

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS CAUSE NO.65 of 2015 & 87 OF 2016
LWAMASAKA NKONGE PROSPER (KINYENYAMBALI)----- APPLICANT

VERSUS

1. JAMES MAGALA MUTEWETA (KYANA)
2. THE KABAKA OF BUGANDA----- RESPONDENTS

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The two applications were consolidated for better determination by order as they sought same or similar orders arising out of the same facts against the same common respondent-The Kabaka of Buganda and also between the applicant and 1st respondent.

The applicant(s) filed an application for enforcement of rights under Article 26,37,50 and 246 of the Constitution and Section 98 of the Civil Procedure Rules and Section 33 of the Judicature Act and Rule 3 of the Judicature (Fundamental Rights and Freedoms)Enforcement Procedure) Rules and O.46 and 52 of Civil Procedure Rules seeking orders that;

1. An order doth issue declaring that the ruling and orders of the 2nd respondent **Kabaka of Buganda His Highness Ronald Muwenda Mutebi** dated 22/3/2016 are binding on the applicant and the 1st respondent.
2. A declaration that the 1st respondent was tasked by the 2nd respondent, **The Kabaka of Buganda** to effect his ruling and orders dated 22nd March, 2016 but did not do so.
3. A declaration be made to the effect that the omission by the 1st respondent to enforce the said ruling and orders, threatens and infringes on the applicant's constitutional, cultural and heritage rights and amounts to contempt of the 2nd respondent's orders and ruling dated 22nd March, 2016.
4. The 1st respondent be disqualified from presiding over the process of electing a **NAMWAMA** after acting in contempt of the 2nd respondent's orders of March, 2016.

5. A declaration be made to the effect that despite the 2nd respondent's ruling and orders nobody has so far been appointed **NAMWAMA**.
6. A declaration be made to the effect any election of the **NAMWAMA** should be done by the sub-clan heads (*abamasiga*) and the Chief prince(*Ssabalangira*) or lineage head as they are the persons entitled to do so.
7. A declaration be made to the effect that the 2nd respondent ensures that his ruling and orders are complied with forthwith.
8. The 2nd respondent appoints the culturally competent head of *Mutuba* of **SSEKKONGE** who is also the current **SSABALANGIRA** in the *Kkobe* clan to make arrangements for the electing of the **NAMWAMA**.
9. The installation of **KIZITO MUTUMBA** as **NAMWAMA** in 2001 and his being recognised as one by the 2nd respondent in 2001 without any election taking place be declared null and void.
10. The applicant be awarded general damages against the 1st respondent for the 1st respondent's failure to convene a legally and fully constituted *Kkobe* clan meeting to identify and elect a **NAMWAMA** as directed by the 2nd respondent-**KABAKA OF BUGANDA**.
11. In the alternative but most importantly and without prejudice to the foregoing, the 2nd respondent reviews his ruling of the 22nd March, 2016, in view of an earlier ruling made by *Kabaka Muteesa* in Clan Appeal No. 3/52 and No. 2/59 as contained in **AKIIKA EMBUGA** of Monday 17th August, 1959 to the effect that the institution of **NAMWAMA** is hereditary while that of Chief Prince (*Ssabalangira*) is not.
12. The costs of the application be provided for.

The grounds in support of this application were stated in the supporting affidavit of the applicant-**LWAMASAKA NKONGE PROSPER KINYENYAMBALI**, the **KINYENYEM BALI** of the **KAKINDA** subclan of the **KKOBE** clan and **NSEREKO JOSEPH** a member of the sub clan of **Kaseenya** (siga) of the **Kkobe** clan but generally and briefly state that;

- a) The **applicant** is aggrieved by the unending **KKOBE CLAN leadership disputes** regarding who is the **rightful KKOBE CLAN head (NAMWAMA)**.

- b) These disputes culminated in the **2nd respondent** making a ruling on the **22nd March 2016** in **KKOBE CLAN APPEAL NO KD/08 OF 1998** where he confirmed and upheld the **clans' Court (Kisekwa)** ruling to the effect that grandson **CHARLES KAYONGO** was not the rightful **KKOBE CLAN HEAD (NAMWAMA)** and secondly that the late **NAMWAMA LEONARD KIRAGGA** was also not the rightful **NAMWAMA**.
- c) By the said ruling, the **2nd respondent** tasked the **1st respondent** to convene a legally and fully constituted Kkobe clan meeting comprising the **rightful royal Kkobe clan lineage head/chief prince (ssabalangira)** and the **9 Kkobe subclan heads (abamasiga)** to elect the Kkobe clan head (**NAMWAMA**).
- d) Despite the **2nd respondent's** very clear instructions, without complying with the **2nd respondent's** orders, the **1st respondent**, installed one **A. KIZITO MUTUMBA** as **NAMWAMA**. According to the **1st respondent**, **A.K. MUTUMBA** was installed **NAMWAMA** in **2001**. The installation of **A. K. MUTUMBA** was recognized by the **2nd respondent** through the **KATIKKIRO** although no election has ever taken place. The **1st respondent** who acted in contempt of the **2nd respondent's** orders should be disqualified for acting in contempt and replaced by the **rightful royal Kkobe clan Chief lineage head (Ssabalangira)** one **Ssekonge**.
- e) In any case, the **1st respondent** does not hold any **cultural responsibility or office** in the **Kkobe clan** and for that matter he is not fit to be accorded the role of convening a Kkobe clan meeting to elect a **NAMWAMA**. The **1st respondent** is only a member of the Kkobe clan --- a grandson "**Omuzukulu**" and much as he is the heir to a former **SSABALANGIRA** one **EZEKIEL NAKALANGUSE KYANA**, the office of **chief prince (Ssabalangira)** is **not hereditary** and consequently it was a cultural error on part of **KOOTI YA KISEKWA** and for that matter the **2nd respondent** on appeal, to give the **1st respondent** the cultural role to convene a Kkobe clan meeting of cultural subclan heads to elect a Kkobe clan head (**NAMWAMA**) and thereby sidelined or ignored the **reigning chief prince Ssabalangira SSEKONGE**.
- f) In the alternative and more importantly and due to the **errors** made by the **2nd respondent** in his ruling of **22nd March 2016**, he ought to review his decision which is **in conflict** with **Kabaka Mutesa's** ruling in Kkobe clan **Appeal No. 2 of 1959**. In that ruling the **institution** of **NAMWAMA** was declared **hereditary** while that of **chief prince/ssabalangira** was declared **elective**. Besides, the **2nd respondent** misinterpreted the ruling in **Kkobe clan Appeal No. 3 of 1950**.
- g) In Kkobe clan **Appeal NO. D/3/1952**, **NAMWAMA YOZEFU BYEKWASO I** had appealed the judgment of **Buganda Lukiiko**, which had **discontinued** him as

NAMWAMA for failure to carry out **Kabaka Muteesa's** directives and instructions. In his ruling dated **16/10/52 KABAKA MUTEESA** reversed **Buganda Lukiiko's** decision to discontinue him as NAMWAMA and restored **YOZEFU BYEKWASO I** as **Kkobe clan head (NAMWAMA)** and directed the **Buganda Lukiiko (parliament)** to reduce his **punishment** to an **appropriate fine**.

- h)** The **Buganda Lukiiko** had discontinued **YOZEFU BYEKWASO I** as NAMWAMA for failure to fulfill **KABAKA MUTEESA'S** directives and instructions for him to reinstate the **chief prince lineage**, then headed by **EZEKIEL NAKALANGUSE KYANA** of **BUZIMWA**. **YOZEFU BYEKWASO** subsequently reinstated the chief prince lineage and **EZEKIEL NAKALANGUSE KYANA** continued to serve as the **chief prince (Ssabalangira)**.
- i)** The reinstatement of **EZEKIEL NAKALANGUSE KYANA** is clearly demonstrated upon the death of **NAMWAMA JOSEPH BYEKWASO II** in **1961**. When **YAKOBO KAYONGO SALONGO** wrote to the Kabaka and his Council, informing them of the death of **NAMWAMA JOSEPH BYEKWASO II** and introducing **11 year old LEONARD KIRAGGA** as heir and successor NAMWAMA and indicating the approval of both the **Chief Prince and all the sub clan heads to the Succession**.
- j)** After case **NO. D/3/52** and the reinstatement of **YOZEFU BYEKWASO I** as NAMWAMA by **KABAKA MUTEESA** in **Case No. 2 of 1959** the issue of who is the rightful NAMWAMA never arose again and consequently, it was a **grave error** on part of the **2nd respondent** to direct and instruct the **1st respondent** to convene a legally and fully constituted **kkobe clan meeting** to elect a **new NAMWAMA** when there was no vacancy for a new NAMWAMA as **NAMWAMA LEONARD KIRAGGA** was still alive. As the institution of NAMWAMA is **hereditary** when **YOZEFU BYEKWASO I** died, he was succeeded by his son **JOSEPH BYEKWASO II** as both his heir and NAMWAMA.
- k)** When **JOSEPH BYEKWASO II** died on the **21st January, 1961**, he was succeeded by his son **LEONARD KIRAGGA** as both heir and successor NAMWAMA, **LEONARD KIRAGGA NAMWAMA** when he died on **5th April, 2008**, was succeeded by his son **NSEREKO JOSEPH BYEKWASO III** as both heir and successor NAMWAMA. Before then, **LEONARD KIRAGGA NAMWAMA** had sued his grandson **CHARLES KAYONGO** for claiming to be the rightful NAMWAMA in the '**Kooti ya Kisekwa court**'. '**Kooti ya Kisekwa**' heard the case and dismissed **NAMWAMA LEONARD KIRAGGA** as NAMWAMA on the **26th September 2001**. It directed **Kyana** whom the **Kisekwa court** called the **head of the chief princess lineage (Ssabalangira)** to call a meeting of **subclan heads (abamasiga)** to elect a new clan head.

The 2nd respondent opposed the application and also filed affidavits in reply-through Omutaka Kayiira Gajuule Kasibante Fredrick David who is also an expert on matters concerning the appointment and confirmation of Clan Heads in Buganda to highlight the position but it appears the facts as presented by the applicant surrounding the Kabaka of Buganda decision are not disputed save for the exception of what the applicant alludes to that happened before in 1950's.

It should be noted that in Miscellaneous Application No. 64 of 2015 Male H Mbirizi K Kiwanuka had earlier on filed challenging the Kabaka of Buganda for the continued recognition of Nsereko Joseph Byekwaso as against Omutaka Augustine Mutumba despite the decision of “ Kooti ya Kisekwa” declaring the lineage in which Nsereko Joseph Byekwaso could not take the position of Kkobe Clan Head-NAMWAMA.

Between 2001-2015, the Kabaka declined to recognise Omutaka Mutumba Kizito Augustine since there was an Appeal against the decision of “ Kooti ya Kisekwa” before him. Under the Kiganda Custom, after the decision of “Kooti ya kisekwa” and there is an appeal before the Kabaka, the sitting clan Head carries the position until otherwise decided or determined on appeal by the Kabaka.

The Kabaka of Buganda finally decided or determined the pending Appeal before him in respect of the dispute. He concurred with the advisory role of ‘Kooti ya Kisekwa’ and directed for a re-election of a new clan head-NAMWAMA and the Process led to the election of Omutaka Augustine Kizito Mutumba as the new clan head-NAMWAMA.

The gist of this application is challenging the election of Omutaka Augustine Mutumba with the view that this court orders The Kabaka of Buganda to review his decision and reinstate Nsereko Joseph Byekwaso as the substantive Clan Head-NAMWAMA.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

The applicant raised 3 broad issues court's resolution issue;

AGREED ISSUES.

- 1. Whether MISC. CAUSE NO. 871 OF 2016 is properly before this court?*
- 2. Whether the 1st respondent (Kyana) properly carried out his duties as directed in the decision of the 2nd Respondent (Kabaka)?*
- 3. In the alternative to issue no. 2 above, Whether in the circumstances of this case, the court can review the 2nd respondent's decision and if so, whether there are valid ground for doing so?*

4. What remedies are available to the parties?

This court has found it necessary to determine one issue outside what was raised by the parties;

Whether the nature of the dispute is justiciable in courts of law?

The applicant was represented by *Mr Mbogo Charles* whereas the 1st respondent was represented by his lawful attorney- *Male H Mbirizi K Kiwanuka* and the 2nd respondent was represented by *Mr Mukasa Twaha*.

Whether the nature of the dispute is justiciable in courts of law?

The customs and cultures of our diverse ethnicities are upheld and promoted by the Supreme law of our land in as much as they do not contravene and/or are consistent with fundamental rights and freedoms, human dignity, democracy and the Constitution of Uganda. The National Objectives and Directive Principles of State Policy XXIV provide as hereunder;

“Cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the Constitution may be developed and incorporated in the aspects of Ugandan life.

The State shall-

- (a) Promote and preserve those cultural values and practices which enhance the dignity and well-being of Ugandans.”***

The dignity of Ugandans is observed and protected under Chapter 4 of the Constitution and it provides for the protection and promotion of fundamental and other human rights and freedoms.

The Constitution provides for a right to culture under Article 37;

Every person has a right as applicable to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.

Article 246 of the Constitution provides for traditional or cultural Leaders;

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.

Section 9 of the Institution of Traditional or Cultural Leaders Act, 2011 provides;

A traditional or cultural leader shall-

- (a) Promote and preserve the cultural values, norms and practices which enhance the dignity and well-being of the people where he or she is recognised as such;***

It can be seen in the light of the above, that cultures and customs in our Country are part and parcel of our livelihood. One may say we breathe and live our respective cultures and customs in the way we relate with one another as Ugandans of various ethnicities. It is therefore of utmost importance that Ugandans should not forget their origins and background regardless of the evolving modernisations and globalisation the world is experiencing.

The identity of Ugandans is of great value and the courts play a major role of observing and enforcing the legislated laws, international laws and the customary traditions/laws in as far as applicable.

Section 15 of the Judicature Act provides;

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 repugnant to natural justice, equity and good conscience and not incompatible directly or by necessary implication of any written law.

The question for determination is to what extent should the courts of law determine or entertain disputes arising out of culture or customs of a given area. It is true the High Court has unlimited original jurisdiction in all matters and such appellate Jurisdiction as may be conferred on it by the Constitution and other law. ***See Article 139 of the Constitution.***

The courts must apply customary law when that law is applicable, subject to the Constitution and any other legislation that specifically deals with customary law.

The jurisdiction of this court in handling disputes related to traditional or cultural institutions or within the community is conferred by *Section 16 of the Institution of Traditional and Cultural Leaders Act of 2011*

Resolution of disputes.

- (1) Any conflict within the traditional or cultural institution or within the community shall be handled by a council of elders or clan leaders or a representative body chosen and approved by the community, in accordance with the traditions, customs and norms of dispute or conflict resolution pertaining to that community.***
- (2) Where the community fails to resolve the conflict or dispute in accordance with subsection (1), the matter shall be referred to the court.***
- (3) For the avoidance of doubt, the conflict or dispute referred in subsection(1) is a conflict or dispute relating to-***
 - (a) Whether or not a community should have a traditional or cultural leader;***
 - (b) Who should be the traditional or cultural leader of the community or area of Uganda;***
or
 - (c) Whether or not the proper procedure for installation of a traditional or cultural leader has been followed.***

The dictates of the said provision are very direct and narrow as to what can be brought to the court. The interpretation of the said provision is that traditional or cultural matters are resolved in accordance with the traditions, customs and norms of dispute or conflict resolutions pertaining to the respective community.

The courts are too westernized to handle cultural and customary issues. The laws and the persons who may be faced with a cultural or custom dispute may sometimes be foreign to the given cultural area. Just like in present case, the predecessor trial Judge who partly handled this matter could not

appreciate the nature of the dispute brought before court-“*who is the rightful NAMWAMA*” The effect of the decision of “*Kooti ya Kisekwa*” etc.

It would be prudent to refer such disputes always to the King or the Traditional or cultural Leader since they are custodians of such cultural institutions, customs, practices and norms. The courts should discourage such petty issues like (*who is the rightful ‘heir’, ‘family head’, ‘clan head’, ‘chief prince’, ‘sub-clan head’ who has cultural duty in the clan or determination of the hereditary positions in a clan*) to be dragged to court. Such issues are better dealt with through the established mechanism of a particular community or dispute resolution mechanism in the given culture or tribe under their customary justice system or dispute resolution.

The different cultural institutions or Traditional & Cultural leaders must have competent and credible mechanisms of addressing the resolution of disputes in their institutions and territory in relation to customary issues and practices.

Before I take leave of this issue, I must add and say that the court’s time is so precious and only issues worth of litigation as interparty with serious questions of law ought to be brought properly before the courts of law and not cultural matters where persons would file any matters before court which are unjusticiable.

The legitimacy and acceptability of decisions of courts of law which may not be based on informed or known cultural and customs of the given society, tribe or area will subject to ridicule and may become a recipe for disaster.

It is equally important to reflect Uganda traditional culture and principles in a meaningful way within the new constitutional dispensation of our country. The flexible nature of customary law, along with its ability to develop to adapt to changing circumstances, means that it is not possible to identify a unified system on how to resolve disputes in every traditional system of every tribe or ethnicity.

Customary law, principles and customary/cultural leaders are not unimportant; indeed, they have a significant contribution to make in our unfolding constitutional democracy. Apart from its importance, all customary law and leadership will have to reflect and adjust to the overall changes that have occurred in Uganda’s constitutional and legal system.

The customs and culture that conflict with the Constitution, especially the Bill of rights or any enacted legislations shall always be challenged in the courts for invalidity. The Constitution is supreme and customary law must comply completely with all constitutional requirements.

The current dispute presented in both consolidated applications can better be resolved by traditional systems within the Buganda Kingdom. The court would not competently resolve the issue of who is the proper head of the Kkobe Clan-**NAMWAMA**.

The parties are advised to refer their dispute to the **KABAKA OF BUGANDA** to address their grievances through their established dispute resolution mechanism.

The applications are dismissed with no order as to costs.
I so Order.

SSEKAANA MUSA
JUDGE
12th/07/2019