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UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

1.

IN THE PRIVY COUNCIL

No.11 of 1960

50998

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N:

THE KATI KI RO OF BUGANDA
(Plaintiff) Appellant

- and -

THE ATTORNEY GENERAL
(Defendant) Respondent

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CASE FOR THE APPELLANT

Record

1. This is an appeal from a judgment and order of the Court of Appeal for Eastern Africa, dated the 9th May, 1959, dismissing an appeal by the Appellant from a judgment and order of the High Court of Uganda, dated 25th November, 1958, where- by the said Court dismissed the Appellant's claim for:-
pp. 43-71
pp. 71-2

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(1) A declaration that the Legislative Council of the Uganda Protectorate as at present constituted is not the Legislative Council referred to in the Second Schedule to the Buganda Agreement, 1955.

pp. 31-8
pp. 39-40

(2) A declaration that the Katikiro is not bound or entitled to take the steps laid down in the said Schedule for the purpose of electing Representative Members to represent Buganda in the Legislative Council of the Uganda Protectorate as at present constituted.

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(3) A declaration that unless and until the Legislative Council of the Uganda Protectorate is reconstituted so as to be the same as the Legislative Council referred to in the Buganda Agreement, 1955 and contemplated at the time thereof there is no procedure for electing Representative Members thereto.

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2. The principal questions raised by this appeal are:

(1) Whether by reason of the constitutional changes made since the Buganda Agreement, 1955, the Legislative Council of the Uganda Protectorate was a different body from the Legislative Council referred to in the Second Schedule to the Agreement or contemplated at the time it came into force, or whether despite such constitutional changes it is to be treated as the same. 10

(2) Whether the Buganda Agreement, 1955 was made on the basis that there should be no "major changes" in the Legislative Council before 1961.

(3) Whether since 1955 "major changes" had been made in the Legislative Council.

3. The principal events and enactments leading up to the present proceedings are as follows:-

In 1894 Buganda (then known as "Uganda") was placed "under the Protectorate of H.M. Queen Victoria" and the Buganda Agreements of 1894 and 1900 defined the relationship between the British Government and the Kabaka Chiefs and people of Buganda. 20

By Article 12 of the Uganda Order in Council, 1902 (S.R. & O. 1902 No.662) the Governor was made the Legislative Authority for the Uganda Protectorate.

By Article 7 of the Uganda Order in Council, 1920 (S.R. & O. 1920 No.884) a Legislative Council for the Protectorate was set up consisting of the Governor and such persons as His Majesty might direct by any Instructions under His Sign Manual and Signet. By Article 8 the Legislative Council was given power to legislate by Ordinance subject to veto by the Governor. By Article 9 there was reserved to the Crown the power to disallow any such legislation and to legislate by Order in Council. Article 13 provided that in the making of any Ordinances the Governor and Legislative Council should conform to and observe the rules, regulations and directions in that behalf contained in any Royal Instructions. 30 40

Royal Instructions were issued on the 5th June,

1920. These Instructions (which were amended from time to time) made provision as to the membership of the Legislative Council, which was to consist of the Governor and certain other members. Clause 25 provided that the Governor was to attend and preside at all meetings of the Legislative Council unless prevented by illness or other grave cause. Voting was dealt with in Clause 26 which laid down that all questions proposed for debate in the Legislative Council should be decided by the majority of votes and that the Governor or the member presiding should have an original vote in common with the other members of the Council, and also a casting vote if upon any question the votes should be equal.

In December 1953 the Uganda (Amendment) Order in Council, 1953 (S.I. 1953 No.1908) was made. By Article 4, Article 8 of the Order of 1920 was revoked and replaced by a new Article 8 which provided that "it shall be lawful for the Governor, with the advice and consent of the said Legislative Council to make laws for the peace, order and good government of the Protectorate." By Article 5 reserved powers of legislation were conferred upon the Governor subject to report to the Secretary of State, to whom was reserved a right of revocation.

4. In November 1954 a White Paper (Cmd. 9320) was presented by the Secretary of State for the Colonies to Parliament by Command of Her Majesty (which was by consent made part of the Record in these proceedings and is therein referred to as "The White Paper"). This followed the withdrawal by H.M. Government of recognition from H.H. the Kabaka, his departure from Uganda and a Conference at Namirembe, presided over by Sir Kenneth Hancock, with representatives of the Baganda and with the Protectorate Government, on various constitutional questions relating to Buganda.

p.50, l.12

The White Paper contained three appendices. Appendix A contained the Agreed Recommendations of the Namirembe Conference, Appendix B a Statement by the Governor and Appendix C an explanatory Memorandum issued by the Namirembe Conference. Paragraphs 1 to 7 of Appendix B contained the Governor's various recommendations to the Secretary of State as to the introduction of a Ministerial system, membership of the Executive Council and

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membership and structure of the Legislative Council. In paragraph 7 the Governor made the following recommendation:-

"1. Provided that the Great Lukiko agrees that Buganda should participate fully in the Legislative Council through Members elected by whatever method is decided to be appropriate, I am prepared to recommend that the number of representative members from Buganda should be increased from three to five."

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In paragraph 8 the Governor made the following recommendation:-

"In order that a period of stability may be secured for the country, I would propose that no major changes in the above constitutional arrangements should be made for six years from the date of the introduction of these arrangements, if approved by H.M. Government; and that, assuming these arrangements are introduced in 1955, the position should be reviewed early in 1961, with a view to introducing any changes that are then agreed at the beginning of the life of the new Legislative Council which will come into being early in 1962."

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Article 43 of Appendix A is as follows:-

"The Buganda Constitutional Committee" (i.e. the Committee appointed by the Buganda Lukiko which participated in the Conference) recommends, in the light of His Excellency the Governor's recommendations to Her Majesty's Government which are set out in Appendix B to these Articles, and the pledge on East African Federation there referred to, that the Great Lukiko agree to the representation of Buganda on the Legislative Council of the Protectorate. The Committee recommends that the representatives of Buganda be elected by the Great Lukiko by secret ballot, and that after the election the Great Lukiko shall assign each of the members elected to a particular area."

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Article 48 is as follows:-

"In order that a period of stability may be secured, no major changes in the constitutional arrangements prescribed in the foregoing Articles shall be introduced for a period of six years, after which there shall be a review; that is, in 1961, assuming that the arrangements recommended in these Articles are brought into force in 1955."

Paragraph 37 of Appendix C states as follows:-

10 "The Agreed Recommendations of the Namirembe Conference are closely interrelated with one another. It was the understanding of the Buganda Constitutional Committee, of the Governor and of Professor Hancock that these Agreed Recommendations would be considered and decided upon as a whole by the Great Lukiko and Her Majesty's Government."

20 The substantive text of the White Paper refers explicitly to the Governor's recommendations (Appendix B) and the Agreed Recommendations (Appendix A) in paragraphs 4, 6 and 16 as follows:-

"4. In the light of the Governor's recommendations the Buganda Constitutional Committee have agreed to recommend to the Lukiko that Baganda Members should be elected to the Protectorate Legislative Council by the Lukiko."

30 "6. The Governor's recommendations for the Legislative and Executive Councils are accepted by Her Majesty's Government who propose that they should be put into effect as early as possible. The Agreed Recommendations dealing with Buganda are also acceptable to Her Majesty's Government and are now being placed before the Great Lukiko."

40 Paragraph 16 recites the decision of Her Majesty's Government after consultation with the Governor that subject to certain conditions the Lukiko should be given the opportunity to choose whether a new Kabaka should be elected or whether Kabaka Mutesa II should return as Native Ruler of Buganda. The first of these conditions was:-

"The Agreed Recommendations of the Namirembe Conference should be accepted as a whole by the Great Lukiko."

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5. The choice thus given to the Lukiko was exercised in favour of Kabaka Mutesa II; who returned to Buganda on the 17th October, 1955.

6. Following upon the recommendations of the Namirembe Conference, the Governor's recommendations and the statement of H.M. Government in the White Paper, various steps were taken.

On the 19th May, 1955 (by L.N. 122 of 1955) the Royal Instructions of 1920 were again amended. By Clause 4 a new Clause 15 was enacted under which the Members of the Legislative Council were to be (a) the Governor, (b) three ex-officio Members, (c) Nominated Members, and (d) Representative Members. By Clause 7 a new Clause 25 was enacted by which it was provided that the Governor should so far as practicable preside at meetings of the Legislative Council and in his absence such Member of the Council as he might appoint, or in the absence of a Member so appointed the senior ex-officio Member present.

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On the 29th July, 1955 the Buganda Agreement, 1955 Order in Council, 1955 (S.I. 1955 No.1221) was made. This was to come into force on a day to be appointed by the Governor. It recited that it was proposed that an Agreement, to be entitled the Buganda Agreement, 1955 was to be made between Her Majesty and the Kabaka, Chiefs and people of Buganda providing for a new constitution for Buganda and for certain other matters, and enacted that when the Buganda Agreement, 1955 had been executed it should be published in the Gazette and the Governor should be empowered to declare by Proclamation that any part of the Buganda Agreement, 1955 should have the force of law.

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On the 18th October, 1955 the day following the return of H.H. the Kabaka to Buganda, the Buganda Agreement, 1955 was entered into between the Governor on behalf of the Queen and the Kabaka on behalf of the Kabaka, Chiefs and people of Buganda.* This provided for the recognition of the Kabaka, the administration of Buganda in accordance with the constitution set out in the First Schedule, the constitution and functions of

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*There had been a transitional Agreement executed on the 15th August, 1955, which this Agreement replaced.

the Lukiko and the representation of Buganda in the Legislative Council.

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7. Article 7 of the Agreement provided as follows:-

10 "7.(1) At all times when provision has been made for at least three-fifths of all the Representative Members of the Legislative Council of the Uganda Protectorate to be Africans and for such number of Africans to be appointed as Nominated Members of the Council as will bring the total number of Africans who are members of the Council up to at least one half of all the members of the Council, excluding the President of the Council, then Buganda shall be represented in the Legislative Council of the Uganda Protectorate, and for that purpose at least one quarter of the Representative Members of the Council who are Africans shall be
20 persons who represent Buganda.

(2) The Katikiro shall submit to Her Majesty's Representative, that is to say the Governor, the names of the candidates for appointment as the Representative Members of the Legislative Council to represent Buganda, that is to say the persons who have been elected for that purpose in accordance with the provisions of the Second Schedule to this Agreement.

30 (3) Notwithstanding the provisions of paragraph (2) of this article a system of direct elections for the Representative Members of the Legislative Council who represent Buganda shall be introduced in the year 1961 if such system has not been introduced earlier."

40 The Second Schedule to the Agreement contained regulations for the election of persons for recommendation to the Governor for appointment as Representative Members from Buganda to the Legislative Council of the Uganda Protectorate, and provided for the establishment of an Electoral College for this purpose.

Regulation 5 provided:

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"Whenever there is occasion to appoint a Representative Member or Members to represent Buganda in the Legislative Council of the Protectorate the Governor shall by notice in writing request the Katikiro to submit names to him for that purpose and the Katikiro shall submit to him the names of persons who have been elected in that behalf by the Electoral College in accordance with these Regulations."

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Regulation 18 provided as follows:

"So soon as the Governor requests the Katikiro to submit a name or names for the appointment of a person or persons as a Representative Member or Members of the Legislative Council the Katikiro shall summon the Electoral College to meet on a convenient date and if the Electoral College has not yet been elected shall fix all the necessary dates for elections to the Electoral College."

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By Proclamation of the 18th October, 1955 the Governor proclaimed and declared that the First and Second Schedules of the Buganda Agreement, 1955 should have the force of law from the date upon which the Agreement came into force.

8. By Notice of the same date, the Governor appointed that day to be the day when the Order in Council (S.I. 1955 No.1221) came into operation.

9. The Royal Instructions were amended on the 13th April, 1956 by L.N. 88 of 1956, and Clause 25 replaced by a clause which provided that the Governor should preside at the sittings of the Legislative Council or in his absence an appointed Member of the Council or in the absence of both the Senior ex officio Member present.

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10. On the 23rd August 1957 the Uganda (Electoral Provisions) Order in Council, 1957 (S.I. 1957 No. 1528) was promulgated. This contained contrasting references to the Legislative Council as then established and the Legislative Council it was proposed to set up. It is submitted that the language used shows that the same term was being employed to describe two different bodies. This submission, it is the Appellant's contention, is reinforced by a consideration of the provisions

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of the Uganda (Amendment) Order in Council 1958 (S.I. 1958 No.1516) referred to in paragraph 13 below.

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10 11. On the 17th December, 1957 Additional Royal Instructions were issued (L.N. 272 of 1957) which, it is the Appellant's case, made major and indeed fundamental constitutional changes to the Legislative Council. These Additional Instructions came into effect by virtue of Proclamation (L.N. 271 of 1957) on the 1st January, 1958. By these Instructions Clause 15 of the 1920 Royal Instructions (as replaced by Clause 3 of 1953 Instructions) was amended by a provision that the Legislative Council should consist of a Speaker as well as the Governor and the Ex-officio, Nominated and Representative Members. A new Clause 15A was enacted which provided:-

20 "15A(1) The Speaker shall be a person who is not an ex officio, Nominated or Representative Member of the Legislative Council and shall be appointed by the Governor by Instrument under the Public Seal.

(2) The Speaker shall hold office during Her Majesty's pleasure, and, subject thereto, for such period as may be specified in the Instrument by which he is appointed, and shall not vacate his office by reason of a dissolution of the Legislative Council."

30 Clauses 25 and 26 of the 1920 Royal Instructions were replaced by new clauses. The new clauses 25 and 26 deal with the presidency of the Legislative Council by the Speaker and new rules as to voting, and are as follows:-

40 "25(1) The Speaker shall preside at the sittings of the Legislative Council, and in the absence of the Speaker such Member of the Council as the Governor may appoint, or if there is no member so appointed, or the Member so appointed is absent, the senior ex officio Member present shall preside:

Provided that if the Governor should have occasion to be present at any sitting he shall preside at such sitting

26(1) All questions proposed for decision in

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the Legislative Council shall be determined by a majority of the votes of the Members present and voting, and if upon any question before the Legislative Council the votes of the Members are equally divided, the motion shall be lost.

(2)(a) Neither the Governor nor the Speaker shall have an original or casting vote; and

(b) any other person shall, when presiding in the Legislative Council, have an original vote but no casting vote."

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p.1

12. By a Plaint dated the 25th June, 1958, the Appellant instituted

THE PRESENT SUIT

p.5, 1.27

against the Attorney General claiming the relief referred to in paragraph 1 of this Case. On the 8th July, 1958 appearance was entered by the Acting Attorney General.

pp.6-10

On the 5th August, 1958 the Respondent applied to the High Court of Uganda under the Civil Procedure Rules Order 7, r.11(a) and (d) for the rejection of the Plaint on the grounds that (1) it did not disclose any cause of action, and (2) that the suit appeared from the Plaint to be barred by Section 4 of the Suits by or against the Government Ordinance (Chap. 7), which application was on the 8th August, 1958 dismissed with costs.

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pp.10-16

pp.16-18

On the 19th August, 1958 the Respondent filed his defence, contending that the Legislative Council as at present constituted was the Legislative Council referred to in the Second Schedule of the Buganda Agreement and contemplated at the time the Second Schedule came into force and further contending that the declarations claimed by the Appellant should not be granted, on the grounds that, (a) the Court, if it had a discretion to grant the declarations, should not exercise such discretion, (b) the Court had no jurisdiction to hear the suit in view of the provisions of the Suits by or against the Government Ordinance.

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13. On the 11th September, 1958 the Uganda (Amendment) Order in Council, 1958 (S.I. 1958 No. 1516) was made. This came into operation on the

27th September, 1958. Article 3 revoked Article 7 of the Uganda Order in Council, 1920 and provided as follows:-

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"(1) There shall be a Legislative Council in and for the Protectorate.

(2) The Legislative Council shall be constituted and shall perform its functions, and any matter incidental or ancillary to the constitution or functioning of the said Council shall be regulated in accordance with any such directions as may be given by Her Majesty by Instructions under Her Sign Manual and Signet or, subject to any such directions, in accordance with any law enacted under this Order, or under the Uganda (Electoral Provisions) Order in Council, 1957."

14. The suit was heard by the High Court of Uganda (Bennet, J.) on the 12th, 13th and 14th November, 1958, when the Respondent abandoned the point that the Court had no jurisdiction and admitted that an Electoral College had been established as alleged in paragraph 9 of the plaint and the argument was directed to the main question on which the declarations were sought.

pp.18-30

p.18; 1.33 -
p.19, 1.7

It was contended on behalf of the Appellant that the changes made in the Legislative Council since 1955 had been so fundamental that the provisions in the Buganda Agreement relating to the Legislative Council were no longer applicable. It was urged that the Governor had virtually disappeared from the Legislative Council, being replaced in the Legislative Council by a Speaker, and Buganda had accordingly partially lost the protection of the Crown which the treaties gave them. Since 1957 the Governor no longer played any real part in law making in Uganda, and the constitution of the Legislative Council since 1957 envisaged that he should play no part. Whereas previously the Governor had a casting vote which could be used to break a deadlock, now if he did appear in the Legislative Council he had no vote. The submission of the Appellant was that by reason of the virtual exclusion of the Governor from the Legislative Council and the change in the system of voting the Legislative Council was a different body from that to which the provisions of the Buganda Agreement, 1955 applied.

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The Appellant further contended that the Legislative Council as changed by the Royal Instructions of 1957 was a different body from that contemplated in 1955 when the Buganda Agreement was signed. The Appellant relied in particular as he contended he was entitled to do, upon the White Paper, which contained the recommendation that no major changes should be introduced, other than the constitutional arrangements therein referred to, for a period of six years, which recommendation was accepted by Her Majesty's Government and in the light of which the Buganda Constitutional Committee agreed to recommend to the Lukiko that Baganda Members should be elected to the Legislative Council. The parties, it was contended, then had in mind the Legislative Council then in being. The Appellant further submitted that the Protectorate Government would be guilty of a breach of faith if, in construing the 1955 Agreement, it sought to exclude the White Paper. At the time of the 1955 Agreement the parties were negotiating on the basis that there would be no major changes in the Legislative Council before 1961, and these there had been.

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pp.31-8

15. On the 25th November, 1958 Bennet J. delivered judgment refusing the three declarations sought by the Appellant and dismissing the Appellant's suit with costs. The learned Judge held, that what the Appellant was really seeking to do was to import into Article 7(1) of the Buganda Agreement, 1955 an implied term that there should be no major changes in the constitution of the Legislative Council prior to 1961 and held that such a term ought not to be implied.

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p.36, l.20

p.37, l.23

p.37, ll.26-34

The learned Judge accepted that there had been changes in the constitution of the Legislative Council since the signing of the Buganda Agreement, 1955, and although finding it unnecessary to express any opinion whether or not such changes were fundamental held that they did not affect the identity of the Legislative Council as a body having a permanent existence. The learned Judge further stated:-

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p.37, l.48 -
p.38, l.32

"Some colour is lent to Mr. Quass's argument that the Legislative Council now in existence is not that referred to in the Buganda Agreement, 1955, by the language of two recent Orders in Council. The Uganda (Electoral

Provisions) Order in Council, 1957 (Legal Notice No. 174 of 1957) mentions, in a recital, the proposed establishment of a Legislative Council referred to therein as 'the proposed Legislative Council.' The Uganda (Amendment) Order in Council, 1958 (Legal Notice No. 246 of 1958) provides, in Section 3, that 'there shall be a Legislative Council in and for the Protectorate.'

10 I find it unnecessary, however, to consider whether or not these two Instruments have created a new Legislative Council for the reason that I am asked for a 'declaration that the Legislative Council of the Uganda Protectorate as at present constituted is not the Council referred to in the Second Schedule to the Buganda Agreement, 1955.'

20 The words 'as at present constituted' can only refer to the Legislative Council in existence, at the date of the filing of the suit, and not to any Legislative body which may have been established after the suit was filed by the Uganda (Amendment) Order in Council, 1958.

30 In my judgment, the Legislative Council in existence at the date of the filing of the suit is the Council referred to in the Second Schedule to the Buganda Agreement, 1955, and is the Council which was within the contemplation of the parties at the time when the Agreement was signed.

I also find that the Katikiro is under a legal duty to take the steps required of him by the Second Schedule to the Agreement."

16. The Appellant appealed by Memorandum of Appeal dated the 26th January, 1959. His grounds of appeal were, inter alia, as follows:- pp.40-3

40 1. The Legislative Council of the Uganda Protectorate, as constituted at the material time, was not the Legislative Council referred to in the Second Schedule to the Buganda Agreement.

2. The changes in the constitution of the said Legislative Council since the making of the Buganda Agreement, 1955, were so fundamental that the provisions in the said

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Agreement and the Second Schedule thereof relating thereto were no longer applicable.

4. The Agreement of the Baganda to send representatives to the Legislative Council, as provided for in the said Agreement and the Second Schedule thereof, was on the basis that there should be no major changes in the constitution of the Legislative Council prior to 1961, and the learned Judge was wrong in holding that the said Agreement and Schedule should be construed without regard to this consideration. 10
5. The learned Judge was wrong in holding that extrinsic evidence was not admissible to interpret the material provisions of the said Agreement and Schedule and in excluding Command Paper 9320 as such inadmissible extrinsic evidence.
6. The learned Judge was wrong in holding that the identity of the Legislative Council was not effected by changes, however far reaching, in the constitution thereof. 20
7. The learned Judge was wrong in finding that the Legislative Council at the time of the suit was the Legislative Council within the contemplation of the parties at the time of the making of the said Agreement.
9. That major changes in the constitution of the Legislative Council had been made since the making of the said Agreement. 30
10. The changes complained of by the Appellant in the constitution of the Legislative Council have resulted in the loss to the Baganda of the protection of the Crown in the Legislative Council.
11. The learned Judge was wrong in finding that the Appellant was under a legal duty to take the steps required of him by the said Second Schedule.
12. In so finding the learned Judge was pronouncing on a matter not raised by the pleadings and not in issue in the suit. 40

13. There was no material before the learned Judge which justified his making the said finding.

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14. That by his use of the phrase "the steps required of him" the learned Judge was posing the question in a manner which necessarily pre-supposed the answer given by him.

10 15. The requirement that the Appellant should submit the names of candidates for appointment as the Representative Members of the Legislative Council to represent Buganda is conditional on the election of persons for that purpose in accordance with the provisions of the said Schedule and such provisions are unworkable.

17. On the 9th May, 1959 the Court of Appeal for Eastern Africa (O'Connor P., Forbes V.P. and Gould J.A.) dismissed the Appellant's appeal with costs.

pp.43-71

20 The Appellant's argument in the Court of Appeal was summarized by O'Connor P. (who delivered the principal judgment) as follows:-

"(1) Major changes have been made in the Legislative Council since 1955.

p.59; 1.44 -
p.60, 1.23

(2) The basis for there being any Agreement at all in 1955 was that there should be no major changes in the Legislative Council before 1961.

30 (3) The Agreement of the Baganda having been obtained on that basis, the Protectorate Government cannot now ignore it.

(4) The Court will not lend its assistance to such a breach of faith.

(5) In any event, it was a condition precedent to there being any duties put upon the Katikiro that there should be no such changes.

40 (6) Where a provision, obligation or promise is either expressly or by implication conditional, if the condition is not fulfilled, the promisor will be excused.

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(7) In the light of the circumstances which the parties must have had in mind when the treaty of 1955 was signed, the term "Legislative Council" must be construed as being a legislative council substantially the same as that then existing, subject to the qualifications expressly set out in section 7(1) of the Buganda Agreement 1955.

" If the matter were treated simply as a matter of contract, Mr. Quass said that he would rely upon there being any implied term as well as a condition precedent that there should be no major changes before 1961 other than those mentioned in the White Paper. He pointed out, however, that the treatment of the matter in the Court below as purely a matter of contract was erroneous, and with this Mr. MacKenna for the respondent agreed. Mr. Quass submitted that the 1955 Agreement was a treaty and he asked us to apply the canons of construction adopted by international tribunals in the construction of treaties. He relied upon a passage in Oppenheim 7th edn. Vol. 1 pp. 862 and 863 and in particular upon a statement in note 1 on page 863: 'English, and in particular, American courts do not hesitate to resort to preparatory work for the purpose of interpreting treaties. See Lauterpacht in H.L.R. 48 (1935) pp.562-571.' He urged us to treat the White Paper as relevant, as being part of the 'preparatory work' leading up to a treaty, namely the 1955 Agreement. He challenged the learned Judge's finding that the provisions of the Evidence Ordinance relating to the exclusion of oral, by written evidence, had the same effect as in English law, and pointed to Section 98 of the Evidence Ordinance; arguing that the Katikiro was not a party to the document in question or a representative in interest of a party."

p.63, 1.2

18. O'Connor P., with whose judgment the other two Judges concurred, held that there was a latent ambiguity in Section 5 of the Second Schedule of the Buganda Agreement, 1955, in that "Legislative Council of the Protectorate" might mean the Legislative Council of the Protectorate as then constituted or the Legislative Council of the Protectorate as established or constituted for the

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- time being, and that for the purpose of construing and resolving this ambiguity one was entitled to endeavour to ascertain the meaning of the words used by considering the surrounding circumstances including the whole Agreement. However, the learned Judge held, it is submitted wrongly, that he was not entitled to consider the White Paper, and held as a matter of construction that the words "the Legislative Council of the Protectorate" in paragraph 5 of the Second Schedule and the words "the Legislative Council" elsewhere in that Schedule include the Legislative Council of the Protectorate after the January 1958 changes notwithstanding that such changes were made within six years. The learned Judge went on to say that even if the White Paper were admissible it -
- Record
p.63, 1.7 -
p.64, 1.6
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- "would be of little or no assistance in construing the meaning of 'the Legislative Council of the Protectorate' in the Second Schedule. The fact that in such a formal document as the 1955 Agreement, there is no stipulation precluding major changes to the Constitution of Uganda for six years, whereas there is such a stipulation relating to the Constitution of Buganda, does not support the contention that there was any such agreement remaining at the date of the treaty with regard to the Legislative Council of the Protectorate."
- p.66, 11.6-13
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- As to the contention of the Appellant that the January 1958 changes were major changes, the learned Judge held that on the view which he took it was unnecessary to decide this, "in constitutional theory they might be but the question does not arise."
- p.66, 11.41-8
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- The finding of the Court below that the Katikiro was under a legal duty to take the steps referred to in the Second Schedule was not upheld, the view of Bennett J. being rejected in the following passage:-
- p.67, 1.42 -
p.68, 1.2
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- "Mr. Quass attacked this finding strongly on the grounds that such a finding was not asked for, and that it was not correct, because the provisions of the Second Schedule were unworkable and, at the date when the Judgment was delivered (though not at the date when the suit was filed), other provisions for the election of representative
- p.70, 11.9-12
- p.70, 11.16-32

Record

members had been brought into force. I think it is not to be wondered at that the learned Judge, having found himself unable to declare as prayed that the Katikiro was not under a legal duty to take the steps laid down in the Second Schedule, should find the converse. Nevertheless, the converse was not necessarily correct. I think that this finding was superfluous and the decision should have been confined to refusing the declarations claimed." 10

p.73

19. On the 14th September, 1959 the Court of Appeal for Eastern Africa gave the Appellant conditional leave to appeal to Her Majesty in Council and on the 29th February, 1960 final leave.

20. The Appellant submits that the effect of the changes in the constitution of the Legislative Council made in 1957 was so fundamental that it was thereafter a different body from the Legislative Council to which the Second Schedule and the other provisions of the Buganda Agreement, 1955 relate. Prior to 1957 the Legislative Council was a body ordinarily presided over by the representative of the Crown, namely the Governor, who had in addition the right to participate in its votes, both by an original and a casting vote. The effect of the Additional Instructions of 1957 was that the Governor was virtually withdrawn from the Council. He was deprived of any vote and was in effect replaced as chairman by a Speaker appointed from outside the Council. It is submitted that the taking away of the Governor's votes and his virtual removal from the Council and the appointment of the Speaker had the effect of making the Legislative Council a body wholly different in nature from the body so named in the Buganda Agreement, 1955. 20 30

21. The Appellant further submits that the Court of Appeal was wrong in excluding the White Paper from consideration in the construction of the words "Legislative Council of the Protectorate" in the Second Schedule. Even if the Second Schedule be regarded as legislation simpliciter, it is submitted that the Court was entitled and bound in construing its provisions to consider the surrounding circumstances, of which the Namirembe Conference and the White Paper were the most important. The Court of Appeal held, it is 40

submitted correctly, that there was a latent ambiguity in the words "Legislative Council of the Protectorate" and that it was entitled upon well established principles, to resort to sources of information outside the enactment for the purpose of throwing light upon its meaning. The Court, however, making what it is submitted was a quite arbitrary distinction, proceeded to hold, it is submitted wrongly, that the surrounding circumstances, while they included the whole of the Agreement, did not include the White Paper (Cmd. 9320) which preceded it.

22. It is in any event further submitted that although the Second Schedule to the Agreement was expressly given the force of law, it does not follow from this that a Court is to ignore the plain fact that it is also part of a formally concluded treaty, to which the canons of construction ordinarily applicable to treaties therefore apply. It is submitted that the Courts below should have followed the practice of international tribunals, in the construction of treaties, according to which practice Courts will resort to preparatory work for the purpose of interpreting treaty provisions. The White Paper, it is submitted, was a party of the preparatory work leading up to the Buganda Agreement, 1955 and as such was admissible to aid in the construction of the provisions of any part of it.

23. The Appellant respectfully submits that this Appeal should be allowed with costs throughout for the following amongst other

R E A S O N S

- (1) Because the Legislative Council of the Uganda Protectorate, as constituted at the material time, was not the Legislative Council referred to in the Second Schedule to the Buganda Agreement, 1955 or contemplated at the time thereof.
- (2) Because the Agreement of the Baganda to send representatives to the Legislative Council, as provided for in the said Agreement and the Second Schedule thereof, was on the basis that there should be no major change in the constitution of the Legislative Council prior to 1961.

Record

- (3) Because major changes had been made in the constitution of the Legislative Council since the making of the said Agreement.
- (4) Because the said changes in the constitution of the Legislative Council have resulted in the loss to the Baganda of the protection of the Crown in the Legislative Council.
- (5) Because the White Paper (Cmd. 9320) was a part of the surrounding circumstances which should be considered for the purpose of construing the legislative provisions of the Second Schedule of the Agreement and the Court of Appeal for Eastern Africa was wrong to exclude it from consideration. 10
- (6) Because the White Paper shows that the Buganda Agreement, 1955 was made on the basis claimed by the Appellant and its introduction accordingly would entitle the Appellant to the relief sought herein.
- (7) Because the said Second Schedule was part of a treaty and the Court of Appeal for Eastern Africa in order properly to construe it should have had resort to the said White Paper as part of the preparatory work which preceded such treaty. 20
- (8) Because the provisions of the Evidence Ordinance entitled and require a Court construing the said Second Schedule to consider the said White Paper.
- (9) Because the provisions of the Uganda (Electoral Provisions) Order in Council, 1957, and of the Uganda (Amendment) Order in Council, 1958, support the submissions of the Appellant as to the proper construction of the phrase, the Legislative Council. 30
- (10) Because the judgments of the Courts below are wrong and ought to be reversed.

PHINEAS QUASS

MONTAGUE SOLOMON

No. 11 of 1960

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL
FOR EASTERN AFRICA

BETWEEN:

THE KATI KIRO OF BUGANDA
(Plaintiff) .. Appellant

- and -

THE ATTORNEY GENERAL
(Defendant) .. Respondent

CASE FOR THE APPELLANT

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