

*Privy Council Appeal No. 11 of 1960*

**The Katikiro of Buganda** - - - - - *Appellant*

v.

**The Attorney General** - - - - - *Respondent*

FROM

**THE COURT OF APPEAL FOR EASTERN AFRICA**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 24TH NOVEMBER, 1960**

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*Present at the Hearing:*

LORD MORTON OF HENRYTON  
LORD KEITH OF AVONHOLM  
LORD DENNING  
LORD HODSON  
MR. L. M. D. DE SILVA

[*Delivered by* LORD MORTON OF HENRYTON]

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The appellant is the plaintiff in this suit. He issued his plaint in the High Court of Uganda on the 25th June, 1958, claiming the following relief:—

“(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.

(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.

(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.

(4) Costs.

(5) Further or other relief.”

Bennett J. dismissed the suit and the Court of Appeal for Eastern Africa affirmed his decree.

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 each successive Kabaka 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 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.

(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.

(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.

(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 to give effect to the recommendations 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:—

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

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.

It is common ground between the parties that the two conditions laid down in Article 7 (1) of the Agreement of 1955 have at all times been fulfilled. Therefore, in the absence of valid reasons to the contrary, the Katikiro would be bound to carry out the provisions of paragraph 7 (2) of that Agreement and of Regulation 5 in the Second Schedule thereto.

Mr. Quass on behalf of the appellant based the appellant's claim to the three declarations set out in his plaint upon the following contentions:—

(1) Between 18th October, 1955 (the date of the Buganda Agreement) and 25th June, 1958, when the plaint was issued, certain changes were made in the constitution of the Legislative Council of the Uganda Protectorate. These changes were so fundamental that the Council bearing that name on 25th June, 1958 ought to be regarded as a different body from the Council bearing that name on the 18th October, 1955. Therefore the appellant was not bound to take any of the steps laid down in the Second Schedule to the Buganda Agreement for the purpose of electing Representative Members to represent Buganda in the former body. Alternatively,

(2) Having regard to the events leading up to the Buganda Agreement of 1955, and in particular to the matters set out in a White Paper (Cmd. 9320) presented by the Secretary of State for the Colonies to Parliament by command of Her Majesty in November 1954, the Second Schedule to the Buganda Agreement should be construed as coming into existence on the basis that there would be no major changes in the constitution of the Council prior to the year 1961. The changes already mentioned were major changes. Accordingly the basis for the Second Schedule is gone, and the appellant is no longer bound by it.

Before examining these contentions it is desirable to refer to certain stages in the constitutional history of Uganda. In June 1894 (following an agreement made in 1893) Uganda was placed "under the Protectorate of H.M. Queen Victoria" and, by the Buganda Agreement, 1894, made on behalf of Her Majesty and the then Kabaka, the Kabaka pledged himself to certain conditions.

By the Buganda Agreement, 1900 (Laws Vol. VI p. 12) made on behalf of Her Majesty and on behalf of the Kabaka, the relationship between Her Majesty's Government and the Kabaka, Chiefs and people of Buganda was further defined. This Agreement was extended by various supplementary agreements.

By the Uganda Order in Council, 1902, section 12, the Governor was made the Legislative authority for the Uganda Protectorate. By section 15 the High Court of the Uganda Protectorate was constituted.

By section 7 of the Uganda Order in Council, 1920 (Laws Vol. VI p. 99) a Legislative Council was constituted for the Protectorate, consisting of the Governor and such persons as His Majesty might direct by any Instructions under His Sign Manual and Signet. Legislative powers (subject to veto by the Governor and assent by the Governor on behalf of His Majesty to Bills) were given to the Legislative Council (Section 8), without prejudice to the power of the Crown to disallow Ordinances and to legislate by Order in Council (Section 9). By section 13, the Legislative Council was bound to observe Royal Instructions.

Royal Instructions were issued in 1920 (Laws Vol. VI p. 104). Under clause XV, the Legislative Council was to consist of the Governor, certain *ex officio* Members, and such official and unofficial Members as the Governor might from time to time appoint pursuant to Royal Instructions. By clause XXV the Governor was required to attend and preside at all meetings unless prevented by illness or other grave cause. By clause XXVI, all questions were to be decided by majority vote, and the Governor or Member presiding was given an original vote and a casting vote if upon any question the votes should be equal.

Thus the position was that from 1902 to 1920 the Governor was the legislative authority for the Protectorate. In 1920 a Legislative Council was constituted, presided over by the Governor in which he was given an original and a casting vote.

In December, 1953 (Legal Notice 314 of 1953) the Royal Instructions of 1920 were amended. A new clause was substituted for clause XV, providing that the Legislative Council of the Protectorate should consist

of (i) the Governor ; (ii) *ex officio* Members ; (iii) Nominated Members ; and (iv) Representative Members. A new clause XVA set out who the *ex officio* Members were to be. By a new clause XVB the Nominated Members were to be (a) such persons holding office in the public service and (b) such persons not holding such office “ who the Governor is satisfied will support Government policy in the Legislative Council when requested by him so to do ” ; as the Governor in pursuance of Royal Instructions might appoint. The Representative Members were to be such persons (not Official Members and not Nominated Members) as the Governor might in pursuance of Royal Instructions from time to time appoint.

In December, 1953, by section 4 of the Uganda (Amendment) Order in Council, 1953 (Legal Notice 317 of 1953), section 8 of the Uganda Order in Council, 1920, was replaced, the Legislative Authority now being made “ the Governor with the advice and consent of the said Legislative Council ”.

Their Lordships were informed from the Bar that the Representative Members were not appointed to represent geographical constituencies but were appointed on a racial or community basis, as follows:—14 Africans, 6 Europeans and 8 Asians, a total of 28 Representative Members—the Africans being balanced by the Europeans and Asians. There were in addition 8 *ex officio* Members and 20 Nominated Members.

The Uganda (Amendment) Order in Council, 1953, section 5, introduced a new section VIIIA in the Uganda Order in Council, 1920, giving the Governor reserved powers to legislate in the interests of public order, public faith or good Government, notwithstanding failure by the Legislative Council to pass the relevant Bill or motion, subject to report to, and **revocation by**, the Secretary of State.

Before November, 1954 (the date of the White Paper already mentioned), Her Majesty's Government had withdrawn recognition from H.H. the Kabaka, and he had left Uganda. A suit had been filed against the Government, judgment had been given and an appeal was pending. A conference presided over by a constitutional expert from England had deliberated at Namirembe near Kampala and had made constitutional proposals relating *inter alia* to the continued participation of Buganda in the Protectorate, a constitution for Buganda and the representation of Buganda in the Legislative Council of the Protectorate.

It is common ground that these events were matters of notoriety in Uganda and most of them are set out in the White Paper. The White Paper also contained “ Agreed Recommendations of the Namirembe Conference ” (Appendix A), “ Statement by the Governor ” (Appendix B) and “ Explanatory Memorandum issued by the Namirembe Conference ” (Appendix C). The White Paper was included in the Record and its contents were strongly relied on by Mr. Quass in support of his second contention already stated. Mr. McKenna for the respondent did not object to its being read *de bene esse* but he contended that it was not admissible in evidence.

Their Lordships will return to this subject later and will now pass on to the subsequent events.

On 19th May, 1955 (Legal Notice 122 of 1955) the Royal Instructions of 1920 (as amended in 1953) were again amended. A new clause was substituted for clause XV under which the members of the Legislative Council were to be (a) the Governor ; (b) three *ex officio* members ; (c) the nominated members ; and (d) the representative members. A new clause was substituted for clause XXV which provided *inter alia* : “ The Governor shall, so far as is practicable, preside at meetings of the Legislative Council ”.

The next event was the signing of the Buganda Agreement of 1955, and the declaration by the Governor (already mentioned) that the First and Second Schedules of the 1955 Agreement should have the force of law.

A further amendment to the Royal Instructions was made on the 13th April, 1956 (Legal Notice 88 of 1956). Clause XXV was again replaced and it was provided that the Governor should preside at the sittings of the Legislative Council and, in his absence, "such Member of the Council as the Governor may appoint" and in the absence of the Governor and of any Member so appointed, the senior *ex officio* Member present.

Their Lordships now come to the changes which Mr. Quass describes as "fundamental" or, if not fundamental, "major" changes. On 17th December, 1957 additional Royal Instructions were issued (Legal Notice 272 of 1957). These came into operation on 1st January, 1958 (Legal Notice 271 of 1957). By these, clause XV of the Royal Instructions was amended by providing 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 XVA was inserted reading as follows:—

*"The Speaker.* XVA (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."

There follow provisos enabling the Speaker to resign his office and giving the Governor power to revoke any appointment of a Speaker.

Clauses XXV and XXVI of the Royal Instructions were revoked and new clauses substituted which, so far as material, read:—

*"Presiding in the Council. Legislative* 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:

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

*Voting.* 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.

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

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

Their Lordships have thought it right to state these events in some detail, and in substantially the same form as they were stated by the learned President of the Court of Appeal for Eastern Africa, because they have some bearing on the question whether the changes made by the Royal Instructions of December, 1957, were either "fundamental" or "major".

Mr. Quass' first contention, already stated, can succeed only if these changes were so fundamental that the Council bearing the name of "the Legislative Council of the Uganda Protectorate" on 25th June, 1958, ought to be regarded as a different body from the Council bearing that name on the 18th October, 1955. In Counsel's second contention there are three steps, (i) the White Paper of November, 1954, is admissible in evidence for the purpose of construing the Uganda Agreement of 1955; (ii) the contents of the White Paper show that the Second Schedule to

the Uganda Agreement came into existence on the basis that there would be no major changes in the constitution of the Council prior to the year 1961 ; (iii) the changes made by the Royal Instructions of December, 1957, were "major" changes.

The changes which Mr. Quass invites their Lordships to regard as being either "fundamental" or "major" changes are first, that the Speaker would normally preside at the sittings of the Legislative Council instead of the Governor, and secondly that the Governor loses his original and casting vote.

It is to be observed that the powers of the Crown and the Governor respectively as regards legislation are left entirely unchanged. So too are the powers of the Council. As regard the conduct of business in the Council, the Governor will still preside when he has "occasion to be present" at any sitting, and the Speaker who will preside in his absence is to be appointed by the Governor and can be removed from his post by the Governor. In these circumstances there seems to be every reason to suppose that the business of the Council will be conducted on the same lines whether the Governor or the Speaker presides.

The loss of the Governor's two votes was counterbalanced by the appointment of two additional "nominated" members, and it will be remembered that nominated members are defined as being persons "who the Governor is satisfied will support Government policy in the Legislative Council when called upon to do so." See clause XV (b) of the Royal Instructions of 1920, inserted in December, 1953, by Legal Notice No. 314 of 1953 already mentioned. Thus, from a practical point of view, the balance of voting power in the Council was preserved.

Their Lordships find it quite impossible to regard these changes as being "fundamental" in any ordinary sense of the word. Still less can they regard the changes as amounting to the substitution of a new body for the Legislative Council as it existed before the changes came into force. Mr. Quass' first contention fails.

Turning to Counsel's second contention, it is to be observed that if the changes in question cannot properly be described as "major" changes in the constitution of the Council this contention also must fail. Viewing these changes in the light of the constitutional history of Uganda, as already briefly set out, and contrasting them with the important changes made from time to time, between 1920 and 1957, in the constitution of the Council, their Lordships think it would be a misuse of words to apply the word "major" to changes which have so little effect on the conduct of affairs in the Council and on the voting, and no effect at all on the legislative powers of the Crown, the Governor and the Council.

The result is that it becomes unnecessary to consider the first two steps in Mr. Quass' second contention ; but as these matters were fully considered in the Courts in Africa, and were fully argued on this appeal, their Lordships will state their views briefly upon each point.

The members of the Court of Appeal for Eastern Africa were unanimous in holding, first, that the rules to be applied in construing the Second Schedule to the Agreement of 1955 were the rules applicable to the construction of statutes, since that Schedule had been given the force of law, and secondly that the contents of the White Paper were not admissible in evidence for the purpose of construing the Schedule. Their Lordships agree with the decision of the Court of Appeal on each of these points. They find no ambiguity in the Second Schedule which would justify the admission of extraneous evidence. They think it right to add that even if the contents of the White Paper were given full consideration they would fall far short of establishing the second step in Mr. Quass' second contention. Their Lordships refrain from discussing this matter at length since they have already held that the changes made in December, 1957, were not major changes in the constitution of the Legislative Council. They desire, however, to call attention to two paragraphs in the Agreement

of 1955 which indicate that the obligations of the appellant under the Second Schedule were not conditional upon there being no major changes made in that constitution prior to the year 1961. First, in Article 7 (1) of the Agreement, already quoted, representation of Buganda in the Legislative Council is made subject to two express conditions. Their Lordships cannot doubt that the condition for which the appellant contends would also have been inserted in the Agreement if the parties had intended to impose it. Secondly, paragraph 11 of the Agreement is as follows :—

“ 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.”

This paragraph refers to the constitution of Buganda and not to the constitution of the Legislative Council of the Uganda Protectorate ; but if the parties had intended a similar prohibition to apply to the Legislative Council they would surely have expressed it in the Agreement, since the subject of major changes during the period in question was so fully in their minds.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the respondent, with one exception. On the 29th June, 1960, the respondent made an application for the appeal to be set down and heard forthwith. That application was refused by the Board, and the costs thereof were reserved. In their Lordships' opinion the appellant's costs of that application should be paid by the respondent. They will be set off against the general costs payable by the appellant to the respondent.



In the Privy Council

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THE KATIRO OF BUGANDA

v.

THE ATTORNEY GENERAL

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DELIVERED BY

LORD MORTON OF HENRYTON

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