this Judgment the defendant appealed to the County Court Grade \"A\", which held as follows:

The Plaintiffs/Respondents have made out their title case against the defendant-appellant but so far the defendant is occupying the compound land, we are awarding the Plaintiffs/Respondents a Reversionary Title.

A further appeal was lodged by the defendant to the Magistrate\'s Court holden at Awka, and on the 23rd day of May, 1959, the Learned Magistrate confirmed the decision of the County Court and dismissed the appeal. Although the effect of a previous Suit No. 33/56 in the previous proceedings was dealt with in the other Courts and evidence led about that Suit, it is in the Magistrate\'s Court that we find the legal effect of that Suit dealt with. The Magistrate held, inter alia, that:

It is also not correct that the matter is res judicata. The claim in the suit No. 33/56 was for recovery of Rent and the Administrative Officer with Resident\'s Judicial Powers found that plaintiff has failed to prove title to the land on which defendant has his house. On this and on some other grounds he dismissed the claim. The Deputy Governor condemned his judgment. It will be noted that he did not find that the land does not belong to the plaintiff: all he said was that the plaintiff failed to prove his title which in that case the plaintiff was not out to do.

The defendant appealed further to the High Court, which on the 23rd November, 1959, allowed the appeal and set aside the decisions of the Courts below. The Learned Judge on appeal held, inter alia, that:

The Respondents base their claim to a declaration of title on the alleged tenancy; if they fail in proving a tenancy, they also fail in asserting their title; they have failed in proving alleged tenancy because the issues decided in a suit as between the same parties are conclusive and cannot be a matter of further litigation between them (Outram v. Morewood, 3 East, 346, 355, 358, and Priestman v. Thomas, 9 P.D. 70, 210).

The judgment is not only conclusive with reference to the actual matter decided but to the grounds for the decision.

The plaintiffs have appealed to this Court from the Judgment of the High Court of the Onitsha Division. In addition to the general grounds of appeal against the evidence, two additional grounds were filed and argued with leave of this Court, and they read thus:

1. Learned Judge misdirected himself when he said at page 39, line 19 of the record that \"the respondents base their claim to a declaration of title on the alleged tenancy; if they fail in proving a tenancy, they also fail in asserting their title;\"

2. The Learned Judge in the Court below is wrong in law when he held that the issue of tenancy raised in the Mbateghete Native Court Suit 33/1956 is res judicata.

I think it is important at the outset to look at Suit No. 33/56 and to decide what effect it has on the case on appeal before us. In that Suit the present ; appellants sued the present respondent for the following:

Recovery of 195 yams, 13 fowls, 13 pots of palm wine and 13 Kola-nuts being the customary land rental due from defendant for 13 years. The lease having been granted for building purposes in 1941 out of which the defendant satisfied the conditions for 2 years only and has since failed. Total cash value of rental - '20.

The Native Court gave Judgment for the plaintiff for the sum of '20, being arrears of rent. There are other portions of the Judgment which deal with title to the area in dispute and which were the subject matter of adverse comment in later proceedings, but I do not for the moment consider them relevant for the point to which I am leading. This Judgment went on appeal before the District Officer. He heard it as an appeal and made the following order:

I study the record and consider that Court should have called as Court\'s witnesses the two remaining sub-families of Umuonala family. The case could be determined on the strength of their evidence without trying to compel the defendant

to bring an action for title to the land in dispute. It is for the plaintiff to prove title, if anyone does. The appeal succeeds.

I set aside the judgment of the Court below and order that the case be re-opened to enable witnesses to be called from the other two sub'families of Umuonala.

The case went back to the Native Court, and a Bench consisting of three at of the five Judges who delivered Judgment, and four who sat over the case when it began on the 6th July, 1956, re-opened the case on the 17th September, 1956, as ordered by the District Officer. On the 8th October, 1956, when further evidence was heard, this Bench had increased to five. The record, when the case was reopened, reads as follows:

The Record of proceedings in the previous hearing read and interpreted before the hearing of the bench. The District Officer\'s remarks also read.

\"Q. by Court to plaintiff: What are the names of those two families whose evidence are required in this case'

Ans.: They are known as Umuonemum and Akpoadimora.

The witnesses were than called as well as some others called by the Court, at the end of which the record reads as follows:

We have reheard the case and also heard new witnesses produced ...

At the hearing of this appeal I brought this matter to the notice of Mr Sofola for the respondent and Shyngle for the appellants, as I thought the order of the District Officer was one he was not empowered by law to make and therefore a matter affecting his jurisdiction. It is true that a full dress argument did not develop on the point. Mr Sofola contended that the proceedings in Suit 33/56 were not a nullity as the res was not affected. References were also made to ss. 33 and 40 of the Native Courts Ordinance, Cap. 142, Vol. 4 of the 1948 Laws of Nigeria. Mr Shyngle on the other hand contended that once the District Officer had no power to send a case back for further evidence to be take the whole proceedings are a nullity, and that that was a matter which could be taken in this appeal.

I shall first deal with the question as to whether this was a matter that could be taken up by the Appeal Court itself. Order VII, rule 2(6) of the Federal Supreme Court Rules provides that:

Notwithstanding the foregoing provisions the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant:

Provided that the Court shall not if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the cause on that ground.

As I said earlier in this judgment, Counsel for both sides were invited by me to adduce arguments on this point, and though there was no full dress argument, neither Counsel sought for an adjournment with a view to making preparations for a more detailed argument.

The Judgment of the Learned Judge in the Court below rests on the point that the decision in Suit 33/1956 is res judicata, and Learned Counsel for the appellants has filed grounds of appeal attacking the judgment and the finding of res judicata. In my view if it becomes apparent on the record that a judgment which is relied on as res judicata is in fact a nullity through excess or lack of Jurisdiction, it is the duty of trial and an Appeal Court of its own motion to take up the point provided opportunity is given to both sides to adduce arguments on the issue.

In the case of Westminister Bank Ltd. v. Edwards, (1942) A.C. 529, Viscount Simon, L.C., says this at page 533:

Moreover, the question was not in issue. There are of course, cases in which a Court should itself take an objection of

its own, even though the point is not raised by any parties to it.

After giving certain instances of when this may be done, the judgment continues thus:

Again, a Court not only may, but should, take objection where the absence of jurisdiction is apparent on the face of the proceedings. Thus an appellate Court not only may, but must, take objection that it has no jurisdiction to hear an appeal if it is apparent that no right of appeal exists.

Lord Wright, at page 536 of the same report, says this:

Now it is clear that a Court is not entitled but bound to put an end to proceedings if at any stage and by any means it becomes manifest that they are incompetent. It can do so of its own initiative, even though the parties have consented to the irregularity, because as Willes, J., said in City of London Corporation v. Cox (3) in the course of giving the answers of the Judges to this House,

\"mere acquiescence does not give jurisdiction.\"

In Farquharson v. Morgan (4) Lord Halsbury states the principle thus:'

It has been long settled that, where an objection to the jurisdiction of an inferior Court appears on the face of the proceedings, it is immaterial by what means and by whom the Court is informed of such objection. The Court must protect the prerogative of the Crown and the due course of the administration of Justice by prohibiting the inferior Court from proceeding in matters as to which it is apparent that it has no jurisdiction.

That was a case of prohibition, but I think the general principle applies equally to the duty of the Court to take the objection when it becomes apparent in the course of proceedings before it in an appeal.

The words of Lord Wright in the passage to which I have referred are very strong indeed

\"at any stage and by any means\".

I now turn to the order of the District Officer, for if he acted in excess of the jurisdiction given him by the Native Courts Ordinance, if he had no power to make the order which he in fact made, then that order is a nullity, and no matter what happened subsequently in the Native Court, no matter what the parties may have agreed upon, the proceedings subsequent to the order are a nullity.

Now the power of the District Officer on hearing an appeal are contained in s. 40 of the aforesaid Ordinance, which reads thus:

A Native Court of Appeal, a Magistrate\'s Court, the High Court, a District Officer, a Resident or the Governor in the exercise of his appellate jurisdiction under this Ordnance may

(a) after rehearing the whole case or not, make any such Order or pass any such Sentence as the Court of first instance could have made or passed in such cause or matter;

(b) order any such cause or matter to be reheard before the Court of first instance or before any other native court or before any Magistrate\'s Court.

It is with s. 40(b) that we are here concerned, for the District Officer never reheard the case. Was the order of the District Officer an order that the case should be reheard or was it an order sending the case back for certain witnesses to be heard' If it was the former, the order was perfectly valid; if the latter, it was invalid.

In the case of Timitimi v. Amabebe, 14 W.A.C.A. 374 at 377, Coussey JA. said that:

There is a distinction between an order or judgment which a Court is not competent to make and an order which, even if erroneous in law or in fact, is within the Court\'s competency.

In my view the present case on appeal comes within the former. The Learned Justice of Appeal went on to say that where there is no jurisdiction the proceedings are void and are of no probative force between the parties.

I have set out above the Order made by the District Officer, a person versed in the English language, though perhaps not a member of the Legal profession, and I cannot convince myself that when one reads the whole of the Order as set out by me above, he meant anything other than, and was understood by the Court below as meaning anything other than what he said, i.e. that the case should be reopened, not retried in toto, but reopened so as to enable certain witnesses to be called. This order is in my view a nullity, with the result that the subsequent proceedings to this order are also a nullity.

I am grateful to my Lord Brett. F.J., for the opportunity given me of reading the remarks which have just been made by him, particularly with respect to the decision of this Court in Ude v. Agu (1961) All N.L.R. 65.1 would humbly agree with the view that the whole of the order of the District Officer, and not just a portion of it, is invalid if the order to reopen is invalid. This would leave the Judgment of the Native Court of the 16th July, 1956, as the subsisting Judgment. As my Lord has said in his remarks no reliance has been placed by Mr Shyngle on this Judgment as constituting res judicata. In my judgment in determining this appeal no help can be obtained from the proceedings in 33/56. They must be ignored. In my view, if the District Officer had no jurisdiction after setting aside a Judgment of the Native Court to order a case to be reopened for the purpose of allowing further witnesses to be called, then the order and the subsequent reopening of the case are a nullity, as are the subsequent appeals based on the case.

I have refrained from saying anything about the effect of the change in the composition of the Court for two reasons: (1) because arguments were not invited on the point, it not having been noticed at the hearing, and (2) the point on which argument was invited is sufficient to dispose of Appeal No. 33/56. That being the case, can the Judgment of the Judge on Appeal, based as it was on the finding that the Judgment in Appeal No. 33/56 operated as res judicata, stand' In my view it cannot. Mr Shyngle for the appellants has argued that there are concurrent findings of fact of three Courts in favour of the appellants, and has asked this Court to confirm the decision of the Magistrate to which I have already referred. This conclusion is inescapable, for the Learned Judge on Appeal in the High Court did not deal with the facts of the case. The Learned Counsel for the respondent has put his arguments on the issue of res judicata and nothing else.

For these reasons I beg to differ from the majority Judgment delivered by My Lord, Bairamian. F.J. I would allow the appeal, set aside the Judgment of the High Court and restore that of the Magistrate. I would award the appellants the costs of the appeal.