THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: ***HON. LADY JUSTICE A.E.N.MPAGI-BAHIGEINE, JA***

HON. LADY JUSTICE C.N.B.KITUMBA,JA

HON.LADY JUSTICE C.K.BYAMUGISHA,JA.

CIVIL APPEAL NO.35 OF 2002

(Arising out of a ruling and order of the High Court of Uganda sitting at Kampala(**Katutsi J.)** ***dated the 13th March2002 in High Court Miscellaneous Cause No.130 of2001)***

BETWEEN

KIKONDA BUTEMA FARMS LTD:::::::::::::: APPELLANT

AND

THE INSPECTOR GEN. OF GOVERNMENT:::::: RESPONDENT

JUDGMENT OF BYAMUGISHA, JA

This is an appeal against the ruling and orders of the High Court wherein the appellant's *ex-parte* application for leave to apply for the prerogative orders of certiorari and prohibition was dismissed. The facts that are material to this appeal are the following: -

The appellant is a limited liability company duly incorporated under the provisions of the Companies Act. It was incorporated in 1967. It owned a piece of land in Singo Mubende District on which it grew rice and other farm products. The promoter of the company was the late Saulo Lubega who owned 60 % shares. He later employed some Asians. He gave them shares in the company of 40 %. In 1973 the farm was expropriated by the Government of the day. The Ministry of Agriculture and Animal Resources on behalf of the Government then managed it.

In 1989 the farm was returned to the widow of Saulo Lubega one Florence. The farm and its machinery were in a dilapidated state. Mrs Lubega submitted a claim to Government for compensation apparently under the provisions of the **Expropriated Properties Act** (Act 9/82). The total claim she made was *shs* 1,084,797,837/= being the replacement cost of the farm machinery, equipment and vehicles that were at the farm in 1973. In 1994 the Government made an *ex gratia* payment of *shs* 100,000,000/= to Mrs Lubega. It seems she did not accept this payment as full and final settlement of the company's claim.

On or about the 13th March 2000, the Permanent Secretary/Secretary to the Treasury wrote a letter to the Solicitor General seeking his legal opinion about the claim. The Solicitor General in a letter dated 23rd May 2000 stated that the Government has never disputed the claim of the appellant and that in terms of the provisions of **Act 9/82** her claim is enforceable against Government. He advised that the appellant should be paid but that the *ex gratia* payment made in 1994 to Mrs Lubega should be deducted from the sum payable.

On the 10th December 2000 the Auditor General wrote to the Permanent Secretary/Secretary to the Treasury giving a go ahead for the payment to be made. On 12th July 2001 the Solicitor General wrote to Messrs Mulira &Co Advocates informing them that the Government was ready to pay the appellant the sum of *shs* 1,015,437,537/= in full and final settlement of the entire claim. The Solicitor General requested Messrs

Mulira & Co Advocates to confirm whether the above terms were acceptable to them. It is not clear whether there was any reply.

It was alleged that on the 30th July 2001, a cheque worth *shs* 500,000,000/= was made in favour of the appellant as part payment of its claim. It was further claimed that the following day the respondent herein stopped payment of the cheque. It is not stated how the respondent communicated his decision to the relevant Government departments and how the appellant came to know about. However, it seems the respondent had been making his own independent inquiries about the appellant's claim under his statutory powers. Consequently he issued a report, which countermanded the Attorney General's advice to pay the applicant. The appellant contends that the advice given by the Attorney-General in his capacity as chief Government adviser on legal matters cannot be reversed by another department of Government. The appellant also claims that the respondent's action of stopping payment has the effect of levying an injunction on Government which is not allowed in law – hence his application for leave to issue a writ of certiorari and prohibition. The application was supported by the affidavit of one Israel Magembe Wamala a director of the appellant. It came before Katutsi J. for hearing on 08/02/2002. He dismissed it on 13th March 2002 hence the instant appeal.

The memorandum of appeal contains the following 9 grounds: -

1. **The learned trial Judge erred in law and fact in holding that the Inspector General of Government advised the applicant to take its complaint to court when there was no evidence to this effect.**
2. **The learned trial Judge erred in law when he proceeded to consider the merits of the main application on an application for leave to be allowed to file an application for orders of certiorari and prohibition.**
3. **The learned trial Judge erred in law and fact when he relied on documents had not been put in evidence.**
4. **The learned trial Judge misdirected himself on the true import and authority of the case he quoted in his ruling.**

5. **The learned trial Judge erred in law and fact when he failed to grant leave to the appellant to file an application for orders of certiorari and prohibition.**
6. **The learned trial Judge erred in law and fact when he held that the Inspector General of Government smelt a rat that is why he stopped appellant's payment.**
7. **The learned trial Judge erred in law and fact when he held that nothing should be done by a court of law to fetter the Inspector General of Government from doing that which the Constitution enjoins him to do when it was the appellant's case that the action of the Inspector General of Government was *ultra vires* the Constitution and the Inspector General of Government's Act.**
8. **The learned trial Judge misdirected himself on law and fact.**

It was the appellant's prayer that the Judge's decision in refusing to grant leave to the appellant be set aside; the suit be remitted to the High Court before another Judge for hearing on merits; and costs of the appeal and those in the High Court be in the cause.

When the matter came before us for final disposal, Mr. Mulira, learned counsel for the appellant, submitted on all the grounds generally. However, I do not propose to deal with all the grounds. I shall deal with ground two only which is that the learned trial Judge erred in law and fact when he proceeded to consider the merits of the main application on an application for grant of leave.

The application for orders of mandamus, prohibition or certiorari is governed by the provisions of **The Law Reform (Miscellaneous Provisions)(Rules of Court) Rules (**S.I.No 74-1). The rules provide that no application can be made unless leave has been granted. Such leave is applied for *ex parte* to a Judge in chambers. The application for leave has to be accompanied by a statement setting out the description of the applicant, the relief being sought and an affidavit verifying the facts relied on. **Rule 2** provide that in granting leave, the Judge may impose such terms as to costs and giving security, as he thinks fit. This rule gives a Judge discretion to grant leave and to impose such terms as to costs and security. An application for leave is the first step in the process. The trial Judge is enjoined to look at the statement of facts the accompanying affidavit and any

annextures that might be attached to the application before granting leave. It is not necessary at that stage to consider whether the applicant would succeed or not. The applicant has to present such facts that would satisfy court that a *prima facie* case exists for leave to be granted. In my view, leave is not granted as matter of course. However the court is not supposed to consider the merits or demerits of the application. Such decision can only be taken after hearing the application *inter partes*.

In the matter now before us, I think, with respect, it was wrong for the trial Judge to rely on the respondent's report when it was not filed with the application. It was premature for the Judge to consider the contents of a report allegedly made by the respondent. But even if the report was available, it was premature at that stage for the learned trial Judge to determine the matter in controversy without giving an opportunity for all sides to be heard. To me, an application filed *ex parte*, can only be rejected if the court is not satisfied that it was brought in good faith or if some document (s) material to the just determination of the substantive application is missing or of some defects apparent on the face of the record. These are matters that the learned trial Judge did not address his mind to.

On the whole, I think the learned trial Judge was wrong when he considered the merits of the application on an application of the nature that was before him. Consequently, the appeal would be allowed. The orders of the trial court would be set aside. The file is remitted to the High Court for hearing before another Judge. The costs of the appeal and those of the proceedings in the lower court would be in the cause.

Dated at Kampala this …30th …day of…May…2003.

C.K.Byamugisha

Justice of Appeal