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Judgments
15, 1965

IN THE PRIVY COUNCIL

No. 56 of 1964

FEB 1965

ON APPEAL

25
LONDON, ENGLAND

FROM THE HIGH COURT OF UGANDA

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B E T W E E N:

(1) THE KABAKA'S GOVERNMENT and
(2) YOWANA PETERO KABUYE Appellants

- and -

10 (1) THE ATTORNEY-GENERAL OF UGANDA and
(2) E. R. NORRIS, ESQ., THE REFERENDUM
ADMINISTRATOR Respondents

CASE FOR THE APPELLANTS

Record

1. This is an appeal from a decree, dated the 30th October, 1964, of the High Court of Uganda (Udoma, C.J., Sheridan and Jones, JJ.), dismissing an action in which the Appellants claimed a declaration that the Referendum (Buyaga and Bugangazzi) Act, 1964 and any regulations purportedly made thereunder were ineffective, and others consequential relief. p¹/₂42

20 2. The following are the relevant legislative provisions: UGANDA (INDEPENDENCE) ORDER IN COUNCIL, 1962.

3. Subject to the provisions of this Order, the Constitution of Uganda set out in the Schedule to this Order shall come into effect in Uganda at the commencement of this Order:

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30 26. (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 those counties should be included a referendum shall be held in accordance with the following provisions:

(a) The referendum shall take place on such date,

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not being earlier than 9th October 1964, as the National Assembly may, by resolution, appoint;

(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 -

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(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 of this subsection, the referendum shall be organised and conducted in such manner as Parliament may prescribe.

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30. (1) Subject to the provisions of this section, Parliament may alter any of the foregoing provisions of this Order or of this section.

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(5) An Act of Parliament so far as it makes an alteration to section 26 or this subsection of this Order 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.

CONSTITUTION OF UGANDA.

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1. This Constitution is the supreme law of Uganda and, subject to the provisions of sections 5 and 6 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

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44. 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,

10 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.

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46. (1) Uganda shall be divided into as many constituencies as there are elected members of the National Assembly in such manner as the Electoral Commission, acting with the approval of the National Assembly signified by resolution, may prescribe.

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REFERENDUM (BUYAGA AND BUGANGAZZI) ACT, 1964

20 1. (1) There shall be a referendum in the county of Buyaga and in the County of Bugangazzi for the purposes of ascertaining which of the following alternatives would be preferred by the inhabitants of the county of Buyaga and of the county of Bugangazzi, namely,

- a) that the county of Buyaga or the county of Bugangazzi, as the case may be, shall form part of the Kingdom of Buganda; or
- 30 b) that the county of Buyaga or the county of Bugangazzi, as the case may be, shall form part of the Kingdom of Bunyoro; or
- c) that the county of Buyaga or the county of Bugangazzi, as the case may be, shall be established as a separate District of Uganda.

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2. (1) There shall be a referendum Administrator and two Referendum Assistant Administrators.

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3. (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 sub-section is the same register as was used for the general election in 1962 for the election of elected members of the Lukiiko of Buganda.

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NATIONAL ASSEMBLY (ELECTIONS) ORDINANCE, 1957

2. In this Ordinance unless the context otherwise requires -

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"voter" means 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.

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9. (1) Subject to the provisions of section 10 of this Ordinance, any person entitled to be registered as a voter shall be entitled to have his name entered on a register of voters in the polling division in which he normally resides.

(2) Any person whose name was on a register of voters in force on the 1st day of November, 1961, and who, since his name was placed on that register, has ceased to reside in the polling division in which he was registered, shall, on application to the registration officer in charge of the polling division within which he is living, be entitled to have his name entered on the register for such polling division.

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(3) Any person who by reason of change of employment or place of employment is temporarily

living in a polling division at the time of a general election, if he can satisfy the registration officer in charge of such division that his name is entered on the register of voters for another polling division, which has been published under the provisions of section 15 of this Ordinance, shall, on application to such registration officer, be entitled to have his name entered, for the purpose of such general election only, on the register of the polling division within which he is temporarily living.

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(4) No application made under the provisions of subsection (3) of this section shall be granted unless it is supported by a certificate from the applicant's employer that the applicant is required by reason of his employment to reside in the polling division in respect of which the application is made. For the purposes of this subsection "employer" shall be deemed to include the head of a Government department or the head of any department of the Kabaka's Government, the Government of a Federal State or the Administration of a District.

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(5) No application shall be made under the provisions of sub-section (2) or (3) of this section after nomination day during a general election.

(6) Whenever a registration officer enters the name of any person on a register pursuant to the provisions of sub-section (2) of this section he shall cause the name of such person to be deleted from any other current register on which it is entered and whenever a registration Officer enters the name of any person on a register for the purposes of a general election pursuant to the provisions of subsection (3) of this section, he shall cause the name of such person to be deleted from any other current register on which it is entered during the period of the general election.

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(7) A person who is a patient in any establishment maintained wholly or mainly for the reception of persons, suffering from a mental illness or of mental defectives, or who is detained in legal custody, at any place, shall not by reason thereof be treated as normally residing in the polling division in which such establishment or place is situated.

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11. (1) In each constituency there shall be compiled in such manner and on such occasions as the Electoral Commission directs registers of voters showing all persons entitled to vote at elections in that constituency.

(2) A register of voters shall be compiled for each polling division comprised within a constituency and shall come into force on such date as the Electoral Commission by notice in the Gazette shall appoint and shall remain in force until the register of voters next compiled comes into force.

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(3) If after the first register of voters has been compiled for any polling division a new register has not been compiled when and if required the register of voters in force when the new register should have come into force shall continue as the register for such division.

(4) Registers of voters in existence on the 9th October, 1962, shall continue to have effect until altered or replaced under this Ordinance.

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3. The Plaintiff was filed in the High Court of Uganda on the 6th of October, 1964. It stated that the first Appellants were interested on behalf of a large number of Baganda who were in the same position as the second Appellant, namely, they were entitled in accordance with section 44 of the Constitution of Uganda (hereinafter called "the Constitution") to vote in the elections for members of the National Assembly for constituencies in the counties of Buyaga and Bugangazzi, but were not entitled to vote in the Referendum proposed under the Referendum (Buyaga and Bugangazzi) Act, 1964 (hereinafter called "the Referendum Act"). The second Appellant resided at an address in the county of Buyaga, and had resided there since the 20th April, 1963. He was a citizen of Uganda, aged 47, and on the 28th of November, 1961 had been registered under section 44 of the Constitution as a voter in the constituency of Kapeka, which was not in either the County of Buyaga or the County of Bugangazzi. The Plaintiff then set out the relevant legislative provisions, and stated that the Respondents intended to hold a referendum under the Referendum Act, and regulations made under that Act, on the 4th November, 1964.

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4. It was contended in the Plaintiff that section 26(1)(b) of the Uganda (Independence) Order in Council, 1962 required that the persons entitled to vote

in the referendum should be the persons entitled at the date of the referendum to vote in any constituency established in either the County of Buyaga or the County of Bugangazzi under section 46 of the Constitution. Under section 3 of the Referendum Act, the persons entitled to vote in the referendum were not the persons entitled at the date of the referendum to vote in such constituencies, but the persons whose names were included in the register of voters in 1962. The Referendum Act, or alternatively section 3 of it, therefore constituted an alteration of section 26 of the Order in Council. Since the first Appellants had not consented that the Referendum Act should have effect, it followed that the Referendum Act, or alternatively section 3 of it, by virtue of section 30(5) of the Order in Council, had not come into effect. The appellants claimed a declaration that the Referendum Act and any regulations purportedly made under it were ineffective; a declaration that section 3 of the Referendum Act was ineffective or ultra vires the Constitution; an injunction to restrain the Respondents and the Government of Uganda from holding, or preparing to hold, a referendum under the Referendum Act or regulations purportedly made under it; and a declaration that the second Appellant was a person entitled to vote in a constituency established in the County of Buyaga under section 46 of the Constitution, within the meaning of section 26(1)(b) of the Uganda (Independence) Order in Council, 1962.

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5. By their Defence, dated the 14th October, 1964, the Respondents admitted that the second Appellant was not a person entitled to vote in the referendum under section 3 of the Referendum Act, but denied the other allegations about him made in the Plaint. They admitted that they intended to hold a referendum under the Referendum Act, and the regulations purportedly made under it, on the 4th November, 1964. They alleged that the Referendum Act and the regulations made under it were valid and effective and made no alteration of section 26 of the Order in Council. They alleged further that the register of voters in force at the time the Referendum Act was passed, the time when the regulations were made under it and the time when the referendum was appointed to be held was the register duly compiled under the National Assembly (Elections) Ordinance, 1957, and Part II

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Record

of that Ordinance was a prescription by Parliament as to the time and manner of registration of voters in accordance with section 44 of the Constitution.

- pp.8-25 6. The trial of the action took place before
p.8 Udoma, C.J. Sheridan and Jones, JJ. on the 21st and
p.8 1.5 22nd October, 1964. The second Appellant gave
evidence. He said he had lived at a village called
Kyakanena, in the County of Buyaga, since the 20th
p.8 1.10 April, 1963. He was 47 years old, and a citizen 10
of Uganda. Before the 20th April, 1963 he had
lived at the village of Kapeka, in the County of
p.8 1.12 Bulemezi, for 21 years. He had been registered as
a voter in the constituency of Kapeka on the 28th
p.9 1.29 of November, 1961. On the 24th September, 1964
p.10 1.10 and 12th October, 1964, he had attended meetings in
connection with the registration of voters in the
p.16 1.6 County of Buyaga. He had produced to the official
in charge the registration slip showing that he had
been registered at Kapeka, but the official had 20
told him that he should go back to Kapeka to vote
in case of any voting.
- p.23 7. For the Respondents, Samuel Byoga Ruteya gave
p.23 1.10 evidence. He said he was the Secretary of the Uganda
p.23 1.20- Electoral Commission. He produced the certified
p.24 1.27 copy of the Electoral register for the constituency
of North Mubende, which included the Counties of
p.24 11.29- Buyaga and Bugangazzi. He said that had been the 30
39 register when the National Assembly had fixed the
date for the referendum in the Counties of Buyaga
and Bugangazzi, at the time when the Referendum Act
had been passed and also at the time when regulations
under the Referendum Act had been made; the Electoral
Commission had not ordered a new registration.
- p.26 8. The reserved judgment of the Court was delivered
p.26-p.35 on the 30th October, 1964. The learned Judges first
set out the pleadings, and summarised the evidence and
p.35 11.8- the contentions of the parties. They then said that 40
18 the second Appellant's evidence showed that he had
attended public meetings, at which some officials had
told the people collectively that they would not be
allowed to vote in the referendum because they were
not registered there. The second Appellant had not
p.35 11.30- satisfied the Court that he had ever applied to a
37 Registration Officer for the polling division in which
he was living to have his name entered on the register
for that division, and had been refused. The
p.37 1.14 constitutional question, the learned Judges went on,
was whether the words "persons entitled to vote" in
section 26(1)(b) of The Uganda (Constitution) Order in

Council meant persons possessing the three qualifications enumerated under (a), (b) and (c) in section 44 of the Constitution, or persons who possessed those three qualifications and were also registered as voters. It had been contended for the Appellants that it was the possession of the three qualifications which made a person "entitled to vote", registration being merely part of the machinery for the exercise of the right to vote. The learned Judges rejected this argument, holding that registration was part and parcel of the qualifications of a voter and a condition precedent to the exercise of the right to vote. The only persons legally entitled to vote, they said, must be registered voters, as appeared from the definition of "voter" in section 2 of the National Assembly (Elections) Ordinance, 1957. Section 26(1)(b) of the Order in Council empowered Parliament to prescribe the manner in which the referendum was to be organised and conducted, and it was intended, in the learned Judges' view, that Parliament should have recourse to the electoral law in determining the persons entitled to vote in the referendum. It had, they thought, been reasonable and competent under section 26(1)(b) of the Order in Council for Parliament to prescribe the register produced by Mr. Ruteja as the register of voters for the purpose of the referendum. The learned Judges added that it might be that persons whose names had been on the register of voters on the 1st November, 1961 elsewhere and had subsequently moved into one of the two Counties could have applied and been registered under section 9(2) of the National Assembly (Elections) Ordinance, and would have been entitled to vote in the referendum. They refrained from expressing any view on that issue, or on the further question, which had been raised by the Attorney General on behalf of the Respondents, whether section 9(2) of the Ordinance was a temporary provision, the force of which had been spent. On the view which the learned Judges took, the question of obtaining the consent of the first Appellants under section 30(5) of the Order in Council did not arise. The action was dismissed with costs.

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9. The Appellants respectfully submit that, under Section 26(1)(b) of the Uganda (Independence) Order in Council, the persons entitled to vote in the referendum are to be the persons entitled at the time of the referendum to vote in any constituency in the two counties. "Persons entitled to vote" are,

Record

in the Appellants' submission, persons possessing the qualifications of a voter; and those qualifications are the three set out as (a), (b) and (c) in Section 44 of the Constitution. Registration is not part of the qualifications of a voter, it is merely part of the procedure devised by the legislature for the exercise of the right of voting by those entitled to vote. Parliament is entitled under Section 26(1)(d) of the Order in Council to establish procedure for the conduct of the referendum; but that right is "subject to the foregoing provisions" of Section 26(1). Any procedure, therefore, which limits the right to vote in the referendum of those entitled to do so under Section 26(1)(b) of the Order (except to the extent that such limitation is an inevitable result of organizing the referendum) constitutes an alteration of Section 26, so that an Act of Parliament setting up such procedure cannot, by virtue of Section 30(5) of the Order in Council, come into effect without the consent of the first Appellants.

10. Under Section 3 of the Referendum Act, the persons entitled to vote in the referendum are not the persons in the two Counties entitled to vote at the date of the referendum, but the persons registered as voters in the two Counties in the register prepared for the elections of 1962, i.e. the persons, or some of the persons, who were entitled to vote in the two Counties nearly three years before the date of the referendum. This is a limitation of the right of voting in the referendum conferred by Section 26(1)(b) of the Order in Council going far beyond anything which might have been inevitable if the referendum was to be organised at all. The Referendum Act therefore makes an alteration to Section 26 of the Order in Council, and, since the first Appellants have never given consent to it, has never come into effect.

11. Alternatively, the Appellants respectfully submit that, even if the words "persons entitled to vote" in Section 26(1)(b) of the Order in Council are interpreted as meaning "persons whose names are in a register of voters", the Referendum Act still makes an alteration of Section 26. On this view of Section 26(1)(b), it provides, in the Appellants' submission, that persons whose names appear at the date of the referendum on a register for a constituency in either of the two Counties shall be entitled to vote in the referendum. Section 3 of the Referendum Act, on the other hand, limits the right of voting in the

10 referendum to those whose names were on a register for a polling division in either of the two Counties in 1962. Although no new register of voters has been compiled since 1962, it has been possible at any time since then for a person, who had his name in a register for a polling division outside the two Counties on the 1st November, 1961 but since then has moved to live in one of the two Counties, to get his name transferred, under the National Assembly (Elections) Ordinance, 1957, Section 9(2) to the register of the polling division of the place of his present residence. Such a person would on any view be entitled under Section 26(1)(b) of the Order in Council to vote in the referendum, but he would not be entitled to do so under Section 3 of the Referendum Act.

20 12. The Appellants respectfully submit that the decree of the High Court of Uganda was wrong and ought to be reversed, and this appeal ought to be allowed, for the following (among other)

R E A S O N S

- 30 (1) BECAUSE some persons entitled under Section 26(1)(b) of the Uganda (Independence) Order in Council, 1962 to vote in the referendum are excluded from so voting by Section 3 of the Referendum:
- (2) BECAUSE the second Appellant is entitled under Section 26(1)(b) of the Uganda (Independence) Order in Council to vote in the referendum but is excluded from so voting by Section 3 of the Referendum Act:
- (3) BECAUSE the Referendum Act makes an alteration to Section 26 of the Uganda (Independence) Order in Council, 1962 and the first Appellants have never consented that it should have effect.

J. G. LE QUESNE

JOHN W. R. KAZZORA

No. 56 of 1964
IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE HIGH COURT OF UGANDA

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- and -

(1) THE ATTORNEY-GENERAL OF UGANDA and
(2) E. R. NORRIS, ESQ. THE REFERENDUM
ADMINISTRATOR Respondents

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