

**THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA  
AT MENGO**

**MISCELLANEOUS CIVIL APPLICATION NO. 11 OF 2003**

**BETWEEN**

**THE INSPECTOR GENERAL OF GOVERNMENT :.....: APPLICANT**

**VERSUS**

**KIKONDA BUTEMA FARM:.....:RESPONDENT**

**RULING OF KAROKOA JSC.**

This is an application by Notice of Motion filed under Rules 4, 5(2) and 7 1 of the Rules of this court. It is seeking extension of time within which to file its Notice of Appeal against the ruling of the Justices of Appeal in Civil Appeal No.35 of 2002 in which it was ordered that the application for leave for orders of certiorari be remitted to the High Court for hearing *denovo* by another Judge and that the proceeding in the High Court be stayed. The application is supported by affidavit sworn by Ms Elizabeth Musoke, the Director of Legal Affairs at the Inspectorate of Government.

The grounds for the application which appear in the affidavit sworn in support of the application are:

- (1) That the applicant, who was the respondent in the above matter, which proceeded *exparte* was not served with a copy of the Notice of Delivery of judgment.

(2) That the applicant only learnt about the ruling/order in the said Civil Appeal when the respondent was presenting the application for leave to apply for orders of certiorari and prohibition on 8<sup>th</sup> July, 2003 consequent upon the order of the Court of Appeal.

(3) That because the applicant was not aware of the said ruling of the Court of Appeal, the applicant could not file a Notice of Appeal within the prescribed time.

(4) That the ruling of the Court of Appeal raises very important points of law which this court should pronounce itself on it. That is that the Court of Appeal was not vested with jurisdiction to handle a matter on appeal relating to prerogative order of certiorari and prohibition, and that because it handled the matter without jurisdiction in contravention of section 38(3) we seek the ruling of" this court on the matter.

It was deponed that the applicant's intended appeal has likelihood of success and therefore prayed that they be given a chance to give notice of appeal out of time.

Mr. Mulira, counsel for respondent, opposed the application on the ground that the applicant had no locus in the matter. He submitted that the judgment in the Court of Appeal arose out of the High Court Miscellaneous Application No. 13 of 2001 which had been brought under Section 3(2) of the Law Reform/Miscellaneous Provisions Act No 74 of 1996 which provides that applications for certiorari, mandamus and prohibition cannot be made without leave of the court. He submitted that sub-section 2 of section 3 of the Act provides as follows:

***"An application for such leaves as aforesaid shall be made exparte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the ground on which it is sought and by affidavits verifying the facts relied on. The judge may, in granting leave impose such terms as to costs as to giving security as he thinks gifts."***

Counsel submitted that in view of the above provisions of the Act, the applicant has no right to bring this application since the leave sought for certiorari has not yet been granted.

Secondly, counsel submitted that section 38(3) of the Judicature Statute deals with prerogative orders of mandamus, prohibition and certiorari. He contended that at this stage there was no order made for any of the prerogative orders. Therefore, subsection 3 of section 38 of Judicature Statute was not applicable. He further contended that even if assuming subsection 3 of section 38 of the Judicature Statute applied, it does not say that there is no right of appeal. All that it says is that an order in respect of any of the prerogative orders made by the High Court shall be final subject to any right of appeal. He concluded that there was no law quoted which stated that there is no right of appeal.

Thirdly, he submitted that section 3 of the Law Reform (Miscellaneous Provisions) Act, 74 makes it clear that there is distinction between application for leave to apply for order of prohibition, certiorari and mandamus from the substantive order of mandamus certiorari and prohibition, because there can be no application for these prerogative orders unless leave thereof has been granted in accordance with this rule. He contended that at this stage we are not talking about these prerogative orders. We are dealing with leave for these orders.

Fourthly, counsel submitted that this application was misconceived, because the issues raised could be raised in the High Court when the substantive application for the order of certiorari is being heard. The applicant will have right of audience.

On the complaint that the applicant was not served with a notice of delivery of judgment, counsel submitted that there was no requirement in law to give him notice of delivery of judgment, since the applicant had not taken part in the High Court proceeding from which these proceedings originated, they (applicant) had

no locus to appear before the Court of Appeal in the same matter which had commenced exparte.

After the Court of Appeal had heard arguments from counsel for respondent it directed that the matter be referred back to the High Court to hear the application for orders of certiorari. The matter was placed before Opio Aweri J. who proceeded exparte and granted application on 11/7/2003, which is due to be heard interparte. Counsel submitted that in the interest of justice, the application for order of certiorari in the High Court should proceed uninterrupted as it touches on matter of national interest of whether an opinion of the Attorney General on legal matters can be countermanded by the Inspector General of Government.

Mr. Karekyezi, in reply started with the last point/issued of whether the Attorney General's legal advice on legal matters can be countermanded by the IGG, and submitted that this issue can be handled in other manner but not necessarily in the certiorari application. He submitted that if the application for certiorari is stayed, the matter would be handled by the High Court in a suit which was recommended by the report and the issue of national interest would be resolved. Counsel submitted that although the IGG had no locus to appear before the High Court, their attendance having been dispensed with, it was their contention that they should have a right to appeal as parties who are directly affected by the decision of the High Court and the Court of Appeal. On the orders given by the Court of Appeal remitting the matter to High Court, counsel submitted that those orders were given by the Court of Appeal without jurisdiction and that's why they are seeking that proceedings for certiorari be stayed. He cited section 38(3) of the Judicature Statute, 1996, for proposition that there is no right of Appeal against prerogative orders. He cited the case of ***Attorney General V State (1971) EA 50*** in support of the above argument.

On the question of whether the applicants were entitled to service of Notice of

delivery of judgment in Civil appeal No 35 of 2003, I think that since the proceeding were commenced *ex parte* in the High Court under section 3(2) of the Law Reform (Miscellaneous provisions) Act, 1974, seeking leave for an order of certiorari, which leave has not yet been granted, and since even the proceedings before the Court of Appeal proceeded *ex parte* under Rule 77(1) of the Court of Appeal Rules, the applicant was not entitled to get notice of the delivery of judgment. In my view, as long as no order of certiorari had been granted, the proceedings remained *ex parte*. Therefore the judgment springing from such *ex parte* proceeding would not affect applicant's interest/rights. In the result, subsection 3 of section 38 of the Judicature Statute is irrelevant to the proceedings at this stage.

Therefore, the decision in the case of **Attorney General V Shah (1971) EA 50** would not be relevant at this stage of the proceedings before leave for the prerogative order of certiorari was granted, because that case is an authority for the proposition that no right of appeal exists against any of the prerogative orders. In the result, the case of **Attorney General V State** (*supra*) is distinguishable, because there, the Attorney General was seeking to appeal against the prerogative order, unlike in the instant case, where the respondent had appealed against refusal by the High Court to allow *ex parte* application for leave to apply for certiorari. In the circumstances, ground two must fail.

In my view, since the original application for leave to apply for certiorari had proceeded *ex parte* and the Court of Appeal had dispensed with applicant's attendance at the hearing of the appeal in accordance with Rule 77(1) of the Court of Appeal Rules, the applicant was not entitled to be served with notice of delivery of judgment.

In the interest of justice, since leave to apply for order of certiorari has been granted by the High Court, let the applicant be served with hearing notice so that

all legal issues are argued and determined. In the meantime, I see no merit in this application which is dismissed with costs.

***Dated at Mengo, this 21st day of August 2003.***

**A.N. KAROKORA**

**JUSTICE OF THE SUPREME COURT**