

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA
MISCELLANEOUS APPLICATION NO. 215 OF 2017
(Arising from Civil Suit No.0013 of 2011)
THE KYABAZINGA OF BUSOGA::::::::::::::::::::::::::::::::: APPLICANT
VERSUS
LIGWEWO RICHARD & 9 ORS::::::::::::::::::::::::::::::::: RESPONDENTS
RULING
BEFORE HON. LADY JUSTICE EVA K. LUSWATA

Brief Background and facts

- 1] On 6/3/2011 the respondents herein filed Civil Suit No. 13/2011 (hereinafter referred to as the main suit) against the Busoga Kingdom and the Attorney General seeking *inter alia*, declarations in respect of their employment as royal guards of the Kingdom. Hearing of the main suit commenced and on 8/7/2015, the Busoga Kingdom and the respondents entered into a consent judgment by which the former agreed to make certain scheduled payments in special and general damages. It appears that the Busoga Kingdom defaulted and as a result, an attempt was made to execute the consent judgment against Kingdom property.

- 2] On 14/7/2017, the Applicant filed this application under Section 98 CPA, Section 13 Judicature Act and Order 52 rr 1 & 3 CPR to move Court for orders that the consent

judgment/decreed entered between the respondents and the 2nd defendant Busoga Kingdom in Civil Suit No. 13/2011 (hereinafter the main suit) be set aside. In addition that, all subsequent executions and actions arising out of the said consent be set aside or nullified and costs be provided for.

Grounds

- 3] The brief grounds to the application are that:
- i. The consent judgment in the main suit dated 13/7/15 is illegal and against court policy
 - ii. The main suit was instituted against the Busoga Kingdom a non-existent entity, and nothing legal could flow from its proceedings
 - iii. There was no person to legally bind the Kingdom as the Kyabazinga of Busoga is the only person/legal corporation sole who by himself or by power attorney can bind the “*Obwa Kyabazinga Bwa Busoga*” and no such powers existed at the time of the consent
 - iv. The consent judgment decree has adverse effects against the applicant who was not a party to the main suit as part of his property is being attached as a consequence of the consent judgment, and it is thus fair and equitable to set it aside.

The Evidence

- 4] Kafuko Ntuyo Robert stating to be the Attorney General of the *Obwa Kyabazinga bwa Busoga* Kingdom (hereinafter OKBB) filed an affidavit in support of the application. He

stated that he was appointed on 14/5/16 with duties that include giving legal advise to the applicant and all attendant bodies and he presented this application under powers of Attorney of the applicant. That as part of his duties, he received information from the applicant that the latter's property on Plot 23 Nile Garden, Jinja Municipal Council (herein after referred to as the suit property) was under threat of execution as a result of the consent judgment. That the execution has in the interim prevented by the applicant's own and Government security.

- 5] That the consent judgment was entered into between Ligwewo Richard for the plaintiffs respondents and Dr. Muvawala Joseph for the Busoga Kingdom, the defendant. That Dr. Joseph Muvawala signed as the Prime Minister of the Busoga Kingdom which at the time he was not and even then, he was not authorized by law to represent the OKBB.
- 6] That in the circumstances above, there is no legal entity called Busoga Kingdom with capacity to sue or be sued and thus, the action is a nullity and the consent judgment is illegal and against policy of this Court.
- 7] In addition that the consent judgment was procured through misinformation, misrepresentation and fraud as the Kingdom at the material time had no legally appointed Prime Minister or cabinet and as such, no person could bind the

Kingdom in such capacity since no one acted under Powers of Attorney of the Kyabazinga of Busoga to bind the Kingdom. Therefore, that the consent was procured through misinformation because Dr. Muvawala who was neither Prime Minister nor holder of Powers of Attorney, had no powers to enter into the consent.

- 8] Further, that the remuneration of the respondents/plaintiffs in the main suit, is the responsibility of the Government of Uganda who recruited them.
- 9] Bukaala Nelson the 4th respondent filed an affidavit in response to the application. He contended that the Busoga Kingdom is a cultural institution pre-existing the applicant who is merely her cultural leader and head with no locus to present this application. That the kingdom has capacity and has previously prosecuted and defended cases in her name and also held property in the same capacity.
- 10] In the alternative that, in presenting her defence to the main suit, the Kingdom duly submitted to the jurisdiction of Court and during the proceedings, the Kingdom was represented by Ngobi Balidawa known to be her Attorney General, whose presence was never opposed in Court. Also that, protracted negotiations leading to the consent judgment were signed between the respondents and

Kingdom officials with Dr. Muvawala as her Prime Minister, to date.

- 11] Further that, the constitutional creation of the traditional leader as a sole body corporate with capacity to sue and be sued did not take away the existence of the institution which existed before the restitution of traditional rulers and traditional institutions, one of which he serves. That the Busoga Kingdom has previously litigated before in the High Court and that the corporate personality of a traditional leader envisaged in the Constitution, extends and covers a traditional institution.
- 12] He also contended that the suit land was before its attachment registered in the names of the OKBB Kingdom and not the applicant and the applicant would have no locus or mandate to complain on behalf of the Busoga Kingdom whom he claims to be non-existent.
- 13] Bukaala in addition contested the allegations of misinformation, misrepresentation and fraud. He contended that the consent judgment was the result of result of a pre-existing relationship between the parties in the suit for services rendered by the respondents to the Kingdom with whom transactions and correspondence were shared before filing of the main suit. That the respondents were recruited as royal guards of the Busoga Kingdom by both the Kingdom

and GOU. The Kingdom paid their allowances and catered for their accommodation while the GOU paid their salaries. That the applicant's inclusion into the suit could have been achieved by substitution for Busoga Kingdom and Kyabazinga of Busoga are well known institutions in Uganda.

- 14] He stated further that, there has been no attempt by the respondents to gain access of the suit property. That the property was attached in execution of the consent judgment, sold and a return of execution filed in Court. Thus, that this application is an afterthought and a waste of Court's time.
- 15] In his brief rejoinder, Kafuko Ntuyo contended that any suits filed against or in the name of Busoga Kingdom, a non existing entity, were done in error and cannot correct the present anomaly. He further contended that registration of the suit property in the name of the suit property in the name of *Obwa Kyabazinga Bwa Busoga* was an anomaly because other kingdom properties are registered in the name of the Kyabazinga of Busoga as the correct entity.
- 16] Kafuko Ntuyo was subjected to cross examination on his affidavit. The gist of his evidence was that he had full instructions of the Kyabazinga William Gabula Nadiope IV, the cultural leader of the Kingdom. He explained that the Kingdom had no Katikiro between 2013 and 2016, until Dr.

Muvawala's appointment in 2016, and he remains the current Katikiro. He conceded that the suit land belongs to the OKBB which is a mistake that was under rectification to put it into the names of the Kyabazinga of Busoga. He admitted knowing the correspondence in the suit emanating from OKBB and the fact that the Kyabazinga is not mentioned in any of them. He explained that the Kyabazinga never corresponds directly.

- 17] M/s Luganda, Ojok & Co., Advocates presented the application which was opposed by Ambrose Tebyasa & Co., Advocates on behalf of the respondents. Both counsel proceeded by written submissions whose contents although not repeated here in detail, shall be considered in my final decision.

My decision

- 18] As well stated by respondents' counsel, consent judgments which are the result of a consensus of parties, will not be set aside except in exceptional circumstances. It must first be proved by credible and cogent evidence that the consent was procured through fraud, illegality or mistake. See **Attorney General & Uganda Land Commission Vrs James Mark Kamoga & Anor SCCA Mo. 8/2004**. I also agree that an illegality if brought to the attention of the Court, irrespective of the stage of the proceedings of the case in general, the Court must intervene and halt the process. In essence as

pointed out by applicant's counsel, illegality overrides all questions of pleadings, including any admissions made. See **Makula International Vrs. Cardinal Emmanuel Nsubuga (1981) HCB 77.**

19] The application is premised on illegality, misrepresentation and fraud. It is argued for the applicant that the Busoga Kingdom does not exist in law, and therefore cannot sue or be sued. That the proceedings of the main suit should have been taken out, against the Kyabazinga of Busoga, who is the legal persona and not the Kingdom which technically does not exist in law. In addition that, Dr. Muvawala who held out to be the Katikiro/Prime Minister of the Busoga Kingdom, was at the material time not yet appointed, and could thereby not bind the institution, an act deemed to be fraudulent and misrepresentation.

20] Much of the responses in counsel Tebyasa's affidavit derived from the evidence by Mr. Kafuko in cross examination. It is argued that the OBKBB and Busoga Kingdom are one and the same thing (one only being the English version of the other) and that the institution which is not a creation of statute existed since 1939. He argued further that OBKBB as an institution, has corporate personality and that, the current law conferred the identity of corporation sole to the institution and not its leader. Therefore that would empower the Busoga Kingdom to sue and be sued as has been the

case before. Counsel further argued that no proof was adduced to show that Dr. Muvawala signed the consent ultra vires his powers or appointment.

The law

21] Both counsel were in agreement with the applicable law, their disagreement arose from its interpretation. It is provided in Article 246(1) of the Constitution that:

“Subject to the provisions of this Constitution, the institution of traditional leader or cultural leader may exist in any area of Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies.”

It is further provided in Article 246(3)(a) that:

“The institution of a traditional leader or a cultural leader, shall be a corporate sole with perpetual succession and with capacity to sue and be sued and to hold assets or properties in trust for itself and the people concerned. Emphasis of this court.

22] Corporation sole is defined by Black’s Law Dictionary 10thEd. (pg 416) to be *“a series of successive persons holding an office; a continuous legal personality that is attributed to successive holders of certain monarchical or ecclesiastical positions such as kings, bishops, rectors, vicars, and the like.*

This continuous personality is viewed by legal fiction, as having the qualities of a corporation.

23] Counsel Tebyasa suggested and I agree that, the Constitution did not create traditional institutions but only restored and streamlined their operations. Indeed, I see nothing in the Constitution to suggest that such institutions were being created for the first time. I am convinced that the Busoga Kingdom and OBKBB mean one and the same thing. I am also prepared to take judicial notice of the fact, as stated by her Attorney General that, the Busoga Kingdom has been in existence since 1939. Indeed, many established Kingdoms in Uganda e.g the Buganda, Bunyoro and Tooro Kingdoms have existed for even longer periods.

24] The purpose of the constitutional provisions was to give recognition to these Kingdoms in line with the customs, traditions and aspirations of the people to whom they applied, and also to incorporate them into the new legal regime of the current constitution. Kafuko Ntuyo explained that OKBB exists as an institution in the form of a federation of “Chieftdoms headed by the Kyabazinga elected as one out of them. That although the Kyabazinga is changed by rotation, the OKBB never changes. In my view this institution as many others were not necessarily given a place in our constitution, although they are of course they continued to be part of the settled customary law of this country.

25] The enabling law was more succinct on this point. The interpretation section of The Institution of Traditional Leaders or Cultural Leaders Act 2011(hereinafter the Act) provides in Section 2 that:

“Institution of traditional leader” means the throne, status or other position held by traditional leaders and Institution shall be construed accordingly.” Emphasis of this Court

Further interpretation in the same section is that:

“Traditional leader” means a king or similar traditional leader by whatever name called who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader”.

Again interpretation in the same section is that *“Corporation sole” means a continuous legal personality that is attributed to successive holders of certain monarchical positions such as kings”.*

26] It was never contested that the Kyabazinga of Busoga is the cultural head of the Busoga Kingdom and its peoples. My understanding of the above sections is that the traditional leader is a living person and not an institution. Going by the definition given by Black (Supra) and the Act, he is a person who acquires continuous legal personality by virtue of monarchical ascendancy. Such a person would be the

Kyabazinga of Busoga and not the Kingdom of Busoga or OBKBB, the Institution.

27] I agree with the definition of the word '*institution*' offered by respondent's counsel that he derived from Black's Dictionary. However, I hasten to add that that definition appeared to be differentiating between an institution (e.g. in the sense of the institution of the Kingdom of Busoga) from an enterprise or undertaking as we know it under Company law. Both the Constitution and the Act did not clothe traditional Kingdoms with corporate personality. They can only hold and manage land through the person of the Kyabazinga who is entrusted with constitutional powers to hold it in trust of his people. For that reason, I would respectfully depart from the decision in **Obwa Ikumba Bwa Bugwere Vrs Mubala L. S. Balamu & 3 Others HCCS No. 13/2014.**

28] I would in resolving the first issue find that it was an error to sue the Kingdom of Busoga. That institution is not registered and only exists in the minds of the Basoga people as a manifestation of their core culture but with no corporate personality. The institution was not capable of being sued and once the pleadings were filed, there would be no room to make a substitution for the Kyabazinga of Busoga because I have held before, it was an error that at the outset went to the root of the claim. The legal person and thus the right party to be sued, vests in the Kyabazinga

as the successive holder of that monarchical position within the institution of the Busoga Kingdom. He is the one to sue or be sued in his office/name or by attorney. See **Buganda Land Board Vrs John Wampamba Misc. Application No. 622/2013.**

- 29] I would accordingly agree with applicant's counsel that estoppel cannot in this case act against the Kingdom of Busoga that submitted to the jurisdiction of Court, filed a defence, participated in negotiations and then, signed the consent. They did so in the erroneous belief that they had nexus to do so. The decision in **Ssimbwa & Alfidra Milton Vrs Trustees of Rubaga Miracle Centre & Anor HCMA 576/2006** followed in **Real Gaba Market Property Owner Vrs KCCA HCCS NO. 248/2008** would hold, that a suit filed by a non existent person is illegal and a nullity. I hold that although the institution of the Busoga Kingdom exists as known, it does not legally exist in order to be sued.
- 30] That said, the claim/plaint against the Busoga Kingdom is a nullity *abinitio* and no substantial pleadings can sustain it. The resultant consent judgment would also be a nullity and of no effect. It cannot be cured by the fact that it was signed by Dr. Muvawala stated to be the Kingdom's Katikiro at the material time, a fact which was in fact contested. My decision here of course does not affect the claim against the Attorney General, who was sued in the right capacity as

representative of Government and stated to be a co-employer of the respondents.

- 31] The above notwithstanding, I would agree with respondent's counsel that no sufficient proof was advanced to show that Dr. Muvawala was not the Katikiro of Busoga at the material time that the consent was executed. Infact, in cross examination, Mr. Kafuko Ntuyo conceded that he is the current Katikiro and was not aware of any pending proceedings against him for falsely holding out in that position. There was also no official position of the Kyabazinga of Busoga about Dr. Muvawala's position. However, those facts would be irrelevant because I have found that the party that Dr. Muvawala purported to represent, does not exist in law, and has no corporate personality to be sued or to even enter negotiations with the respondent/plaintiffs.

Conclusion

- 32] I would accordingly allow the application. The consent judgment/decreed in Civil Suit No. 13/2011 is set aside. I further hold that all subsequent applications for executions, pending or part executions and actions arising out of the consent judgment/decreed are nullified and set aside.
- 33] As a result of my findings above, I would go further to hold that since Busoga Kingdom does not exist in law, they could not be sued and their claim against them, cannot be

maintained. Setting aside the consent judgment *per se*, would mean that the suit can continue to hearing against them which is not the case. The suit against Busoga Kingdom is accordingly dismissed and struck off the record. The matter will proceed against the Attorney General alone or limitation allowing, a fresh suit can be filed against the Kyabazinga of Busoga.

34] The achievement of the applicant has been to draw this Court's attention to an illegal consent judgment. They have in the process saved their property from what would have been an illegal attachment of Kingdom property that is held in trust by the Kyabazinga. In my view, that is sufficient vindication. They have also not proved any fraud or misrepresentation by the respondents. I would thus exercise my discretion to deny them costs of this application, to hold, that each party shall meet their costs.

I so order

Signed

EVA K. LUSWATA
JUDGE
DATE 3/12/2019