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Judgment
15, 1965

Privy Council Appeal No. 56 of 1964

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT OF UGANDA AT
KAMPALA

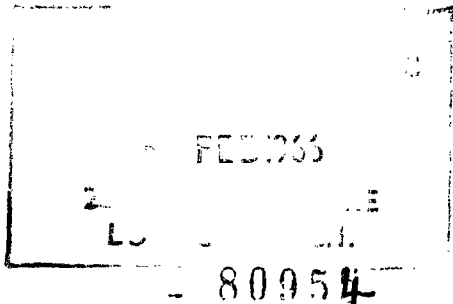
B E T W E E N :-

THE KABAKA'S GOVERNMENT
and YOWANA PETERO
KABUYE Appellants

- and -

THE ATTORNEY GENERAL OF
UGANDA and E. R. NORRIS
ESQ., the REFERENDUM
ADMINISTRATOR. Respondents

10.



CASE FOR THE RESPONDENTS

1. This is an appeal by the Plaintiffs by leave of the High Court of Uganda from the judgment of the High Court of Uganda at Kampala given on 30th October, 1964 the action having been heard by three judges in accordance with the Constitutional Cases (Procedure) Act of Uganda (the Honourable the Chief Justice, Sir Udo Udoma, the Honourable Mr. Justice Sheridan and the Honourable Mr. Justice Jeffreys James) whereby the action was dismissed with costs. Record
20. In the action the first Appellant claiming to be interested on behalf of a large number of Baganda alleged to be in the same position as the second Appellant, and the second Appellant claiming to be entitled in accordance with Section 44 of the Constitution of Uganda, claimed a declaration that the Referendum (Buyaga and Bugangazzi) Act 1964 passed by the Legislative Assembly of Uganda or alternatively Section 3 thereof and the Regulations made thereunder were ineffective, an injunction to restrain the Respondents from holding the referendum under the said Act and certain other or ancilliary relief as set out in the prayer of the plaint.
30. The State of Uganda (being the territories formerly comprised in the Uganda Protectorate) was created as an independent state within the Commonwealth by the Uganda Independence Act 1962 and by the Uganda (Independence) Order in Council, 1962.
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The Constitution of Uganda is set out in the Schedule to the said Order in Council and the constitutions of the various Federal States hereinafter mentioned are set out in sub-schedules to the said main schedule.

4. By paragraph 2 of the Constitution of Uganda (being the Schedule to the said Order in Council as aforesaid) Uganda consists of Federal States, Districts, and the territory of Mbale. The Federal States are the Kingdom of Buganda, the Kingdom of Ankole, the Kingdom of Bunyoro, the Kingdom of Toro and the territory of Busoga. 10.

5. The territory of Uganda includes the county of Buyaga and the county of Bugangazzi (which said counties are commonly known as "the lost counties") and which have been the subject of dispute as to which of the Federal States (if any) they ought to belong. In order that the said matter should be finally and peacefully determined, Section 26 of the said Order in Council provided as follows :- 20.

"1) In order to ascertain the wishes of the inhabitants of the County of Buyaga and of the County of Bugangazzi as to the territory of Uganda in which each of these counties should be included a referendum shall be held in accordance with the following provisions :-

(a) the referendum shall take place on such date, not being earlier than 9th October 1964, as the National Assembly may, by resolution appoint; 30.

(b) the persons entitled to vote in the referendum in a county shall be the persons entitled to vote in any constituency established in that county under section 46 of the Constitution of Uganda;

(c) the questions submitted to a voter in the referendum in a county shall be such as to ascertain whether the voter wishes the county -

(i) to form part of the Kingdom of Buganda; or 40.

(ii) to form part of the Kingdom of Bunyoro; or

(iii) to be established as a separate District of Uganda;

(d) subject to the foregoing provisions of this sub-section, the referendum shall be organised and conducted in such manner as Parliament may prescribe." The said reference to "Parliament" is to the Parliament of Uganda.

5. The voting constituencies which were to be set up in accordance with Section 46 of the Constitution as aforesaid were duly set up and no issue arises in respect thereof in this action.

6. Section 44 of the Constitution provides as follows :-

"A person who -

(a) has attained the age of 21 years;

(b) is a citizen of Uganda; and

(c) has been resident in Uganda for six months immediately preceding the date on which he applies for registration as a voter, shall, unless he is disqualified for registration as a voter under any law, be entitled, upon making his application in that behalf at such time and in such manner as may be prescribed by Parliament, to be registered as a voter for the purpose of elections of elected members of the National Assembly."

7. On 11th September 1964 the National Assembly (being the Parliament of Uganda) passed the Referendum (Buyaga and Bugangazzi) Act 1964 which made provision for the holding of the said referendum pursuant to Section 26 of the said Order in Council as aforesaid. Section 3 of the said Act provided as follows :-

"1). The register of voters for each polling division in the county of Buyaga and in the County of Bugangazzi, as the case may be, for the elections in 1962, of elected members of the National Assembly shall be the register of voters for the purpose of this referendum; and accordingly every person whose name is included in that register shall be entitled to cast a vote in that polling division in favour of one or other of the alternatives.

2). For the avoidance of doubts, it is hereby

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declared that the register of voters referred to in the preceding sub-section is the same register as was used for the general election in 1962 for the election of the elected members of the Lukiiko of Buganda."

The Lukiiko is the Legislative Assembly of the Kingdom of Buganda and under section 24 of the Constitution of Buganda it is expressly provided that the register of electors thereof shall be the same register as that used for the election to the National Assembly. 10.

8. By Section 30(5) of the said Order in Council it is provided that an Act of Parliament so far as it makes any alteration to the said Section 26 of the said Order in Council shall not come into effect unless the Kabaka's Government and the Government of the Kingdom of Bunyoro have each consented that the Act should have effect.

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9. By the Plaint in this action dated 6th October 1964 it was claimed by the Appellants that the Referendum Act or alternatively Section 3 thereof and the Regulations made thereunder, were of no effect on the ground that the said Section 3 conflicts with Section 26 (1) (b) of the said Order in Council, in that Section 26 (1) (b) on its proper interpretation requires that the persons entitled to vote in the said referendum should be the persons entitled to vote in any constituency as aforesaid as at the date of the holding of the referendum, whereas under the said Section 3 of the Referendum Act only persons included in the said register established in 1962 were entitled to vote and that as the Kabaka's Government had not consented that the said Act should have effect, the said Act or alternatively Section 3 thereof never came into effect. By their Defence dated 14th October 1964 the Respondents made no admission as to the right of either Appellant to bring the action and further pleaded that the said Referendum Act and the Regulations made thereunder were at all times valid and effective in law and did not make any alteration to Section 26 of the said Order in Council and were not inconsistent therewith; that the Register of Voters in force at the time the Referendum Act was passed, when the Regulations thereunder were made and when the referendum was appointed to be held, was the Register duly compiled under and in accordance with the National Assembly (Elections) Ordinance 1957 which was the Register which was used for the election of the elected members of the Lukiiko of 20. 30.

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Buganda at the General election of the Lukiiko held in 1962; that Part II of the said Ordinance was a prescription by Parliament as to the time and manner of registration of voters in accordance with Section 44 of the Constitution of Uganda.

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10. It was proved by evidence at the trial that the said register of electors referred to in Section 3 of the said Act was the register currently in force when the National Assembly passed a resolution in accordance with the said Referendum Act fixing the date (4th November 1964) for the holding of the referendum and when the Act itself was passed and that no other electoral register had since been compiled or ordered by the Electoral Commission.

20. 11. The only evidence called on behalf of the Plaintiffs in the action was that of the second Plaintiff personally who gave evidence that he formerly lived and was registered as a voter at Kapeka which is outside the territory of the said two counties and that he had moved into Buyaga County on 20th April 1963 and he further gave evidence of purported attempts by him on 24th September 1964 and 12th October 1964 (the same month as the trial) to be registered as a voter in the said county and which attempts were abortive. In their judgment however the learned trial judges stated that the said Plaintiff had failed to satisfy them that he did at any time apply to any registration officer in charge of the appropriate polling division within which he was living to have his name entered on the Register of Voters for such polling division and that his application was refused. The non-admission in the Defence that the first Plaintiff was entitled to bring the action was however waived by the Attorney General.

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40. 12. The only evidence called on behalf of the Defendants was that of Mr. Samuel Byoga Rutega, the Secretary to the Electoral Commission who produced the said current electoral register in respect of the said two counties and who gave evidence as aforesaid in relation to the same.

Pages 23 to 25.

13. The following submissions were made by Counsel on behalf of the Plaintiffs viz:

(i) That having regard to the fact that Section 26 (1) (a) of the said Order in Council directed that the referendum should

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be held not earlier than 9th October 1964 (being 2 years from the coming into operation of the said Order) it was the intention of the said Order that the fate of the said Counties should be decided in accordance with the wishes of the people who were living there at the date the referendum was held.

(ii) That on the proper construction of Section 26 (1) (b) of the said Order the words "persons entitled to vote" mean "persons possessing the qualifications of a voter" i.e. complying with (a) (b) and (c) of Section 44 of the Constitution, whether or not they were actually registered as voters. 10.

(iii) That in the alternative, the effect of Section 9 (2) of the National Assembly Electors Ordinance 1957, as amended, on its proper construction, is that, in the circumstances set out in the said sub-section, a person who was registered as a voter in a place in Uganda outside the said counties on 1st November 1961 but has since removed into the said counties was entitled to apply to have his name transferred from the electoral register for the polling division of his former place of residence to the register of the polling division of his new place of abode, but that such a person would nevertheless be excluded from voting in the referendum by the effect of Section 3 of the Referendum Act. 20. 30.

(iv) That a special register of voters ought to have been prepared for the purpose of the referendum.

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to 41.

14. In its judgment dismissing the action (to which judgment the Respondents will refer for its full terms) the Court held (inter alia):-

(i) That in construing the words "persons entitled to vote" in Section 26 (1) (b) of the said Order in Council the whole of Section 44 of the Constitution must be considered and that therefore the persons legally entitled to vote must be registered voters. 40.

(ii) That it might well be that persons whose names were on the Register of Voters on 1st November 1961 and who had not been inhabitants of the two Counties but were prepared to give up their residences outside the two counties,

- could have applied and been registered under Section 9 (2) of the National Assembly (Elections) Ordinance 1957 and would have been entitled to vote in the referendum, but as on his own admission the second Plaintiff was not on the Register of Voters on 1st November 1961, it was unnecessary for the purpose of the judgment to inquire into that issue and that in the absence of evidence and further argument the Court refrained from expressing any view on the submission of the Attorney General that Section 9 (2) of the said Ordinance was a temporary provision the force of which had been spent.
- 10.
- (iii) That the Court did not agree with the submission on behalf of the Plaintiff that a special register should have been compiled for the purpose of the Referendum.
- 20.
- (iv) That the Referendum Act and the Regulations made thereunder were of full force and effect and were not in any way inconsistent with the Conditions of Uganda.
15. The Respondents respectfully submit that Section 26 (1) of the said Order in Council did not contemplate that the inhabitants of the two counties whose wishes were to be ascertained were to be the inhabitants as at the date of the holding of the referendum. Apart from the fact of the necessity for the preparation of an electoral register, which would make such a situation impracticable, it is submitted that it was the intention of the said Order to ascertain as nearly as practically possible the wishes of the then existing inhabitants after allowing a reasonable period for "cooling off" and for the working of the new Constitution, and not to facilitate the flooding of the said counties with new voters.
- 30.
16. The National Assembly (Elections) Ordinance 1957 (as amended) is by virtue of Section 4 of the said Order in Council a prescription by Parliament within the meaning of Section 44 of the Constitution, notwithstanding that the said Ordinance was passed before the Constitution was created and the right to vote is governed by the terms of the said Ordinance.
- 40.
17. The Respondents submit that the phrase "persons

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entitled to vote" in Section 26 (1) (b) of the said Order in Council means the persons entitled to vote in accordance with the electoral law of Uganda, which is in fact contained in the National Assembly (Elections) Ordinance 1957 (as amended) Section 2 of which defines a voter as "a person qualified to be registered as a voter at an election who is so registered and at the time of an election is not disqualified from voting". It is further submitted that Section 44 of the Constitution does not create a right to vote but merely defines the circumstances which give a person the right to apply for registration as a voter. Alternatively, it is submitted that if Section 44 of the Constitution does create a right to vote, on the proper construction thereof such right to vote only arises on registration and does not exist prior thereto. 10.

18. The compilation of a new register of electors is the responsibility and is at the discretion of the Electoral Commission which was created by Section 45 of the Constitution and which is independent of Parliament. Section 11(4) of the National Assembly (Elections) Ordinance 1957 (as amended) provides that the Register of Voters in existence on 9th October 1962 shall continue to have effect until altered or replaced under the Ordinance. The said Register of Voters was still in force and had not been revised or altered or replaced at the time of the passing of the Referendum Act or at the time of the making of the Regulations thereunder or at the time of the resolution fixing the date for the taking of the referendum. 20. 30.

19. As to the contention of the Appellants that by virtue of Section 9 (2) of the said Ordinance persons registered as voters in another district would in the circumstances therein referred to have been entitled to be put on the Register of Voters after removal into one of the two Counties but would nevertheless have been debarred from voting under the Referendum Act, the Respondents submit:- 40.

(i) That Section 9 (2) on its proper construction was a temporary provision inserted by way of amendment in the year 1961 to enable persons to transfer their registration as voters during the compilation of the new register in 1962 and is limited by Section 11 (4) of the said Ordinance which provides that the Register of Voters on 9th October, 1962 shall continue to have effect until altered or replaced under the Ordinance. In the premises it is submitted that there was 50.

no provision for such transfers after 9th October, 1962.

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10. (ii) In the alternative if (contrary to the Respondents' contention) any such transfers were possible after 9th October 1962 on the proper construction of the said Ordinance, then any such transfer would have given the transferred voter a right to vote in the referendum. It is submitted that upon the proper construction of Section 3 of the Referendum Act the register of voters therein referred to includes any voters who since the elections in 1962 may have been transferred thereto in accordance with Section 9 (2) of the said Ordinance.

20. The Respondents respectfully submit that this appeal should be dismissed with costs for the following (among other)

R E A S O N S :

20. (1) For the reasons stated in the judgment of the High Court of Uganda.
- (2) Because at the respective times of the passing of the Referendum Act and the making of the Regulations thereunder and the passing of the resolution fixing the date for the holding of the referendum and at all material times the only current register of voters was the one referred to in Section 3 of the said Act.
30. (3) Because the words "persons entitled to vote" contained in Section 26 (1) (b) of the said Order in Council on their proper construction mean the persons entitled to vote in accordance with the electoral law of Uganda.
- (4) Because on the proper construction of section 2 of the said Ordinance (as amended) and on the proper construction of Section 44 of the Constitution no person is entitled to vote unless he is included on the current Register of Voters.
40. (5) For the reasons set out in paragraph 18 hereof.

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(6) Because in the premises the Referendum Act was a proper implementation of Section 26 (1) of the said Order in Council and was in accordance with the Constitution of Uganda.

(7) Because Section 26 (1) (d) of the said Order in Council expressly provided that subject to the foregoing provisions thereof, the referendum should be organised and conducted in such manner as Parliament might prescribe.

P. GOODENWAY

No 56 of 1964

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- and -

THE ATTORNEY GENERAL OF UGANDA
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REFERENDUM ADMINISTRATOR

CASE FOR THE RESPONDENTS.

EDWIN COE & CALDER WOODS,
~~7 New Court,~~ ^{7, Felby}
61/62 Lincoln's Inn, W.C.2.