

Privy Council Appeal No. 56 of 1964

The Kabaka's Government and another - - - - *Appellants*

v.

The Attorney General of Uganda and another - - - *Respondents*

FROM

THE HIGH COURT OF UGANDA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH
APRIL, 1965

Present at the Hearing:

VISCOUNT DILHORNE

LORD MORTON OF HENRYTON

LORD HODSON

LORD PEARCE

LORD UPJOHN

(Delivered by VISCOUNT DILHORNE)

In this appeal from the High Court of Uganda the Kabaka's Government and Mr. Yowana Pertero Kabuye seek to challenge the validity of a referendum held to determine 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.

Section 26 (1) of the Uganda (Independence) Order in Council 1962 (which came into force immediately before the 9th October 1962) prescribed that:—

- (a) the referendum should take place on such date, not being earlier than the 9th October 1964, as the National Assembly might, by resolution appoint;
- (b) the persons entitled to vote in the referendum in a county should be the persons entitled to vote in any constituency established in that county;
- (c) the questions submitted to a voter in the referendum in a county should be such as to ascertain whether the voter wished the county:—
 - (i) to form part of the Kingdom of Buganda; or
 - (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 the referendum should be organised and conducted in such manner as the Parliament (of Uganda) might prescribe.

The National Assembly appointed the 4th November 1964 as the date for the holding of the referendum.

Section 3 of the Referendum (Buyaga and Bugangazzi) Act reads as follows:

“(1) The register of voters prepared 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 purposes 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 declared that the register of voters referred to in the preceding subsection 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."

It was contended on behalf of the appellants that on the proper interpretation of s.26 (1) (b) of the Independence Order in Council, the persons entitled to vote in the referendum were those entitled to vote at the date of the referendum in any constituency established in either county under s.46 of the Constitution; that s.3 of the Referendum Act did not provide for that but only for voting by those whose names were included in the registers for the elections in 1962; and that the Referendum Act or s.3 thereof thus constituted an alteration of s.26 of the Independence Order in Council and so was, by virtue of s.30 (5) of that Order in Council, ineffective without the consent of the Kabaka's Government which had not been given.

The respondents, the Attorney-General of Uganda and Mr. E. R. Norris the Referendum Administrator, did not dispute that those entitled to vote in the referendum on the 4th November 1964 were those then entitled to vote in the constituencies in the two counties, but asserted that the Referendum Act did not have the effect alleged, that it did not alter s.26 of the Independence Order in Council and consequently the consent of the Kabaka's Government was not required for the Act to be effective.

It was argued for the appellants that those 'entitled to vote' were those qualified to vote by s.44 of the Constitution of Uganda set out in the Schedule to the Independence Order in Council. That section reads as follows:—

"A person who

(a) has attained the age of twenty-one 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 his making 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 purposes of elections of elected members of the National Assembly."

Their Lordships cannot accept the appellants' contention that 'entitled to vote' in s.26 of the Independence Order in Council has the same meaning as 'qualified to vote'. S.44 of the Constitution states what qualifications are necessary for registration as a voter. Those entitled to vote are those qualified and whose names are included in the register in force at the time of the election.

S.3 of the Referendum Act only made provision for voting by those on the registers in force in 1962, with the result that those who became qualified after those registers came into force and before the 4th November 1964 were not able to vote in the referendum.

S.11 (2) of the Legislative Council (Elections) Ordinance 1957 reads as follows:—

"A register of electors shall be compiled for each polling division and shall come into force on such date as the Governor shall appoint and shall remain in force until the register of electors next compiled comes into force."

S.11 (2) of the National Assembly (Elections) Ordinance 1957 (revised as at the 1st July 1964) similarly provides that a register of voters which has come into force 'shall remain in force until the register of voters next compiled comes into force'; and s.11 (4) of this Ordinance expressly provides that registers of voters in existence on the 9th October 1962 should continue to have effect until altered or replaced under this Ordinance.

No new registers had come into force for the polling divisions in the two counties by the 4th November 1964 and so the persons entitled to vote in

the constituencies in those counties on that date were the persons who were qualified to vote and whose names were included in the registers in force for the elections of 1962.

In their Lordships' opinion the Referendum Act, by prescribing that the register of voters prepared for each polling division in these counties for the elections in 1962 should be the register of voters for the purposes of the referendum, did no more than prescribe that the persons entitled to vote in the referendum on the 4th November 1964 should be those entitled to vote in the constituencies in the two counties at that time. The Act thus complied with and did not alter or restrict s.26 of the Independence Order in Council.

If a new register had been brought into force after 1962 and before the 4th November 1964, then there would have been great force in the appellants' contention. That, however, did not happen. While it is true that those who qualified for registration after the 1962 registers came into force were not able to vote in the referendum, it is also true that they would not have been entitled to vote in an election on the 4th November 1964. No matter how long or how short the period may be, no person who becomes qualified to vote between the date on which the register comes into force and polling day is entitled to vote.

The appellants further contended that it was implicit in s.26 of the Independence Order in Council that there should be a new register compiled and brought into force before the date of the referendum, so as to enable those who qualified for registration after 1962 to secure registration and to vote. In their Lordships' opinion no such inference is to be drawn from s.26. All that s.26 (1) (b) required was that the persons entitled to vote in the referendum should be those then entitled to vote in the constituencies in the two counties and this was secured by the Referendum Act.

The appellants also advanced two arguments based on s.9 of the National Assembly (Elections) Ordinance 1957. S.9 (1) of this Ordinance states that any person entitled to be registered as a voter should be entitled to have his name entered on a register of voters in the polling division in which he normally resides.

The appellants put forward as an alternative argument the contention that s.9 (1) enabled a person who was qualified to get his name added to the register in force for the polling division in which he normally resided. They argued that the Referendum Act s.3 (2) (which stipulated that the registers to be used in the referendum were to be the same registers as were used in the general election in 1962 for the election of electors of the Lukiiko) prevented a person from getting his name added to a register; and so the Referendum Act restricted the operation of s.26 of the Independence Ordinance.

Their Lordships are unable to accept the appellants' argument as to the interpretation to be placed on S.9 (1). The purpose of a register of voters is to enable those in charge of the polling stations to discharge their duties and the register is their guide as to the persons to whom they may *prima facie* issue ballot papers. It is not necessary to enlarge on the difficulties which would arise if, between the date of the register coming into force and polling day, it was possible for newly qualified persons to get their names added to the register. In their Lordships' view, if it had been the intention that persons should be entitled to get their names added to the register after it had come into force, the language of s.9 (1) would have been very different. In their view all that s.9 (1) does is to secure that those qualified for registration as voters shall have their names put on the register of voters in the polling divisions in which they normally reside.

The second argument advanced by the appellants on s.9 was that the right to transfer from one register to another given by that section available to voters in an election was not available to voters in the referendum as the Referendum Act stipulated that the same registers should be used as were

used in the general election in 1962 for the election of members of the Lukiiko. So, it was argued, the Referendum Act restricted the rights given by s.26 of the Independence Order in Council.

S.9 (3) gave such a right to someone temporarily living in a polling division at the time of a general election whose name was entered on the register of voters for another polling division. No right given by this subsection could have been exercised between the 1962 elections and the date of the referendum.

S.9 (2) gave a more limited right of transfer. Any person whose name was on the register of voters in force on the 1st November 1961 and who had ceased to reside in the polling division in which he was registered was given the right to have his name entered on the register for the polling division within which he was then living.

If, after the 1962 elections, persons had availed themselves of this right and had had their names included in the registers for the two counties so that they could vote in an election taking place in the two counties, then it could have been argued with considerable force that the registers in force for voting in any such constituency were not the same as those used for the general election of 1962.

However the Record does not show that any such additions were made to the registers for the two counties since the 1962 elections. Mr. Rutega, the Secretary of the Electoral Commission who gave evidence for the Defence, said that he did not know of any case where a man who had moved from one constituency to another had applied for transfer to another register.

In the absence of evidence of such additions, there is no ground for concluding that the registers used for the referendum were not in fact the registers used for the general election in 1962, and the registers which would have been used for an election in a constituency in the two counties at the date of the referendum.

The appellants sought to put forward a further ground on which they contended that the Referendum Act failed to comply with the requirements of the Independence Order in Council. This ground had not been put forward in the pleadings or raised during the hearing in the High Court of Uganda. They asked that in the exercise of their discretion their Lordships should allow them to put this ground forward, and urged that it was a matter which turned solely on the interpretation of the statutes and Ordinances and that, in view of the provisions of the Independence Order in Council for the settlement of the long standing dispute in relation to the two counties, it was specially desirable that they should not be precluded from doing so.

Before deciding whether to exercise their discretion as requested, discretion that should be exercised only in very exceptional circumstances, their Lordships felt that it was desirable that they should be informed as to the ground sought to be put forward.

The appellants said that they sought to argue that the registers of voters prescribed by the Referendum Act were not registers of voters qualified to vote by virtue of s.44 of the Constitution. That Constitution came into effect immediately before the 9th October 1962 (The Independence Order in Council s.1 (2) and s.3); and thereafter the only persons qualified to vote in a constituency election and so in the referendum were those qualified by s.44 for registration. The registers of voters drawn up for the general election in 1962 were registers of voters with different qualifications and so the Referendum Act ran contrary to s.26 of the Independence Order in Council and the Constitution of Uganda.

S.2 (2) of the Uganda (Electoral Provisions) Order in Council 1961 laid down the qualifications for registration as a voter for the purposes of elections to the National Assembly. It read as follows:—

“ Every person

- (a) who has attained the age of twenty-one years: and
- (b) who is a British subject or a British protected person or not being a British subject or a British protected person has been resident in the

Uganda Protectorate for five years out of the eight years immediately preceding the date on which he applies for registration as a voter : and

- (c) who has been resident in the Uganda Protectorate 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 his making application in that behalf at such time and in such manner as may be prescribed by any law, to be registered as a voter for the purpose of elections to the proposed National Assembly.”

The registers for voters for the elections in 1962 were registers of those possessing these qualifications. The appellants sought to contrast the qualifications laid down by this Order in Council with those prescribed by s.44 of the Constitution. They pointed out that under that section only citizens of Uganda were entitled to be registered as voters; and that British subjects, British protected persons and those who had been resident in the Protectorate for five out of the eight years immediately preceding the date of application for registration were not entitled under s.44 to be registered as voters.

The Attorney-General of Uganda drew their Lordships' attention to s.10 of the Legislative Council (Elections) Ordinance 1957. The material parts of that section read as follows:—

“ No person shall be entitled to vote at an election notwithstanding that his name has been entered on a register of electors who:—

- (a) is disqualified from registering as an elector under any law for the time being in force in the Protectorate relating to offences connected with elections, or

.”

S.10 of the National Assembly (Elections) Ordinance 1957 (revised as at the 1st July 1964) differed from this part of s.10 of the Legislative Council (Elections) Ordinance in that the words ‘ the Protectorate ’ had been changed to ‘ Uganda ’ and the words ‘ relating to offences connected with elections ’ had been repealed in 1963.

The Attorney-General said that the purpose of the repeal of the words ‘ relating to offences connected with elections ’ was to make it possible to refuse a ballot paper to someone who, even though on the register, was not qualified to vote with the result that officials at the polling stations would refuse to issue ballot papers to those whose registration cards did not show them to be citizens of Uganda.

It is inherently improbable that those responsible for the passage of the Referendum Act 1964 should not have been aware of s.44 of the Constitution and also of the fact that the registers for the 1962 election were compiled on a different basis to those to be made after the Constitution came into force; and bearing in mind the amendment to s.10 referred to above, it appears that provision was made to secure that those voting in the referendum should be those on the 1962 registers qualified to vote under s.44 of the Constitution.

The appellants sought to contend that a distinction was to be drawn between ‘ disqualification ’ and ‘ non-qualification ’ and sought to contend that those on the registers not qualified to be registered under s.44 were not disqualified from voting by s.10. Bearing in mind that those qualified for registration for the 1962 elections were, unless they were citizens of Uganda, deprived of their right to vote by s.44, it is not inappropriate to describe them as having become disqualified. Their Lordships do not think that the restricted interpretation of s.10 for which the Appellants contended, is a correct interpretation of that section.

For these reasons their Lordships do not consider that the appellants have established a *prima facie* case for their contention that the effect of the Referendum Act was to enable persons not qualified under s.44 to be registered as voters to vote in the referendum.

Their Lordships for the reasons given have humbly advised Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

In the Privy Council

THE KABAKA'S GOVERNMENT
AND ANOTHER

v.

THE ATTORNEY GENERAL OF UGANDA
AND ANOTHER

DELIVERED BY
VISCOUNT DILHORNE

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