

UGANDA / JUDGMENT

Musiime v Umar and Others

(Civil Suit No. 10 of 2018) [2020]

UGHCCRD 163 (27 August 2020)

[2020] UGHCCRD 163

COURT

HC: Criminal Division (Uganda)

BEFORE

Asiimwe, J

CASE / FILE NUMBER

Civil Suit No. 10 of 2018

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MBARARA**CIVIL SUIT NO. OIO OF 2018****PHILLIP MUSHME PLAINTIFF****VERSUS**

1. UMAR ASIIMWE
2. PROF. VENASIASBARYAMUREEBA
3. MAX MUHUMUZA
4. KANKIRIHO MUTEGUYA
5. BAINGANA MIKE
6. KATUSHEMERERWEBRENDIA DEFENDANTS

JUDGEMENT**BEFORE JUSTICE TADEO ASIIMWE.****BACKGROUND**

The plaintiff sued the defendants jointly and severally seeking the following orders

- a) A declaration that the ¹st defendant is not a king of Ankole at all.

- b) A declaration that the action of the 1st defendant in purporting to appoint and indeed appointing a cabinet, present or in future, which for the time being comprises of the defendants, among others, was/is an illegality per se and is illegal, null and void.

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- c) A declaration that the 1st defendant's act, in cohort with the defendants of staging managing a coronation at which he declared himself as a King of Ankole is not rooted in the culture, custom, traditions, rites, ceremonies and royal foundations of Ankole and it is thus illegal, null and void.
- d) An order restraining the 1st defendant by way of a permanent injunction, from holding himself out, parading himself, showcasing himself, referring himself to be referred to as a King, referring to himself by word and deed or otherwise as a King and or King of Ankole and in any way performing functions, roles, responsibilities, rituals, rites, ceremonies and functions which culturally and exclusively vest in a King.
- e) An order restraining the 1st defendant by way of a permanent injunction, from further more making use of, and or in any way inviting to his aid or that of the co-defendants, any of his supporters, purported subjects, believers, agents, assignees and any other persons by whatever name called, royal tools, insignia, emblem(s), paraphernalia, symbols, regalia and any other tool of trade which in any way symbolize or relate to royal ceremonies, royal rites and rights and entitlements.
- f) An order restraining the 1st defendant by way of a permanent injunction from accessing and making use of and or in any way setting foot at the Ankole cultural site at Itaaba, Kyabanyoro, Rwampala County in Mbarara District, or indeed any cultural site whatsoever situate within geographical preview of Ankole which

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sites are in anyway symbolic of and exclusively open to a lawful installed King.

- g) A declaration that the 1st defendant along with the co- defendants are members of an illegal society so far as they have founded a purported kingdom outside the realms of the law for the time being in force in Uganda.
- h) A declaration that all appointments are made by the 1st defendant per the press releases signed and published by him on the 7/12/2016, and any other appointments made by him prior to and or subsequent to the impugned press release are illegal, null and void.
- i) A declaration that the purported coronation of the 1st defendant before subsequent to and or on the 29/10/2016 was/is illegal, null and void.

- j) An order restraining the defendants by way of a permanent injunction from convening meetings, whether in private or public in any manner, electronic, media print, radio, television or any manner whether for or against Kingship in Ankole and or in any way offering commentary representative of them as cultural and traditional leaders in Ankole by whatever name called.

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- k) An order restraining the defendants by way of a permanent injunction from attending any royal ceremony and function as traditional and cultural leaders representing Ankole kingdom or at all. ^X----- -y

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7 JI 1) An order condemning the defendants in costs of this suit with a certificate of 2 counsel

The plaintiff contends that the 1st defendant and the co- defendants assumed the roles and responsibilities as a King of Ankole and formed a cabinet without any color of right or entitlement and started performing functions and ceremonies unlawfully.

The defendants in their joint written statement of defense denied all these allegations and stated the 1st defendant was rightly installed as the king of Ankole.

At the hearing of this matter, it was brought to the attention of court that the 3rd defendant Max Muhumuza conceded to the plaintiffs case during mediation and judgement was entered against him with no orders to costs. The plaintiff also withdrew cases against the 2nd and the 5th defendants and the suit proceeded against the 1st, 4th and 6th defendants.

The plaintiff was represented by counsel kandiho while the defendants were represented by Counsel Tusubira Paul.

SCHEDULING

At scheduling, the parties agreed on the following facts;

I. The 1st defendant purports to be the king of Ankole.

5 II. The 1st defendant, in that purport, appointed, among others, a cabinet comprising of the 2nd, 3rd, 4th, 5th, and 6th defendants, h.

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III. In that regard, the ¹ st defendant conducts himself as a king of Ankole by the way he dresses and otherwise.

The following were the agreed issues.

1. Whether the 1st defendant is the rightful king of Ankore or at all.
2. Whether the cabinet appointed by the 1st defendant comprising of, among others, the 2nd, 3rd, 4th, 5th, and 6th defendants herein was lawfully appointed.
3. What remedies are available to the parties?

EVIDENCE

The plaintiffs counsel led evidence through PW1, Joshua Muvumba who stated that he obtained his PHD from Harvard University in 1992 and as a prerequisite for his PHD, he did a dissertation on "The politics of stratification and transformation in the Kingdom of Ankore, Uganda 1982". He also testified that he has made several publications on Ankore kingdom. He stated that in Ankole, the succession queue to kinship is such that a reigning King names his successor in the anticipation of demise. Upon the demise of the reigning King, the son so named, in most cases by virtue of a testamentary disposition and or will, is named a successor and is made to undergo a set of cultural rituals, customs, ceremonies and performances before ascending to the throne. He concluded his testimony stating that the 1st defendant is

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known in the royal formation of Ankole and the entirety of Ankole Kingdom. In his cross-examination, he stated that Gashonga was not an imposter to the throne and that the Ankole Kings are not born with marks as claimed by the 1st defendant. That the Kings are not born but they are selected from children of the reigning King by all the clan leaders and if one did not have children, then you go outside the Clan, Chiefs and Elders.

- e. \ PW2, Phillip Musiime in his evidence stated that he understands and is well acquainted with the History of Ankole kingdom. He stated that in Ankole, kingship and entitlement therefore is rooted in succession, ie, from father to son. The said succession ladder is achievable by the son only and only upon the demise of the father who is a reigning King and the succession lineage can only be disturbed by a situation arising whereby the reigning King is not survived by a biological son with kingly traits or at all. He further testified that the 1st defendant has a father, a one Kawesa Edrisa who resides in Kasese District and that the 1st defendant and his father don't feature anywhere in the late Omugabe John Barigye Ntare VI. He further stated that it is Crown Prince Charles Aryaija Rwebishengye Barigye, is the only person in Ankole presently, and entitled to the throne of the King of Ankore. In his cross-examination, PW2 testified that the king is selected from Abahinda clan and that Omuhinda outside Ankole kingdom cannot be a king. He also stated that Sir Charles Gashonga II was succeeded by his son Prince John Barigye who was never enthroned due to government block;

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PW3, Kagando Wilson stated that he was shocked when he was assured by Max Muhumuza that DW1 was the King of Ankore while at Rwampara. He corroborated the evidence of PW1 and PW2 confirming that the 1st defendant is not the rightful King of Ankore as he was aware of the lineage of kings.

On the other hand, DW1- Umar Asimwe, testified that the lineage of Ankore Kings starts with Ruhanga (God the creator of heaven and earth). Kakama succeeded Ruhanga. Kakama was succeeded by Ishaza, then Bukuku, then Ishiimbwa, Nduhura Omuchwezi, then Wamara and then Ruhinda Rwa Njunaki. The lineage went on as stated in the plaint but with others left out, upto the reign of Sulaiman Kahaya II, who reigned from 1885 to 1944 when he died. That Ordinarily because Kahaya would have been the one to become a king, his son known as Nkabisigara was exiled in Busongora near the present Kasese town by the colonialists. After the death of Kahaya II in 1944, with the intervention of the British Colonialists, an impostor called Sir Charles Godfrey Rutahaba was installed king and named himself Sir Charles Gasyonga II (Ekyebumbe). In 1967, the government of Uganda led by Milton Obote abolished all kingdoms in Uganda. Kahaya II had died childless and had it not been by colonial interference, the next in the lineage should have been 1st Defendant's great grandfather Nkabisigarira I. He also stated that in 1993, Prince John Patrick Barigye attempted to install himself king of Ankole but the government denied him recognition. DW1 also confirms that from information received from his parents, he was born with signs of ^a king which inclj^dn^.

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which he referred to as "Bagyendanwa Engoma yobugabe bwankore" on his left hand palm and kingly signs on his stomach. In his cross examination, he stated that he was enthroned on 29th of October 2016 at Itaba cultural site and his father Idririsa Igumira Kaweesa was still alive and living in Kasese. He testified further that it is possible to have a king during the lifetime of his father and that his father was actually never a king. He concluded his evidence stating that he is the rightful king of Ankore kingdom. In support of his evidence, DW2 Kankyiriho Muteguya, DW3 and DW4 Micheal Nchwede also testified that DW1 is the rightful king.

BURDEN OF PROOF

Dealing with the burden of proof first, the law on this matter is clearly stated in section 100 of the Evidence Act which reads: -

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof is on that person."

Section 102 of that Act clarifies further: -

and now "The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

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This being a civil suit, the burden of proof lies with the plaintiff. To decide in his favor, the court had to be satisfied that the plaintiff has furnished evidence whose level of probity is such that a reasonable man, even in a case such as this where the defendant has not adduced any evidence, might hold that the more probable conclusion is that for which the plaintiff contends, since the standard of proof is on the balance of probabilities / preponderance of evidence (see *Lancaster v. Blackwell Colliery Co. Ltd* 1918 WC Rep 345* and *Sebuliba v. Cooperative Bank Ltd* [1982] HCB 130).*

RESOLUTION

ISSUE ¹

Any area in Uganda has a constitutional right to have a traditional or cultural leader. The institution of traditional or cultural leaders under which the plaintiff and the Defendants fall was created by the Constitution of the Republic of Uganda, 1995.

Art. 246 (1) provides

- *(1) Subject to the provision of this constitution the institution of traditional or cultural leader may exist in any part area of Uganda in accordance with the culture, customs and traditions of the people to whom it applies (emphasis added)*
- *(6) For the purposes of this article 'traditional leader or cultural leader' means a King or a similar traditional or cultural leader*

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leader or cultural leader by whatever name called who derives allegiance from the fact of birth or descent in accordance with customs, traditions usage or consent of people led by that traditional or cultural leader, (emphasis added)

In the present case from evidence on record and arguments of both counsel, the plaintiffs pleaded and based their case on purely traditions while the defendant's pleaded traditional and culture but mixed it with consent or aspirations of the people. Some pieces of the defendants' evidence pointed still to that effect. In this judgment I will turn to those areas in resolution of issues.

The Judicature Act Cap 13 is relevant to this case.

S.14 (2) (b) (ii) and (c) and S.15 (1) are quite clear and I shall quote them verbatim,

Section 14 (2) is to the effect that; -

- (2) Subject to the constitution and this Act, the jurisdiction of the High Court shall be exercised
- (b) Subject to any written law and in so far as the written law does not extend or apply, in conformity with
- Any established and current custom or usage. (i)

(c). Where no express law or rule is applicable to any matter in issue before the High Court, in Conformity with the principles of justice, equity and good conscience.

S. 15 of the Judicature Act provides for the application of customary law it read; -

"Nothing in this Act shall deprive the High Court of the right to observe or enforce the observance of or shall deprive any person of the benefit of any existing custom which is not urgent to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law".* (Emphasis added).

From the evidence presented by the parties, it is not in dispute that there existed a Kingdom named Ankole Kingdom. The main dispute is on the legitimacy of the 1st defendant as a King of Ankole Kingdom. It is however not in dispute that kings of African tradition are determined according to the culture, tradition and practices of a particular kingdom. This was emphasized in the case of **Prince J. D. C Mpuga Rukidi v Prince Solomon Iguru & Hon. Kajura C. A. No. 18/1994 S. C.** where the appointment of king Iguru Solomon had been objected to by the appellant on a number of grounds. Among others he was fathered out of an incestuous relationship and therefore not a Royal son, that his father had already shown by conduct to all his subject that the appellant would succeed him and not IGURU. The Supreme Court upheld Iguru's appointment on among other grounds that it was done in conformity with the culture of the BANYORO the Supreme Court ignored claims that IGURU was not a legitimate son born out of wedlock and in incest. The court's position on that controversial point was that there was evidence that the cultural practice of the BANYORO

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allowed the king to have many wives so all his sons were royal sons and any one he appoints could be his successor.

In the present case, the plaintiff's claim is that the kingship of Ankole is determined on basis of sons inheriting kingship from their fathers. That in absence of a king then it is the issue based on birth and descent that appoints another king in conformity with the culture.

On the other hand, the defendant's argument is that he is the legitimate ruler of Ankole Kingdom. He stated in his evidence that he was bom with a Drum, beads and body marks on his body which the Ankole Clan leaders based on to pronounce him a king of Ankole on the 27th December 2015.

However, no evidence was led by the defendants to show that the persons who sat and declared the 1st defendant a King were actually recolonized clan leaders of Ankole kingdom.

The position of the law in Uganda is that a leader of any Kingdom is established by cultural practices and traditions of a particular Kindom. A leader who is defined under Art 246 (6). This article defines a traditional or cultural leader to mean a king or by any other name who derives allegiance from the fact of birth or descent in accordance with the customs, traditions and usage.

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Defining or characterizing "customary law" typically makes some reference to established patterns of behavior that can be objectively verified within a particular social setting or community which is seen by the community itself as having a binding quality. Such Eugtej-gg.

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acquire the force of law when they become the undisputed rule by which certain entitlements (rights) or obligations are regulated between members of a community. According to one definition, "custom" is a "rule of conduct, obligatory on those within its scope, established by long usage. A valid custom must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to Statute Law, though it may derogate from the common law" (see **Osborne's Concise Law Dictionary,** Ninth Edition (Sweet and Maxwell, 2001). "Customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws" (see **Black's Law Dictionary,** 8th edition, 2004).

It is also defined by section ¹ (1) (a) of **The Magistrates Courts Act** as "the rules of conduct which govern legal relationships as established by custom and usage and not forming part of the common law nor formally enacted by Parliament." Customary law is therefore generally conceived as locally recognised principles, and more specific norms or rules, which are orally held and transmitted, and applied by community institutions to internally govern or guide all aspects of life.

s I Section 56 (3) of the *Evidence Act* permits a court to take judicial notice as a fact, the existence of practices which are not subject to reasonable dispute because they are generally known within the trial court's territorial jurisdiction. Further, under section 46 of *The Evidence Act,* when the court has to form an opinion as to the existence of any general custom or right, the opinion as to the existence

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custom or right of persons who would be likely to know of its existence if it existed, are relevant.

The former Court of Appeal for East Africa in the case of *Ernest Kinyanjui Kimani* v. *Muiru Gikanga* [1965] EA 735* held that where African Customary Law is neither notorious nor documented, it must be established for the court's guidance by the party intending to rely on it and also that as a matter of practice and convenience in civil cases, the relevant customary law, if it is incapable of being judicially noticed, **should be proved by evidence of expert opinions adduced by the parties.**

In this case, the plaintiffs counsel led evidence of PW1 Joshua Mavumba, a professor in political science who has a PhD from Harvard university and presented his research paper on the stratification and transformation of the kingdom of Ankole which was admitted as PEI and was not contested to by the defendants. He testified as an expert witness whose knowledge pertaining the history of the kingship of Ankole was rich and very important. He stated that in Ankole, the succession queue to kingship is such that a reigning King names his successor in the anticipation of demise and that upon the demise of the reigning King, the son so named, in most cases by virtue of a testamentary disposition and or will, is named a successor and is made to undergo a set of cultural rituals, customs, ceremonies and performances before ascending to the throne. He restated the lineage of succession of the kings of Ankole as stated in PEI. The evidence of PW1 was corroborated by the evidence of PW2 and PW3 who stated that

the would be rightful king of Ankole is prince Charles Rwebishengye who succeeded prince John Barigye but still awaiting coronation by government.

Idriris Igumira Kaweesa is alive and resides in Kasese. From the evidence on record, it is clear that the father of DW1 was never a king. It is therefore not possible that DW1 can be a King yet the father was never a King in the first place. Besides, even if it were true that great grandfather was to succeed a one Kahaya if it were not for colonial interference, it would not have made him a king as a grandson whose father is alive. On the other hand, the 1st defendant when asked about who his father was in the lineal succession in PEI, he stated that his father was not among but was rather a son to one of the kings named Kahaya. That the said Kahaya would have succeeded his great grandfather Nkabisigarira if it were not for colonial interference. He however stated that his father

Further, the argument of the 1st defendant that he was born with Kingly marks does not fall within the 2 constitutional ways on how one can be a traditional leader as provided for under Article 246 of the constitution of the Republic of Uganda. The kingly marks described by the 1st defendant as a basis of his kingship also fall outside the customs and practices of Ankole kingdom as presented by the plaintiff witnesses. Besides the 1st defendant failed to prove that it is a practice/custom of Ankole kingdom that Ankole kings are born with kingly marks as he claims.

In addition to the above, following government restoration of kingdoms in Uganda under the **Traditional Institutions Statute of 1993** and the **institution of Traditional or Cultural Leaders Act 2011**, whoever satisfies the cultural traditions or customs, to be enthroned as a king, he ought to be recognized by government under the above laws.

The 1st defendant in addition to his failure to satisfy the cultural norms of Ankole Kingdom has never been recognized by government under the institution of **Traditional or Cultural Leaders Act, 2011**.

It is therefore court's finding that the 1st defendant is not the legitimate King of Ankole Kingdom. Issue 1 is therefore answered in the negative

ISSUE 2. Whether the cabinet appointed by the 1st defendant comprising of, among others, the 2nd, 3rd, 4th, 5th, and 6th defendants herein was lawfully appointed.

This issue is dependent on the finding and resolution of court in issue one where the 1st defendant has been found not to be a legitimate king of Ankole. Therefore, whatever acts he did in furtherance of his alleged kingship cannot be said to be lawful. Therefore, the appointment of the 2nd to 6th defendant as his cabinet was illegal.

Issue 2 is consequently answered in the negative.

ISSUE 3. What remedies are available to the parties?

The plaintiff sought for a number of remedies ranging from A-I. A number of the prayers are repetitive in nature. I will therefore allow only prayers from A-D.

COSTS

The plaintiff prayed for the costs of this suit. "It is trite law that a successful party will not be deprived of costs unless it is quality of misconduct. But it is also well settled that there can be other good reasons than misconduct justifying the departure from the general rule, depending on the circumstances of each case. See *WAMBUGU v. PUBLIC SERVICE COMMISSION* [1972] EA 269..."

In *PRINCE MPUGA RUKIDI v. SOLOMON IGURU*, court denied the successful party costs and held that since it was a kingdom matter, it was a matter of public importance, there is need for reconciliation among the contestants for the wellbeing of the kingdom.

Although this is a kingdom matter, the circumstances slightly differ from the above case. I therefore shall award the plaintiff half costs of this suit. The prayer for a certificate of two counsel is not granted as only one lawyer appeared in court for the plaintiff.

In conclusion, Judgment is entered for the plaintiff against the 1st, 4th and 6th defendants with the following orders; -

- 1). The 1st defendant is and was not the rightful or legitimate king to the throne of the king of Ankole Kingdom. *¹ a
- 2). The purported coronation of the ¹st defendant as a king of Ankole and subsequent appointment of cabinet members was wrongful and contrary to article 246 (1) and (6) of the Constitution of Uganda.
- 3). An order restraining the ¹st defendant by way of a permanent injunction, from holding himself out, parading himself, showcasing himself, suffering himself to be referred to as a King, referring to himself by word and deed or otherwise as a King and or King of Ankole and in any way performing functions, roles, responsibilities, rituals, rites, ceremonies and functions which culturally and exclusively vest in a King is hereby issued.
- 4). Half costs of this suit are awarded to the plaintiff as against the 1st
V TADEO A _ _ [&]; , 4th and 6th defendants. ---

JUDGE

27/08/2020

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