

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

HCT-04-CV-CS-0013-2014

**OBWA IKUMBANIA BWA BUGWERE.....PLAINTIFF
VERSUS**

- 1. MUBALA K.S. BALAMU**
 - 2. DAKA JOSEPH MOITI**
 - 3. WASUGIRYA FRED BOB**
 - 4. KALERWE ANTHONY.....DEFENDANTS/COUNTER CLAIMANTS**
- VERSUS**

- 1. KIRYA BADRU**
- 2. JOHN CHRISTOM WAYABIRE.....COUNTER DEFENDANTS**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Plaintiffs are duly registered entity brought a suit against the defendants jointly and severally for;

- a) A declaration that the appointments to the respective positions of traditional leader, Prime Minister, Speaker and Deputy Prime Minister respectively are illegal, null and *void ab initio*.
- b) A declaration that all the actions by the defendants conducted in the name and under the head of the Plaintiff institution are null and *void ab initio*.
- c) A permanent injunction restraining the defendants in any way dealing, conducting or engaging in any activities in the names and under the head of the plaintiff.
- d) General damages.
- e) Costs of this suit.

The facts constituting the cause of action are stated in paragraphs 4, 5, and 6 of the plaint.

In defence, by joint written statement of defence/counterclaim defendants stated that the defendants did not authorise the suit, and prayed for dismissal of the suit under paragraph 3 and 4 of the written statement of defence for the following reasons.

- i) Plaintiff is not a body corporate not having capacity to sue or be sued as it is a partnership between **KIIRYA BADRU** and **JOHN. C. WAYABIRE** , and not the cultural institution of the Bagwere community.

In paragraph 6 of the written statement of defence the defendants aver they are the validly appointed leaders and executives of the cultural institution of the Bagwere Community called **OBWA IKUMBANIA BWA BUGWEERE**, and all activities done by them are lawful.

In paragraph 7 they aver that **KIRYA BADRU** and **J.C. WAYABIRE** are the ones who fraudulently misrepresented their partnership as the cultural institution of the Bagwere Community and as its leaders whereas not. They further aver that the general Notice gazetted them that is GN 303, was revoked under general Notice 503 of 2014.

Defendants then raised a counter claim against the plaintiffs for declarations that the firm known as “**OBWA IKUMBANIA BWA BUGWERE**” is not the bagwere cultural institution known as “**OBWA IKUMBAANIA BWA BAGWEERE.**”

- ii) A declaration that the counter claimants are the Ikumbania Prime Ministers etc of the Bagwere Community.
- iii) A permanent injunction.
- iv) General damages.
- v) Costs of the counter claim.

In reply to the written statement of Defence and Counter claim, maintained their allegations per plaint and denied all issues raised in the written statement of defence and the counter claim. Particularly that the alleged degazettement of General Notice 303 of 2014 by General Notice 503, was annulled by General Notice 518 of 2014.

They prayed that both written statement of defence and counter claim be dismissed with costs.

Following scheduling by the parties the following facts were agreed as uncontested as they appear on court record.

1. Obwa Ikumbaania Bwa Bugwere is the cultural institution of the Bagwere.
2. The institution was recognised by the government on the 6th May 2014 under the General Notice 303 of 6.5.2014.
3. Under General Notice 303 of 2014 **Bishop J.C. Wayabire** was gazetted as a cultural leader of Obwa Ikumbania Obwa Bugwere.
4. On 09.05.2013 Bishop J. C. Wayabirew and Badru Kirya registered a business name known as “Obwa Ikumbania Bwa Bugwere.”
5. On 15.08.2013 **Mr. Badru Kirya** on behalf of Obwa Ikumbania Bwa Bugwere, (the firm) filed a Notice of change of particulars of business of that firm to that of General trading and contract sources to
 - a) Works of visual arts or literature to the public for cultural or educational purposes and services of the entertainment and or recreation of people.
 - b) Promote the development, preservation and enrichment of all the people in the community and promote or preserve the cultural values, norms and practices of the community.

7 issues were listed at the scheduling as herebelow:

1. Whether the plaintiff has *locus standi* to lodge this suit.
2. Whether the suit is vexatious, frivolous and an abuse of court process.

3. Whether the counter claimants have *locus standi* to lodge their counter claim.
4. Whether the counter claim is frivolous and vexatious and discloses no cause of action.
5. Who is the rightful Ikumbania of Obwa Ikumbania bwa Bugwere.
6. Whether the 1st counter Respondent fraudulently caused the government to recognise the 2nd Counter Respondent as the Ikumbania of Obwa Ikumbania Bwa Bugwere.
7. What remedies are available to the parties?

That be as it may, in their submissions all counsel chose to collapse their arguments into three issues- namely.

1. Whether the suit/counter claim is properly before court.
2. What is the rightful Ikumbania of Obwa Ikumbania bwa Bugwere and whether 2nd counter defendant's recognition by government was fraudulent.
3. Remedies

I will follow the same issues as amended by counsel in submissions since they cover all matters in disagreement before this court.

PRELIMINARY:

In their background address to court, plaintiffs referred to agreed issues as per the record and asserted that on 3rd March 2015 it was agreed that Obwa Ikumbania Bwa Bugwere is the cultural institution of the Bagwere, and that the institution was recognised by government.

Counsel for defendant/counter plaintiff objected to the assertion, stating that what was agreed was "Obwa Ikumbania Bwa Bugwere" that it was Ikumbaania with double "aa" as opposed to single 'a'. The record is not clear on this.

What I see on the untyped record of the proceedings is that “Obwa Ikumba^a nia (with ‘a’ inserted at the top) Bwa Bugwere is the cultural institution of the Bagwere. However I agree with plaintiff’s counsel’s observations that these words are used interchangeably by all parties as I will move to show later. This is therefore a non-issue.

EVIDENCE:

The Plaintiff/Counter Defendant called two witnesses **Kirya Badru** and **Gastor Mususu** – Lawful Attorney of the 2nd Counter Defendant.

Defendants/counter plaintiffs all testified and gave further evidence through three witnesses.

All parties relied on sets of exhibits as allowed by the Court.

THE LAW:

The burden of proof is well settled.

In all civil matters proof is on the balance of probabilities. He who wants court to believe him on a fact alleged by him also has the burden to prove its existence (sections 101, 102 and 103) of the Evidence Act.

In cases involving fraud, the standard of proof is higher than in ordinary civil suits. Fraud must be specifically pleaded as per *JWR Kazzora v. MLS Rukuba SCCA 13 of 1992 and Ratilal Gardhanbhai v. Makanji (1957) EA 314*.

I also take note of the fact that this matter being a dispute involving culture, it is governed by the Constitution of the Republic of Uganda, 1995 (as amended) and the Institutional or Cultural Leaders Act 2011.

RESOLUTION OF ISSUES:

1. Whether the suit/counterclaim is properly before Court:

Both the Plaintiff and Defendants/Counter claimants, argued three sub issues under the limit which I now resolve as follows.

i) Which name is the true reference to the cultural institution of Bugwere?

The plaint refers to the cultural institution styled as “Obwa Ikumbania bwa Bugweere”- and Plaintiffs argued that it is one and the same as the “Obwa Ikumbaania bwa Bugwere.”

While the Plaintiffs in reply to arguments raised by Defendants/Counter Claimants that the two are different, argued that:-

-This was an agreed fact with a single ‘a’ as the cultural institution. They argue that no emphasis on this matter was raised at scheduling.

They argue that these words are used interchangeably by all the parties and referred court to a set of documents where this can be checked out.

I have checked the record and all pleadings as filed. I have come to the conclusion that both Plaintiffs and Defendants/Counter Claimants, used the name “Obwa Ikumbania bwa Bugwere” interchangeably, at times with single ‘a’ at times with double “aa” in their different documents on record. These for example included documents attributed to defendants as PE.5, PE.7, PE., PE.5, a letter by Kalere Anthony (DW.3) reads “Obwa ikumbania bwa bugwere” with single ‘a’.

PE.6: Request for assistance “letter by Daka refers to Ikumbania with single ‘a’.

PE.7: Memorandum on Obwa Ikumbaania (with ‘aa’ in the heading), but with single ‘a’ in the body of the letter authored by Daka JOS.

This evidence is contrary to what defence counsel argues that these two references are not one and the same thing. I agree with the plaintiff/Counter Respondent that the use of single 'a' or double 'aa' in the word Obwa Ikumbania bwa bugwere is appearing commonly and interchangeably everywhere among the documents on record, and it is my conclusion that it is intended to be a reference to one and the same entity being the name of the cultural institution of the Bagwere. It therefore follows that the Plaintiff is the same and one with the references under Exh.PE.1, Exh. PE.2 and Exh PE.3 the Gazettes that declared the existence of a cultural institution among/of the Bagwere.

ii) Is the Certificate of Registration and particulars of Registration of the Plaintiff, a partnership of J.C. Wayabire and PW.1 Badru Kirya?

The defence argued that the certificate of Registration and particulars of registration and Exh. DE.19, show that the plaintiff is a business name registered on 07.May.2013. They further argue that a partnership is not a legal entity separate from its owners (partners). The Plaintiff therefore had no right to bring the suit according to Defendants. They argued that Plaintiff did not have locus to bring the suit.

Further they argued that the person mandated to sue under the Cultural Organisation Act is the cultural or traditional leader since he or she is a corporation sole. They argued that there was no requirement under Act 6 of 2011 for registration of name of traditional or cultural institutions, and to that extent plaintiff has no *locus standi* to sue and plaint ought to be rejected under O.7 r. 1(a) of the Civil Procedure Rules.

In Reply to this, the Plaintiff/Counter Defendant's counsel stated that section 7 of the Traditional Cultural Leaders Act is self explanatory. The definition of "a corporation sole" under section 2 of the same Act is that it is a reference to the institution not the 'person'. He further argued that the institution of a traditional or cultural leader becomes a

corporation sole by Act of Parliament and not through registration under the Company Act or Business name Registration Act or NGO Act.

I have carefully considered the arguments. I do find that the law applicable to this issue is the Constitution of the Republic of Uganda Article 246; and Act 6- The Institution of Traditional (or cultural Leaders Act 2011).

This law is comprehensive as to how the institution of cultural leaders is legally to operate.

Under Section 7 of the Act the heading reads:

“capacity of institution of traditional or cultural leaders

(a) The institution of a traditional or cultural leader is a corporation 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.”

This section when subjected to the natural literal interpretation of the words (as held in ***Margret Ziwa and 2 Others v. Catherine Nava Nabagesera CCA 39 of 1997***), the natural meaning of the section is that the word institutional refers to an organisation or corporation. Institution in corporation law according to Black’s Law Dictionary 3rd Edition page 987;

“An organisation or foundation, for the exercise of some public purpose or function as an asylum or university. By the term “institution” in this sense is to be understood as an establishment or organisation which is permanent in its nature as distinguished from an enterprise or undertaking which is transient and temporary.”

The idea here is that, this is talking about the unit of operation as distinct from the “human personality” who runs it.

This is therefore, clear that when reference is made to the institution being a corporation sole- the definition under Section 2 is all telling and embracing of plaintiff’s arguments in reply that it is a reference to the “legal personum” not the human being.

Section 2 provides:

“Corporation sole” means continuous legal personality that is attributed to successive holders of certain monarchical positions such as kings.”

The definition from **Halsbury’s Laws** as correctly argued, shades light to the differences between corporation sole and corporation aggregate.

However by section 2 of the Act 6, the reference is out of context, as the learned authors do state as follows in **Halsbury’s Laws of England Volume 9, 4th Edition**.

“In some cases the creation is expressed to be for all purposes, while in others the purposes are defined by statute. The Public Trustee is a Corporation Sole.”

“Unlike corporation aggregate, a corporation sole has a double capacity namely it is corporate capacity and it is natural or individual capacity, so that a conveyance to a corporation sole may be in either capacity.” (Paragraph 1206 (Halsbury Laws of England line 10).

I am therefore in agreement with Plaintiff’s Counsel’s assertion that the corporation sole in this case was a reference to the institution not the leader. For that reason, the plaintiff had the capacity to bring the suit as it did.

iii) Is the Counterclaim properly before court?

The law on cause of action has been settled. A counter claim is as good as a separate suit, and hence is determined as such suit. A suit must have a cause of action.

A cause of action means every fact which is material to be proved to enable the Plaintiff succeed or every fact which if denied the plaintiff must prove in order to obtain judgment. (Per *Aluminium Ltd v. Restuta Twinomugisha CACA. 22/2000*).

Under O. 7 r. 11(a) of the Civil Procedure Rules, a plaint may be rejected if it does not disclose a cause of action. According to the case of *Kapeka Coffee Works Ltd v. NPART CACA 3/2000*, it was held that:

“In determining whether a plaint discloses a cause of action the court must look only at the plaint and nowhere else.”

For the court to be able to that the standard test was as stated in *Auto Garage v. Motokov [1971] EA 514* that:

“The question whether a plaint shows a cause of action is settled by a perusal of the plaint alone together with anything attached. The plaint must show that:

- a) the Plaintiff enjoyed a right*
- b) the right has been violated*
- c) the defendant is responsible for that violation.”*

In this case the Counter Claimants in pleadings show that;

- a) they enjoyed a right as the elected leaders of their institution.
- b) their right to leadership above has been violated.
- c) Its the defendants who have violated their rights.

All these averments come out in the pleadings under paragraphs 10, 11 and 12 of the counter claim.

By looking at the counter claim alone, there is a cause of action.

All other arguments that the Plaintiff/Counter Defendant raises are matters for the trial as they are in issue.

I therefore find that there is a cause of action. The counter claim is rightly before court.

The issue therefore terminates in the affirmative. Both the plaintiff and Counter Claimant have locus before court and are properly before court.

Issue 2: Who is the rightful Ikumbania of Obwa Ikumbania Bwa Bugwere?

This issue raises the following sub issues:

- i) Whether there is evidence in proof of the Plaintiff's case that they are the right Obwa Ikumbania bwa Bugwere.
- ii) Was the 2nd Counter Defendant's recognition by government fraudulent?

I resolve this issue as follows.

i) Evidence as to who is Ikumbania.

There was evidence before court on behalf of each side contained in evidence as reviewed by each party.

Arising from the evidence, it is important for this court to take note of the following pieces of evidence which lay background to the matters in issue.

GENESIS:

The people of Bugwere did not have a unified institution as a single cultural union until the creation of ABAA, then BACU. During the process of getting organised from evidence of PW.1, PW.2 and DW.6 (**Mubala**). Both **Mr. Mubala** (DW.6) and PW.1 (**Kirya**) were

instrumental in trying to push for the unity of the Bagwere. In 2006 DW.1 was leader of ABBA, while **Kiryia Badru** was the speaker according to DW.1's evidence.

DW.1 claimed that he transformed the ABAA Constitution of 2006 into the BACU Constitution following a constitutional review. After that review he became elected as "Ikumbania" (see paragraph 5, 6, 7, 8 and 9) of his statement on oath dated 20th September, 2016.

This evidence is however countered by PW.1 who during cross-examination denied that evidence. He said at that time **Mr. Mubala** was leader of 'ABAA' as chairperson, and that the name Ikumbania came into force by virtue of the BACU Constitution of 2006.

He however objected to the suggestion that **Mubala** (DW.6) was Ikumbania because **John Wayabire** was elected as Ikumbania on 6th July 2013 following a constitutional process. This was done under the 2013 Constitution.

PW.1 in re-examination clarified that **Bishop Wayabire** was elected under Article 8:4:2, which did not bar single candidacy. He also stated that on 5.May.2014, Bishop Wayabire was gazetted as the leader, and assumed office. He was then installed on 6th July 2013.

PW.1 further revealed that while the 2013 Constitution was registered the Constitutions of 2006 and 2009 were not. The registration was of the institution called "Obwa Ikumbania bwa Bugwere."

The witness further clarified that when the Constitutional review committee of Ntwatwa was set up, it was reviewing the 2006 Constitution of BACU. However its report was not adopted because of a conflict due to its proposals which annexed the 2009 constitution, so the report was not received. The witness did not present the report to the council for adoption instead a steering committee was set up to spearhead the "Obwa Ikumbania".

They also denounced all other organisations attempting to represent the interests of the Bagwere Community. This then resulted into the 2013 Constitution.

The witness claimed that DW.1 did not qualify for election under the 2013 Constitution by virtue of a criminal conviction.

This evidence is corroborated by **PW.2- Mususu Gastafas**.

These details are however countered by the defence in some specific areas for instance the evidence of DW.6 (**Mubala**) in cross-examination was that he was not invited for the 2013 stakeholders meeting and was not aware of the election of **Bishop Wayabire**. He confirmed that BACU was different from Obwa Ikumbania and also confirmed that he is still the leader of 'BACU'. DW.6 (**Mubala**) also confirmed that the Twatwa report was discussed and approved. This meeting comprised of 33 clans out of 86 clans. The witness in cross-examination further conceded that the resolutions he sent to the Ministry of gender requesting for recognition bore the names 'BACU' not 'Ikumbania', though later they communicated that they changed from 'BACU' to Ikumbania.'

In further cross-examination the witness conceded that by 6th June 2011 and that the 2009 Constitution was registered on 4th August 2014.

DW.1 Wasugirya in cross-examination revealed that it is true there was and still a state of confusion since his appointment as Speaker and he has never performed his duties. He however confirmed the genesis as narrated by DW.6, regarding the fact that BACU is the organisation which DW.6 heads and it is what was seeking to transform to "Obwa Ikumbania" before Plaintiffs took over.

DW.2 Medeyi Denis in cross-examination confirmed that he attended the meeting of 6.July.2013 and signed the attendance list but did not participate in the election. In his evidence in chief paragraph 4, notes that there was some grumblings about the 2009 constitution which led to appointment of an Adhoc Committee to carry out a review. PW.1 (**Badru Kirya**), **Fred Wasugirya** and **Jimmy Kirya** were members. As a result on 28th June 2013 he was invited to attend a meeting at Budaka saza headquarters on 6th July 2013. In paragraph 7 he says **Bishop Wayabire** was declared unopposed as elected Ikumbania of Bagwere. He did not participate in the election. He on perusal of the attendance list found discrepancies. In paragraphs 10, 11, and 12 he testifies how PW.1 book centre state in organising for the 6th July 2013 meeting which gave birth to the Ikumbania called **Wayabire**.

DW.3 Kalele Anthony in evidence in chief confirms that the **Wayabire** group through all sorts of ways had the cultural institution of Bagwere that is Obwa Ikumbania Bwa Bugwere gazetted by the government with **Bishop Wayabire** as its leader; when he is not the legitimate one but 1st Defendant.

During cross-examination he conceded that **Mubala** (D.6) was installed under the 2006 not 2009 Constitution.

DW.4Tawonia Wilson inter alias in paragraph 9, 10 and 11 of his statement confirmed that government had recognised the cultural institution of the Bagwere with **Bishop Wayabire** as its leaders. The witness stated that by 2010 efforts were already under way to engage government on the need to recognise their cultural institution.

However in cross-examination he conceded that there are no registration documents from government to their institution.

DW.5 Daka Joseph testified that he mounted a search on behalf of the Ikumbania with the Registrar of companies. He got the particulars showing that **Badru Kirya** and **John C. Wayabire** were the owners of that business name, and had incorporated the Bugwere Cultural Trust.

DW.7 Dr. Twatwa, gave evidence how he participated in the constitutional review process.

From all the above evidence, it is clear that the society of the Bagwere was interested in coming together as a cultural institution. By the year 2006, the process had transformed itself into a cultural union called BACU. (Bagwere Cultural Union). The leaders of that union were chaired by **D.6 Mubala** and others including **Kirya Badru**.

The evidence herein as contained in the exhibits both from plaintiffs and defendants e.g. see (PE.4- Constitution of the Bagwere Cultural Union of 2006). This constitution under Article 6:1 provides that:

*“The Union shall have a leader to be called and known as the “Ikumbania”
Ikumbania under Section 2 is defined as “the leader/head of the Bagwere
Cultural Union.”*

According to the preamble the aim is to associate and promote their culture subject to the 1998 Constitution.

All evidence by the parties shows that **D.6 Mubala** was elected the chairperson of this “union” and it was him who put in motion a constitutional review process to amend the 2006 constitution. The evidence shows that upon commissioning the Twatwa Committee the grand norm changed. This is in paragraph 2 of DW.1 **Dr. Twatwa**’s statement on oath. In paragraph 2 he stated that among his recommendations was to change the name of the Cultural Institution to Obwa Ikumbania Bwa Bugweere. In paragraph 3 he claims

this was done by way of the Constitution of 2009. However in their testimonies both PW.1- **Badru Kirya** and PW.2 (**Mususu G.**) stated that the **Dr. Ntwatwa** report made proposals including the proposed 2009 Constitution which a section of the members rejected.

The said 2009 Constitution was therefore never adopted and instead another Adhoc Committee was set up to review the 2009 proposed Constitution and to spearhead the process of transforming the “Obwa Ikumbania”. This process later resulted into the 2013 Constitution, and the eventual revolution which gave rise to the events of 6th July 2013. (See evidence of PW.1, PW.2, DW.1, DW.2, DW.3, DW.4, DW.5, DW.6 and DW.7).

Clearly with due respect to all arguments regarding the evidence as to the steps each group took to try and legalise themselves, this case resolves on one simple question. Who is legally recognised by the governing laws of the country?

I have carefully followed the genesis as laid out above and I do not hesitate to find that there were two warring groups in the Bugwere Society by the time the events of 6th July 2013 took place. There is a legal saying that equity helps the vigilant. Who was vigilant?

What the evidence shows is that there was a kind of *coup de'tat* which unseated the status quo of 2006-2009, Constitutions ushering in a new status quo on 6th July 2013. This situation in law is described as a revolution.

A type of situation which **Kelsen H** describes in his “General Theory of Law and State (1945). This theory was what the High Court referred to in the case of ***Uganda v. Commissioner of Prisons Exparte Matovu (1966) EA 514.***

CJ Udoma Held:

“the series of events which took place in Uganda from February 22 to April 1966 when the 1962 Constitution was abolished in the

National Assembly and the 1966 Constitution adopted in its place as a result of which the Prime Minister was installed as executive President with power to appoint a vice President could only appropriately be described in law as a revolution. These changes had occurred not in accordance with the principle of legitimacy but deliberately contrary to it.”

This case though of a political nature gives some insight to this court how to explain the question which all defence witnesses kept on asking, why the Plaintiffs took the steps they did and regularised them with government.

I can only describe it as “a social revolution” which happened and led a faction to leave ‘BACU’ and opt for their new organisation called the “Obwa Ikumbania bwa Bugwere” currently registered with the government with **Bishop Wayabire** as the “Ikumbania”.

In law following the cases of *exparte Matovu* (supra) such a revolution is recognised for as long as it is successful and leads to a new grand norm which gives it legitimacy. In this case the organisation is registered, has complied with all requirements under the Act, and has been gazetted. It is therefore legitimate.

Why is this so?

In this case the law applicable is the Constitution and the institution of Traditional or Cultural Leaders Act.

The requirements for one to become a cultural leader are enumerated under Sections 3 and 4 of the Act thus:

Section 3

“Subject to the Constitution the institution of traditional 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.”

Section 4;

“A Traditional or Cultural leader may be instituted in the following ways:

- (a) In accordance with the culture, customs and traditions of the people to whom it applies*
 - (b) In accordance with the wishes and aspirations of the people to whom it applies, through a resolution of not less than two thirds of all members of the district local government councils respectively in the area.*
- (2) The institution under subsection (1) shall be communicated in writing to the Minister.”*

The law above is what the two leaders in issue have to be subjected to. Who of them satisfies the above legal provisions?

Clearly from the evidence both **Mr. Mubala** and **Bishop Wayabire** qualify to be such leaders on account of deriving allegiance from birth or decent. Therefore they were both rightful contestors to the leadership of this cultural group. However it is argued by **Mr. Mubala** (D.1) that he was installed in 2006 to the ‘Ikumbania’ position and was in process of transforming ‘BACU’ into the “Obwa Ikumbania bwa Bugwere’ when the Plaintiff/Counter Respondent fraudulently overtook the process and had another institution registered with D.2 as its leaders.

Going by the evidence on record, it has to be appreciated that by the year 2015 when the 2009 Constitution is alleged by defendants to have been registered, the government had already gazetted D.2 (counter claimant) **J.C. Wayabire** as the Ikumbania. This was because **J.C. Wayabire** complied with the provisions of the law under Section 4 (b) of

the traditional or cultural Leaders Act, and provided all the necessary documents that eventually led to gazettelement.

Without repeating the different scenarios that played into this, as per PW.1, PW.2, DW.1-DW.7, all stated that there was a lot of activity which happened and at the end of it all, the government was satisfied and it duly gazetted **Bishop Wayabire** as the Ikumbania of the Obwa Ikumbania bwa Bugwere. All these documents were agreed on by counsel and none of them has been smuggled on record as was alleged.

This then leads me to the next question. Was the gazetting a result of fraud on the part of **D.1-Kirya** and **D.2- Wayabire** (on counter claim?)

The law of evidence is that he who alleges a fact must prove it (Sections 101, 102, 103 of the Evidence Act).

However where the Plaintiff pleads fraud, then the standard of proof is above the ordinary balance of probabilities. *R.G. Patel v. Layi Makanji [1957] EA 314.*

The Counter Claimant, raised the thesis that through evidence it was established that D.6 was installed Ikumbania of BACU, and they moved to petition government for recognition. (DW.6 and DW.5) counsel argued further that since D.6 was invited by 2nd Counter Defendant to his function of installation (DE.7) he was leading the institution as Ikumbania. Counsel referred to actions later by PW.1 and PW.2 as subversive and hence evidence of fraudulent conduct. He then referred to the resolutions submitted and argued that they were false.

In response Counsel referred to *Kampala Bottlers v. Damanic (U) Ltd SCCA 22 of 1992*, to argue that fraud need be specifically proved and no proof of the alleged falsehoods was

pleaded or provided by evidence in court. The law is that parties must be bound to their pleadings. See *Nakiryia Ssekataba and Anor. V. AG. CA 38 of 2003*: which held that:

“It is trite law that parties are bound by their pleadings during the trial. In this case the Respondent did not raise the question of the statutory notice being wanting as a preliminary point of objection for determination before, during, and after the trial.....”

Similarly in this case before me the counter claim did not raise the issue of these resolutions being defective in his written statement of defence, and counter claim.

In court no evidence was proved to show the allegations as contained in the submissions. There is therefore no evidence before court to prove that the resolutions are false.

Unless the Counter Claimant shows evidence, there is no evidence to show that the production of the resolutions violated Section 4(1) (b) of the Act.

The findings of this court have revealed that where as the defendant was the sitting chairperson of ‘BACU’ and desired to transform ‘BACU’ into the cultural institution called “Obwa Ikumbania Bwa Bagwere” and hence get himself recognised as the rightful Ikumbania by the government, he did not comply with, and satisfy the requirements of Section 4(1) (b) of the Institution of Traditional Cultural Leaders Act. He indeed exhibited letters and documents which prove that he attempted so to do and was still in the process of transforming BACU.

(See DE.11, DE.10). Also evidence in chief of DW.1, DW.2, DW.3, DW.4, DW.5 and DW.7, all alluded to the fact that between 2009-2013, there were constitutional review processes which put the BACU leadership in abeyance, meanwhile two factions emerged on led by **Mr. Mubala** and another by **Bishop Wayabire**. See evidence in chief of **Dr. Twatwa** (paragraph 3, 4, 5, 6 and 7). This same evidence is contained in the testimony

of **DW.6 Mubala**. It was the evidence of DW.6 that he was not the Ikumbania of the Bagwere but of “BACU.”

Arising from the matters above, the standard of proof of fraud by the Counter Claimant has not been satisfied.

In the case of *Cranimer Sajjabi Imaka & Anor. V. Kawune Wakhooli & 2 Others*, the Court of Appeal referring to the provisions of Section 101 of the Evidence Act held that:

“The petitioners have to satisfy this court that the practices/customs applied in electing the Kyabazinga contravene the Busoga culture.....”

This standard of proof is higher in fraud cases where court in *M. Kibalya v. Kibalya (1994-5) HCB 80* and followed in *Haji Zaidi WAsige v. Opendi & Anor. HCT-CA-0124/12* – Mbale held that:

“The standard of proof in fraud cannot be substituted by a mere reference to fraud at the bar during the hearing or at submissions. The nature of the allegations, one documentation involve and extent of dishonesty which counsel alluded to should on all fairness have been pleaded. This gives the respondent chance to prepare and to prove adequate responses. Court would then investigate and make informed decision.”

In this case this did not happen.

Finally I would like to comment on the counter claim that the institution referred to as “Obwa Ikumbania bwa Bugwere” and “Obwa Ikumbaania bwa Bugwere” are different institutions. The above argument is self defeating. This is because these words are used interchangeably both by the Plaintiffs and Defendants, in documents supplied, statements on oath and even in their pleadings. It is not clear even from the written statement of defence which institution counsel is defending. A perusal of the written statement of

defence/counter claim paragraph 14 (i) the Counter Claimant prays for judgment as pleads as follows:

- (i) A declaration that the firm known as “OBWA IKUMBANIA BWA BUGWERE is not the bagweere cultural institution known as “OBWA IKUMBAANIA BWA BAGWEERE.”
- (ii) A declaration that the Counter Claimants are the Ikumbaania Prime Minister, Speaker and Deputy Speaker of the OBWA IKUMBAANIA BWA BUGWEERE, the cultural institution of the Bagwere community.....”

Clearly here there are now three different institutions being referred to; one attributed to the Plaintiffs/Counter Defendants with single ‘a’ two others claimed by Counter Claimant as the legitimate are being Obwa Ikumbaania (double ‘aa’) bwa Bugwere, while the other is Obwa Ikumbaania Bwa Bagweere.

If Counsel’s arguments of dwelling on spellings are to go by then his pleadings are also inconclusive as to which cultural institution is the legitimate one of all the three above. I have however found that the Counter Claimant for reasons above has not proved any fraud as pleaded. I do find that the rightful Ikumbaania of the institution called ‘Obwa Ikumbania bwa Bugwere’ and recognised by the government is the 2nd Counter Defendant; and his recognition by government was fraudulent.

ISSUE 3: REMEDIES

In the main suit, Plaintiffs prayed for damages and costs, but prayed that counter claim be dismissed with costs. They prayed for damages of 200 million.

They also prayed for a permanent injunction restraining Defendants from interfering with the leadership of Obwa Ikumbania bwa Bugwere.

The Counter Claimants prayed for striking out or dismissal of main suit with costs and judgment be entered for Counter Claimants on the counter claim. They prayed for damages of shs. 500,000,000/= and costs.

In the final result having resolved the issues as above.

I do find as follows on the main suit, the Plaintiff has proved the claim on the balance of probabilities judgment is entered on their behalf.

Regarding costs and damages, this court will be guided with earlier decisions of superior courts and the High Court for guidance.

In the case of *Nziri & 3 Others v. Philip Isaiah & 8 Others (Civil Suit 011 of 2016 (Arua))*, Hon J. Y. Nyanzi while considering the award of costs in a similar case, relied on the wise guidance of the Hon. C.J. Oodoki in *Prince Muga Rukidi v. Solomon Iguru CA No. 18/1994 SC*, where he held that:

“It is trite law that a successful party will not be deprived of costs unless it is guilty of misconduct. But it is also well settled that there can be other good reasons that misconduct justifying the departure from the general rule depending on the circumstances of each case.”

See *Wambugu v. Public Service Commission [1972] EA 269*.

This is an important case which settled the question of successor to the throne of Bunyoro-Kitara and the traditional ruler of Bunyoro kingdom. It was a matter of public importance. There 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.

This same reasoning appears to have been followed in *Cranmer Ssajjabi 7 Anor. V. Kawune Wakhooli & 2 Ors Const. Pet No. 11 of 2008* where the court found no merit in the petition but made no order as to costs.

I am of the opinion that similarly this case is a highly sensitive matter among the Bagwere Community. There is need for reconciliation, and to facilitate that process this court orders that each party meets its own costs and also mitigate its own damages.

COUNTER CLAIM

The counter claim is not proved.

It is accordingly dismissed and for similar reasons no costs are awarded. Each party should bear its own costs.

The plaintiff is entitled to a permanent injunction restraining the defendant from the leadership of Obwa Ikumbania Bwa Bugwere, as prayed.

I so order.

Henry I. Kawesa
JUDGE
12.04.2017

OBITER DICTUM

Given the nature of this conflict, this court advises the two factions to get together and follow the provisions of Section 16 (Part IV) of the Act in order to reconcile their differences. The Act provides PART VI Section 16:

“Any conflict or dispute within the traditional or cultural institution or within the community shall be handled by a council of elders or a representative body chosen and approved by the community.....”

In the above spirit of reconciliation the Ikumbania should consider the need to convene an immediate reconciliatory meeting in which modalities for unity will be mapped. It is advisable that being a cultural institution such conflicts should be solved amicably as provided for under Section 16 (Part VI) above.

Henry I. Kawesa
JUDGE
12.04.2017