

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT ARUA

CIVIL SUIT NO. 0011 OF 2010

MARK .A. NZIRI & 3 OR _____ PLAINTIFFS

=VERSUS=

PHILLIP ISSIAH & 8 ORS _____ RESPONDENTS

JUDGMENT

BEFORE HON. JUSTICE NYANZI YASIN

FACTUAL BACKGROUND

1. This case has an interesting background of culture and traditions. It is a dispute over the Kingship of the Ragem. As the details will reveal later the dispute is between the sons of a former King on one hand and the sons of that King's brother's son and other subjects of the Kingdom on the other hand.
2. Although there seem to have existed other Kings before 1927, the concern of this case starts from that year. In that year King

ANDEREA ALI II became the ruler of the Kingdom having succeeded his father King OWINY.

3. King Andrea Ali II's reign ended in 1945 when he died. He was succeeded by his son ANGERO KEROYUNG. Among other children born to King Andrea Ali were Mark Ali Nziri PW1, Vincent Ali PW2, Lorension Koch Oweco PW3, Opok James PW4.

From the evidence King Andrea Ali II had over 40 children.

4. When Angelo Keronying died, he was succeeded by his son VICENT ALI III. It is said in 1992 this new King died though his date of death is not clear. He died when still young. He was unmarried and had no children.
5. It is claimed by the plaintiffs that on a vaccum being created by VICENT ALI's death, the 4th plaintiff LORENSIO KOCH OWACO was appointed the care taker of the kingdom. As such he took over the royal regalia (instruments of power) pending the replacement of the Kingship by one of the grandsons of King Andrea Ali II who was the father of Angelo Keronying to succeed the throne.
6. It is further claimed from the evidence that in 2005 the royals being the children of the King Anderea Ali chose EMMANUEL OWINY to take over the Kingship. He was not enthroned immediately. While waiting being enthroned that is when the defendants appointed the 7th defendant King of the Ragem and prepared to enthrone him at Nyakachodo.
7. The plaintiff brought this suit at the time when the preparations were going on to have the 7th defendant enthroned for declaratory orders and injunctions.

In summary the orders sought for were;-

- a) A declaration that the 1st to 6th defendants have no authority according to the cultural succession tradition of the Ragem Chiefdom to appoint and coronate the 7th defendant as King of the Ragem.
- b) A declaration that the appointment is vested in the plaintiffs according to the traditional norms and practice of the Ragem.
- c) A declaration that the 7th defendant is not the legitimate heir to the throne o the king of her Ragem.
- d) A permanent injunction restraining the 1st to 6th defendants from coronating the 7th defendant king of Ragem.

However in January 2009 the 7th defendant was coronated King rendering the prayer for an injunction redundant as of now.

8. The 1st to 7th defendants did not agree with any of the allegations above. They filed a detailed written statement of defence in which they also justified that their actions were in accordance with the culture and traditions of the Ragem. In the Written statement of defence it was pleaded;

- a) That the father of the 7th defendant SAVERIO ALI was the rightful heir of the Kingdom that is why his son the 7th defendant OLARKER was enthroned in 2007.
- b) From the evidence of PW3 Phillip Issiah and Leowule Kerwotho Yuda, there were 3 sons with Saverio Ali born to King WINY the other was Andrea Ali who became King and is father of the plaintiffs.
- c) That according to traditions of the Regam out of King OWINY's sons, it was SAVERIO ALI who was supposed to succeed his father as King and not Anderea Ali. That it was

the brother of late King who confused the king leading to enthronement of Andrea Ali. The king's brother was called OYUDA.

d) That the enthronement of the 7th defendant was therefore lawful as he is a son of Saverio Ali who was himself was supposed to be a King by succeeding his father.

e) That late Andrea Ali was disowned due to having a relationship with his father's wife (King's wife) AKUMU's daughter.

f) That all the children of Andrea Ali were born outside marriage as their mothers were inherited from late King OWING.

9. At the trial the defence brought a lot of evidence to justify the lost Kingship and procedures contrary to the ones pleaded by the plaintiffs in appointment of a Successor to a deceased King.

10. For instance while the plaintiffs vehemently stated that a deceased King named his own successor as a matter of choice, the defendant's told court the King could only appoint the heir through the son who finds APAYA in the sauce.

11. The defendants also testified that where the King is not survived by a son the elders/clan choose one of the royals to become a King. While the plaintiffs agree that a royal could be appointed, the difference is that the plaintiffs say it is only the sons of the deceased King who appoint the king from the grandson of the deceased King so that the lineage of Kingship does not go back wards but forward. None of the brothers to the deceased King can be King but a son of such brother.

AGREED FACTS

12. At the scheduling conference the following facts were agreed upon;-
- a) KING OWINY was a legitimate King of the Ragem Chiefdom.
 - b) Andrea Ali
Saverio Ali
Phillip Issiah
Kerwotho Oyuda } Were all sons of late King Owiny.
 - c) The plaintiffs are all sons of King Andrea Ali II.
 - d) The 7th defendant is a son of Saveria Ali (Ali s/o Owiny)
 - e) Both the plaintiffs and the defendants all are members of the Regam community.

13. AGREED ISSUES

- a) Whether the 7th defendant is the legitimate heir to the throne of the Regam Chiefdom and if so
- b) Whether the enthronement of the 7th defendant was in conformity with the traditions and customs of Regam.
- c) Remedies to be made.

14. I must comment that the above issues were rephrased by this court with observation that the first issues framed at scheduling conferencing were too blanket. Issue number two if it is to be answered depends on the answer in issue number one. Number two itself has **sub-issues** which are very important to consider. Those sub-issues will be developed if it becomes of essence to consider issue number two.

15. LAW APPLICABLE

Any area in Uganda has a constitutional right to have a traditional or cultural leader. In so doing that society would rely on Art. 246 of the constitution of Uganda 1995.

16. 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 leader or cultural leader by whatever name called who derives alliegence 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)

17. In the present case from evidence and arguments of the learned advocates, the plaintiffs pleaded and based their case on purely traditions while the defendants 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.

18. The JUDICATURE ACT (Cap/ 13 Laws of Uganda) has also provisions which are relevant to this case. S.14 (2) (b) (ii) and (c) and S.15 (1) of that Act are relevant to this case. 14 (2) reads;

19. S.14

(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
 - (i) Any established and current custom or usage.
 - (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.
- 20. S.15 of the Judicature Act provides for the application of customary law it reads

S.15 *“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)

- 21. At the hearing of this suit Mr. Samuel Ondoma of Alaka & Co. Advocates represented the plaintiff’s. Mr. Donge Opar Silvester of Donge & Co. acted for the defendants. This court allowed the learned advocates to present their final arguments in writing, which they did. This court has read and considered the submissions of the learned advocates.
- 22. This was a very contested trial in which both parties expressed utmost interest and concern. The plaintiff presented 6 witnesses namely they were;-
 - 1) Mark Ali Nziri 81 s/o Andrea PW1
 - 2) Vicent Ali 81 s/o Andrea PW2

- 3) Lorenzio Koch Owach 82 s/o Andrea PW3
- 4) Opoki James Ali 70 s/o Andrea PW4
- 5) Ali Vura 77 PW5
- 6) Yosamu Loka 76 PW6

23. The defendants on the other hand called 7 witnesses namely;-

- 1) Yunus Onyutaloka 67 DW1
- 2) Olarker s/o Saverio 68 DW2
- 3) Phillip Issiah 90 s/o Owiny (brother of) King Andrea Ali DW3
- 4) Leowule Kerwotho Oyuda 90 s/o King Owiny (brother of) King Andrea Ali.
- 5) Alfred Ongom 70 DW5
- 6) Akira Nicholas 74 Chieflet of Pakwero DW6.

24. Through those witnesses each side adduced detailed oral evidence. This court has reviewed the evidence adduced. Wherever and whenever it becomes relevant to the issue under consideration, such evidence will be relied on and reviewed.

25. **WHETHER the 7th defendant is the legitimate heir to the throne of the Regam Chiefdom**

26. The evidence adduced by the plaintiffs on the above issue related to what they pleaded in paragraph 4 (a) – (j) of the plaint. Apparently learned counsel Mr. Ondoma Samuel followed the same line of both his pleadings and evidence of his witnesses in the final submission.

27. The gist of the plaintiffs reasons that the 7th defendant is not the legitimate heir to the Regam throne can be captured from evidence of PW.1 Mark Ali Nziri the relevant part of his evidence runs as below

“We have a lineage we follow. There are 33 Kings enthroned since the coming of KOCH OWACO from the Sudan. I will start from Chief OWINY II. He died on 5th May 1927. When he died his son Andrea Ali succeeded him and was enthroned as King. He ruled for 18 years without any problem. On the 31/01/1945 Andrea Ali died. After his death ANGELO Karonyung his son succeeded him, there was no problem at all.Angelo Keronyung dies around 1958 – 59. Upon his death still his son Vicent Ali III (OWINY) succeeded him and was enthroned King of the Ragem. He was a child of only 8 years.....He did not rule for long. He died before he could marry and left no child.We the grandchildren of Andrea Ali we appointed one of the grandsons of King Andrea Ali to take over the Kingdomit was about 2005. we choose Emmanuel Owiny a son of Vincent Owing who is a son of Andrea Ali”

28. The same PW1 went ahead to explain why the 7th defendant could not be enthroned as King of the Regam. He testified as below;

“The king therefore had to come from the grand children of Andrea Ali our father, SAVERIO Ali was a son of king Owiny II. He was a brother of Andrea Ali Saverio Ali is the father of the 7th defendant. Andrea Ali was chosen a king. He was a brother of Saverio Ali that means the next king could not be chosen from the lineage of Saverio Ali. On our culture the appointment of the king can not go backwards. The moment Andrea Ali was appointed King it means Saverio Ali being a brother of a king can never be a King. It also means that it is

the lineage of Andrea Ali which gives future kings. That is why when our father died, his son Angelo Keronyung was appointed King. We now all other children of King Andrea Ali, cannot claim the throne because it goes forward in lineage.....Olarker being a son of Saverio Ali who was a brother of King Andrea Ali cannot be King because their Kingship lineage stopped when Andrea Ali was made King”.

29. In cross examination he explained that when a reigning King dies is succeeded by a heir he has appointed and if he dies without a son it then is royals who chose the next king from the lineage of the former king. He denied that such appointment has any involvement of the other people.
30. The evidence of PW2, PW3 and PW4 was similar to that of PW1 on the foregoing point. They only differed in wording but the gist remained the same. From that evidence it was submitted the Kingship ought to move in the manner it has been moving and not to be reversed.
31. The defendants on other hand put up a spirited challenge to the submission of the plaintiff on this point, learned counsel Donge argued that the evidence of DW1 YUNUS ONYUTA LOKA it was established that a successor to the deceased King would be appointed in two ways. The first was by the King himself through APAYA system. The second one was when the king does not leave a successor and one is chosen by the clan leaders of the Regam.
32. DW1 explained that APAYA is a bead put in sauce/food. This food is eaten by all the sons of the king. The son who gets the APAYA three

times on different occasions is confirmed the successor of the king. On how APAYA system operates DW1 testified as follows;

“The kind himself can appoint his successor. He tells his wife to prepare food for a meal and a bead or APAYA is put in the food/sauce. He calls all his children to eat the food. When they are eating the child who gets the APAYA from the sauce and shows it to his father will be the successor to the king. It is done for the first time. The process is repeated the second time and the third time. On the second and third time the same things are done as in the first time. If the first son to get the APAYA does not get it in the second occasion he can not be the king.....For the child to be the successor to the king he must get the APAYA three times.....If he gets it the 3rd time the father introduces him to the chief lets”.

33. DW1 was supported by the evidence of DW3 and DW4 who were sons of king OWINY. Then two testified that they participated in such a process in which SEVERIO ALI got the APAYA three times and was the one who was supposed to be the heir to their father’s throne save that OYUDA the king’s brother diverted the kingship to Andrea Ali II.

34. DW1 then went ahead to explain what happens if the king dies childless. He said;-

“When the king dies with no child the Regam community sits down and they appoint a child who can work there”

35. Under court examination he added

“By Regam community I mean elders who choose the king it is not for every one. It is the clan leaders of the Regam

community. They are the ones who sit to choose the heir. When the clan leaders sit they have to convince the child who is their choice to come and stay with them. When the child comes and stays with them they appoint him a king”.

36. In relation to the 7th defendant DW1 evidence was to the effect below
“It was discovered Vincent Ali III died without a child. The chief lets wrote a letter in their letter they requested the grand children of the Kingdom to sit down and choose a king.....the elders of the Regam sat down and selected OLARKER to be enthroned as kind. As I said before the Regam community has the power to select the person to be their king KIVULU S/O Nyabongo died with no child the Regam appointed SAGARA to be their king. KIVULU died long a long. I came to know of him as an elder of the Regam.....other elders have been telling me all the history of the kingdom”.

37. From the evidence of DW1, DW3 and DW4 Mr. Donge developed two strong arguments favouring the 7th defendant’s appointment. The first was that the 7th defendant’s appointment was legitimate in so far as he is the son of Saverio Ali who was King OWINY’s rightful successor having got the APAYA three times.

38. The second was that as Vicent Ali III had died childless the Regam elders could appoint a heir to the throne. They sat and as DW1 explained appointed OLARKER. It is important for this court to state Ms Donge’s views and conclusion on this point. He argued as below;
“Once a king dies childless it is more acceptable that the Regam elders or community participate in choosing a successor king.

It would be dictatorial for only one family to do so. This kind of tradition would be termed repugnant and neither acceptable nor enforceable.

39. The burden to prove that the 7th defendant was legitimately enthroned fell on the defendants. They had to adduce evidence on the balance of probabilities to convince this court to make a finding to that effect. S.101 (1) of the evidence Act would be instructive on this point. The section provides that;

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts **which he/she asserts must prove that those facts exist**”.(emphasis added)

I will now turn and consider the evidence available. Is there evidence to show how the 7th defendant came to be appointed king in conformity with any procedure in that question.

39. I will start with the letter of invitation contained in Exh. D1. DW2 the 7th defendant testified about Exh. D1 as below

“I received a letter on 15/07/2007 inviting me to go with my son called LIMTHO. **The purpose of the letter was that my son was going to be chosen the king of Regam.** The letter was written by Kerwoth Oyuda” (emphasis mine)

40. The first paragraph of Exh. D1 is clear enough to state its purpose. I will reproduce it verbatim;

“With this letter, this gathering is calling for you, Mr. Olar Saverio **to come to them with your son who will be introduced and enthroned as Regam King.** The son is called LIMTHO OLAR. (emphasis mine).

41. According to Exh. D1 the elders had decided on who the king was supported to be. It was LIMTHO and was to be enthroned. When DW2 was cross examined as to what happened to LIMTHO his relevant evidence ran as below but rather in unclear tone;

“According to the letter (Exh. D1 it was my son who was appointed to be enthroned as king. That is what the elders agreed in the letter.....I did not bring my son. There was no need to bring him. He did not qualify according to our culture I was alive as the father. In choosing my son the elders who wrote the letter were right.....on the 3rd March when I came for the meeting the elders did not ask me for LIMTHO.....”

42. The communication in Exh. D1 if read as whole seems to be a resolution perhaps taken after a meeting. There is Exh. D2 evidence that another meeting was held to enthrone to the 7th defendant but no mention was made of LIMTHO.

43. Apart from the 7th defendant explaining that in their culture LIMTHO could not be a king when his father is still alive, there was no any other witness who justified that custom. In any event I would take it that before Prince Kerwitho Oyuda wrote exhibit D1 as an elder all such matters had been considered and resolved.

In absence of independent evidence of the custom DW2 claimed it is not understandable how the name of the 7th defendant came into picture for Kingship.

44. Exh. D1 was introduced in evidence by the defendants. It was tendered in court particularly when the 7th defendant was giving

evidence as DW2. It must then be given its full meaning. It appoints another person a king and not the 7th defendant.

45. The second aspect of evidence I have consider is on the procedure how the 7th defendant was chosen or appointed.

I will start with evidence of DW1 – I have already reproduced his evidence where he confirmed to court that the king where the deceased king was childless is chosen by clan leaders and it is not a matter for everyone. He went ahead to the best of his memory to name about 13 clans/clan leaders who appoint a king of theRegam.

46. However Dw2’s evidence does not suggest that he was appointed or chosen by clan heads. In his evidence of cross-examination the 7th defendant said

*“I do not know how the kings before me became kings. I was still young. **It is my testimony that I was elected by the people. My Secretary has the list of people who elected me. It was by show of hands**”.* (Emphasis added)

47. Earlier in his evidence in-chief – DW2 had pointed to such an electoral method. He said

*“The elders told us that the purpose of calling the meeting was to select a person who would become a king. **They wanted to elect a king. All the members agreed to elect a king.** They said in Uganda most places have their kings so they wanted to have their own king”*

48. The above piece of evidence further show that according to DW2 the king was elected by the people. Yet according to DW.1 who appeared as the principal witness on matters of procedure that was not the method of replacing a king. According to DW.1, It is done by clan

- heads and he named them. That would render the evidence of the defence to be too contradictory in a material area or particular.
49. Worse still, the evidence of DW2 that he was elected by show of hands contradict the contents of Exh. D2. The minutes at the meeting show that DW.2's name was chosen and several speakers supported it. It is not shown anywhere that there was an election of the king by show of hands. But now the person who was the subject of action, on oath before court gave a different version of events. It renders the evidence to be suspected.
50. DW1 gave evidence at that system of appointing a king where none existed had ever happened in the Regam. He referred to the era of **Kivula s/o Nyabongo** who died with no successor. The Regam appointed SAGARA a king to replace him. He however concluded by saying that he got those stories from elders which would make it hearsay evidence Act. Its acceptance would offend S.59 (a) and (b) of the Evidence Act. I do not accept the stories he told.
51. However it remains an issue **to answer whether the 7th defendant qualified to be considered the Regam king even if there were no problems on his evidence in procedure.**
52. To resolve the above this court has framed the following sub-issues.
- Whether the Regam king could be replaced using the APAYA system.
 - Whether the lineage of kings does not reverse.
- The two sub-issues would cover and answer the remaining part of the main issue which in my view is more relevant.
53. Whether the Regam king could be replaced using the **APAYA system**

54. On the side of evidence the defendants adduced through DW1, DW3, DW4 and Exh. D2. the evidence of DW3 and DW4 was more direct than others. These two witnesses claimed to have participated in the tradition when their father OWINY II was alive. Exh. D2 on the other hand containing statements of speakers who referred to the existence of the system. It is not clear from the minutes whether they had the personal knowledge or not.
55. However taking the minutes as are under min. 6/08 in the speech of ISAYA RWOTH DWONGO APILI he said
- “The Kingdom was for Saverio but the elder Mr. OYUDA was the one who brought confusion SAVERIO got the bead (APAYA) in the cooked vegetable and his father king Owiny is the one who kept it. When Owiny died Andrea was enthroned in his place (meaning Saverio).
56. Other speakers in Exh. D2 who referred to APAYA tradition included YOSAMO LOKO, MUHUNDI under Min. 17/08, OTIM CRACIANO and others.
57. On the side of what appears to be direct evidence was given by DW3. He said he was present and added
- “At first our father appointed SAVERIO ALI to be king because a bead was put in the sauce/food and he got three times. I was present. We were eating together all the three times. SAVERIO did not become the king after getting the bead. After the death of our father our uncle called OYUDA took away the kingship and gave it to Andrea Ali”.*

58. DW4 a brother of DW3 with whom they shared the apparent age of 90 years told a similar story. For purpose of proper evaluation of evidence I will still reproduce what he said in this Judgment, he said
- “Andrea Ali became a king because our father confused the kingship. It was supposed to be Saverio Ali. I knew it because I was present. I and Phillip Issiah are age mates.....SAVERIO ALI got the bead from the Sauce three times I was present. We ate the food with Phillip Issiah”.*
59. Learned counsel Donge for the defendant argued that the evidence on the use of APAYA system was not at all challenged. That does not appear to be true. The truth is that the defendant through the evidence I have reproduced above justified the operation of the APAYA tradition.
60. The plaintiffs on the other hand were sons of King Andrea Ali. They appeared and testified as PW1, PW2, PW3 and PW4, they testified that upon their father’s death, their brother ANGELO KERUYUNG was appointed to replace him. PW1 and PW2 were present when Angelo was being enthroned.
61. All the sons of king Andrea Ali were categorilly clear that they were never subjected to the APAYA tradition before Angelo was appointed a king among them. By giving a different version to the evidence of DW3 and DW4 in my humble view the plaintiffs challenged the evidence on use of APAYA. It is therefore not true to say that the evidence was not challenged as Mr. Donge argued.
62. I have compared the evidence of the two sides and found the following areas of concern irresistibly inviting comments of this court.

- (i). While it may be true or untrue that Andrea Ali was not the true king, he would still be bound by the traditions and customs of the Regam to use APAYA. Why is it that he did not use it when appointing his successor Angelo Keronying? By the time Angello became king many people like DW3 and DW4 were already adults. They did not confirm to this court that the system continued operating or that Andrea Ali defied or ignored this tradition.
- (ii). The second aspect to be reviewed and compared to evidence of use of APAYA is the fact that both the witnesses of the plaintiffs and defence agree that by the time Andrea Ali became king, SAVERIO ALI was living. Equally that by the time Angelo Karonying succeeded his father Andrea Ali Saverio Ali was a living person. There is no evidence from the defendants to suggest that SAVERIO ALI who was the successor through APAYA ever claimed the throne from either his brother Andrea Ali or nephew Angelo Karonyung. During much of the relevant period DW3, DW4 PW1 and PW2 were present and adults, none of them testified to court that SAVERIO Ali ever at all attempted to reclaim the throne he is said to have lost. The absence of a claim to throne would weaken the position that SAVERIO had been made a successor through the APAYE system. I say so because my view is that the coronation of Andrea Ali, Angello Karonying would not all have gone on with no mention that the persons who were being coronated are not at all kings but Saverio Ali.
- (iii) (a). The third aspect is found in evidence in Exh. D2 in the speech of ISAYA DWONGO APILI. He said for 60 years the kingdom did not have a substantive leader (read king). I believe by use of the words

“substantive” he meant one appointed through APAYA, and what he said in following that statement justifies.

The evidence of PW1 put their father’s death to have occurred on MAY - 1945. That is when Andrea Ali became king without passing through the APAYA system. Consequently when the defendant convened a meeting in Exh. D2 on March 2008 they were seeking to re-establish a custom that had not been a force for 80 years. Yet during those 80 years the kingdom had been through the reign of 3 kings except for the period that followed the death of Ali Vincent III childless. The system last worked if it is true in 1927 when Andrea Ali became king.

(iii)(b). If the two position are compared that is the system that has not worked for 80 years the one in use since Andrea Ali appointed his heir Angello, would be more of the tradition and custom than the one not in use.

(iv) (a). The fourth area concerns the death of VICENT ALI OWINY III. All agree by evidence that he died childless, unmarried and therefore left no successor. His date of death was lightly stated to be 1992. I do believe the gap he left would eagerly have been filled by the Regam before the manner they did in 2008, if it was genuinely true that the kingship was lost. There were legal avenues to do so.

In 1993 the then Legislature enacted ***the constitutional (Amendment) statute 1993***. Like the provision of Art. 246 (1) of 1995 Constitution, it was to the effect that traditional leaders or cultural leader may exist in any area in Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies.

(iv) (b). Since the law allowing the defendants to replace a king came into force in 1993 knowing that the kingship had been lost, my view is that an earlier action would have been taken and not to wait till 15 years or until in 2005 when the plaintiff had appointed a replacement awaiting coronation.

63. I have given a conclusion on each of the four areas of concern. Whether it is true or not true that the APAYA system could appoint a king, the 80 years it has not been in use and the fact that there is no proof that subsequent kings used it since OWINY II the defendants could not base on it let alone use its existence in 1927 to appoint a king in 2008 about 80 years later.

64. **Whether the lineage of kingship does not reverse in the Regam.**

I have already stated in his judgment the evidence on this point as given by PW1, 2, 3 and 4. I may only add that in Exh. D2 Mark Nziri, James Opoki, Pico Ocamringa, Otwiya Donito all told the meeting of the same position.

65. Before considering the evidence it is important to answer a very strong argument presented by Mr. Donge. In his submission Mr. Donge argued – if PW2 agreed he was not a king and his son **Emmanuel Owiny** had been appointed a king then kingship reverses. Equally Olarkar s/o Saverio Ali could be appointed King.

66. With respect to Mr. Donge that is not what the evidence suggested. The best explanation to refer to is evidence of PW1. PW1 explained that the moment one of the sons of OWINY II become a king none of OWINY II's sons could be a king. Their lineage stopped on Andrea

- Ali and it was now the **children of Andrea Ali** to continue with the kingship.
67. He further said the moment Angello Keronyung became a king none of them could be a king. But they being the lineage of Andrea Ali, Angello son having died with no body else to replace him they had to appoint a grandson of Andrea Ali to replace Vincent Ali II. Between the deceased king Vicent Ali II and Emmanuel Owiny s/o PW2 the two in African sense would be brothers (cousins) that is not a reverse of image.
 67. The theory that kingship does not reverse seem to be supported by the defence evidence to some extent. In Exh.D1 which as I said seemed to be resolution of a meeting of elders LIMTHO OLAR a grandson of Saverio Ali was appointed instead of his father Olarkar the 7th defendant. I have already said that the meeting of March 2008 did not give any reason for dropping LIMTHO OLAR whom they appointed and were only waiting to have him enthroned. The evidence of the 7th defendant that LIMTHO could not be king in Regam culture while his father was alive was never supported by other elders older than him to be the custom and tradition of the Regam.
 68. The evidence which is so far on the record showed that the Regam have had kings before and from 1927 up to the death of Vicent Ali III who are sons born to the deceased kings. None of them has ever been challenged.
 69. The comparative evidence given by DW1 of the era of ODONGO and PINCHO as I said on evidence KIVULU s/o Nyabongo, this court cannot treat as evidence the legendary stories told to DW1 by elders

- unless those elders are called to testify. To do so would be accepting hear-say evidence.
70. Having considered the detailed evidence of PW1, PW2, PW3 and PW4, parts of Exh. D2 relating to the position of the plaintiffs and the actual reason why LIMTHO OLAR and not his father had been appointed in Exh. D1 I am convinced on a balance of probability that kingship among the Regam does not reverse.
71. From the evidence I heard and recorded they some cultural and traditional aspects which show that the reversal of kingship may not be easy. I will cite among others
- (i). The ritual which requires the new king to stay in the Shrine with his step mother for 3 days. The step mother is the wife of the deceased king. He is made a wife of the new king. If the new king comes from a reversal lineage they cannot get that person. (wife of the king). Unless the ritual is done away with. You cannot present any woman other than the king's wife and then you say you are doing the same ritual.
 - (ii). Another example is the burial place for all kings. In Regam king are buried at Nyakachodo. Evidence established that the father of the 7th defendant who was not a king is buried in a foreign piece of land in Masindi District. Such a situation may be difficult to rectify. Unless if the lineage continues and it is argued that the new king has his father king buried at Nyakachodo to create a relationship with Nyakachodo. It appears you cannot just be the first one in your lineage to be buried at Nyakachodo, a burial place for kings.
72. It was stated that this case was subject to the provisions of Art. 246 (1) (2) and (b) constitution of Uganda.

- Art. 246 (1) sets two ways in which a traditional leaders may be put in place. The first one is to be in conformity with culture, customs and traditions of that community. The second one is based on the wish of the people.
73. In the present case the defendant case seemed to have two legs. By tradition it was argued the 7th s/o Saverio Ali who put the APAYA would be king. I have not believed their position and I gave reasons.
74. The second aspect is by wishes and aspirations of the people. The evidence in Exh. D1 & 2 evidences of DW1 particularly and evidence of DW2 if compared becomes too contradictory to be believed. A mere example among others I gave in Exh. D1 the 7th defendant is not the appointed king but LIMTHO. That would not depict the wishes and aspirations of the people. Also DW.2's claim that he was elected and DW1 that clans appointed him.
75. To the contrary there is evidence which supports a leader established by cultural practices and traditions. 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.
76. The custom of a son inheriting kingship from his father at least proved from 1927 onward has been established and proved. The leader of the Regam could only be appointed in conformity with Art 246 (1) and (6) based on customs, culture and traditions.
77. In **PRINCE J.D.C MPUGA RUKIDI – APPELLANT**
=VERSUS=

PRINCE SOLOMON IGURU & HON. KAJURA C.A. No. 18/1994 S.C.

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

78. In the present case the plaintiffs proved that their king is governed on basis of sons inheriting kingship from their fathers. In absence of a king then it is the issue based on birth and descent that appoints another king in conformity with the culture. I do not agree with Mr. Donge with respect that such customs are repugnant to equity, justice or any written law. If we go by comparison that is what happens in so many other areas with traditional rulers in Uganda if it was that repugment it would not be enforced.

In all I answer the first issue in the negative. The 7th defendant is not the legitimate heir to the throne of the Regam.

79. ISSUE TWO

This issue was only conditioned to the answer in issue one being in the affirmative. Since my finding is in the negative there is no need to discuss it. I may only thank the parties for having laboured to produce the required evidence on the procedure of enthroning a king but I will not discuss it. It would be an academic exercise if the 7th defendant never qualified to be coronated.

80. I consequently enter judgment for the plaintiff and make the orders below;-

- 1) That it is declared that the defendant is and was not the rightful or legitimate heir to the throne of the king of the Regam chiefdom Wadelai.
- 2) It is declared that his coronation was wrongful and contrary to article 246 (1) and (6) of the Constitution of Uganda.
- 3) It is declared that the plaintiff proved that the Regam kingdom is governed based on birth and descent and any traditional leaders to be appointed and coronated have to be in conformity with the provisions of Art 246 (1) and (6) and any other law in force relating to traditional/cultural leaders.

79. **COSTS**

The plaintiff asked for the costs of this suit. I have not awarded costs to either party. I find the words of my lord ODOK C.J in **PRINCE MPUGA RUKIDI =VS= SOLOMON IGURU** (supra) best to explain why I did not. The C.J. (JSC as then was) wrote

“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 =VS= PUBLIC SERVICE COMMISSION [1972] EA 269...***

This was an important case which settled the question of successor to the throne of BUNYORO – KITERA and the traditional ruler of Bunyoro kingdom. It was a matter of public importancethere is need for reconciliation among the contestants for the well being of the kingdom. In those circumstances I agree that each party should bear its own costs”.

The honourable JSC concluded. I can not add any more useful words to the words of the Hon. JSC. It was for similar reasons that I awarded no costs to the successful plaintiffs.

NYANZI YASIN

JUDGE

28/03/2013

28/03/2013

Mr. Ondoma Samuel for plaintiff

All plaintiffs are in court.

Mr. Paul Manzi holding brief for Mr. Donge for defendants upon request.

Mr. Manzi Paul

I am informed the 7th defendant is sick.

The defendants are represented by the Nelson Kerpol - 8th defendant and 5th defendant.

Canrach court clerk

Court: Judgment is delivered in the presence of the above.

NYANZI YASIN

28/03/2013