IN THE COURT OF APPEAL

AT KISUMU

(Coram: Potter, Kneller & Hancox JJA)

CIVIL APPEAL NO 19 OF 1983

BETWEEN

GIRADO MAHAJA.......................................APPELLANT

AND

KHUTWALO & ANOTHER..........................RESPONDENT

JUDGMENT

This case involves a long-standing dispute over the land known as Parcel 243 at Sisenye village in the Busia District, comprising about 50 acres and said to be occupied by over forty people. In 1967 the first respondent to this appeal sued a relative, one Khayaja Weswa, in the 3rd class district magistrate's court at Funyula and the boundary dispute that existed between them was decided in the respondents' favour. Nine years later both the respondents successfully filed an objection to the adjudication register which, according to Mr Miruka Owuor's affidavit filed on June 22, 1982, wrongly recorded the land in the appellant's name. A further objection was filed by one Hitila Musungu, the son of the original defendant, in the same year, which the Adjudication Officer decided in favour of the first respondent, holding that he must respect the decision of the district magistrate at Funyula in 1967 and that Hitila must move from the land as indeed he had been ordered to do in the 1967 case.

The appellant appealed against that decision to the Minister for Lands and Settlement who, under subsection (4) of section 29 of the Land Adjudication Act (cap 284) which was added by Act 16 of 1977 to the main Act with effect from October 28, 1977 had delegated his powers to hear appeals under that section to District Commissioners of all Provinces, save the Nairobi Area, by Legal Notice 73 of 1978. Accordingly the District Commissioner of Busia District held proceedings on August 13, 1981 at which all three parties were present, heading those proceedings as follows:

> "Appeal to the Minister under section 29 of the Land Adjudication Act cap 284 in the Court Busia DC sitting before me Z Orwa under section 73, 1975 Land Appeal Case No 243/1977."

Then, as the learned judge from whose decisions this appeal is brought said, the parties were recorded as having been sworn and to have had their grounds of appeal read over to them, which they accepted. There followed what appeared to be testimony, though it is not absolutely clear by whom that testimony was given and some cross-examination by the opposite party or as the case may be one of the opposite parties. Then the District Commissioner, calling himself a court, said he would visit the land on August 26, 1981 for the purpose of viewing it. The final part of this brief record consists of written reasons by the District Commissioner for allowing the appeal by the appellant Girado Mahaja (a cousin of the original Khayaja Weswa) and awarding this land parcel Number 243 to him, with costs to be borne equally by the present

respondent. This, then, constitutes the record of the proceedings which were brought up before Gicheru Ag J and quashed by him on February 22, 1983. As Mr Miruka Owuor said in the course of his submissions on behalf of the present respondent, that which purported to be the judgment of the District Commissioner was not dated, though with an abundance of caution he had sought an enlargement of the time allowed under order LIII rule 2 of the Civil Procedure Rules to bring an application for *certiorari*, concurrently with his application for leave therefore, both of which were contained in his chamber summons filed in the High Court at Kisumu on June 22, 1982.

This chamber summons was supported by the affidavits of Mr Miruka Owuor and of the first respondent. The former, *inter alia*, recited the history of the dispute, that he had applied for the record of the proceedings before the District Commissioner on May 17, 1982 (which the respondent, received on June 14) and exhibited first, the statement required to support an application for leave to apply for an order of *certiorari* under order LIII rule 1(2) (cap 21) secondly a petition to His Excellency the President and thirdly, a list of sixty two clan elders supporting the respondents claim to the disputed land.

This application for leave came up for hearing *ex parte*, as the rule says before VV Patel J, presumably in chambers, on August 9, 1982, but at the request of Mr Miruka Owuor it was transferred to the High Court at Kakamega. As Mr Oraro who appears for the appellant in this appeal observed, this was not served on the advocates then acting for his client, Messrs Nageri & Co so, of course, they would have been unaware of the transfer (they having filed their notice of appointment in Kisumu Registry on July 15, 1982) when the application for leave came before Gicheru Ag J *ex parte*, on November 2, 1982 and was adjourned for ruling on November 5. On that occasion Gicheru Ag J said he would like to have a glance (a phrase which was criticised by Mr Oraro both in the memorandum of appeal and in his submissions) at the proceedings referred to in paragraph 28 of Mr Miruka Owuor's affidavit, together with the proceedings before Mr Orwa, the Busia District Commissioner, before giving his ruling. For my part I cannot see why the learned acting judge used this phraseology because quite obviously the proceedings before Mr Orwa were the subject of the application for *certiorari* and the record thereof would have to be before the High Court before it could make any such order, see *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 KB 338.

The contents of the record will depend very much on the nature of the proceedings sought to be brought up and quashed. For instance in *Baldwin v Patents Appeal Tribunal* [1958] 2 All ER at p 371, it was held that the parties' patent specifications, since their construction was in question, should form part of the record - see also *R v Knights-Bridge Crown Court ex parte International Sporting Club (London) Ltd* [1981] 3 WLR 640, in which the court in effect said that it would even regard other documents as forming part of the record for the purposes of showing that the Tribunal in question has erred in law - [1981] 3 WLR 640 at p 647. Equally obviously the earlier proceedings leading up to the proceedings which are the subject of the application would in this case have to be considered for the purpose of arriving at a decision on the application itself.

However, once Gicheru Ag J had seen these proceedings he reached the conclusion that the respondents were not given a full and fair opportunity of being present when the District Commissioner visited the land for the purpose of viewing. Indeed the respondents had said in their statement, though the learned acting judge did not refer to this, that they had been summoned before the District Commissioner on the September 4 and ordered to vacate the land within fifteen days and threatened with imprisonment if they did not do so, hence the Petition to His Excellency the President. Gicheru Ag J then made orders quashing the proceedings before the District Commissioner and that the Land Appeal should be reheard by the present District Commissioner in conformity with the rules of natural justice.

In presenting the appeal against that decision Mr Oraro condensed the 17 grounds listed in the memorandum of appeal under six headings, namely that the judge had no jurisdiction to extend the time within which to apply for *certiorari*; that the service of the notice of motion dated November 23, 1982 seeking the order of *certiorari* on the appellant was defective; that the District Commissioner who held the proceedings in question, though a necessary party, had not been served, or sought to be served; that the judge had given an order of *mandamus* when none was asked for and no leave therefor had been given; that the transfer of the suit to the Kakamega High Court was irregular and prejudicial to the

appellant and finally that since the Land Adjudication Act (cap 284) provided by section 29 that the Minister's decision should be final, the decision of the District Commissioner, to whom this power had been delegated, was equally final. In any event, he said, the Act did not require that the proceedings should be in the nature of a court hearing, with the right to call evidence, the duty to hear submissions and the obligation to hear both sides. All subsection (1) of section 29 of that Act said was that the appellant should deliver his grounds of appeal in writing to the appellate authority, with an obviously corresponding obligation upon that authority to consider them and "make such order thereon as he thinks just." Section 12 of the Act, Mr Oraro submitted, was only relevant to that which went before the compilation of the adjudication register and did not confer rights on the parties after its publication and did not govern any objection proceedings, wherein section 26(2) only required the adjudication officer to determine the objection after such further consultation and inquiries as he thinks fit. Still less was it applicable to an appeal under section 29(1), to the requirements of which I have just referred.

Mr Miruka Owuor made several criticisms of the District Commissioner's decision, in supporting the learned judge's order. In particular he said that the District Commissioner had not delivered a judgment or order in the presence of the parties that he was instructed that the District Commissioner had never in fact visited the land, that it was difficult, if not impossible, to say that he had concluded the case and, if so, when (hence his application to enlarge time) and that it was self evident from the record, which he produced that only one side had been permitted to testify. Mr Miruka Owuor therefore submitted that the District Commissioner had failed to exercise his function or discretion judicially, that his decision was a fundamental breach of natural justice and of the Constitution and that the only course his aggrieved clients could have taken was to seek an order of *certiorari* from the court otherwise they would have had no redress for that which had occurred. Moreover his clients had encountered the utmost difficulty in obtaining the typed records of the proceedings, as he had deponed in paragraphs 12 to 15 of his affidavit and he went so far as to say that he would not exclude the suggestion that the record could have been completed by the District Commissioner after it had been applied for on May 17, 1982. In the result the decision could have even been as late as June 13 (I think he must have meant 14), in which event, of course, his application for leave fourteen days later was well within the time prescribed.

As regards the service of notice Mr Miruka Owuor said that of course the application for leave was stated in the relevant rule to be *ex parte* and the transfer of the case to Kakamega was at his suggestion: a purely administrative action by the court which did not affect the substantive issues. Consequently the application for leave to Gicheru Ag J was likewise *ex parte*. The respective dates had been obtained informally at the Court registry in the normal way. When Tom Odoyo Oyugi sought to serve the notice of motion on the appellant on January 17, 1983, he refused to sign it as, obviously had he done so he "could have landed in problems." There was need to serve the District Commissioner, who was not a court and not a person directly affected within order LIII rule 3(2) (cap 21).

Mr Miruka Owuor finally submitted that the Land Adjudication Act could not have contemplated a situation in which the Minister or as the case may be, the District Commissioner, could ignore whatever had taken place and simply reverse the order of the adjudication officer, without observing the rules of natural justice, which included the right of both parties to be heard. As to that which Mr Oraro had referred to as an order of *mandamus* (that the land appeal be re-heard), this was a further indication of the fairness of the learned judge's order, in that instead of merely quashing the decision, which would have been of benefit to the respondents alone, he ensured that both parties would have the right to be heard on the rehearing, which was a necessary consequence of the judge's finding that the previous proceedings had not conformed to this requirement.

Since his application was within the time limited under the rules, Mr Miruka Owuor submitted that Mr Oraro's point that any power to extend the time limited under order LIII rule 2 of the Civil Procedure Rules given by order XLIX rule 5, (which, of course, I did not apply to the application to enlarge time here, since Mr Owuor specifically said in opening the proceedings before Gicheru Ag J that it was made under section 95 of the Civil Procedure Act) could not prevail against the express provisions of section 9(3) of the Law Reform Act (cap 26) did not arise. He said that the court had, in any event, power to enlarge time, since that section had in effect been incorporated in order LIII and he purported to distinguish the authority relied on in this respect by Mr Oraro, *Re an Application by Gideon W*

Githunguri [1962] EA 520, which was in any event not binding on this court. That decision laid down quite clearly that section 9(3) the Law Reform Act imposes an absolute period of limitation, which cannot be extended and the basis of the decision, as I understand it, was that no power of enlargement in the rules, being subsidiary legislation, could defeat an express provision in a substantive enactment.

While subsection (2) of section 9 gives power to make rules prescribing that an application for *mandamus*, *prohibition* or *certiorari* shall be made within six months, subsection (3) to which subsection (2) is expressly made subject, applies specifically to an application for an order of *certiorari* to remove any proceedings for the purpose of their being quashed. Subsection (3) is in very similar terms to rule 2 of order LIII, which also relates only to an order of *certiorari* to remove proceedings for the purpose of their being quashed, in contrast, for instance, to rule 3(1). For my part I have found it very difficult to appreciate the essential difference between the power conferred by subsection (2) and what was described as the absolute period of limitation in subsection (3). However, it is true to say that the one is permissive and the other contains a prohibition on the power of the court to grant leave, (as does rule 2 of order LIII) and it is possible that the only explanation of that distinction is that the power to enlarge time was not intended by the legislature to exist in relation to this kind of application for an order of *certiorari*. Nonetheless I would hesitate to reach a finding that no power of enlargement of time was intended to be given in such cases, for there are instances in which to deprive the applicant of the right to apply therefor would work definite injustice. Unless persuaded by cogent argument to the contrary I would lean against an interpretation of the subsection which would impose an absolute time limit. I derive support for this view from *R v London County Council, ex parte Swan & Edgar* [1927] Ltd [1929] 141 LT at p 591 where the Divisional Court held that the Rules of the Supreme Court did give power to enlarge the time limit set by rule 21 of the Crown Office Rules.

Fortunately, however, I do not need finally to resolve this point, for without disrespect to the able argument of Mr Oraro on this, the first of his main grounds, it is readily apparent that Mr Miruka Owuor did not make his application under the rule but, as I said, under section 95 of the Act and he did not seek to get away from this on the appeal. But, as I read that section, it does not confer any power to extend the time limited for the doing of any act or the taking of any proceedings under the Rules (as does rule 5 of order XLIX), but only where the court itself fixes or grants a period for the doing of any act, as for example where a defendant or a respondent is ordered to bring money into court or to deliver up a certain thing by a specified date. A notable and frequent example is when arbitrators are ordered to file their award by a certain date and they do not do so. That section in my judgment has no application to the present situation and was inappropriate in this case. As regards, the first main ground, therefore, in my opinion the learned acting judge should have refused to enlarge time under the plain wording of the section, always assuming that Mr Miruka Owuor required the extension in view of the incompleteness of the District Commissioner's record in this respect.

I now turn to the appellant's second main ground as to notice of the substantive proceedings. While I agree that the application for leave must be made *ex parte*, as Mr Oraro said if it was coupled with an application to extend time then, very probably, notice, of that part at least, ought to be given to the other side, subject of course to the question, which follows from the third point raised by Mr Oraro as to who is the other side in a *certiorari* application. But though one unsigned copy of the notice of motion was filed in the Kakamega district registry on November 23, 1982, no attempt appears to have been made to serve it until January 17, by which time the date stated therein for the hearing had already passed. Indeed on the stated date December 22, 1982, the respondent (the present appellant) is recorded as 'absent not served', and the application was stood over generally and not adjourned to a fixed date.

Mr Oraro complained that there was nothing to show that notice of the adjourned hearing was served on the appellant, but I observe that the carbon copy of the notice of motion, which is the one with Oyugi's endorsement of service on the reverse of one of the documents attached to it, does bear the new date in the space provided. That document, though stamped with the name of the Deputy Registrar, does not bear the date in the space provided at the end, though it is stamped as being received in the district registry on November 23, 1982.

Whatever the merits, or, possibly, demerits, of the notice of motion it is difficult not to appreciate the

force of Mr Oraro's contention that there was little excuse for not serving the advocates who had been on record for the appellant since July 15, 1982, Messrs Nageri & Co. If they had no instructions they could always have refused service. However, the indications are that they were intended still to be on the record for a photocopy of their notice of appointment was filed in the Kakamega district registry on February 15, 1983, accompanied by a letter of the same date complaining that they had not had any notification of the hearing of the application, but that their client had heard 'rumours' in Nairobi regarding an *ex parte* hearing. Mr Miruka Owuor had, on November 11, 1982, written to Nageri & Company stating that leave had been obtained and asking whether the application (meaning the notice of motion) could be served on them. On their own showing Messrs Nageri & Co chose not to reply to this letter until January 18, 1983, for in their letter of February 12 they said:

> "… and in reply '(to the letter of November 11)' in ours ref HN/CR/612/82 dated January 1, 1983 paragraph 5, we reminded him that we had filed notice of appointment of advocates upon learning that the same had been filed."

Although the letter of January 18 is not on the record, it is equally difficult, to escape the conclusion that "the same" meant the application for an order of *certiorari* and if this was so and if they knew of the existence of the application, why did they abstain from enquiry as to its passage? The appellants' advocates' knowledge or otherwise of the application would not relieve Mr Miruka Owuor and his clients of the duty and the necessity in ordinary prudence, to ensure proper service. In his letter of January 5, Mr Miruka Owuor confirmed the date taken by telephone and he undertook to serve copies of the application on the respondent. Doubtless, as he said in this court, since he did not get a reply to his letter of November 11, he assumed that the application should be served on the client and not on the advocates. But this was, perhaps, an unsafe assumption, confirmed by the clients' refusal to acknowledge by signature the service of the documents on him by Oyugi.

I confess I have not found the issue as to service of the notice of motion an easy one to decide, but, after full consideration, I am of the view that although the original notice was not signed and more important, showed a date already passed, the carbon copy was validly served on the respondent. The rules do not preclude his personal service if the party is represented. The new date accorded with the entry in the Deputy Registrar's diary and the notice itself does on the face of it appear to have the sanctity and authority of the court. Mr Miruka Owuor told us, that "his clerk went and got the date altered," but there never was any suggestion that the date had been inserted in Mr Owuor's copy afterwards and I have no doubt that carbon copy bore the date of January 26, 1983, when it was served on the appellant. Moreover, Oyugi's affidavit was never challenged, neither was his attendance sought for cross-examination. As is stated in the preliminary note to the title "Service of Process" in Volume 14 of the *Encyclopaedia of Forms & Precedents, Lord Atkin Edition*:

> "The object of all service is to give notice to the party on whom it is made, so that he may be aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the court may feel perfectly confident that service has reached him, everything has been done that is required."

For my part I feel confident that the appellant did have notice of the hearing on January 26 and that he could easily have got in touch with his advocates, who were in any event aware of the existence of the application, before that date. Since the exclusion of Sundays in the computation of time by order XLIX rule 2 does not apply where the period is less than six days, eight clear days elapsed between the service of the notice on the 17th and the day named therein, the 26th, for the hearing. Accordingly, as to ground 2 of Mr Oraro's condensed grounds of appeal, I would hold that the service was sufficient to give the appellant notice of the hearing and that the ground of the appeal fails.

The third main ground has not occasioned me very great difficulty. It is important to bear in mind the nature of the order of *certiorari*. It is in some respects not quite as clear cut as those for *mandamus* and prohibition. It is more supervisory in nature than those orders. It transfers or removes the record of the proceedings of the inferior court to the High Court for the purposes of correcting errors of law which appear on the face of the record, or for the purpose of the correction of an excess of jurisdiction and if

necessary, for the purpose of quashing the order of the inferior court or tribunal.

In all the English authorities on *certiorari*, both before and after the introduction of the judicial review procedure, the tribunal or other body whose decision is sought to be removed into the High Court, has been made a party to the application. For instance the *Northumberland* case and the *Knights-Bridge Crown Court* case (supra) *R v Secretary of State Home Affairs, ex parte Hosenball* [1977] 1 WLR 766 and *R v Greater Birmingham Supplementary Benefit Appeal Tribunal, ex parte Khan* [1979] 3 All ER 759, but there are many others. The application is almost always brought in the name of the Crown. In East Africa the practice as to heading the application is not as consistent. In *Makenge v Ngochi*, Civil Appeal No 25 of 1978 (unreported) another case involving a land adjudication appeal, the title of the case is shown as between two individuals, who were representatives of their respective clans. But the court accepted that the Minister was an interested party, for Sir Eric Law JA said at page 7 of the judgment:

> "'The Minister was not formally cited as a respondent; he was however served as an interested party and appeared and was heard on this appeal, represented by learned state attorney Mr Munene, who supported the appellant in arguing that the appeal should be allowed. Mr Munene did not ask for an order for costs."

Other cases filed in High Court include Miscellaneous Civil Case No 56 of 1979, in which the Business Premises Rent Tribunal, the body whose decision was sought to be removed and quashed, was the first respondent. In Miscellaneous Application 4 of 1974, the Public Service Commission's decision to retire the applicant in the public interest was challenged by an application for *certiorari*, which was coupled with an application for *mandamus*, and the Commission was made a party indirectly by the Attorney General being joined as its representative. In Miscellaneous Application 36 of 1973 (on appeal [1973] EA 529) the parties to the dispute were stated to be the Railway Unions of Kenya and Uganda and the Workers Union of Tanzania on the one hand and the East African Railways Corporation on the other. On the appeal in that case Mr Shields appeared as *amicus curiae* for the Attorney-General, but, no doubt, to watch the interests of the then East African Industrial Court, whose decision was in question. However in *East African Community v Railway African Union (Kenya)* (No 2) [1974] EA 425, there is no record of who, if anyone, appeared for the Industrial Court. In *Bisuche & Barasa Tavash v JH Angaine*, Civil Appeal 31 of 1972, another land adjudication case, the Minister who heard the appeal (before the powers were delegated) was made a respondent to the proceedings.

The only authority, or at any rate the only recent reported authority, which was on a *mandamus* application, in which the title appears to be in conformity with that which the application really is, namely by the Republic against the person or body sought to be compelled or, as the case may be, whose decision is questioned on the part of a person who is not a party to the proceeding (ie the *certiorari* application), but who has an interest in the matter, is *R v Director General of East African Railways Corporation ex parte Kaggwa* [1977] KLR p 194.

Leaving aside, however, the title of the proceedings, it is in my view essential that the tribunal or person whose decision is impugned, whether or not that tribunal or person constitutes a court should, if not named in the title of the proceedings at least be served and have an opportunity to being heard. As Mr Oraro said; how can a court quash the findings of a person not a party? It is idle for Mr Miruka Owuor to say that the District Commissioner was not a court and therefore that the presiding Officer thereof need not have been served with the notice of motion under order LIII of rule 3(2). Even if he was not a court (as he expressed himself to be), he was still amenable to an order of *certiorari* in his appellate capacity, as he was obliged to reach a decision after considering the grounds of appeal and the proceedings before the adjudication officer. As Law JA said in the *Bisuche* case (supra):

> "The order of the Minister '(now the District Commissioner)' determining an appeal under the Act is by section 29(1) thereof, final. As was held in *Re Marles Application* [1958] EA 153, the fact that a decision is stated to be final does not preclude the issue of *certiorari*, for alleged excess or want of jurisdiction."

Fletcher - Moulton LJ said in *R v WoodHouse* [1906] 2 KB at p 535

> "the procedure of *certiorari* applies in many cases in which the body whose acts are criticised would not ordinarily be called a court, nor would its acts be ordinarily termed "judicial acts." The true view would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts."

In my view the District Commissioner was, at the very least, a person directly affected by the proceedings and I would therefore resolve ground 3 of Mr Oraro's grounds of appeal in the appellant's favour and apart from ground 1, I would allow this appeal on that ground alone. In view however, of importance of this case and the very careful submissions of both counsel I propose to deal briefly with the remaining grounds advanced by Mr Oraro and replied to by Mr Miruka Owuor.

On ground 4, I cannot regard the judge's order, that the land appeal he reheard, as other than a consequence of that which he had just decided and indeed, as part of the decision. It did not, in my opinion, amount to an order of *mandamus* for which, of course, leave was not sought. It might be that the judge could have removed and quashed the proceedings without more but that would have left the parties in the air. I think he would have been quite right, in the circumstances of this case, having quashed the proceedings before the District Commissioner, to make the order he did for a rehearing. This is in fact, what happened in the recent decision of *R v Uxbridge Justices ex parte Heward Mills* [1983] 1 All ER 530, where the Divisional Court, in quashing an order of forfeiture of a recognisance against a surety, sent the case back for consideration of the surety's means *de novo* by another bench of justices. However, as ground 3 has, in my opinion, succeeded, it is not necessary for me to deal further with this aspect of the case.

As to Mr Oraro's fifth main ground of appeal I really cannot see that there is any valid complaint as to this, save that since Messrs Nageri & Co were on the record, even though the application for leave was *ex parte*, it might have been prudent for someone to notify them of the changed venue. I would reject this ground of appeal also.

The sixth and final ground of appeal was that the learned acting judge should not have entertained the application for *certiorari*, since the Land Adjudication Act did not in any event require a compliance with the practice or the rules of a court hearing, so that a failure to observe them did not amount to an error of law. Mr Oraro maintained that section 12 had no application to an appeal under section 29 and indeed, did not apply to anything that occurred after the compilation and publication of the adjudication register. This has support in the following passage from Law JA's judgment in *Makenge v Ngochi* (supra)

> "But no such duty (as under section 12 of the Act) to follow the procedure laid down for the hearing of civil suits is prescribed in respect of the Minister. He is not bound to follow the prescribed procedure. His duty, by section 29 of the Act, is to "determine the appeal and make such order thereon as he thinks just."

I do not, however, understand Law JA to have said that the Minister (here the District Commissioner) was <u>precluded</u> from following that procedure, for in *Bisuche v Tavash & Angaine* (supra) he made no criticism of the fact that the Minister had heard evidence from and adduced by both the parties and indeed, upheld the High Court's order refusing *certiorari*.

In the instant case the short answer to Mr Oraro's last group is that the District Commissioner <u>did in fact</u> proceed to hear evidence and he recorded that all three parties were present. If he began to hear evidence in pursuance of the procedure whether prescribed or not, then he must surely finish the case in the same manner. But did he not in fact do so? An examination of the photostat copy of these proceedings shows that "both", meaning the two respondents to this appeal, were sworn and their grounds of appeal read and accepted. Then there is a gap followed by a paragraph of evidence from someone. It is possible that this was from the appellant, but, as against that, the cross-examination is by only one person. In that event the District Commissioner might have thought that the affirmation by the respondents of their grounds of appeal filed under section 29(1)(a) followed by the hearing of the appellant's evidence, would be a sufficient hearing of both sides. But it is impossible to be sure from the record that this was so. I am unable to say that the District Commissioner did hear both sides and if that were not so (and clearly the

judge thought it was not so) then having embarked on hearing one side it was his clear duty to hear the other. A failure to do so would amount to an error on the face of the record requiring correction by *certiorari*. As Chesoni J said in *Kaggwa's* case (supra) in relation to a *mandamus* application:

> "It must be remembered that the court as a custodian of the rights of those under its jurisdiction must ensure that justice is done to those who come before it regardless of whether or not that interferes with the management of the executive arm of government. That is why there is no other remedy open to the applicant the court has no choice but to grant the order of *mandamus* (*fiat justitia*) so that justice may be done and be seen to be done (see *R v Bishop of Sarum* [1916] 1 KB 466."

Reverting to ground 3 for the moment, had the District Commissioner been made a party then this difficulty might well have been resolved. For these reasons I would be inclined to dismiss the last ground of the appeal which, as I said, was argued on the basis that the District Commissioner was not obliged to hear evidence or to hear both sides. Since, however, in my judgment, ground 3 succeeds, I would allow this appeal against the judge's order of *certiorari* and remit the case to the High Court for a fresh hearing of the application, with a direction that the District Commissioner, as an interested party, be served and given an opportunity to appear and be heard. I would award the costs to this appeal and in the High Court to date, to the appellant.

Potter JA. I agree with the judgment herein of Hancox JA and with the orders proposed by him. As Kneller JA agrees, it is so ordered.

Kneller JA. I agree.

Dated and delivered at Kisumu this 11th day of August, 1983.

K.D POTTER

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JUDGE OF APPEAL

A.A KNELLER

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JUDGE OF APPEAL

A.R.W HANCOX

………………………

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR