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

(CORAM: TUMWESIGYE, JSC)

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CIVIL APPLICATION NO. 16 OF 2017

(An application arising out of Civil Application No. 15 of 2017 arising from Civil Application No. 11 of 2017, arising from Civil Appeal No. 17 of 2014)

BETWEEN

- 15  
1. KIGANDA JOHN  
2. TAYEBWA ROBERT ..... APPLICANTS

AND

- 20  
1. YAKOBO M.N SENKUNGU  
2. JAMES KENJURA  
3. JOHN RWAKAMURANGA .....RESPONDENTS  
4. GIRADESI KATONYA  
5. YOHANA RWAKAARO  
6. CRESENSIO MUKASA

25  
RULING

This is an application brought by notice of motion under rules 2(2) and 6(2) (b), 42(1&2), 43(1) & 50 of the Judicature (Supreme Court Rules) Directions seeking the following orders:

- 30  
(a) An interim order for stay of execution of the judgment and orders of this court's judgment entered in Civil Appeal No. 17 of 2014

5 delivered on the 6<sup>th</sup> day of April, 2017 pending the disposal of the substantive application for stay of execution now pending before this court vide Civil Application No. 15 of 2017.

(b) Costs of this application.

10 The applicants filed an affidavit in support of the motion sworn by the 2<sup>nd</sup> applicant and a supplementary affidavit sworn by John Baptist Byarugaba, the Chairman Local Council 3 of Lwemiyaga Sub- County, Sembabule District and an affidavit in rejoinder. The 6<sup>th</sup> respondent opposed the application and filed affidavits in reply sworn by the respondent himself.

The brief background to this application is as follows;

15 The 6<sup>th</sup> respondent brought a suit in his capacity as the holder of letters of administration of the estate of the late Guisite Nakaima against Yakobo M. N. Senkungu, James Kenjura, John Rwakamuranga, Giradesi Katonya, and Yohana Rwakaaro in the High Court for orders that the certificate of title of Yakobo M.N Senkungu be cancelled on ground that his and his  
20 predecessors in title's names were entered on the register fraudulently. Gusite Nakaima had died on the 13<sup>th</sup> day of June, 1941 leaving behind two pieces of land situate in Mawogola, namely Block 30, plot No. 1 at Kabagoma of about 641 acres and Block 31, plot No. 1 at Ntyazo of about 623 acres.

25 The 6<sup>th</sup> respondent on obtaining letters of administration in 1986 sought to transfer the land into his name only to discover that the proprietorship

5 of the said land had already changed. The certificate of title which was exhibited in court showed that on the 3<sup>rd</sup> day of August 1978, under instrument No. MSK 54168, a one Peter Ssekasiko became registered proprietor with an alleged transfer form from the late Nakaima. Three months later, on the 27<sup>th</sup> day of November 1978, Ssekasiko transferred  
10 the land to one Eugene Ssonko under instrument No. MSK 54497. On the 25<sup>th</sup> January 1980, under Instrument No. 60006, the proprietorship changed to Yakobo M.N Senkungu.

The above mentioned set of facts led to the filing by the respondent of the High Court suit. During the course of the suit at the High court  
15 specifically on the 24<sup>th</sup> day of May, 1996, the proprietorship of the suit land changed to Ezekiel Rwankanyuzi.

Various amendments to the pleadings were effected and in 2004 there was an application vide Misc. Appl. No. 25 of 2004 to amend the plaint to join Mr. B. Nsereko and Mr. Ezekiel Rwankanyuzi as defendants to the  
20 suit. However, the application was dismissed by Mwangusya, J (as he then was) who ruled that the alleged fraudulent transactions of the two persons sought to be joined would easily be established through evidence adduced by the parties on the pleadings.

The learned judge who had the suit held that the plaintiff had failed to  
25 prove fraud on the part of Yakobo M. N Senkungu who transferred the

5 title of Mawogola Block 30 Plot 1 to Ezekiel Rwankanyuzi under whom the applicants claim.

Dissatisfied with the decision of the High Court, the 6<sup>th</sup> respondent appealed to the Court of Appeal which reversed the decision of the High Court in favour of the 6<sup>th</sup> respondent. Being dissatisfied with the decision  
10 of the Court of Appeal, Yakobo M.N Senkungu, James Kenjura, John Rwakamuranga, Giradesi Katonya and Yohana Rwakaaro appealed to this court which upheld the decision of the Court of Appeal and dismissed the appeal with costs.

The applicants being aggrieved by the decision of this court filed an  
15 application for review, a substantive application for stay of execution and this application pending the disposal of the substantive application. The grounds for this application were framed as follows:

- a) The applicants have filed an application in this honorable Court  
vide Civil Application No. 11 of 2017 seeking for orders for this  
honorable court to recall its judgment entered in Civil Appeal No.  
17 of 2014 delivered on the 6<sup>th</sup> day of April, 2017, for the purposes  
of reviewing and, or correcting the errors on record and amending  
or otherwise varying the same for having affected the rights of the  
applicants unheard.
- 25 b) That the Applicants have filed an application for stay of execution  
and / or effecting of the decision and orders of this honorable

5 there's merit in the application to stay execution of the orders  
therefrom with a view to correcting the same.

(iii) THAT the applicants are beneficiaries of the estate of the late  
Ezekiel Rwankanyuzi as his sons and have a beneficial interest  
in the property comprised in Block 31 Plot 1 which they have  
10 occupied and possessed since 1996 without encumbrance save  
for the current threats arising out of the impugned judgment of  
this honorable Court whose execution would affect their said  
interest unheard.

(d) THAT the applicants will individually and collectively suffer  
15 irreparable damage/ loss if the order sought herein is not granted  
as they will be the subject of eviction from the land where they  
reside and derive all their livelihood and the said land shall be  
alienated, transferred or otherwise dealt with by the respondents  
or their agents, in a manner that may be irrecoverable, before the  
20 main application for stay of execution which is pending in this  
Honorable Court is heard and determined and the said  
application, may take long to be heard and finally determined.

e) THAT there is a serious threat of execution as a warrant of  
execution arising out of the judgment and decree entered in Civil  
25 Appeal No. 17 of 2014 has been issued yet it is the execution  
thereof that the substantive Application for stay hereto is seeking  
to stay hence the substantive Application for stay execution in the  
interim pending the hearing and determination of the main

5 court's judgment entered in Civil Appeal No. 17 of 2014 delivered  
on the 6<sup>th</sup> day of April, 2017, which will be rendered nugatory if the  
orders sought herein, are not granted and execution is allowed to  
proceed.

10 c) That the said application for stay of execution has high chances of  
success in that:

15 (i) THAT in the judgment and orders whose execution is sought  
to be stayed, there was an accidental slip and omission in  
wherein the court inadvertently in its judgment in evaluating  
the chronology of the transfers and registered proprietors in  
respect of Block 31 Plot 1 omitted to find that Yakobo  
20 Mukaaku Mutendwa Senkungu the 1<sup>st</sup> respondent hereto  
transferred the land to Ezekiel Rwankanyuzi who was  
registered on the certificate of title under instrument No. MSK  
7121 on 24/5/96 and therefore a registered proprietor whose  
proprietorship would not be ignored.

25 (ii) THAT the accidental slip or omission to establish during  
evaluation of evidence that Ezekiel Rwankanyuzi was the  
registered proprietor and owner of the land, yet a copy of his  
title had been exhibited on the court record by the parties  
thereto and forming part of the record of appeal to the  
Supreme Court is a major omission, whose final judgment is  
affecting the applicants' rights to property unheard and thus

5 application for stay of execution which is pending before this honorable court.

(f) That it is only just and equitable that the application be allowed.

The affidavit in reply was sworn by Cresensio Mukasa, the 6<sup>th</sup> respondent. He stated, inter alia, that:

10 (1) The decision of the Supreme Court is final and there is no right of appeal against such decision.

(2) The applicants' application for review is not concerned with the correction of errors arising from an accidental slip but is rather a disguised appeal and, therefore, has no likelihood of success.

15 (3) The applicants were never parties to the High Court civil suit, the appeal to the Court of Appeal and the appeal to the Supreme Court and hence have no locus standi to bring an application for stay of execution and review.

(4) The applicants are not in the eyes of the law persons aggrieved by the decision of the Supreme Court.

(5) The application is incompetent and untenable.

(6) The respondent is the registered proprietor of the suit land and is entitled to possession of the said land; consequently, the applicants' application is baseless.

25 (7) The applicants would in any way be prejudiced if the application is not granted.

5 (8) The application is brought in bad faith to defeat and frustrate the execution of the decree in Civil Appeal No. 17 of 2014.

The 6<sup>th</sup> respondent opposed this application and filed an affidavit in reply wherein he stated interalia that:

- 10 1. That the applicants' application for review is not concerned with the correction of errors arising out of accidental slip but rather seeks to appeal the decision of this honorable court which is alien to our laws.
- 15 2. That the applicants have no locus standi to bring the said applications for stay & review having not been parties to the suit in the High Court, Court of Appeal and the Supreme Court.
3. That the applicants are not aggrieved persons in the eyes of the law and that their application for review has no prospects of success and that they will not be prejudiced in any manner if the application for interim stay of execution is not granted.

20 At the hearing, Mr. Caleb Alaka, Mr. Medard Lubega Ssegona & Mr. Samuel Muyizi Mulindwa appeared for the applicant while Mr. Paul Kuteesa appeared for the respondent.

At the beginning of the hearing, court granted the counsel applicants application to withdraw the application against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> 25 respondents on ground that only the 6<sup>th</sup> respondent was a necessary party for the purposes of this application.



5 Presenting the applicants' case, learned counsel submitted that the applicants seek an order for stay in the interim to preserve the status quo pending the disposal of the substantive application for stay now pending before this court.

He submitted that the applicants have satisfied the grounds for the grant  
10 of an order for interim stay of execution namely:

1. The lodgment of an application for review in this court vide civil application No. 11 of 2017 with a high likelihood of success.
2. The lodgment of an application for substantive stay of execution vide Civil Application No. 15 of 2017.
- 15 3. The existence of an imminent threat of execution of the decree.
4. The applicants' substantive application for review and appeal will be rendered nugatory if an interim order for stay is not granted.
5. The applicants will suffer irreparable damage if the stay is not granted.

20 Counsel for the applicant relied on the case of Drake Francis Lubega vs. Attorney General & 2 Others Misc. Appl. No. 13 of 2015 which cited Theodore Sekikubo & Others vs. Attorney General SCCA No. 4 of 2014 in which this court stated that for an application for interim order for stay it suffices to show that a substantive application is pending before the  
25 court, there is a serious threat of execution before the hearing of the pending substantive application and that it is not necessary to pre-empt

5 the consideration of matters necessary in deciding whether or not to grant the substantive application for stay.

He argued that in this case the application for review of the judgment vide Civil Application No. 11 of 2017 should be read as being analogous to a notice of appeal because there can be no appeal against the orders of this  
10 court. That there exists a substantive application for stay vide Civil Application No. 15 of 2017, there is a serious threat of execution as indicated in paragraph 8 of the 2<sup>nd</sup> applicants affidavit in support in which he states that a warrant of execution arising out of the judgment and decree in Civil Appeal No. 17 of 2014 has been issued by the Court of  
15 Appeal and yet it is the execution that the substantive application seeks to restrain. Indeed annexure "C" of the affidavit in support is a warrant of execution instructing Mwesigye Jackson, a Court Bailiff, to give vacant possession of the suit land to respondent. That the application was filed without undue delay.

20 On the likelihood of success of the application for review, counsel submitted that the applicants are in possession of the suit land as beneficiaries and children of the late Rwankanyuzi Ezekiel who is indicated as the registered proprietor of the land in issue, that they were not party to the Civil Appeal No. 17 of 2014, and, therefore, they cannot  
25 be deprived of their interest in the suit land unheard. He thus submitted that the applicants present a fit and proper one for the grant of an interim order for stay of execution and that they have complied with the

5 requirements thereof as laid out in the cases of Hon. Theodore Ssekikubo & others vs. Attorney General (supra), Alcon International Ltd vs. New vision, and SC Misc. Application No. 4 of 2010 Hwang Sung Industries vs. Tajdin, SCC Appl. No. 19 of 2008.

10 Learned counsel for the respondent opposed the application. He argued that the application has no merit and ought to fail because it is not supported by any provisions of the law. That this application is based on rule 6(2) (b) of the Judicature (Supreme Court, Rules) Directions which permits this court to grant an order of stay of execution where a notice of appeal has been lodged in accordance with rule 72 of this court's rules  
15 and that indeed all the authorities cited by the applicant reiterate this position. He relied on the case of Belex Tours & Travel Ltd vs. Crane Bank Ltd, Misc. Appl. No. 21 of 2015, where this court held that where is no notice of appeal filed since the applicants cannot appeal against the judgment of this court and that for that reason the application ought to fail  
20 on that ground alone.

Counsel further contended that even if the notice of appeal had been filed, the other considerations for the grant of an order for interim stay of execution had not fulfilled; that for instance there is no proof on record of the said application for review, and that counsel only submitted from the  
25 bar about the existence of the said application. Counsel argued further that the application for substantive stay of execution was also not attached

5 to the application and affidavits in support and that, therefore, the applicants' counsel's submission is only based on speculation.

Counsel further argued that the applicants' contention that the application for review has a likelihood of success has no basis and for this he relied on the case of Belex Tours and Travel vs. Crane Bank (supra) where it  
10 was held that it is not enough to merely state that the application has a reasonable likelihood of success, that the applicant must go further to show why he thinks that the application stands a reasonable likelihood of success and that the applicants failed to show this.

Counsel submitted further that the applicants have no locus standi to file  
15 this application since their benefactor is no longer the registered proprietor of the land in dispute. Counsel referred court to paragraph 7 of the respondent's affidavit in reply in which he deponed that he is the registered proprietor of the suit land and annexures "A" & "B" are certificates of title Block 30 Plot 1 & Block 31 Plot 1 respectively which  
20 are all registered in his name and that of Emmanuel Katorogo.

Counsel contended that he was heard in the High Court, Masaka in **Misc. Appl. No. 25** of 2004 which was an application for leave to amend the  
25 complaint to join Mr. B. Nsereko and Mr. Ezekiel Rwankanyuzi as defendants to the suit which was dismissed by Mwangusya, J (as he then was).

Counsel argued further that the respondent was not aware that the applicants were in possession of the disputed land and that whoever in

5 possession of the same got there through the eviction of the respondent pursuant to the High Court decision which has since been set aside by the Court of Appeal and subsequently by this court. He thus argued that the court cannot continue protecting applicants' alleged interest in the suit land and possession thereof because the Supreme Court ruled otherwise.

10 On whether the applicant will suffer irreparable damage if the application is not granted, counsel argued that the applicants will not suffer any irreparable damage if the order for interim stay is not granted. He contended that the peculiarities of the case are that it's only fair to let the respondent, the successful party in SCCA No. 17 of 2014 enforce the

15 orders of the court having suffered an eviction and dispossession from the suit land in 2006 pursuant to the High Court decision.

### CONSIDERATION.

The rules governing the grant of stay of execution are well settled. They are based on Rule 6(2) (a) of the Judicature (Supreme Court Rules) Directions which provides that the court may order for stay of execution in any civil proceedings where a notice of appeal has been given in accordance with rules 72 of the rules of the court.

The court is further empowered to entertain such applications under Rule 2(2) of the Judicature (Supreme Court) Rules) Directions which gives this

25 court wide discretion to make such orders as may be necessary to achieve the ends of justice or to prevent the abuse of its process.

5 These principles have been laid down in a number of decisions of this court notably in Francis Drake Lubega vs. A.G & Anor, (supra), Hon. Theodore Ssekikubo & Others vs. A.G & others, (supra) Alcon International Ltd vs. The New Vision Printing and Publishing Co. Limited & Anor, SCMA No. 4 of 2010) Hwang Sung Industries Ltd vs. Tajdin Hussein and others, (supra), Belex Tours & Travel Limited vs. Crane Bank Limited, (supra) Stanbic Bank Uganda vs. Atabya Agencies Ltd, (supra), Akankwasa Damian vs. Uganda, Const. application No. 07 of 2011 and 09 of 2011, Hon. Mukasa Fred Mbidde & Hon. Micheal Mabikke vs. Law Development Centre, Misc. Appl. No. 15 of 2015, where this court held that the basic requirements that must be satisfied by an applicant for the grant of an interim order for stay of execution are the following:

1. The applicant should have filed a notice of appeal and requested for certified copy of the judgment and proceedings to enable him or her file a memorandum of appeal.
2. The applicant should have lodged a substantive application for stay of execution.
3. The applicant must show that there is a serious threat of execution of the judgment and orders being appealed against.
4. It must be shown that the substantive application and the appeal will be rendered nugatory if court does not grant the interim order of stay.

5 5. It should be shown that the appeal stands a reasonable likelihood of success.

6. It must be shown that the applicant will suffer irreparable loss if the court does not grant the interim order of stay of execution.

10 It is readily conceded by counsel for the applicants that no notice of appeal has been filed in this court and that this application does not purport to be based on such. Indeed counsel for the respondent opposes the application on the ground that the application is strange to the law as it does not meet the requirements of rule 6(2)(b) of the rules of this court on which the application purports to be based.

15 Counsel for the applicants, however, argues that the application for review of this court's decision in SCCA No. 17 of 2014 should be treated as being analogous to a notice of appeal and that an interim order can be granted by this court pending the disposal of the substantive application for stay of execution.

20 The question as to whether the applicants' application for review of this court's decision in SCCA No. 17 of 2014 should be treated as a notice of appeal is key to the determination of the instant application for an interim order for stay of execution.

25 Rule 2(2) of the rules of this court preserves the court's inherent power to make any orders to achieve the ends of justice or to prevent abuse of its process. This position was restated in the case of G.Afro vs. Uganda Breweries Ltd, SCC

5 Appl. No. 12 of 2008 where G.M Okello, JSC, held that under rule 2(2) of the (Supreme Court Rules) Directions the court has the power to make such orders as may be necessary for achieving the ends of justice and prevent abuse of the process of court.

The extent of this court's powers of review was discussed in the case of  
10 Livingstone Sewanyana vs. Martin Alier, Civil Application No.4 of 1991(SC), where the court considered the power that was preserved in rule 1 (3) then and is now in rule 2 (2). After noting and comparing the inherent power of the Court of Appeal in England and observing that the inherent power as articulated in 1966 case of Lakhamshi Brothers Ltd. vs. R. Raja and Sons  
15 (supra), was reflected in rule 35 of the Court of Appeal Rules of 1972, which the Supreme Court inherited, the court went on to clarify -

20 *"But rule 35 will not exhaust the inherent jurisdiction of the Supreme Court, otherwise Rule 1(3) would not have been necessary. The latter rule is there to provide for the many types of cases when the inherent jurisdiction will be necessary for the ends of justice"*

*"The jurisdiction of this Court to recall its judgment and correct or otherwise alter it, however, is not limited to the slip rule. It may also be exercised under its inherent power, which is set out in r.1 (3)....."*



5 In the instant case, the applicants have applied to this court for review of its decision in SCCA No. 17 of 2014 based on the alleged contravention of the right to be heard which is enshrined in Article 28 (1) of the Constitution which provides:

10 *“In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and an impartial court or tribunal.”*

In my view, the question is whether the applicants’ application for review of this court’s decision in SCCA No. 17 of 2014 should be treated as frivolous and not worthy of serious consideration, or is such as should warrant this court’s  
15 attention. Deciding this question at an early stage is important because the decisions and orders of this court as the final court of this country’s judicial system should not be open to constant and needless applications for their alteration. There must be an end and finality to litigation. But there may be special circumstances that may warrant alteration of the court’s decision or  
20 orders where, if not done, blatant injustice may be occasioned. That is why it was found necessary to include rule 2(2) in the rules.

Therefore, in my view, the question as to whether the application for review should be treated as analogous to a notice of appeal must, as a necessary condition, be linked to deciding whether the application for review stands a  
25 reasonable likelihood of success.

5 It is clear from the record that at the time of the High Court Judgment, the applicants' father Ezekiel Rwankanyuzi was the registered proprietor of the suit land. He was never party to the suit right from the High Court, Court of Appeal and the Supreme Court. This was caused by the fact that the plaintiff had not been successful after Mwangusya, J, rejected the application to amend the plaintiff  
10 to join Rwankanyuzi as one of the co-defendants. It is not in dispute that the name of Ezekiel Rwankanyuzi, the father of the applicants, was struck off the register without giving him or his successors opportunity to be heard. This to me, strikes at the heart of the principles relating to the administration of justice in this country and is a breach of Article 28(1) and 44(c) of the Constitution.

15 It is my view, therefore, that the applicants' application for review stands a reasonable likelihood of success and that, flowing from this, it should be treated as a notice of appeal under rule 6(b) of the rules of this court for the purpose of determining the applicant's application for stay of execution.

This case must be distinguished from the case of Belex Tours and Travel Ltd  
20 vs. Crane Bank (supra) cited by learned counsel for the respondent. In that case I rejected the application for stay of execution based on the applicant's application for review of this court's judgment. Rule 6(2)(b) of this court's rules requires that a notice of appeal should be lodged in accordance with rule 72 of the rules. The applicant in that case did not comply with this rule. He did not  
25 advance any special reasons why his application for review should be regarded as a notice of appeal. He sought to adduce evidence to prove fraud yet being the plaintiff in the case, he was expected to have assembled all the necessary

5 evidence to prove his case at the trial stage. The instant application is, in my view, different in that there is a fundamental principle of justice in issue that requires the application of rule 2(2) of the rules of this court.

Counsel for the respondent's contention that there is no evidence on record of the applicants' application for review and substantive application for stay is a  
10 valid one. However, a reading of the title to the applicants' notice of motion shows that these two applications have been lodged in court and that this application arose out of civil application No. 15 of 2017 (application for substantive stay of execution) which itself arose out of Civil Application No. 11 of 2017 (application for review of SCCA No. 17 of 2014). I agree with counsel  
15 for the respondent, however, that lodgment of these applications should have been adduced as evidence in the applicant's affidavit in support though I do not consider this as a fatal omission to the application.

The essence of an order for interim stay of execution is that when a party pursues his/ her right of appeal, the appeal should not be rendered  
20 nugatory should it be successful; the stay will preserve the status quo pending the disposal of the appeal.

The applicants are in possession of the disputed land and this has been the state of affairs since 1996, and they derive their livelihood from the same. The 6<sup>th</sup> respondent's averment that he is not aware of the  
25 applicants' occupation of the land is therefore not true.

Having found that the application for review should be treated as a notice of appeal, I am convinced that the order for an interim stay of execution is

5 necessary for the preservation of the status quo pending the disposal of  
the substantive application for stay of execution otherwise the applicants'  
application for review will be rendered nugatory.

The fact that there is a serious threat of execution is conceded. The  
10 Court of Appeal issued a warrant to Mwesigwa Jackson, a Court Bailiff to  
deliver vacant possession of the suit land (annexure "C") of the affidavit in  
support of the notice of motion. The applicants have, therefore, satisfied  
me that there is a serious threat of execution.

In the result, I allow this application for an interim order for stay of  
15 execution pending the hearing of the substantive application for stay of  
execution.

Costs to abide the outcome of the substantive application for stay of  
execution.

20 Dated at Kampala this .....16<sup>th</sup>.....day of .....June.....2017

  
Jotham Tumwesigye

**JUSTICE OF THE SUPREME COURT**