PART I

INTERNATIONAL LAW IN GENERAL

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ATTORNEY-GENERAL *v.* GODFREY KATONDWAKI

Uganda, High Court

10 *January* 1963

SUMMARY: *The facts.*—An agreement, which entered into force on 30 August 1962, was made between the Governor of what was at the time the Uganda Protectorate for and on behalf of Her Majesty the Queen, of the one part, and the Omugabe of Ankole on behalf of the Eishengyero (*i.e.* Legislative Assembly) and People of the United Kingdom of Ankole, of the other part (the Ankole Agreement). The Agreement was intended to subsist until, and only until, the end of the state of protection then existing. The third schedule of the Agreement set out a Constitution of Ankole, paragraphs 18 and 19 of which provided for an Eishengyero, and provided that the Omugabe should appoint an Electoral Boundary Commissioner to determine the manner in which Ankole should be divided into constituencies.

On 6 October 1962 the Omugabe appointed Godfrey Katondwaki (the defendant) to be the Electoral Boundary Commissioner, pursuant to the Ankole Agreement. Prior to this appointment the Omugabe notified the Governor by letter that he was appointing the defendant to the office, and the Governor replied advising that the appointment should be deferred

until the new Constitution of an independent Uganda came into force. On 8 October the defendant produced a report stating that he had demarcated the necessary constituencies. He continued to act as Electoral Boundary Commissioner until November 1962, and there was evidence that he had exercised the powers and performed the functions of his office so as to revise his report and to bring it more into conformity with provisions of the Ankole Agreement.

At midnight on 8 October the state of protection over Uganda came to an end, and immediately thereafter the provisions of the Constitution of Uganda, contained in a Schedule to the Uganda (Independence) Order in Council 1962, came into force. The Constitution contained provision for the appointment of an Electoral Boundary Commissioner for the Kingdom of Ankole.

By Section 4 of the earlier Constitution of Uganda[1] the Governor had power to declare that any agreement between Her Majesty and the Ruler of the Kingdom of Ankole should have the force of law. Neither the Ankole Agreement, nor its predecessor concluded in 1901, had been the subject of a declaration under Section 4 of the earlier Constitution.

The plaintiff sued for declarations that the appointment of an Electoral Boundary Commissioner for the Kingdom of Ankole should be in accordance with the Uganda (Independence) Order in Council 1962 and that the defendant had no right or authority to exercise the powers or perform the duties of that office by virtue of the Ankole Agreement. The plaintiff claimed that the defendant's appointment had not been made under provisions having the force of law, and that even if it had been so made, it ceased to be of effect immediately prior to 9 October 1962 owing to the expiration of the Ankole Agreement. The defendant claimed to have been validly appointed, and that his appointment continued and was valid notwithstanding that the Ankole Agreement ceased to have effect on 9 October 1962. During the proceedings the status of the Ankole Agreement was raised.

Held: The declarations sought by the plaintiff should be granted. The Ankole Agreement was in the nature of a treaty and unless incorporated within the municipal law of Uganda its provisions did not confer rights or impose duties justiciable and enforceable by the Courts. It had not in fact been given the force of law in Uganda, and after independence the law applicable to the appointment in question was to be found in the Constitution of Uganda, with which the defendant's appointment was not in accordance.

Sheridan, J. A., read the following judgment of the Court:

This suit, which was heard by three judges of the High Court in accordance with the provisions of the Civil Procedure (Constitutional Cases) Act 1962, is one in which the plaintiff, the Attorney-General of Uganda, sues the defendant, who claims to be the Electoral Boundary Commissioner for the Kingdom of Ankole, for:

1. a declaration that the Electoral Boundary Commissioner for the Kingdom of Ankole is to be appointed under paragraph 18

[1] Uganda (Constitution) Order in Council 1962, Second Schedule.

of Schedule 2 to the Constitution of Uganda which was brought into force on 9 October 1962, by the Uganda (Independence) Order-in-Council 1962, and not otherwise;

2. a declaration that the defendant has no right or authority to exercise the powers or perform the duties of the Electoral Boundary Commissioner;
3. an injunction to restrain the defendant from exercising those powers or performing those functions.

By his defence, the defendant claims:

1. that he was validly appointed by the Omugabe on 6 October 1962;
2. that in accordance with those provisions he delimited the constituencies of the Kingdom of Ankole before the Ankole Agreement 1962, expired immediately before 9 October 1962;
3. that his appointment continued to be valid after 9 October 1962, notwithstanding the expiry of the Ankole Agreement 1962, as it is not expressly stated in the constitution that it is intended to have a retrospective effect;
4. that paragraph 18 and paragraph 19 of Schedule 2 to the constitution refer to future but not past appointments which were properly made prior to 9 October 1962.

The reference throughout the statement of defence to article 19 and article 20 of the Ankole Agreement was incorrect, and it is clear that the defendant intended to refer to article 19 and article 20 of the Third Schedule to the agreement (the Constitution of Ankole). We have considered the defence as if it had been amended by the substitution of the correct reference for the incorrect reference.

Stated shortly, it is the plaintiff's case that the defendant performed certain acts as Electoral Boundary Commissioner, both before and after 9 October 1962, by virtue of an appointment purporting to have been made under the provisions of the Third Schedule to the Ankole Agreement 1962 (the Constitution of Ankole), that that purported appointment was not made under provisions having the force of law, that even conceding the validity of the original purported appointment, it certainly ceased to be of effect immediately prior to 9 October 1962, and that the defendant has not been appointed Electoral Boundary Commissioner under the provisions of Schedule 2 to the Constitution of Uganda (Special Provisions relating to Ankole).

The defendant's case is that he was validly appointed commissioner, and as such was entitled to exercise the powers of the office, and that the appointment continued to have validity notwithstanding that the Ankole Agreement 1962, ceased to have effect on 9 October 1962.

It will be convenient to refer to the Ankole Agreement 1962, as 'the Agreement', to the Third Schedule to the Agreement as 'the

Ankole Constitution', and to the Uganda (Independence) Order-in-Council 1962, as 'the Independence Order'.

The Agreement, it was expressed to come into force on 30 August 1962, and the relevant provisions of the Ankole Constitution are:

1. Article 18, which provided that the Eishengyero (the Legislative Assembly of Ankole) should consist, *inter alia*, of fifty-five elected members.

2. Article 19, which was in the following terms—

> "19. (1) The Omugabe shall, as soon as practicable after the coming into force of the article and wherever it shall be necessary for the review of the boundaries of constituencies, appoint an Electoral Boundary Commissioner.
> (2) The Electoral Boundary Commissioner shall be an independent and impartial person and, in the discharge of his functions under the constitution shall not be subject to the direction or control of any other person or authority.
> (3) The Electoral Boundary Commissioner shall be appointed for such period as may be agreed between the commissioner and the Omugabe as being necessary for the performance of his functions under article 20 of this Constitution and during that period he shall not be removed from office by the Omugabe except for inability to discharge the functions of his office (whether arising from infirmity of mind or body or from any other cause) or for misbehaviour.
> (4) Before tendering advice to the Omugabe as to the appointment of any person to be Electoral Boundary Commissioner the Enganzi shall consult the leader of the principal party in opposition in the Eishengyero, and before any appointment is made, the Omugabe shall consult the Governor."

3. Article 29 (1) and (2), which was in the following terms:

> "20. (1) For the purposes of election to the Eishengyero, Ankole shall be divided into as many constituencies as there are elected members of the Eishengyero in such manner as the Electoral Boundary Commissioner may determine.
> (2) The boundaries of each constituency shall be such that the electorate is, as far as practicable, equal in all constituencies.
> (3) . . . . . "

The suit raises issues both of fact and of law and we first consider the facts.

On 14 September 1962, Mr. Kabaireho (D.W. 2), the Enganzi (Chief Minister), took initial steps to secure the appointment of an Electoral Boundary Commissioner by the Omugabe. In accordance with article 19 (4) of the Ankole Constitution, he contacted Mr.

Bananuka (P.W. 1), the Leader of the Opposition in the Eishengyero in order to consult him over the proposed appointment. There is a conflict of evidence as to how far this consultation went. Mr. Bananuka says that it proved abortive, whereas Mr. Kabaireho says that they both produced two names, the defendant being one of his nominees. At that time the defendant was Assistant Chief Judge in the Kingdom. Mr. Bananuka suggested that they should refer the matter to the Omugabe, but Mr. Kabaireho declined, and said that he was merely consulting Mr. Bananuka as Leader of the Opposition. Mr. Kabaireho went to the Omugabe, accompanied by Mr. Mutasherwa (D.W. 3), the Omulamuzi. After a discussion in which Mr. Kabaireho says that he recommended the defendant for the appointment, the Omugabe said that he would appoint the defendant. On 15 September 1962, Mr. Kabaireho wrote a confirmatory letter to the Omugabe (exhibit 8). On 17 September 1962, the Omugabe replied (exhibit 9), that he had selected the defendant.

The wording of these letters might suggest that the final choice had been left with the Omugabe, but here we accept Mr. Kabaireho's testimony that he in fact recommended the defendant to the Omugabe at the interview on 14 September 1962, and that the Omugabe followed the advice which had been tendered to him.

On 15 September 1962—that is, before the date of the letter, exhibit 9—the Omugabe had written to the Governor (exhibit 10), informing him that he was appointing the defendant. Although the Governor, by his reply dated 2 October 1962 (exhibit 11), advised the Omugabe to wait until the new Constitution came into force, this exchange of letters amounted, in our view, to a consultation with the Governor. On this evidence we are satisfied that article 19 (4) of the Ankole Constitution was complied with.

Meanwhile, on 15 September 1962, the Omugabe had written to the defendant (exhibit 3), informing him of his impending appointment. The letter went further and amounted to a de facto appointment. As the Agreement was due shortly to expire, the defendant was exhorted to have the material for delimiting the constituencies ready by the time he was officially appointed. This was done by the letter dated 6 October 1962 (exhibit 2). It set out article 19 and article 20 of the Ankole Constitution, and although it states that the report should be ready about the end of October, this was clearly contrary to the understanding that the defendant was working to a date line of 8 October 1962. In fact, the defendant produced a report on that date (exhibit 7). In it, the defendant states that he had demarcated the fifty-five constituencies with the help of the 1959 population census. This resulted in an uneven distribution of the electorate between the constituencies, one constituency exceeding 17,000 electors, while another contained less than 2,000; therefore it cannot be said that the boundaries proposed in the report for each constituency were such that the electorate in each was "as far as practicable equal" as

prescribed by article 20 (2) of the Ankole Constitution. The defendant's task was not an easy one, as his successor may well discover, but a better yardstick would have been the register of electors for the polling divisions in the electoral districts of Ankole compiled under the Legislative Council (Elections) Ordinance 1957.

However, we would like to make it clear that, in these proceedings, we were not asked to pronounce upon the validity of the report.

The defendant admits that he continued as Electoral Boundary Commissioner until 28 November 1962, but he would have us believe that he did not exercise any of the functions of that office after 8 October 1962. On this, the documentary evidence, consisting of the defendant's mileage and night allowance claims and his signature in the visitors' book at a Gombolola headquarters (exhibits 1, 5 and 6), all point the other way. Although Mr. Kabaireho denies it, it is a reasonable inference that the purpose of the defendant's tour of the Kingdom after 8 October 1962, was to revise his report so as to bring it more into conformity with article 20 (2) of the Ankole Constitution.

Even conceding that the appointment under the Ankole Constitution was valid, it is clear that by paragraph 18 of Schedule 2 to the Constitution of Uganda the Omugabe was enjoined to appoint an Electoral Boundary Commissioner. The relevant provisions of paragraph 18 are as follows:

> "18. (1) The Omugabe shall, as soon as practicable after the coming into force of this Schedule and whenever it shall be necessary for the review of the boundaries of constituencies, appoint an Electoral Boundary Commissioner.
>
> (2) . . . . . .
>
> (3) . . . . . .
>
> (4) In the exercise of the powers conferred on him by this paragraph the Omugabe shall act in accordance with the advice of the Electoral Commission of Uganda."

This provides an answer to the submission of Mr. Kazzora, who appeared for the defendant, that the Attorney-General, representing the Government of Uganda, had no standing in the matter, on the grounds, if we understood him correctly, that being Attorney-General to a Government which was not a party to the Agreement he was entitled neither to sue nor be sued under that agreement.

This argument can shortly be disposed of; it is abundantly clear that whatever the Attorney-General's right of instituting suits in this court may or may not be, he is not in this instance suing on any provision of the Agreement. There are therefore no merits in Mr. Kazzaro's submissions in this respect and we dismiss them from consideration.

There can be, and indeed there is, no dispute between the parties that the Agreement was made between the Governor of what was then the Uganda Protectorate for and on behalf of Her Majesty the

Queen of the one part and the Omugabe of Ankole on behalf of the Eishengyero and People of the Kingdom of Ankole of the other part, and was intended to subsist until, and only until, the end of the state of protection then existing. That state of protection came to an end by virtue of the Uganda Independence Act 1962, at midnight on 8 October 1962, immediately after which the provisons of the Constitution of Uganda set out as a Schedule to the independence order came into force

The Third Schedule to the Agreement purports to set out in detail a Constitution of Ankole, and by article 6 (3) of the Agreement itself Her Majesty's Government undertook to take the necessary steps to give that Constitution the force of law as part of the Constitution of Uganda.

There can be no question of acquired rights under the Agreement subsisting after 9 October 1962, except in so far as any such rights might have been given effect to by the Constitution of Uganda, and Mr. Kazzora had to concede that the defendant's appointment was not an existing office which was preserved by section 5 of the Independence Order. In so far as it is necessary to decide the point, we agree with Mr. Kazzora's submission that the Constitution of Uganda had no effect prior to 9 October 1962, but would add that the submission appears to have no relevance to the issues raised.

At all material times prior to 9 October 1962, the Constitution of Uganda (hereinafter referred to as the "earlier Constitution") was that set out in the Second Schedule to the Uganda (Constitution) Order-in-Council 1962, which was made under powers conferred by the Foreign Jurisdiction Act 1890, and which came into operation on 1 March 1962. By section 4 of the Order, all existing laws had effect as if they had been made in pursuance of the Order, and the term "existing laws" was expressed to mean all Ordinances, laws, rules, regulations, orders and other instruments made or having effect as if they had been made under Orders-in-Council, previously in existence and having effect as part of the law of Uganda or any part thereof immediately before 1 March 1962. At that time there was in existence an earlier Ankole Agreement, namely that of 1901, as from time to time amended, but there is no dispute that this did not have the force of law in any part of Uganda. See *Daudi Ndibarema* v. *Enganzi of Ankole*, [1960] E.A. 47 (C.A.).[1]

It is clear then, that the Ankole Agreement 1901, was not an existing law for the purposes of the earlier Constitution. On the other hand, the District Administration (District Councils) Ordinance 1955, which had been made under the previously existing constitutional instruments, and the regulations made under that Ordinance, were existing laws for that purpose. The relevant regulations for the purpose of this suit are the Eishengyero of Ankole Constitutional Regulations 1955, as from time to time amended. By section 8 (1)

[1 *International Law Reports*, 27, p. 275.]

and (3) of the Independence Order, these regulations continue to apply and the existing Eishengyero is kept in being until 28 February 1963, unless it be earlier dissolved.

By section 4 of the earlier Constitution, provision was made to enable the Governor in his discretion to declare that any provision of any agreement between Her Majesty and, *inter alia*, the Ruler of the Kingdom of Ankole, should have the force of law, the effect of any such declaration being expressed to be that any such provision so declared should have the same force and effect as if it had formed part of the earlier Constitution. We were informed from the Bar that no provision of the 1901 agreement or of the 1962 agreement had been the subject of any such declaration.

It cannot, we think, on the present state of the authorities, be disputed that the Agreement is in the nature of a treaty, and that unless its provisions have become incorporated within the municipal law of Uganda, those provisions do not confer rights or impose duties which are justiciable and therefore enforceable by the courts. As has been seen, there was provision in the earlier Constitution for giving the Agreement, or any part of it, the force of law, but no steps were taken to do so. Faced with this position, Mr. Kazzora, for the defendant, argued that the mere fact of the Agreement having been published in the Legal Supplement to the Uganda Gazette gave it the force of law without the necessity of any other formality. We are unable to accept this argument. There were no doubt sound reasons for publishing the text of the Agreement in the Legal Supplement of the Gazette, not the least of which was the consideration that, had any part of it been given the force of law, it would have been readily available for reference in the bound volumes of statutory law published in each year. It is within our knowledge that Statutes which are expressed to be brought into operation after their enactment upon the happening of a certain event are published in the Legal Supplement after being enacted and not when they are brought or otherwise come into operation. The mere fact of publication in a Legal Supplement does not, in our view, give the matter published the force of law.

It is not in dispute that at all material times Her Majesty had full jurisdiction, power and authority over the whole of Uganda, including the Kingdom of Ankole. That jurisdiction, power and authority has been exercised in the past by a number of Orders-in-Council, of which the last is the Independence Order, and it is well settled law that the jurisdiction so to do is not necessarily to be exercised in accordance with any existing treaty or agreement.

As was said by Denning L. J., in *Nyali Limited* v. *Attorney-General*, [1956] 1 Q.B. 1 at p. 15:

> "Although the jurisdiction of the Crown in the Protectorate is in law a limited jurisdiction, nevertheless the limits may in fact be extended indefinitely so as to embrace almost the whole field of

government. They may be extended so far that the Crown has jurisdiction in everything connected with the peace, order and good government of the area, leaving only the title and ceremonies of sovereignty remaining in the Sultan. The courts themselves will not mark out the limits. They will not examine the treaty or grant under which the Crown acquired jurisdiction: nor will they inquire into the usage or sufferance or other lawful means by which the Crown may have extended its jurisdiction. The courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown the courts will not permit it to be challenged. Thus, if an Order-in-Council is made affecting the protectorate, the courts will accept its validity without question: see *Sobhuza II* v. *Miller and Others* [1926] A.C. 518 at p. 528.[1] It follows, therefore, that in the present case we must look, not at the agreement with the Sultan, but at the Orders-in-Council and other acts of the Crown so as to see what jurisdiction the Crown has in fact exercised; because they are the best guide, indeed they are conclusive, as to the extent of the Crown's jurisdiction."

In the same case, Parker L. J., said as follows:

" . . . it is, I think, clear that these courts will not consider the limits of the jurisdiction granted by treaty or otherwise to Her Majesty. Such limits may be extended by sufferance and usage and the courts will and must assure that the legislative and other acts in question are within the jurisdiction granted. All that they can do is to look at the instrument manifesting the exercise of the jurisdiction to see whether it has been lawfully exercised according to the law in force. (*Cf. Sobhuza II* v. *Miller*, [1926] A.C. 518.)"

We were unable to understand Mr. Kazzora's submission concerning the interpretation of the Constitution of Uganda and of the Agreement which, if we understood him correctly, was that in considering the effect of an instrument, such as the Agreement, in relation to the extent of Her Majesty's jurisdiction and powers over a Protectorate, we are not entitled to be guided by judicial precedent, such as has been established in the cases of *Sobhuza II* v. *Miller*[1], [1926] A.C. 518; *Nyali Ltd.* v. *Attorney-General* and *Daudi Ndibarema* v. *Enganzi*.[2]

It appeared to us that he argued that as the Constitution of Uganda is now the supreme law of Uganda, we are unable to go behind it by considering earlier views which have been expressed by the Privy Council, by the East African Court of Appeal and by other courts in relation to the exercise of Her Majesty's powers whether under the prerogative or under the Foreign Jurisdiction Act, 1890.

We confess that we are unable to understand this argument. The

[1 *Annual Digest*, 3, p. 40.]
[2 *Supra*.]

Constitution of Uganda is itself a Schedule to an Order-in-Council expressed to have been made by virtue of powers conferred by the Foreign Jurisdiction Act, 1890, and is therefore part of that Order. Although, as is abundantly clear, previous Orders-in-Council relating to the Uganda Protectorate are expressed to have been revoked, and the constitutional position of Uganda is now that of independence within the Commonwealth, we are nevertheless, in our opinion, entitled to rely upon previous judicial decisions to guide us in our findings in relation to a position which has arisen in which it is suggested that the exercise of Her Majesty's jurisdiction may have been in conflict with her treaty obligations.

For these reasons, therefore, we reject this submission.

It follows then, in our opinion, that all we are entitled to consider in relation to the appointment of the Electoral Boundary Commissioner is what is contained in the municipal law relating to that appointment. The only provision of the municipal law to which our attention has been drawn is that contained in Schedule 2 to the Constitution of Uganda which is set out above.

It is clear that the method of appointment thereby prescribed differs materially from that provided in the Ankole Constitution, and that any existing appointment, even if valid, does not have continued validity by virtue of the Independence Order. It is therefore clear, in our view, that the appointment of the defendant as Electoral Boundary Commissioner of the Kingdom of Ankole is not in accordance with the provisions of the Constitution.

Accordingly, there will be declarations and an injunction in the terms prayed in the plaint.

[Report: [1963] East Africa Law Reports 323.]