

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

**CRIMINAL APPEAL NO.03 OF 2018**

*(Coram: Arach-Amoko, Mwangusya, Opio-Aweri, Buteera, JJSC & Nshimye, Ag. JSC)*

**Between**

**SARAH KULATA BASANGWA .....APPELLANT**

**Versus**

**UGANDA ..... RESPONDENT**

*[Appeal from the judgement of the Court of Appeal at Kampala (Kavuma, Bossa and Kakuru, JJA.) dated 15<sup>th</sup> January, 2018 in Criminal Appeal No.02 of 2012]*

**JUDGMENT OF THE COURT**

This is a second appeal. It arises from the judgment of the Court of Appeal which reversed a ruling by which a High Court Judge discontinued criminal proceedings instituted by the Inspectorate of Government against the appellant. The ground upon which the proceedings were discontinued was that the IGG was barred from investigating and/or prosecuting the case in view of the fact that a Civil suit No.251 of 2010 and Miscellaneous Application No.107 of

2010 filed by the complainants against the appellant and others on the same subject matter was pending in Court.

**Background:**

The facts as found by both the High Court and the Court of Appeal are that on 28<sup>th</sup> of November 2011, the respondent who at the time was a Commissioner for Land Registration was charged with Abuse of office contrary to Section 11 of the Anti-Corruption Act of 2009. It was alleged that the appellant between the 9<sup>th</sup> of July, 2010 and 4<sup>th</sup> of August ,2010 at the Land Registry in Kampala while performing her duties as Acting Commissioner for Land Registration did, in abuse of the authority of her office, arbitrary acts which were prejudicial to M/S Lakeside City Ltd when she hastily and unlawfully registered M/S Kikonyogo Investment Ltd as the Proprietor of land comprised in FRV 429 Folio 5 Block 537 Plot 103 Wakiso, Busiro , FRV 432 Folio 23 Block 537 Plot 102 Wakiso, Busiro , FRV 380 Folio 6 Block 697 Plot 103 Lubowa Estate Wakiso, FRV 356 Folio 12 Block 1073 Lubowa Estate Wakiso, to the detriment of M/S Lakeside City Ltd, the true purchasers and owners of the land described above. Before the respondent could take plea, a point of law was raised by her Learned Counsel, Mr. Michael Okecha contending that the Inspectorate of Government was barred from investigating the matter, as the complainant in that criminal case had also filed two civil matters at the Civil Division of the High Court vide High Court **Civil suit No.251 of 3010 and Misc. Application No.107 of 2010** arising therefrom. The Learned Magistrate decided to refer the matter to the High

Court for an Opinion under Section 206 of the Magistrate Court Act. The question reserved for interpretation was set as follows:-

**“Whether under Section 19(1)(c) of the Inspectorate of Government Act, the Inspector General of Government is barred from investigating and prosecuting this case in light of Civil suit No.251 of 2010 and Misc. Application No.107 of 2010 filed by the complainants against the accused and others on the same subject matter.”**

The Hon Justice Paul Mugamba, J (as he then was) delivered his opinion on the matter on 20<sup>th</sup> December 2011, in which he answered in the affirmative and militated the discontinuance of the criminal proceedings against the appellant. The Inspectorate of Government being dissatisfied with the above decision of the High Court, filed an appeal to the Court of Appeal. The Court of Appeal reversed the decision of the High Court and held that institution of criminal proceedings against the appellant by the respondent did not in any way amount to questioning or reviewing of civil proceedings before the Civil Court. The appellant being dissatisfied with the judgement of the Court of Appeal, has appealed to this Court raising five grounds namely:-

- 1. That the Learned Justices of Court of Appeal erred in law when they failed to properly apply the law to the facts thereby reaching a wrong decision hence occasioning a miscarriage of justice.**



- 2. That the Learned Justices of Court of Appeal erred in law when they misinterpreted section 19(1) (c) of the Inspectorate of Government Act that it does not bar the Inspectorate General of Government from investigating civil matters before the Court whereas not hence occasioning a miscarriage Justice.**
- 3. The Learned Justices of Court of Appeal erred in law and fact when they failed to properly apply the facts and holding in case of Gordon Sentiba & others vs The Inspector General of Government (Supreme Court Civil Appeal No.06 of 2008 and other cases referred to, to the present case therein arriving at a wrong decision hence occasioning a miscarriage of justice.**
- 4. The Learned Justices of Court of Appeal erred in law when they determined the applicability of section 19 (1) (c ) by comparing it to powers of Director of Public Prosecution (DPP)**
- 5. The Learned Justices of Court of Appeal erred in law when they pronounced themselves without input of dissenting judgement**

When the appeal was called up for hearing on 24<sup>th</sup> July, 2018, Mr. Okecha Michael of Okecha, Baryayanga & Co Advocates, appeared for the appellant while Mr. Kinobe Rogers, Senior Inspectorate Officer represented the Respondent.

In his submissions, counsel for the appellant argued grounds one and two together and the rest separately. The respondent followed the same order.

On **Ground 1 and 2**, Counsel for appellant contended that while it was common knowledge that the respondent has wide statutory powers as the government ombudsman to investigate and prosecute matters including abuse of authority as provided under Article 225 of the Constitution of Republic of Uganda and Section 8 of the Inspectorate of Government Act, there were certain exceptions to the said powers provided under section 19(1) (c) of the Inspectorate of Government Act. Counsel submitted that under this law which is very explicit and mandatory, the IGG shall not question any matter which is before Court. Counsel contended that the criminal proceeding sought to be brought by the respondent were already subject in a civil matter vide **Miscellaneous Cause No.107 of 2010** in the High Court of **Uganda at Kampala, Lakeside City vs The Commissioner Land Registration and three others**. Counsel accordingly submitted that the IGG was precluded by section 19(1) (c) from investigating or questioning anything in regard to the said matter.

Citing Section 175 of the Registration of Titles Act Cap 230, counsel also submitted that the alleged criminal act by appellant was performed in her capacity as the Commissioner Land Registration, making her immune to any action or proceeding in regard to the same. Counsel contended further that the act was bona fide because it was done in accordance with the registrar's known



statutory duty of which the registration of proprietors and caveats on property are among the said cardinal responsibilities. Counsel further contended that if the respondent had good reason to bring criminal proceedings against the appellant, it should have accorded her an opportunity to be heard as is provided under section 25 (2) of the Inspector General of Government Act. Counsel for the appellant faulted the Learned Justices of Appeal for misinterpreting the law and for failure to properly apply the facts at hand as they noted in their judgment that institution of criminal proceeding against the appellant did not in any way amount to questioning or reviewing civil proceeding before the High Court yet they acknowledged the fact that both matters arise from the same facts.

In his reply, Counsel for the respondent contended that the charges of abuse of office preferred against the appellant as disclosed in the charge sheet did not in any way intend to question or review the **Miscellaneous Cause No.107 of 2010** in the High Court of Uganda at Kampala Lakeside City Ltd vs the Commissioner Land Registration and three others. Counsel contended that Article 230 of the Constitution and Section 14(4) of the Inspectorate of Government Act 2002 amongst others, mandate the Inspectorate of Government to investigate and prosecute cases involving corruption and abuse of authority or public office. Counsel submitted that the case against appellant was founded on an alleged abuse of office which is within the mandate of the respondent to investigate and prosecute without interfering with the hearing of the civil suit.

On immunity, Counsel for the respondent submitted that **section 175 of the Registration of Titles Act** is not applicable. He contended that the Commissioner Land Registration is only protected when his or her action is done in good faith and not when the action is wrong and is done knowingly and deliberately in which case it amounts to a criminal act.

Counsel cited the case of **Attorney General and Another vs Afric Co-co-operatives Miscellaneous Application No.6 of 2012**, where court observed that allegation of fraud and forgery are serious allegations and no court of law should allow its process to be used to enable a party benefit from a clear fraud. Counsel further submitted that this Court emphasized that the IGG's power to investigate forgeries are wide. The pending civil suit between two parties cannot be a bar to criminal prosecution, that the civil suit was against the Commissioner Land Registration and not the appellant in person and that the remedy offered in civil action was not in contradiction with the remedies the prosecution by IGG intended to achieve. Counsel contended that no evidence was adduced to show how the appellant was denied the right to be heard as mandated under section 25 (2) of the Inspectorate of Government Act.

The question whether the acts of the appellant were bona fide or not is a triable issue in the criminal trial itself. What we are called upon to determine is whether the institution of the criminal proceedings by the respondent are barred by section 19 (1) (c) of the



Inspectorate of Government Act and we shall determine that without going into merits of the would be criminal case.

The Court of Appeal dealt with the issue giving rise to ground one and two in the following passage:-

**“In the case before us the facts are clearly different. The appellant is not seeking to question or review the civil matters before court. But rather has instituted separate legal proceeding in a criminal Court, against the appellant in person.**

**We do not accept the argument that the institution of criminal proceeding against an individual public officer by the IGG amounts to questioning or reviewing a civil matter before Court, nor does it amount to interference with the independence of the judiciary.**

**The IGG in the case before us is not seeking to investigate any civil matter before a Court of law but rather seeks to continue investigating and prosecuting a criminal matter before another competent court in exercise of its legal mandate.**

**It cannot be a correct proposition of the law that where a civil suit is pending between two parties, no criminal proceedings may be instituted against one of the parties arising from the same facts.**

**It is not correct to suggest that whenever criminal proceedings are instituted in respect of matter that is also**



**a subject of civil litigation, that alone amounts to interference with the independence of the judiciary...**

**Nowhere in the Gordon Sentiba case (supra) does the Supreme Court suggest that the IGG cannot commence criminal proceedings against any person in respect of matter that is subject of civil proceedings.**

**In that case Odoki CJ (as he was then) who wrote the lead judgement stated as follows; "in this case nothing prevented the respondent from investigating officers it considered had abused their power and take appropriate action according to its well laid down procedure"**

**That is exactly what happened in the case before us. The Inspectorate of Government has not sought to question, review or even investigate the pending civil matters mentioned above but rather has chosen to take the route suggested by the Supreme Court against them...**

**We find that section 19(1)(c) of the Inspectorate of Government Act does not bar the Inspectorate of Government from instituting criminal proceeding against appellant or any other person by reason that there are subsisting civil proceedings arising from the same facts**

**Our own understanding of section 19(1)(c) (Supra) is that it bars the inspectorate of government from questioning or reviewing proceedings before a Court of law. The IGG cannot for example inquire into the nature or process of**

**Court proceedings or question their validity or appropriateness...”**

We find no reason to depart from the above reasoning of the Justices of Court of Appeal. Section 19 (1) (c) only forbids the IGG from questioning or reviewing a matter in the civil Court, and in this case, the IGG was not in any way reviewing or questioning the said civil matter. We are in agreement with the Court of Appeal that criminal proceedings may emanate from the same facts but it doesn't deter prosecutors to institute criminal proceedings because the facts are similar to that of civil case.

We find no merit in grounds 1 and 2 and we uphold the reasoning and judgment of the Court of Appeal as the true position of the law.

On Ground 3, Counsel for appellant relied on the case of **Gordon Sentiba & Others vs The Inspector General of Government Supreme Court Civil Appeal No.6 of 2008** where Justice Odoki, CJ, stated that to investigate civil proceedings commenced or completed before the respondent commences investigations violated the principle of independence of the judiciary and could not be sanctioned by the Court. Counsel contended that the respondent preferred charges against the appellant on the 31<sup>st</sup> day of October, 2011 nearly a whole year after the civil matter was instituted in the High Court of Uganda at Kampala which action violates the independence of the judiciary. Counsel further criticized the Learned Justices of Appeal for relying on the case of **Attorney General and Inspector General of Government vs Afric Co-**



**Operatives Society Limited Miscellaneous Application No.6 of 2012** and submitted that it was different from the instant case as the former was in regard to a report from the IGG which had not been disclosed to the respondent thus bringing questions of fairness and natural justice

In reply Counsel for respondent submitted that the case of **Gordon Sentiba & Others vs The Inspector General of Government** (supra) was distinguishable from the present case because while in Sentiba's case this Court criticized the Inspectorate of Government for attempting to investigate a decision that had been made by Court on ground that it was made fraudulently, in the instant case, the prosecution of the appellant was founded on an alleged illegal action by her and it did not in any way interfere with the ongoing civil case against her office. Counsel quoted Justice Odoki CJ where he observed that in that case nothing prevented the respondent (Inspectorate of Government) from investigating officers it considered had abused their powers and take appropriate action according to its well laid down mandate, which proposition supports the prosecution of the appellant.

We agree with counsel for respondent that this case is totally different from the case of Sentiba, in that while in that case, the Inspectorate of Government was attempting to investigate a decision of Court (consent judgment) that had been made by Court on ground that it was made fraudulently, in the instant case the respondent intends to prosecute the appellant for an alleged illegal action taken by her and there is no interference whatsoever with

the civil case, which may be taken to violate the independence of the judiciary. We find no merit in this ground.

On **Ground 4**, Counsel for appellant submitted that the position of the Director of Public Prosecutions which is created under Article 120 of the Constitution of the Republic of Uganda, 1995 and that of Inspectorate of Government which is created under Article 223 of the Constitution of Republic of Uganda are distinct with different responsibilities and criticized the Learned Justices of Appeal for comparing the DPP to the IGG who is restricted under section 19(1) (c) of the Inspectorate of Government Act.

Counsel for respondent submitted that the observation was plainly seen and did not constitute the reason to uphold the appeal against the appellant. He contended that whereas the Director of Public Prosecutions under Article 120 of the Constitution and the Inspectorate of Government under Article 223 of the Constitution are distinct, the comparison did not influence the judgment but rather a comparison basing on the constitutional functions of the two offices, implying that the DPP could as well have instituted criminal proceedings while the civil case against the commissioner proceeded.

The observation of the Court of Appeal on this issue was that:-

**“We note that the criminal proceedings against the appellant from which the appeal arises could have been instituted by the DPP. There is no provision in the Magistrates Act or any other law that restricts the powers**



**of the DPP in the same way as section 19(1) (a) (c) of the Inspectorate of Government Act restricts the power of the inspectorate of government “**

We find nothing wrong with the Court of Appeal in comparing the mandate of the DPP and IGG as far as instituting criminal proceedings are concerned. Both of them derive the power directly from the Constitution. We have explained the restrictions of the IGG under section 19. We find no merit in this ground.

On **Ground 5**, Counsel for appellant cited Article 135 (1) of the Constitution of Republic of Uganda which provides that the Court of Appeal shall be duly constituted at any sitting if it consists of an uneven number not being less than three members of the Court. Counsel contended that the judgement of Court of Appeal of 15<sup>th</sup> day of January, 2018 was signed by only two Honorable Justices of Court of Appeal instead of the required minimum of three. Counsel submitted that it is trite law that a judgment of a dissenting justice should be attached in the way it was done in the case of **Wepukhulu Nyunguli vs Uganda Criminal Appeal No.21 of 2001** where dissenting judgment of Justice Mulenga was attached to the rest of the judgement of the Court and his reason for disagreeing with the rest of the Justices of Supreme Court. Counsel submitted that there was no evidence of the third Justice participating in writing of the judgement and the judgement itself is dated on a date when he was no longer a Justice of the Court of Appeal.

Counsel for respondent agreed with counsel for the appellant that under Article 135(1) of the constitution the Court of Appeal is duly constituted at any sitting, if it consists of an uneven number not less than three members of the court but hastened to add that a majority of the court constitute a judgment of the court. Rule 33(3) of the Judicature (Court of Appeal Rules) Direction SI-13-11 is to the effect that, in criminal appeals, one judgement shall be given as the judgement of the court but a judge who dissents shall not be required to sign the judgment. It is not mandatory under the rule for dissenting judge to give his/her reasons for dissent nor does it require him or her to indicate his or her input whatsoever in the judgement of the Court. Counsel submitted that the decision of Court of Appeal constituted majority decision without the need for having signature or input of the dissenting judge.

This Court has had occasion to discuss the consequences of delivering judgment where for one reason or another one of the judges who heard the case is no longer in jurisdiction. This was **Civil Application No. 17 of 2007 between Orient Bank Ltd and Fredrick Zaabwe and Mars Trading Limited** where it was contended that a case heard and decided by a coram of five Justices is invalid if at the time it is delivered one of the Justices has ceased to be member of the Court. Justice Karokora, JSC had retired. The Court stated as follows:-

**“It is a trite that a judgment takes effect from the day it is pronounced, hence the requirement in sub-rule (9) that it be as of the day it’s delivered and not necessarily the day it**



is signed, though more often than not the two are done at the same time. On the other hand, the requirement for the judgment to be in writing and signed is to ensure its authenticity and validation as the judgment of the Judge /Judges making it. In the case of reserved judgments, the writing and signing are invariably done before the time the judgment is delivered, and its authenticity and validity are thus preserved up to its delivery. Where at any time before its delivery, the judgment is altered because there is change of mind, the altered judgment had to be similarly authenticated and validated. In either case, the judgment is delivered as the valid judgment of the judge who prepared and signed. We are not persuaded that the situation where the judge, having signed a reserved judgment, does not alter the judgment, calls for speculation whether it is by choice or because the judge ceased to be a member of the Court. We say this because in our view, much as the day of delivery is the day it takes effect, it is not the day the decision is made. We think that neither the interest of justice nor public policy would demand that decision of five judges be invalidated because one of the judges who participated in the decision retired or died before the decision was pronounced." (emphasis added)

We note the distinction between the case of Orient Bank where the fifth judge had retired after signing the judgment and this instant case where Kavuma, DCJ retired without signing the judgment.

The others, namely, Bossa, JA and Kakuru, JA signed it. The appellant stated that there was no evidence that the third Justice did not participate in writing of the judgment and there was no evidence of any form to show that after the hearing the said third judge became incapacitated to render him unable to participate in writing of the judgement or to express his views to the two other justices of the panel.

**Rule 33 Sub rule (3) of the Judicature (Court of Appeal Rules)**

**Direction**, provides that:-

**33. Judgment.**

**(1) This rule shall apply to judgments and orders by the court.**

**(2) .....**

**(3) In criminal appeals, one judgment shall be given as the judgment of the court, but a judge who dissents shall not be required to sign the judgment.**

**(4) The presiding judge may, in any particular case, direct that separate judgments be given.**

**(5) ....."**

The rule provides for one judgment as clearly submitted by counsel for the respondent. There is no requirement for a dissenting judge to write a dissenting judgment.

In the case of **Wepukhulu Nyunguli Vs Uganda (Supreme Court Criminal Appeal No.21 of 2001)** cited by counsel for the appellant, five judges of the Supreme Court heard the appeal. Rule 32 sub



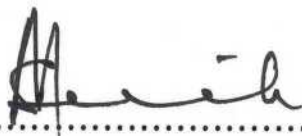
rule (2) of the Judicature (Supreme Court Rules) Directions which is similar to the above Court of Appeal rule provides that **“in criminal application, other than an application heard by a single judge, and in criminal appeal, one Order and Judgment shall be given as the order of judgment of the Court, but a Judge who dissents shall not be required to sign the judgment; except that the presiding judge may, in any particular case, direct that separate orders or judgments be given.”**

The judgment was signed by three out of the five judges that heard the case. The other two judges dissented. Of the two judges who dissented only Justice Mulenga, JSC explained the reason why he had withheld his signature from the majority judgment. The other dissenter, Justice Oder, JSC withheld his signature without recording his reasons for doing so. Both were in compliance with the rule. In this case Hon. Justice Kavuma, DCJ who was the head of the panel withheld his signature from the majority judgment. It is not open to speculation as to why he withheld his signature. As the head of the panel he also had the option to direct that separate judgments be given which he did not do.

There was a majority decision which constituted the judgement of the Court. The absence of a third Justice's signature does not invalidate the decision of the court which was taken after a hearing of the case in accordance with the constitution. In the circumstances we find no merit in ground five which is also dismissed.

As a result since all the grounds of appeal have been dismissed, the appeal is dismissed for lack of merit.


Dated this 3rd day of December 2018

  
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Arach-Amoko, JSC  
**JUSTICE SUPREME COURT**

  
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Mwangusya, JSC  
**JUSTICE SUPREME COURT**

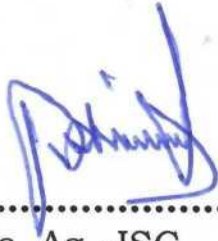
  
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Opio-Aweri, JSC  
**JUSTICE SUPREME COURT**

  
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Buteera, JSC  
**JUSTICE SUPREME COURT**





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Nshimye, Ag. JSC

**JUSTICE SUPREME COURT**