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**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA AT KAMPALA**  
*[CORAM: KISAAKYE, JSC]*

**MISC. APPLICATION NO. 13 OF 2017**

**BETWEEN**

10 **E. B. NYAKAANA & SONS LTD. ::::::::::::::::::::] APPLICANT**

**AND**

**BEATRICE KOBUSINGE & 16 ORS. ::::::::::::::::::::] RESPONDENT**

*[Application arising out of Supreme Court Civil Appeal No. 02 of 2017]*

**RULING OF COURT**

15 E. B. Nyakana & Sons Ltd.(hereinafter referred to as the applicant)  
filed this application under Rules 2(2), 6(2)(b), 41(1) & (2) and 43(1) of  
the **Judicature (Supreme Court) Rules** seeking an interim order for  
stay of execution of the Court of Appeal Judgment in Civil Appeal No.  
55 of 2014.

20 The brief background to this application is that the respondents  
petitioned the High Court (**High Court (Fort Portal) Company Cause**  
**No. 01 of 2005**) seeking a winding up order against the applicant on  
grounds of mismanagement. Following a protracted hearing spanning  
a number of years, the High Court finally granted the winding up order  
25 on 4<sup>th</sup> July 2013 on grounds that it was just and equitable to wind up  
the applicant and immediately appointed a liquidator.

Dissatisfied with the order of the High Court, the applicant appealed to  
the Court of Appeal which upheld the decision of the High Court to  
wind it up.

30 Originally this application was filed against 17 respondents. However,  
the 12<sup>th</sup> to 17<sup>th</sup> respondents were struck out in **Civil Application No.**

5 **13 of 2017 (No. 1)** for failure of the applicant to serve them. The application is therefore against the 1<sup>st</sup> to 11<sup>th</sup> respondents.

This application is based on the following nine grounds set out in the Notice of Motion.

- 10 1. *That the Applicant has appealed against the Judgment of Court of Appeal to the Supreme Court.*
- 15 2. *The respondent is in the process of executing the orders of the Judgment of the Court of Appeal and the Judgment was passed against the applicant on 6<sup>th</sup> May 2016.*
3. *The application has been filed without delay.*
- 20 4. *The respondent has threatened execution of the order of the Taxing Officer aforementioned.*
- 25 5. *That the applicant will suffer irreparable loss and or damage of the execution if the said Order is not stayed and the decision of the application aforesaid will be rendered nugatory if execution is allowed to proceed.*
- 30 6. *The execution will interfere with the activities of the Applicant and thereby resulting into substantial loss which cannot be remedied in any way by award of damages or otherwise if the execution is not stayed.*
- 35 7. *That the applicant made a similar application, that is Misc. Application No. 16 & 18 in the Court of Appeal but has failed to secure a date.*
8. *That the application has a high chance of success.*
9. *That it is in the interest of justice that the execution of the decree be stayed pending the hearing and determination of the Application for stay pending Appeal.*

40 While the application states that it was supported by the Affidavit of Sam Phiri, the application is supported by an affidavit sworn by Kate Nyakana.

5 On the other hand, the respondents filed two affidavits in reply where they contested the application. Beatrice Nyakana deponed on behalf of the 1<sup>st</sup> to 5<sup>th</sup> respondents while Bob Kagaba deponed on behalf of the 6<sup>th</sup> to 12<sup>th</sup> respondents.

10 The applicant was represented by Yesse Mugenyi. The 1<sup>st</sup> to 5<sup>th</sup> respondents were represented by Charles Tibajuka while Oscar Kihika represented the 6<sup>th</sup> to 12<sup>th</sup> respondents. Parties filed written submissions in support of and in opposition to the application.

### **Applicant's submissions**

15 Counsel for the applicant submitted that for the applicant to qualify for grant of an interim order for stay of execution, it was incumbent upon the applicant to show that: (a) a Notice of Appeal had been lodged in accordance with Rule 72 of the Rules of this Court; (b) a substantive application for stay of execution was pending before this Court; (c) there is a serious threat of execution before the hearing of the  
20 substantive application; and (d) that the application for the interim order has been filed without delay.

Counsel submitted that the applicant had filed and served a Notice of Appeal on the respondents, lodged a Record of Appeal within the stipulated time of sixty days and had also scheduled the main appeal  
25 to be heard.

Counsel for the applicant further submitted that the applicant had already filed a substantive application for stay of execution (Misc. Application No. 12 of 2017) in this Court, which was pending hearing.

Regarding threat of execution, counsel for the applicant relied on  
30 ***Editor in Chief of the New Vision Newspaper v. Jeremiah Ntabgoba, Civil Application No. 63 of 2004 (CA)*** and submitted that the Court of Appeal directed that the applicant's properties be disposed of or distributed within a period of 12 months with effect from 14<sup>th</sup> December 2016. He contended that six months had since

5 lapsed yet the main application had not yet been fixed by this Court for hearing.

On irreparable damage, counsel for the applicant submitted that if execution were to be commenced, irreparable damage will be caused to the applicant. He contended that the applicant is worth Uganda  
10 Shillings 4 billion and that if its assets are distributed among the respondents, none of the beneficiaries/respondents has the capacity to mobilize the said amount of money to compensate the applicant company in the event it was found by this Court that the distribution was unlawful.

15 Counsel for the applicant contended that it was essential that the property of the applicant should not be disposed of before the main appeal was heard since its disposal would render the applicant's appeal nugatory. Lastly, counsel also contended that this application was filed without delay. Counsel prayed that the status quo be  
20 maintained before the appeal was heard and that this application be granted.

Counsel for the applicant further relied on the decisions of this Court in ***Theodore Ssekikubo & 4 others v. Attorney General, Constitutional Application No. 04 of 2014***; and ***Bitamisi***  
25 ***Namuddu v. Rwabuganda, Civil Application No. 11 of 2014*** in support of his submissions.

### **Respondents' Submissions**

All the respondents opposed the application. Counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents refuted the applicant's contention that it had filed an  
30 application for interim stay of execution at the Court of Appeal before filing one in this Court as is required by Rule 41(1) of the Rules of this Court.

Counsel submitted that the applicant did not attach on its supporting affidavit a copy of the alleged application or letters allegedly written to

5 the Deputy Chief Justice seeking a hearing date. In the absence of such evidence, counsel contended that no evidence of a prior application in the Court of Appeal was adduced and therefore, the applicant had failed to prove that it filed a similar application in the Court of Appeal first before filing the present application in this Court.

10 Regarding the Notice of Appeal, counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents submitted there was no competent Notice of Appeal before Court because the one on record offended Rule 72(2) of the Rules of this Court which requires that the Notice of Appeal should be lodged ‘within fourteen days after the date of the decision against which it is  
15 desired to appeal.’ According to counsel, the applicant filed its Notice of Appeal on 29<sup>th</sup> December 2016, which was 15 days after Judgment had been delivered on 14<sup>th</sup> December 2016. Relying on the authorities of **Zubeda Mohamed & Anor v. Laila Kaka Wallia & Anor, Civil Reference No. 07 of 2016 (SC)** and **Katayira Francis v. Rogers  
20 Bosco Bugembe, Civil Application No. 23 of 2016 (SC)**, counsel for the 1<sup>st</sup> -5<sup>th</sup> respondents contended that the late filing rendered the main application from which this interim application arose incompetent and by implication this application.

Further relying on **Horizon Coaches Ltd. V. Rurangaranga & Anor  
25 [2010] 1 E.A. 77**, counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents also submitted that the existence of a competent Notice of Appeal was not pleaded as a ground in the Notice of Motion. Yet, he contended, the import of Rules 42 and 43 of the Rules of this Court is that applications are argued on the basis of grounds stated in the Motion rather than in the  
30 supporting Affidavit.

Regarding a pending substantive application in this Court, counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents also submitted that neither was a copy of the said substantive application attached to this application nor was the Court number of the substantive application given by the applicant.

35 Counsel further submitted that this ground was also not stated in the

5 Notice of Motion. In counsel's view, all this had the effect of rendering the present application incompetent.

On the threat of execution, counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents submitted that the applicant did not adduce evidence of an application filed by the respondents to commence execution of the Court of Appeal  
10 decree. Counsel further submitted that the Court of Appeal in its Judgment did not make any order as to costs and that in the circumstances, the threat of execution for costs as stated in ground 6 of the Notice of Motion was imaginary.

Counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents also found fault with the  
15 applicant's supporting Affidavit. First, he submitted that whereas the Notice of Motion expressly stated that it was supported by the affidavit of Sam Phiri, no such affidavit was attached to the motion. Secondly, that in paragraph 16 of the affidavit of Kate Nyakana, the affidavit was deponed in support of an application for stay of execution and not an  
20 application for an interim order of stay of execution. In the circumstances, he prayed that the application be struck out or dismissed with costs.

Counsel for the 6<sup>th</sup> to 11<sup>th</sup> respondents associated himself with the submissions of counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents and briefly  
25 submitted in respect of some of the contested property.

He submitted that some of the properties the applicant was claiming as belonging to the estate of the late E.B. Nyakana (plots 11-13 Ruhandika Street and on plot 4 Kabafumu Road, Fort Portal) belonged to the estate of the late Charles Sagoro Nyakana and by implication to  
30 the 6<sup>th</sup> to 11<sup>th</sup> respondents, who were the beneficiaries of this estate. Counsel referred and relied on paragraph 4 of Bob Kagaba's affidavit in reply and the attached joint scheduling memorandum duly entered and signed by both the applicant and the respondents at the Court of Appeal to support his contentions.

5 In light of this, counsel for the 6<sup>th</sup> to 11<sup>th</sup> respondents submitted that since the applicant had conceded that the above properties were not part of the estate of the late E.B. Nyakana, the same could not be claimed by the applicant.

10 In the circumstances, counsel for the 6<sup>th</sup> to 11<sup>th</sup> respondents prayed that the application be dismissed with costs.

In rejoinder, counsel for the applicant refuted the respondents' contention that the applicant's Notice of Appeal was lodged out of time. He submitted that under Rule 4(a) & (e) of the Rules of this Court, the day of Judgment, the day of lodging the Notice of Appeal and the  
15 period covering the Christmas vacation were not to be considered in the computation of time. Counsel for the applicant contended that if the above days were excluded, then it became evident that the applicant lodged its Notice of Appeal within the prescribed time.

20 Regarding the threat of execution, counsel for the applicant submitted that the Court of Appeal directed that all the properties in the applicant's names be cancelled and replaced with those of the executors and thereafter distribution of the property be made among the beneficiaries of the estate of the late E.B. Nyakana within a period of 12 months from the date of Judgment.

25 Regarding the respondent's contention that there was no pending substantive application, counsel for the applicant contended that the respondents' allegation was speculative since evidence was presented to show the existence of a substantive application with a Court number. He further submitted that no evidence had been adduced by  
30 the respondents to contradict this fact or that the cited number refers to some other application.

Counsel for the applicant further contended that the mix up of the names of the deponent of the affidavit in support of the notice of

5 motion was an error that could be cured by Article 126 (2)(e) of the Constitution. Counsel reiterated the applicant’s earlier prayers.

**Court’s determination**

10 Before proceeding to consider whether the applicant has met the above requirements for grant of an interim order of stay of execution, there is a matter that I have deemed proper to dispose of by way of a preliminary point. This relates to matters over which this Court and the Court of Appeal have concurrent jurisdiction.

Rule 41(1) of the Rules of this Court provides as follows:

15 ***“Where an application may be made to either the Court or to the Court of Appeal, it shall be made to the Court of Appeal first.”***

The orders the applicant intends to stay temporarily were issued by the Court of Appeal, which is also vested with powers under Rule 2(2) of the ***Judicature (Court of Appeal) Rules*** to make such orders as  
20 may be necessary to meet the ends of justice. These include powers staying execution of its orders. Indeed in ***Housing Finance Bank Ltd & Anor v. Edward Musisi, Misc. Application No. 158 of 2010 (CA)***, the Court of Appeal held that under Rule 2(2) of its Rules, it is vested with powers to grant a stay of execution of its orders to a deserving  
25 applicant in cases of an applicant intending to appeal against its decision to the Supreme Court.

It therefore follows that since this Court and the Court of Appeal have concurrent jurisdiction over this application, the applicant was enjoined to file its application in the Court of Appeal first.

30 The applicant contends that it complied with this provision but has failed to secure a hearing date. The respondents on the other hand submit that there has been noncompliance with Rule 41(1) of the Rules of this Court.



5 I have perused the record of this application. I note that in both  
ground 6 of the application and paragraph 8 of the applicant's affidavit  
in support of this application, it is stated and deponed respectively,  
that that the applicant lodged Misc. Applications Nos. 16 / 2017 and  
10 17/ 2017 in the Court of Appeal praying for an interim order and stay  
of execution in January 2017. Again in paragraph 8 of the applicant's  
affidavit in support of this application, the deponent depones that  
continuous efforts by the applicant's lawyers to secure a date to have  
the applications fixed and heard at the Court of Appeal have been  
unsuccessful, despite writing series of letters to the Deputy Chief  
15 Justice over the matter.

However, none of these documents referred to in ground 6 and  
paragraph 8 were attached to the Affidavit in support of this  
application. In the circumstances, the Court is not able to satisfy itself  
whether the applicant complied with Rule 41 (1) of the Rules of this  
20 Court before it filed the present application in this Court.  
Consequently, it is my finding that the applicant did not comply with  
the provisions of Rule 41 (1) of the Rules of this Court.

My finding above should have been enough to dispose of this  
application. However, I note that Rule 41(2) of the Rules of this Court,  
25 permits this Court to entertain an application under Rule 6(2) (b) (that  
is an application for stay of execution) to safeguard the right to appeal,  
even though the applicant has not first made his or her application to  
the Court of Appeal. Given that the present application arises from an  
application for stay of execution, I will in the interests of justice,  
30 proceed to determine the merits of this application vis-à-vis the  
requirements the applicant must first satisfy in order for the Court  
grant it an interim order of stay of execution.

The application shows that it was filed under Rule 6 of the **Judicature  
(Supreme Court) Rules**. However, the applicant, submitted that the

5 application is brought under Rules 2(2), 6, 42 (1) and 47(2) of the Rules of this Court.

Be that as it may, Rule 6(2) (b) of the **Judicature (Supreme Court) Rules** provides for stay of execution and is not applicable in the present application. The Rule which is applicable to this application  
10 for an interim order for stay of execution is Rule 2(2) of the **Judicature (Supreme Court) Rules**. This Rule vests this Court with inherent powers to make such orders as are necessary to meet the ends of justice.

The above position was recently restated by this Court in **Zubeda**  
15 **Mohamed & Anor v. Laila Kaka Wallia & Anor, Civil Reference No. 7 of 2016**, where it was held as follows:

***“The law governing applications for injunctions or stay of execution is set out in Rule 6(2) (b) of the Rules of this Court which reads as follows:***

20

...

***Applications for stay of execution are handled by a full bench. In cases of urgency, however, this Court is empowered by Rule 2(2) of the Rules of the Court to issue interim orders in order ‘to achieve the ends of Justice.’ Applications for interim orders are heard by a single Justice of the Court. Applications for interim orders are granted pending determination of the substantive application, not the appeal. An interim order is a stop gap measure to ensure that the substantive application is not rendered nugatory.”***

25

30 The question for determination now is whether the applicant has satisfied this Court to exercise its discretion to grant the applicant an interim order of stay of execution pending the disposal of the main application.

According to the supporting affidavit to its application sworn by Kate  
35 Nyakana, the applicant contends that it has: (a) lodged a Notice of Appeal; (b) filed Civil Application No. 12 of 2017 seeking for an order of Stay of Execution from which the present application emanated.

5 There is a wealth decisions of this Court's that have laid out the factors that Court will consider before granting an application for an interim order for stay of execution pending the determination of the substantive application. These include ***Zubeda Mohamed & Anor v. Laila Kaka Wallia & Anor, Civil Reference No. 7 of 2016 (SC); Theodore Ssekikubo & 4 others v. The Attorney General, Constitutional Application No. 04 of 2014 (SC); Yakobo Senkungu & ors v. Cresensio Mukasa, Civil Application No. 05 of 2013 (SC)*** among others.

15 A perusal of these authorities shows that before Court exercises its discretion, it must be satisfied that:(a) a Notice of Appeal has been lodged in accordance with Rule 72 of the Rules of this Court; (b) a substantive application for stay of execution is pending before Court; (c) there is a serious threat of execution before the hearing of the substantive application; and (d) the application has been filed without  
20 undue delay.

Turning to the first factor, the applicant submits that it filed a Notice of Appeal. This contention is also repeated in paragraph 6 of the applicant's affidavit in support of the application. However, the applicant neither attached a copy of the Notice of Appeal nor the  
25 Judgment of the Court of Appeal from which the intended appeal emanated attached. Attaching these two crucial documents could have gone a long way in helping Court to determine whether the applicant had filed a Notice of Appeal, and if so, whether it was filed in accordance with Rule 72 (2) of the Rules of this Court.

30 I note that copies of both the Court of Appeal Judgment and the Notice of Appeal were attached on the Affidavit in Reply to the application deponed by the 1<sup>st</sup> respondent, Beatrice Kobusinge. Notwithstanding this attachment by the 1<sup>st</sup> respondent, I still find that it was the duty of the applicant and not the respondent to prove that it had lodged a  
35 Notice of Appeal in accordance with Rule 72(2) of the Rules of this

5 Court. It would, in my view, be bad practice for the applicant or this  
Court for that matter to solely rely on the documents filed by the  
respondent(s) to prove the applicant's case. In the circumstances, I  
find that the applicant did not prove to this Court that it had lodged a  
Notice of Appeal in accordance with Rule 72 (2) of the Rules of this  
10 Court.

I now turn to the next ground which is the existence of a pending  
substantive application. Counsel for the applicant submits that he  
has filed a substantive application (**Civil Application No. 12 of 2017**)  
for stay of execution in this Court. This contention is also averred in  
15 paragraph 14 of the affidavit in support of the application. I however  
note that just like in the two preceding instances, counsel for the  
applicant did not adduce any evidence to support his contention. It  
could have been proper to attach this pending substantive application  
(if any) on the affidavit in support of the application. In the  
20 circumstances, the Court is not able to ascertain whether there is a  
pending substantive application for stay of execution or not.

The Notice of Motion also stated that that the application is supported  
by an affidavit deponed by Sam Phiri. However, no such affidavit was  
attached. Rather the applicant instead filed an affidavit in support,  
25 deponed by Kate Nyakana *'in support of an application for stay of  
execution!'* It therefore follows that the application did not have an  
affidavit in support. I am unable to agree with the applicant's counsel  
that such an error should be overlooked basing on Article 126 (2) (e) of  
the Constitution.

30 Regarding the threat of execution, I am also not satisfied that the  
applicant has made a case on this ground. No evidence was adduced  
by the applicant that the respondents have filed any application to  
commence execution of the Court of Appeal decree. I also agree with  
counsel for the respondents that the threat of execution for costs as  
35 stated in ground 6 of the Notice of Motion was imaginary. This is

5 because the Court of Appeal expressly stated that it will not make any order as to costs.

10 Lastly, counsel for the applicant in ground 9 in support of the application contended that in the interest of justice, the application should be granted. Justice, in my view presupposes fairness. I have already alluded to the fact that originally, this application was brought against 17 respondents. However, following this Court's Ruling in **E. B. Nyakana & Sons v. Beatrice Nyakana & 16 others, Civil Application No. 13 of 2017 (No. 1)**, the 12<sup>th</sup> to 17<sup>th</sup> respondents were struck out. They were struck out following the applicant's repeated failure to serve them with this application in spite of even being ordered to do so by this Court. It also suffices to note that the 17<sup>th</sup> respondent is the Official Receiver mandated under the relevant laws of our country to manage the affairs of companies that are being wound up, like the present applicant. This Court cannot make an order against the Official Receiver when the Official Receiver has not been heard. The same applies to the other respondents that were never served with this application by the applicant.

25 In the circumstances and for reasons given above, I have found no basis to warrant this Court to grant the orders sought in the application. This application is therefore dismissed with costs to the 1<sup>st</sup> to 11<sup>th</sup> respondents.

Dated at Kampala this.....day of ..... 2017.

30 .....  
**JUSTICE DR. ESTHER KISAAKYE,**  
**JUSTICE OF THE SUPREME COURT.**