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UNIVERSITY OF LONDON

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INSTITUTE OF ADVANCED

IN THE PRIVY COUNCIL LEGAL SYSTEMS No.11 of 1960

O N A P P E A L

FROM HER MAJESTY'S HIGH COURT OF APPEAL FOR
EASTERN AFRICA

B E T W E E N

THE KATI KIRO OF BUGANDA

(Plaintiff)
Appellant

- and -

THE ATTORNEY GENERAL OF UGANDA

(Defendant)
Respondent

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C A S E F O R T H E R E S P O N D E N T

RECORD

1. This is an appeal by leave of the Court of Appeal for Eastern Africa from a judgment and order of that Court (Sir Kenneth O'Connor, President, Mr. Justice Forbes, Vice President, and Mr. Justice Gould, Justice of Appeal) dated the 9th May, 1959, dismissing with costs the Appellant's appeal from a judgment of the High Court of Uganda (Bennett J.) whereby the High Court had dismissed the Appellant's suit with costs.

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2. By a Plaint dated the 25th June, 1958, the Appellant, the Plaintiff in the suit, claimed in the High Court against the Respondent declarations in the following terms:-

(1) A declaration that the Legislative Council of the Uganda Protectorate as at present constituted was not the Legislative Council referred to in the Second Schedule to the Buganda Agreement, 1955. P.4.

(2) A declaration that the Appellant was 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.

3. The Buganda Agreement, 1955, was made on the 18th October, 1955, between the Governor of the Uganda Protectorate on behalf of Her Majesty and the Kabaka of Buganda for and on behalf of the Kabaka, Chiefs and People of Buganda. The Agreement contained provisions regulating the election and the recognition of Kabakas and the composition and functions of the Lukiko. It provided that Buganda should be administered in accordance with the Constitution set out in the First Schedule to the Agreement. Article 11 of the Agreement was in these terms:-

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"11. No major changes shall be made to the Constitution set out in the First Schedule to this Agreement for a period of six years after the coming into force of this Agreement, but at the end of that period the provisions of the said Constitution shall be reviewed."

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Article 7 of the Agreement made the following provisions for the representation of Buganda in the Legislative Council of Uganda:-

"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 persons who represent Buganda.

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"(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.

10 "(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.

20 "(4) Her Majesty's Government shall during the year 1957 arrange for a review by representatives of the Protectorate Government and of the Kabaka's Government of the system of election of Representative Members of the Legislative Council who represent Buganda. In such review consideration will be given to any scheme submitted by the Kabaka's Government for the election of such Representative Members based upon the recommendation contained in the Sixth Schedule to this Agreement. Every effort will be made
30 resulting from such review in time for the election of the Representative Members of the Legislative Council who represent Buganda when the Legislative Council is generally reconstituted after the general vacation of seats in the Council next following the coming into force of this Agreement."

Regulation 5 of the Buganda (Legislative Council Candidates) Regulations contained in the Second Schedule to the Agreement was in these terms:-

40 "5. 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

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submit to him the names of persons who have been elected in that behalf by the Electoral College in accordance with these Regulations".

4. The Buganda Agreement, 1955, Order in Council, 1955, made on the 29th July, 1955, to come into operation on a day to be appointed by the Governor of the Uganda Protectorate, provided that the Governor might declare by Proclamation that any part of the Uganda Agreement, 1955, should have the force of law. The Governor appointed the 18th October, 1955, as the date when this Order in Council should come into operation, and upon the same day declared by Proclamation that the First and Second Schedules of the Buganda Agreement, 1955, should have the force of law.

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5. The Appellant's contention in the Courts below was that the constitution of the Legislative Council had been altered after the 18th October, 1955, by Royal Instructions which came into operation on the 1st January, 1958, and that the Legislative Council under its altered constitution was no longer the Legislative Council referred to in the Buganda (Legislative Council Candidates) Regulations. Stated shortly, the effect of the alteration was to provide for the office of a Speaker, who would preside at the sittings of the Legislative Council except when the Governor should be present, and to take away from the Governor the power of voting in the Legislative Council. The Instructions in force on the 18th October, 1955, had provided that the Governor should, so far as practicable, preside at meetings of the Legislative Council and should have an original and a casting vote.

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6. Article 7 of the Uganda Order in Council, 1920, provided that there should be a legislative Council in and for the Protectorate and that the Council should consist of the Governor and such persons, not being less than two at any time, as His Majesty might direct by His Instructions: Clause XV of the original Royal Instructions of 1920 provided for the composition of the Legislative Council (Governor, Ex-officio Members, Official Members, Unofficial Members). Clause XXIV fixed the precedence of these Members. Clauses XXV and XXVI were in these terms:-

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"XXV. The Governor shall attend and preside at all meetings of the Legislative Council, unless when prevented by illness or other grave cause; and in his absence that member shall preside who is first in precedence of those present."

10 "XXVI. All questions proposed for debate in the Legislative Council shall be decided by majority vote, and the Governor or member presiding shall have an original vote in common with other members of the Council, as also a casting vote if upon any question voting shall be equal."

7. Since 1920 the Royal Instructions have been frequently amended.

20 (a) In 1953 Clause XV was amended by altering the class of Ex-officio members, and by substituting for Official and Unofficial Members, Nominated and Representative Members. At the same time provision was made for a new order of precedence in an amended Clause XXIV.

(b) In 1955, among many other alterations, Clause XV was altered by removing certain office-holders from the class of Ex-officio Members, and a new Clause XXV was substituted for the old:-

"XXV. (1) The Governor shall, so far as is practicable, preside at meetings of the Legislative Council.

30 (2) In the absence of the Governor there shall preside at any meeting of the Council -

(a) such Member of the Council as the Governor may appoint;

(b) in the absence of a Member so appointed the senior Ex-officio Member present.

40 (3) For the purposes of paragraph (2) of this Clause the Ex-officio Members of the Council shall have seniority in the order in which they are mentioned in Clause XV of these Instructions."

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- (c) In 1956 a new Clause XXV was substituted in these terms:-

"XXV. (1) There shall preside at the sittings of the Legislative Council -

(a) The Governor; or

(b) In the absence of the Governor, such Member of the Council as the Governor may appoint; or

(c) In the absence of the Governor and of any Member so appointed, the senior Ex-officio Member present.

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(2) For the purposes of paragraph (1) of this Clause the Ex-officio Members of the Council shall have seniority in the order in which they are mentioned in Clause XV of these Instructions."

- (d) On the 17th December, 1957, the Royal Instructions were again amended by Instructions which were to come into operation on such date as might be fixed by the Governor (1st January, 1958). Clause XV was amended by providing that a Speaker should be included among the Members of the Council. A new Clause XV A provided that the Speaker should be appointed by the Governor and that he should hold office during Her Majesty's pleasure. The following Clauses were substituted for Clauses XXV and XXVI:-

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"XXV. (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:

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

(2) For the purposes of paragraph (1) of this Clause the ex-officio Members of the Council shall take seniority in the order in which they are referred to in Clause XV of these Instructions.

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"XXVI. (1) All questions proposed for decision in 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.

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(2) (a) Neither the Governor nor the Speaker shall have an original or a 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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8. On the 18th October, 1955, (when the Buganda (Legislative Council Candidates) Regulations became law), the voting members of the Legislative Council consisted of the Governor (1 original and 1 casting vote), Government side (Ex-officio and Nominated Members) 28, Representative Members 28. From the 1st January, 1958, the voting members consisted of Government side (ex-officio and Nominated Members) 32, Representative Members 30. At all times since the 18th October, 1955, the composition of the Legislative Council has been such as to satisfy the two conditions of Article 7(1) of the Buganda Agreement, 1955, viz. that at least three-fifths of all the Representative Members were Africans and that at least one half of all the Members of the Council, excluding the President of the Council, were Africans.

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9. On the 25th June, 1958, the Appellant filed his Plaint in this suit claiming the declarations set out in paragraph 2 of this Case. In paragraph 11 of the Plaint he referred to Article 7 of the Uganda Order in Council, 1920, (summarised in paragraph 6 of this Case.) In paragraph 12 he described the composition of the Legislative Council as it was on the 18th October, 1955, (as in paragraph 7(b) of this Case). Paragraphs 13 and 14 of the Plaint were in these terms:-

P.3.

P.4.

"13. The Legislative Council of the Uganda Protectorate is now differently constituted and the voting changed, by virtue of Royal Instructions dated the 17th December, 1957, to which the plaintiff will refer for their

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full scope and effect. These Instructions provide for the appointment of a Speaker and deprive the Governor both of an original and a casting vote.

"14. The plaintiff submits that the Legislative Council as at present constituted is not the Legislative Council referred to in the said Second Schedule or contemplated at the time it came into force, but is a body fundamentally different from it in its character and operation."

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PP.4-5. There followed the prayer for the declarations.

10. The Respondent by his Defence contended that the Legislative Council as at present constituted is the Legislative Council referred to in the Second Schedule to the Buganda Agreement, 1955, and contended further or in the alternative that so long as the conditions contained in Article 7(1) of that Agreement were satisfied, the Appellant was bound or entitled to take the steps mentioned in the second declaration claimed, even if (which was denied) his submission in paragraph 14 of the Plaint was correct.

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P.23. 1.13 11. At the hearing of the suit before Mr. Justice Bennett the Appellant called a witness, one Amos Coroli Sempa, who stated that he took part in the negotiations in London leading to the Buganda Agreement, 1955. His evidence about these negotiations (objected to by the Respondent but admitted de bene esse by the learned judge) was that the constitution of the Legislative Council was not discussed and that he did not contemplate the appointment of a Speaker at that time.

P.24.11.
6-13.

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12. The Appellant also tendered in evidence a White Paper presented by the Secretary of State for the Colonies to Parliament in November, 1954, entitled "Uganda Protectorate, Buganda," published as Command 9320. As part of this White Paper there was reproduced a Statement in which the Governor of Uganda had made certain recommendations to Her Majesty's Government. This Statement, after describing the composition of the Legislative Council as it then was, and certain changes which the Governor proposed to recommend to the Secretary of State, continued in these terms:-

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"8. 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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The White Paper also reproduced as Appendix A the Agreed Recommendations of the Namirembe Conference (being a Conference between the Governor of Uganda and the Buganda Constitutional Committee appointed by the Lukiko and presided over by Sir Keith Hancock). Articles 43 and 48 of the Recommendations were in these terms:-

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"43. The Buganda Constitutional Committee 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 (being the Statement cited above), 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 should assign each of the members elected to a particular area.

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"48. 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."

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The passages from the White Paper cited above were relied upon by the Appellant as showing that the Legislative Council which was contemplated by the signatories of the Buganda Agreement, 1955, was a Council to which no major or fundamental changes were to be made prior to 1961. The Respondent contended that this material was inadmissible for the purpose of construing the Buganda Agreement, 1955, including the Second Schedule thereto.

- PP.31-38. 13. On the 25th November 1958, Mr. Justice Bennett gave judgment dismissing the Appellant's claim. The learned Judge's reasoning may be summarised as follows:- 10
- P.34 (i) The expression "The Legislative Council of the Uganda Protectorate" must bear the same meaning in Article 7 and in the Second Schedule. 11.34-40.
- P.35.147- (ii) There was no ambiguity in the expression. There were not two or more Legislative Councils in existence in Buganda when the Agreement was signed, nor at any time before the filing of the suit. Extrinsic evidence was therefore inadmissible, and Article 7 of the Second Schedule must be construed without reference to the material in the White Paper. P.36.1.1 20
- P.36.11. (iii) What the Respondent was really seeking to do was to read into Article 7 an implied term that there should be no major changes in the constitution of the Legislative Council prior to 1961. It was impossible to do so. He could not believe that the signatories to the Agreement had left anything which they intended unsaid. Two conditions had been expressed in Article 7. It would be wrong to imply a third. P.37.11. 9-11. 30
- P.37.11. 16-25.
- P.37.11. (iv) "That there have been changes in the constitution of the Legislative Council since the Buganda Agreement, 1955, was signed is common ground. Whether or not those changes are fundamental is a matter upon which I find it unnecessary to express any opinion since, however far reaching they may be, they do not, in my judgment, affect the identity of the Legislative Council as a body having a permanent existence. A legislative body may 26-41. 40

undergo fundamental changes in its constitution without losing its identity. One illustration which springs readily to mind is the curtailment of the powers of the House of Lords which was effected by the Parliament Act 1911. The House of Lords did not lose its identity, but survived the operation in a somewhat emasculated form."

10 15. The Appellant appealed to the Court of Appeal, who delivered judgment on the 9th May, 1959, dismissing the appeal. The learned President delivered the first judgment, with which the two other learned judges concurred. The judgment sets out the history of the changes in the Legislative Council, and continues thus:- PP.43-70.
PP.70-71.

20 "I have traced the history of the matter in some detail in order that it should not be thought that any aspect of it has been overlooked. The Constitution of the Uganda Protectorate has advanced along the now stereotyped lines for British Colonial and Protected Territories. Since 1920 the Legislative Council has changed from a small body consisting of ex-officio and official members appointed by the Governor to a much larger body including some representative members directly elected to represent constituencies. On 1st January, 1958, the (by no means unusual) step of virtually removing the Governor from the Legislative Council (while retaining his right to attend on occasion and preside) and of putting in a Speaker who would normally preside was put into force. That this was not an unusual step may be seen from the fact that a Speaker now normally presides over the Legislatures (to mention some only) of Tanganyika, Kenya, Northern Rhodesia, Trinidad, and the Federation of Malaya. Halsbury 3rd Edn. Vol. 5 p.603 et seq. At the same time the Governor's two votes were removed and two Government back-bench members appointed in lieu. The short point in this case is whether these changes (which I will call 'the January 1958 changes') so altered the Legislative Council as to make it no longer 'the Legislative Council of the Protectorate' referred to in paragraph 5 and other paragraphs of the Second P.58. 1.16.

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Schedule, and to absolve the Katikiro from any obligations under that Schedule."

16. The learned President stated that the provisions to be construed were the words of a Schedule which had been given the force of law, and that the rules of construction applicable were those for the construction of general public enactments and not those which merely apply to contract or to private Acts or Ordinances which may be analogous to contracts. He rejected a submission by the Appellant that he should apply the rules adopted by international tribunals in the construction of treaties. He said that there was a latent ambiguity in the expression "Legislative Council of the Protectorate" in that the words might mean the Legislative Council of the Protectorate as then constituted, or the Legislative Council of the Protectorate as established or constituted for the time being. The Court was entitled for the purpose of resolving this ambiguity to look at the provisions of the whole of the Agreement, but not at the contents of the White Paper. The judgment continued:-
- P.61.11.33-39. 10
- P.61. 1.43- 10
- P.62. 1.2. 10
- P.63. 1.2. 10
- P.64. 1.45. 20
- P.66. 11.6-8. 20
- P.66. 1.9. 30
- "I proceed, therefore, to construe the words 'Legislative Council of the Protectorate' in paragraph 5 and elsewhere in the Second Schedule taking into consideration the 1955 Agreement, but not the White Paper. On this basis I think that the meaning of the expression 'the Legislative Council of the Protectorate' would not be confined to the Legislative Council of the Protectorate as constituted at the date that the Second Schedule was given the force of law or the date when the 1955 Agreement was signed. Article 7(3) of the 1955 Agreement shows that the expression 'Legislative Council' in section 7 included the Legislative Council before and after 1961, notwithstanding that a major change - direct election of Representative Members - would be inaugurated in 1961 and might be inaugurated sooner, a change which, as we have seen, involved the establishment of a new Legislative Council. I think that 'the Legislative Council of the Uganda Protectorate' in section 7 means the Legislative Council as established and constituted at the relevant time. There is 40

nothing in the 1955 Agreement or the Schedule which lays down that no major change in the constitution of the Legislative Council of the Protectorate (other than that mentioned) shall be made before 1961. One would expect that if that had been the intention it would have been stated, particularly having regard to the fact that there was such a statement relating to Buganda (Art.11). The expression 'the Legislative Council' in the Second Schedule must bear the same meaning as in section 7 upon which that Schedule depends. In my opinion, as a matter of construction, 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."

Article 11 referred to here is set out in paragraph 3 of this Case.

17. The learned President said that he would have reached the same conclusion if he had not taken the 1955 Agreement itself into consideration:- P.66. 1.49.

"If I had been construing paragraph 5 and other paragraphs of the Second Schedule without reference to the rest of the 1955 Agreement, I should have construed 'the Legislative Council of the Protectorate' as the Legislative Council of the Protectorate for the time being however it might be constituted. I think this would be the ordinary meaning. For instance, a provision in an Act that Rules made by a Minister are to be laid before 'Parliament' would not be held to refer only to Parliament as then constituted, but would continue to be operative if that Parliament had since been dissolved or had undergone some major constitutional change. The point was not taken, but it seems that the definition of 'Legislative Council' in section 2(1) of the Interpretation and General Clauses Ordinance may apply to the regulations constituting the Second Schedule and would support the same view." P.67. 1.2.

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18. The learned President stated that he would have reached the same conclusion even if he had taken into consideration the contents of the White Paper:-

P.67. 1.26.

"It does appear that there was a recommendation, agreed to by all parties before November, 1954, when the White Paper was presented to Parliament, that there should be no major changes in the Constitutional arrangements then proposed for Uganda (which proposals did not include the January 1958 changes) for six years from 1955. But, as already stated, even if it be assumed that the recommendation applied to the January, 1958 changes (a doubtful assumption), there is no evidence to show whether that recommendation was endorsed by Parliament, or whether it was or was not varied or abandoned by consent of the high-contracting parties in the eleven months which elapsed before the 1955 Agreement was signed. Accordingly, the White Paper, even if admissible, 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."

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The learned President's reference to "a stipulation relating to the Constitution of Buganda" is a reference to Article 11 of the Buganda Agreement, 1955, cited in paragraph 3 of this Case.

P.68. 1.3.

For these reasons the learned President held that the Appellant was not entitled to the first of the three declarations claimed by him.

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19. The learned President went on to consider the Appellant's claim to the second and third

P.68. 1.11.

declarations. He said that the argument here depended to a great extent on the proposition that the

Legislative Council after the January 1958 changes was not the Legislative Council referred to in the Second Schedule - a proposition to which he was not prepared to accede. He rejected a further argument that the Appellant's duties under Paragraph 5 of the Second Schedule were conditional upon there being no major changes in the Uganda Constitutional arrangements before 1961. If the field were that of contract - which he thought it was not - there would be no ground for implying such a term. Article 7(2) of the 1955 Agreement did not confer upon the Appellant any contractual right, and the obligations imposed upon him by paragraph 5 and the other paragraphs of the Second Schedule were obligations imposed upon him by law and which would not be discharged, whether the 1955 Agreement was performed according to its tenor or not.

P.68.11.28-
: 46.
P.69.11.46-
48.
P.70.11.
1-5.

20. The learned President found it unnecessary to decide whether the January 1958 changes were major changes or not.

P.70.11.
9-12.

The Respondent will submit that this appeal should be dismissed for the following (among other)

R E A S O N S

- (1) BECAUSE the Legislative Council of the Uganda Protectorate as constituted at the date of the issue of the Plaint was the Legislative Council referred to in the Second Schedule to the Buganda Agreement, 1955.
- 30 (2) BECAUSE the Appellant has not established that he was not bound or entitled to take the steps laid down in the Second Schedule for the purpose of electing Representative Members to represent Buganda in the Legislative Council of the Uganda Protectorate.
- 40 (3) BECAUSE the Appellant has not established that Legislative Council of the Uganda Protectorate requires to be reconstituted before there will be any effective procedure for electing Representative Members thereto.
- (4) FOR the reasons given in the judgment of Mr. Justice Bennett.

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(5) FOR the reasons given in the judgment of Sir
Kenneth O'Connor, President.

B. MacKENNA

D. A. GRANT

No. 11 of 1960

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN
AFRICA

B E T W E E N

THE KATI KIRO OF BUGANDA (Plaintiff)
Appellant

- and -

THE ATTORNEY GENERAL OF UGANDA
(Defendant)
Respondent.

C A S E F O R T H E R E S P O N D E N T

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