**Kawalya-Kagwa v Registrar of Titles**

**Division:** Court of Appeal at Kampala

**Date of judgment:** 21 October 1974

**Case Number:** 38/1974 (4/75)

**Before:** Spry Ag P, Mustafa and Musoke JJA

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**Appeal from:** High Court of Uganda – Wambuzi, C.J

*[1] Land – Mailo land – Applicant from Ghana – Whether member of indigenous African tribe or*

*community – Effect of mixed blood – Interpretation* (*Special Provisions*) *Act* (*Cap*. 17), *s*. 2 (*U*.).

*[2] Statute – Construction – Member of indigenous African tribe or community – Meaning –*

*Interpretation* (*Special Provisions*) *Act* (*Cap*. 17), *s*. 2 (*U*.).

**JUDGMENT**

The following considered judgments were read, **Spry Ag P:** The appellant is the widow of the late

Michael Hamilton Kawalya-Kagwa, who was murdered on 9 September 1971. By his will, he appointed her the sole executrix of it and he left the whole of his estate to her. She applied to the High Court for, and was, on 11 July 1972, granted, probate of the will. She also claims to be the executrix, by representation, of the will of Michael Kagwa’s father. The appellant’s father was a member of the Gaa tribe of Ghana and her mother is a native of Britain. She is a citizen of Uganda. The appellant applied to the Registrar of Titles, the present respondent, to be registered as proprietor of the mailo lands of the late Michael Kagwa and his father, as such executrix, under s. 143 of the Registration of Titles Act (Cap. 205). The Registrar refused registration, on the ground that the appellant was a non-African and therefore needed the consent of the Minister under the provisions of the Land Transfer Act (Cap. 202), which, subject to certain qualifications, prohibits any non-African from occupying or entering into possession of any land of which an African is registered as proprietor without such consent. The appellant then asked the Registrar if he would register transfers executed by her in her capacity as executrix and again he refused. The appellant then took out an originating summons under O. 34 of the Civil Procedure Rules, calling on the Registrar, under s. 190 of the Registration of Titles Act, to substantiate and uphold the grounds of his refusal. The matter was heard by the Chief Justice, who upheld the decision of the Registrar on both issues. It is against the decision of the Chief Justice on the first issue that this appeal is brought. The basis of the Chief Justice’s decision was that the meaning of the word “African” in the Land Transfer Act, which itself contains no definition, is to be found in s. 2 of the Interpretation (Special Provisions) Act (Cap. 17). This, so far as is relevant, reads as follows: “In any Act of Parliament or Ordinance enacted before the 19th July, 1963, unless it is expressly provided otherwise or the context otherwise requires, references to a native or to an African shall be construed as references to a person who is a member of an indigenous African tribe or community . . .” In the affidavit supporting the originating summons, the appellant had claimed that she was of indigenous African descent, her father having been a member of the Gaa tribe, and that she would be recognised as a member of that tribe or community. In the High Court, Mr. Katera, for the appellant, argued that by custom the appellant was an African by virtue of her father’s membership of the Gaa tribe. On this, the Chief Justice made two findings. The first, with which I respectfully agree, was that customary law must be proved. The second, was that where “as in this case” customary law is in conflict with a written law, “the customary law is out”. I agree with the general proposition but, with respect, I do not see where there is any conflict in the present proceedings. I shall return to this question. The Chief Justice examined the history of the definition of “African” from the definition of “native” in the Interpretation (Definition of “Native”) Ordinance 1945 through the Interpretation and General Clauses Ordinance (Cap. 1, Revised Edition, 1951) to the Interpretation (Special Provisions) Act. The two earlier definitions are substantially similar and it will suffice to set out the relevant part of the 1951 Ordinance. This reads: “3. (1) In this Ordinance and in every other Ordinance, unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided, each of the terms ‘African’ and ‘native’ means any person who is a member of or one of whose parents is or was a member of an indigenous African tribe or community, but the term ‘African’ or ‘native’ shall not include– ( *a*) a n Egyptian, an Arab, an Abyssinian (Amhara, Tigre and Shoa), a Somali, a Seychellois, a Baluchi born in Africa, a Malagasy or a Comoro Islander: Provided that any of the said persons may be declared an ‘African’ by a magistrate of the first or second class if, of his own motion, he proves to the satisfaction of the magistrate that he is living among members of any indigenous African tribe or community in accordance with their customary mode of life.” The Chief Justice noted two differences between the earlier definitions and the current one. In the first place, the earlier definitions contain the words “one of whose parents is or was a member of an indigenous African tribe or community” while they are omitted from the current definition. Secondly, the earlier definitions expressly excluded certain categories of persons; the current definition has no such express exclusions. The Chief Justice held that the first of these differences means that under the current definition a person may only claim to be an African if both his parents were Africans. He said: “To give any other construction to the definition would be to defeat the intention of the legislation which in its wisdom chose to drop the words which included in the definition of the word ‘African’ a person one of whose parents was a member of an indigenous African tribe or community and the other not such a member.” Secondly, he held that the fact that no categories of persons are expressly excluded from the current definition “means that . . . any person on the continent of Africa is an African provided that he is a member of an indigenous African tribe or community.” On the first of these points, I accept that where one statute replaces another and in the process certain words are omitted, there will normally be an assumption that the omission was deliberate and the new provision will be interpreted accordingly. In making such an assumption, however, regard must be had to the result to which it would lead. In the present case, the effect would be considerable and very grave. Under the former law, persons of mixed parentage could lawfully acquire, occupy and devise land to their children. If the interpretation of the Chief Justice is correct, it would appear that on the coming into operation, on 6 December 1963, of the Interpretation (Special Provisions) Act, any persons who had so acquired and occupied land became in unlawful possession of it and certainly they would thenceforward have been unable, without the consent of the Minister, to devise it to their children. There is, of course, no saving provision. This would be a very serious invasion and deprivation of private rights. It is, of course, within the power of the legislature to make such a change by express enactment but, with respect, I am not prepared to infer it, if any other interpretation is possible. I think an alternative interpretation is available. The former definitions were complicated, with the references to parents importing the matter of blood and the references of membership of a tribe or community importing a matter of status; that is, of course, assuming that membership of a tribe or community is not a question of blood alone. The current definition is simpler and does not necessarily involve the question of parentage. I think it may have been to achieve that end that the present wording was adopted. I know of no authority on this question. In *Katate v. Nyakatukura* (1953), 7 U.L.R. 47, Bennett, J., held that a limited liability company could not be an “African” because: “Being a distinct legal entity and abstract in nature, it is not, in my opinion, capable of having racial attributes.” I respectfully agree, but it could equally have been said that a company cannot be a member of a tribe or community. That brings me to a point strongly urged by Mr. Wilkinson, who appeared for the appellant. He argued that the legislature has chosen to use both the words “tribe” and “community”, that they must have different meanings and that the latter word is more general in its meaning. I think there is considerable merit in this argument. I would link it with the larger question: what is meant by the expression “indigenous African tribe or community”? As I have said, the Chief Justice applied the expression to tribes and communities in any part of Africa. He also remarked: “it is not disputed that the Gaa tribe of Accra in Ghana is an indigenous African tribe.” I think it is questionable whether the word “indigenous” is strictly appropriate to a tribe or community but it is, I think, used in a general sense as meaning born in or springing from the soil of a particular area. If, if, in the present context, the particular area is regarded as the continent of Africa, the words “indigenous” and “African” appear synonymous and one or other is redundant. We are, however, concerned with a Uganda statute and it seems to me that it would be reasonable and logical to interpret “indigenous” as “indigenous to Uganda”. I do not think such an interpretation is ruled out by the fact, stressed by the Chief Justice, that the current definition of “African” contains none of the express exceptions contained in the earlier definitions. Looked at in the general context of the African continent, those exceptions seem to be meaningless. For example, one of the exceptions in the 1951 Ordinance is an Egyptian, but Algerians are not excepted. I can see no logical reason for saying that an Algerian is an African but an Egyptian is not. I think the explanation is to be found by looking more closely at the exceptions. Arabs, Abyssinians, Somalis, Seychellois, Baluchis, Malagasies and Comoro Islanders are all present in East Africa and might be said to constitute communities. Individuals of any of those communities, while excluded from the definition of “African”, could, under the earlier definitions, be treated as Africans if they lived among members of an indigenous African tribe or community in accordance with their customary way of life. For example, a group of Abyssinians living in Uganda could not be treated as Africans by virtue of their constituting a community but an individual Abyssinian living among a local community in Karamoja could be declared an African. This, I think, clearly shows that under the earlier definitions “indigenous” must have meant indigenous to Uganda and not merely to Africa. Egyptians were not excluded in the 1945 definition and I do not know why they were mentioned in the 1951 Ordinance: I do not know of any substantial number of Egyptians in East Africa, but there may be or there may have been. I think that the earlier definitions were intended to cover people living in Uganda: the indigenous tribes and communities were, so to speak, African as of right and certain other individuals might be treated as Africans. The “exceptions” were not so much aimed at excluding specified categories of people as allowing persons who were not Uganda Africans to be treated as such. If, as I believe, “indigenous African tribe or community” in the earlier definitions was intended to mean “African tribe or community indigenous to Uganda”, I see no reason to suppose that the words were used in any different sense in the current definition. The next question to be decided is: what is membership of a tribe or community. Obviously a person both of whose parents are Baganda is a Muganda but whether a person whose father was a Muganda and his mother, say, an Indian is or is not a Muganda seems to me a matter of the customary law of the Baganda. On such questions, the customary laws of different tribes may well vary considerably. “Community” is, I think, a much looser term than “ tribe”. I think a community might be based on nationality, or language, or religion, or race, or indeed any factor which causes people to associate together. For example, the Egyptians in Uganda, assuming that there are some, could not be regarded as a tribe but might constitute a community. The test of membership of a community would, I think, be twofold: first, the fact of association and, secondly, the acceptance of the individual as a member by the rest of the community. Applying these views to the present case, I agree with the Chief Justice that the appellant was not entitled to be regarded as a member of an indigenous African tribe by virtue of her parentage, but for different reasons. I agree that she failed to prove that the customary law of the Gaa tribe would recognise her as a member of that tribe, but I do not regard the Gaa tribe as an “indigenous African tribe” for the purposes of the Land Transfer Act. I think that expression relates only to the tribes of Uganda. No mention appears to have been made in the High Court of the Buganda laws and we thought it proper to raise this of our own motion. Mr. Matovu, who appeared for the Registrar, summarised the position most helpfully. In the first place, the Constitution, by article 126 (1), expressly preserves “the system of mailo land tenure”. Secondly, the Local Administration Act 1967, by s. 100 (4), preserves all laws made by the former Kingdoms and subs. (6) of that section provides that where by virtue of any existing law any duty or power is conferred upon any person or authority which has by law or otherwise become unable to perform or exercise it, the Minister responsible may, by statutory instrument, provide for its performance or exercise by such person or authority as he may think fit. The power has been exercised by the Minister, who, by S.I. 1967 No. 150, directed that the power vested in the President and the Lukiiko to give approval under paras. (*c*) and (*d*) of s. 2 of the Possession of Land Law and the power vested in the Katikiro, the Omulamuzi and the Omuwanika of Buganda to sign instruments of transfer and other documents under s. 5 of that law should be exercised by the Minister responsible for Mineral and Water Resources, and the power vested in the Lukiiko by s. 2 of the Land Succession Law to issue certificates of succession should be exercised by the Administrator-General. Mr. Matovu therefore submitted, and I would agree, that the Buganda laws relating to mailo are still in force and effective. Mr. Matovu also submitted that, when dealing with mailo land, the provisions of the Buganda Possession of Land Law and those of the Land Transfer Act should be read together. Again, with respect, I agree. The relevant provision of the Possession of Land Law is s.2 (*c*), which forbids the owner of a mailo willing it to “a man who is not of the protectorate”. We heard some argument on the meaning of those words. Mr. Matovu submitted that they should be regarded as equivalent to “a member of an indigenous African tribe or community”. Mr. Wilkinson Contended that in the context of changed circumstances they should be interpreted as meaning “a citizen of Uganda” and he pointed out that the appellant is a citizen of Uganda. I would, with respect, reject Mr. Wilkinson’s submission. I accept, as a general proposition, that a court interpreting a statute must do so in terms of current realities. Citizenship did not exist in 1908 when the Possession of Land Law was enacted. The constitutional and political position today is entirely different. But for over sixty years, the words “man of the Protectorate” have, so far as I am aware, been interpreted as “Uganda African”. In those circumstances, I think any change should be brought about by the legislature and not by the judiciary, because matters of policy are involved. This is particularly so, since there is another statute in existence, the Land Transfer Act, which expressly restricts the transfer of land to or its occupation by non-Africans. On this basis, again, I think it is quite clear that the appellant could not properly obtain registration as the proprietor of mailo land on the basis that she is a member of the Gaa tribe. At the hearing of the appeal, Mr. Wilkinson took a different course. He argued that the appellant, while possibly not a member of the tribe of the Baganda, had become a member of the Baganda community, by virtue of her marriage to the late Michael Kagwa. He referred to her having borne his children, living in his house on his ancestral lands and mingling freely with her Baganda neighbours. Mr. Matovu replied that this claim had never been advanced in the High Court, never considered by the Chief Justice and was supported by no evidence. The appellant’s, case had been clearly and exclusively that she was an African by virtue of membership of the Gaa tribe. I think Mr. Matovu’s objection is irresistible and that this appeal must fail. I say this with great regret, because I think that if proper evidence had been adduced to establish the facts, particularly the way of life of the appellant and her acceptance, if she is accepted, as a member of the Baganda community, it might well have been held that she is an African for the purposes of the Land Transfer Act and the Possession of Land Law. Such evidence might well have come partly from the appellant herself and partly from some Muganda occupying a position of respect and responsibility. It is not open to us to hold that the appellant is an African without any evidence on which to rely. No application was made at the hearing for leave to adduce evidence and it would not be proper for us at this stage to order it. We are not concerned in this appeal with the status of the appellant’s children, and I will only remark that, on the views I have expressed, it may well be that they could establish entitlement to be regarded as Africans. I would dismiss the appeal. Counsel agreed that the costs should be paid out of the estate and I would so order. As the other members of the court agree, there will be an order accordingly.

**Mustafa JA:** I have read the judgment prepared by Spry, Ag. P. I am in entire agreement with its reasoning and conclusion and have nothing useful to add.

**Musoke JA:** I have had the advantage of reading in draft the judgment prepared by Spry, Ag. P. I agree with it and have nothing useful to add. *Appeal dismissed.* For the appellant:

*PJ Wilkinson QC* and *J Kateera* (instructed by *Hunter & Greig*, Kampala)

For the respondent:

*MB Matovu* (Solicitor-General), *Y Kagumire* (Chief Registrar of Titles) and *P Nsibirwa* (State Attorney)