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

10 [Coram: Arach-Amoko, JSC.& Odoki, Tsekooko, Okello & Kitumba, Ag. JJSC]

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*Constitutional Application No. 04 of 2014.
(Arising from Constitutional Application No. 03 of 2014)*

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1. HON. THEODORE SSEKIKUBO
 2. HON. WILFRED NIWAGABA
 3. HON. MOHAMMED NSEREKO
 4. HON. BARNABAS TINKASIMIRE
 5. HON. ABDU KATUNTU

Between

..... APPLICANTS.

And

- 20
1. THE ATTORNEY GENERAL
 2. HON. LT. (RTD.) SALEH M. W. KAMBA
 3. MS. AGASHA MARY.
 4. JOSEPH KWESIGA
 5. NATIONAL RESISTANCE MOVEMENT

..... RESPONDENTS.

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30 *{Notice of Motion seeking for interim order of stay of Execution of decision and decree of the Constitutional Court at Kampala (Kavuma, Ag. DCJ./PCC., Nshimye, Kasule, Mwendha and Butera, JJA./JCC.) dated 21st February, 2014 in Constitutional Petitions No. 16, 19, 21 and 25 of 2013 and Constitutional Applications Nos. 14 and 23 of 2013}*

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RULING OF THE COURT.

BACKGROUND:

Hon. Lt. (Rtd.) Saleh M. W. Kamba and Ms. Agasha Mary (2nd and 3rd respondents) instituted Constitutional Petition No. 16 of 2013 against the Attorney General, (the first respondent) Hon. T. Ssekikubo, (1st applicant) Hon. W. Niwagaba, (2nd applicant) Hon. M. Nsereko (3rd applicant) and Hon. B. Tinkasimire (4th applicant) and the same respondents also instituted Constitutional Applications No. 14 of 2013 and No. 16 of 2013. The National Resistance Movement (NRM) (5th respondent) separately instituted constitutional

5 petition no. 21 of 2013 and this was followed by Constitutional Application No. 21
of 2013 and No. 25 of 2013 against the same five respondents.

Joseph Kwesiga (the 4th respondent) also separately instituted Constitutional
Petition N. 19 of 2013 against the Attorney General of Uganda while the Hon.
10 Abdu Katuntu (the 5th applicant) instituted Constitutional Petition No. 25 of 2013
against the same Attorney General of Uganda (1st respondent).

By the said petitions and applications, the petitioners and the applicants (now
respondents) challenged the constitutionality of the decision by the Speaker of
15 Parliament not to declare as vacant the seats of Parliament of each of the four
applicants following their expulsion from NRM.

The Constitutional Court consolidated the said petitions and applications, heard
parties and delivered judgments on 21st February, 2014. By a majority of four to
20 one, the Court allowed the petitions and the applications and ordered as follows—

- 1) *The 2nd, 3rd, 4th and 5th respondents are hereby ordered to vacate their seats
in Parliament forthwith.*
- 2) *The Electoral Commission is directed following the service to it of a copy of
25 this judgment by the 1st respondent to conduct by-elections in the
constituencies hitherto represented by Hon. Theodore Ssekikubo, Hon.
Wilfred Niwagaba, Hon. Mohammed Nsereko and Hon. Barnabas
Tinkasimire in accordance with the electoral laws of this country.*
- 3) *A Permanent Injunction is hereby issued restraining the Rt. Hon. Speaker
30 of Parliament and the Rt. Hon. Deputy Speaker of Parliament from
allowing the 2nd, 3rd, 4th and 5th respondents to continue sitting in
Parliament or to take part in any Parliamentary activity or any committees
and stop payment to the 2nd, 3rd, 4th and 5th respondents of any salaries,
35 allowances, other emoluments and entitlements, save those that may have
accrued to them immediately before the issuance of these orders.*

5 *4) The mandatory injunction issued by this Court on 10th September 2013 is hereby vacated.*

5) We grant costs to the successful parties in the consolidated Constitutional Petitions and Applications with a certificate for two counsel.

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The orders were reduced into a Court Decree which was served on the Speaker of Parliament by the 1st respondent on 24th February, 2014. Consequently the Speaker declared the seats vacant and by letter dated 25th February, 2014, the Speaker advised the first four applicants as directed by Constitutional Court.

15 Meantime on 24th February, 2014 the four applicants instituted a Notice of Appeal intending to appeal against the majority Court decision. On 25th February, 2014 the present applicants instituted Notice of Motion No. 03 of 2014 and No. 04 of 2014. The latter is the subject of this ruling.

20 The Applicants instituted this application under Rules 2(2) and 6(2)(b) of the Rules of this Court for orders of interim stay and an interim injunction of the orders and decree of the Constitutional Court pending the determination of the substantive application No. 3 of 2014 which is pending before this Court. By the latter application, the applicants are seeking for stay of execution until disposal of
25 the intended appeal.

The application is supported by the affidavit of Hon. Ssekikubo the 1st applicant sworn on 24th February 2014. According to that affidavit —

30 *1. The Applicants who are dissatisfied with the judgment and the orders of the Constitutional Court filed a Notice of Appeal and have requested for a record of proceedings.*

*2. The Applicants' intended appeal to the Supreme Court challenging the decisions and orders of the Constitutional Court raises several
35 constitutional and legal issues that warrant serious judicial consideration by this Court and the appeal has a high chance of success.*

- 5 **3. The Applicants have filed Constitutional Application No. 03 of 2014 for Stay of Execution of the orders of the Constitutional Court and for a temporary injunction pending disposal of the appeal and the Application has good chances of success.**
- 10 **4. Unless restrained by the Supreme Court, the Rt. Hon. Speaker, the Rt. Hon. Deputy Speaker of Parliament and the Electoral Commission shall soon implement the orders of the Constitutional Court and this will irreparably occasion loss to the 1st, 2nd, 3rd and 4th Applicants of their political, economic and other fundamental rights and freedoms and render the substantive Application for stay of execution and the temporary injunction; and the intended appeal nugatory.**
- 15 **5. The balance of convenience in maintaining the status quo is in favour of the 1st, 2nd, 3rd and 4th Applicants retaining their seats in Parliament till the substantive application for stay of execution and temporary injunction is heard and disposed of by this Court.**
- 20 **6. That the application has been brought without undue delay.**

25 Mr. Sam Mayanja of Mugisha & Co. Advocates swore in reply an affidavit on behalf of the 2nd, 3rd and 5th respondents.

Mr. Bafirawala and Ms. Jane Kibirige, the Clerk to Parliament each swore an affidavit in reply on behalf of the 1st respondent. Similarly, Mr. Kwesiga swore an affidavit in reply and on behalf of the 1st respondent. These three affidavits in
30 reply in effect challenge the application for interim orders and injunction and they suggest that execution has been done.

SUBMISSIONS:

During the hearing, Mr. Peter Walubiri assisted by Mr. Alaka, Mr. J. Galisonga,
35 Mr. E. Orono, Mr. Jude Mbabali and Ms. Sauda Nsereko represented the applicants. The 1st respondent was represented by Mr. Bireije, Commissioner for Litigation assisted by Ms. P. Mutesi (PSA), Mr. Richard Adrole (SA), Mr. M. Ijanga (SA) and J. Kamukire (SA). The 2nd, 3rd and 5th respondents were represented by

5 Mr. J.M. Mugisha who was assisted by Mr. J. Matsiko, Mr. Bakiza and Mr. S. Tinobusingye. Lastly Mr. Edson Karuhanga represented the 4th respondent.

Mr. Peter Walubiri opened the submissions on behalf of the applicants. Basing on the affidavit of Hon. Ssekikubo, Mr. Peter Walubiri submitted that the Applicants
10 were dissatisfied with the decision of the Constitutional Court and have filed a Notice of Appeal and requested for the record of proceedings. That the appeal raises very serious Constitutional issues and is likely to succeed.

Learned counsel contended that the Applicants have also filed a substantive
15 application for a stay of execution and an injunction and it has been fixed for hearing on 28th February 2014. He submitted that there are serious threats of execution as the Rt. Hon. Speaker has already written to the Applicants ordering them to vacate their seats; and the Clerk to Parliament has advised the Electoral Commission to conduct fresh elections. Learned counsel argued that if the status
20 quo is not maintained by granting the orders sought in this application, then both the substantive application and the appeal will be rendered nugatory. According to learned counsel, the order of the Constitutional Court was in two limbs; by the first limb, the applicants are required to vacate their seats and the Speaker should stop paying any money to each of the applicants. On the other hand the
25 2nd limb, the Electoral Commission, should organize fresh elections in the respective constituencies of the four applicants.

Counsel submitted that there is no evidence that the Electoral Commission has organized the elections or even started to do so. Even if the Speaker's and the
30 Clerk's letters can be treated as part of the execution process, they amount perhaps to partial / incomplete execution. He contended that until elections are held and the Members of Parliament sworn in, the court can intervene. He cited

5 **Hwang Sung Industries Ltd v. Tajdin Hussein and 2 Ors** (*Supreme Court Civil Application No. 19 of 2008*) where execution by attachment and sale was held to be incomplete where the property of the judgment debtor was attached but had not yet been sold; that in this case, attachment alone did not effect the execution. He submitted that in this case there was only partial execution and that a stay
10 ought to be ordered.

The order that the MPs should vacate parliament and that the Speaker stops paying them and stops them from sitting in Parliament has not yet been executed as 'sitting' is not a one day event, they were only disrupted for 3 sittings and could
15 resume once the court allowed them to.

Counsel also submitted that the electoral law provides grounds upon which by-elections may be conducted. He contended that Section 95(2) of the Parliamentary Elections Act states that an election shall be postponed where an
20 appeal has been filed. He referred Court to the case of G. W. Okecho v. George Owor (*Constitutional Application 02 of 2011*), where the Supreme Court stayed a declaration of the Constitutional Court and allowed the Applicants to contest in the elections. He argued that the orders of the Constitutional Court cannot fetter the discretion of this court to stay those orders and allow persons who have
25 appealed to argue their appeal first. He submitted that the Court grants the orders sought in the application so that the right of appeal is preserved.

Mr. Bireije Dennis, Commissioner for Civil Litigation and Counsel for the 1st respondent opposed the application and relied on the affidavits of Mr. Bafirawala
30 and Ms. Kibirige. His primary reason was that the execution had already taken place and, therefore, there is no execution to stay. He referred also to the letter from the first respondent to the Speaker and to the Clerk to Parliament, and

5 contended that these letters were written in compliance with the Court's orders; that the Speaker also informed Parliament of her compliance with the Court order. The Clerk to Parliament had been notified of the order and had stopped salaries, entitlements and all other emoluments to the four Applicants. He submitted that, as of now, the Applicants are not in Parliament, therefore, to
10 grant the application will amount to changing the status quo. Further, he argued that since the issue whether the Applicants are in Parliament or not is a contestable issue to be determined in the appeal, this was not the right place for it.

15 He submitted that the principles governing stay of execution of orders are clear. He referred court to the authorities of **Akankwasa Damian v. Uganda**, (*Supreme Court Constitutional Application No. 07 and 09 of 2011*), **Dr. Ahmed Muhammed Kisuule vs. Greenland Bank in Liquidation**, (*Civil Application No. 07/2010*) and **NHCC v. Kampala District Land Board & Anor**. (*Supreme Court Civil Application*
20 *No.12/2008*), that the Applicants must prove (i) irreparable damage if a stay of execution is not granted (ii) the intended appeal has high chances of success. He submitted that counsel for the Applicants has failed to prove that once the application is not granted, his clients will suffer irreparable damage.

25 In response to the argument of partial execution, Mr. Bireije responded that this was not true as the orders of the Speaker had been fully complied with. On the second limb, Mr. Bireije contended that to argue it at this point was unnecessary as the substantive application had been fixed for 28/03/2013 and it is inconceivable that the Electoral Commission would organize elections in that
30 short time.

5 Learned counsel also referred to Mr. Bafirawala's affidavit and submitted that Hon. Ssekikubo was not in court when the judgment was delivered, that Counsel Dr. Kanyeihamba did not make any application as he was just standing and the Court stated that it was *functus officio* and therefore Hon. Ssekikubo's affidavit was hearsay. He prayed that the Court disallows the application.

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Mr. John Mary Mugisha for the 2nd, 3rd and 5th Respondents, submitted that the application is an abuse of Court process and does not satisfy the conditions precedent for granting an interim order under R2(2) and 6(2)(b). He associated himself with the submissions of Mr. Bireije and added that the application had
15 been overtaken by events and had gone into the limbo of legal mootness in so far as the orders had been implemented and there was, therefore, nothing to stay as deponed in Mayanja's affidavit. He also added that the Applicants had not made out a prima facie case that their intended appeal is likely to succeed. He argued that they needed to show that they have an arguable case. He argued further
20 that there is no status quo to preserve as the seats are now vacant; that the Applicants should have applied for a mandatory injunction which is the order that can alter the status quo. Mr. Mugisha also submitted that the Applicants had not shown what they would stand to lose if the application is not granted. Rather, the Respondents would lose by the continued violation of the Constitution
25 and the non-representation of the constituents in Parliament to the chagrin of the NRM party. He cited the cases of **Legal Brains Trust ltd v. Attorney General, (EACJ Appeal 4/2012)** and **Joseph Borowski v. the Attorney General of Canada. (SC of Canada, 20411 of 1989)** in support of his argument for 'legal mootness'.

30 Learned counsel also cited **Akankwasa Damian (supra)** and **Administrator General and Anor v. NSSF (Supreme Court Civil Appeal No. 02 of 2009)** on the conditions necessary for the grant of an interim order and stated that in this case,

5 the interim order could not be granted as execution had been carried out. He
contended that there is no threat as the orders being sought in the motion had
already been implemented. That the implementation is not a process, but an
event and this was therefore a *fait accomplis*. He also argued that the case of
Hwang Sung Industries Ltd. (*supra*) is distinguishable as there, the Court only
10 stayed the sale, and not the attachment as the attachment had not been
completed. Learned counsel contended further that section 95 of the
Parliamentary Elections Act gives instances where it is applicable and the instant
vacation of the seats is not one of the instances, therefore Mr. Bireije's authorities
were applicable as there was no matter to be stayed. Counsel concluded that the
15 application did not pass the test as the Applicants have not brought it within the
ambit of the conditions precedent.

Mr. Joseph Matsiko, when assisting Mr. Mugisha, submitted that the Applicants'
authorities are inapplicable and distinguishable. The case of **Giullino Garigio**
20 (*Supreme Court Civil Application 03 of 2013*) states that the grant of interim
orders is to maintain status quo, however this was not an application to preserve
status quo as this effectively overturn the status quo. The decree has been
extracted, sent to the Rt. Hon. Speaker who has acted on it, therefore, it has been
executed and is complete.

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In the case of **Okecho v. Owor**, (*Supra*) the order nullifying the election of the
Applicants had not been executed yet or even served on the Electoral
Commission, therefore there was something to stay unlike in the present
application. In the case of **Hwang Sung Industries Ltd.** (*supra*) there was an
30 attachment and sale and the only part that was stayed was the sale, as
attachment had been completed. He submitted further that Section 95 of the
Parliamentary Elections Act should be read with Article 81(2) to answer the

5 question whether the Electoral Commission should be restrained from conducting
fresh elections. He argued that Article 81 contains a mandatory command that
by-elections must be conducted within 60 days after a seat falls vacant and that
the grounds in Section 95 do not apply to the Applicants. It was his submission
that to grant the stay therefore would run contrary to the spirit and letter of
10 Article 81(2).

Learned counsel contended that the case of having unrepresented constituents
from 4 constituencies is worse compared to the right of appeal of the Applicants
and the right to receive emoluments and that this has to be weighed against the
15 right of Ugandans to be represented.

Mr. Edison Karuhanga for the 4th respondent associated himself with the
submissions of the other counsel for the respondents and relying on Rule 41 of
this Court contended that counsel for the Applicants had denied himself the
20 opportunity to apply orally for stay in the Constitutional Court, and therefore
execution was not stopped as the Applicants lost that opportunity. On the
submission for the Applicants that they were only disrupted, counsel responded
that court orders are not merely disruptive but must be implemented. He
submitted further that section 95 of the Parliamentary Elections Act did not
25 apply to this Court, but to the High Court.

Mr. Caleb Alaka for the applicants made a rejoinder to the submissions of counsel
for the respondents arguing that the Applicants' application was not moot,
academic nor was it overtaken by events. He referred to the authority of **J.**
30 **Borowski**(supra) and contended that the Supreme Court of Canada analysed
what 'legal mootness' was and this case was not moot as the concrete dispute is
the interpretation of Article 83 of the Constitution of Uganda. He submitted that

5 the authorities cited, i.e., **Legal Brains Trust**, (*supra*) **Damian Akankwasa**, (*supra*) **NHC** (*supra*) deal with grounds for a substantive application not for interim orders, but even then, the Applicants' pleadings by affidavit had met those standards.

10 Learned counsel submitted that the authorities cited by Mr. Mugisha were correct in as far as they refer to completed execution. In the instant case, however, the Applicants have not been replaced and Mr. Bireije has rightly conceded that the Electoral Commission had not conducted by-elections. There was therefore something to stay. He also referred to Article 132(3) on the right of
15 appeal to this Court, and submitted that in the light of this Article, Article 82(2) referred to by Mr. Matsiko could not be read in isolation.

On section 95, he submitted that there is already a contention whether the Constitutional Court had the jurisdiction to evict the Applicants which they
20 intend to argue on appeal. Sections 3 and 95 of the Parliamentary Elections Act should be read together. He submitted therefore that the Constitutional command should be read together with the jurisdiction of this court and the appellant's right of appeal.

25 Mr. Walubiri, lead counsel for applicants, in rejoinder contended that as Mr. Bireije had stated, the Speaker's letter did not fetter the right of appeal of the Applicants, therefore that right should be respected so that the appellants get an effective remedy. He further submitted that Mr. Bireije had also conceded that the question was whether the Applicants are still in or out of Parliament.
30 Counsel maintained that they were in Parliament and that their sitting had only been disrupted, and the letters cannot stop court from granting the injunctions sought.

He also explained that Counsel in the Constitutional Court was not given an opportunity to apply for the stay as court stated that it was *functus officio*. He cited the authority of **Lawrence Musitwa Kyazze v. Eunice Busingye** (*Supreme Court Civil application No. 18 of 1990*) where a litigant has an option of making an application to the lower court and the higher court, he can make the application in the lower court where he finds it impracticable to make the application to the higher court. Counsel also argued that Mr. Matsiko's argument on Article 81 presupposes that the court will be persuaded to find that it cannot grant a stay because of the Speaker's letter. However that is not true as the Court has the jurisdiction. He submitted finally that section 3 must be read together with section 95 of the Parliamentary Elections Act. The bye-elections are subject to section 95 and it should therefore be read to include situations under Article 83. He concluded by reiterating the prayers in the Notice of Motion.

COURT'S CONSIDERATION:

Rule 2(2) of the Judicature Supreme Courts Rules gives this Court very wide discretion to make such orders as may be necessary to achieve the ends of justice. One of the ends of justice is to preserve the right of appeal. In the cases of **Yakobo M. Sekungu and Ors vs Cresensio Mukasa**, (*Civil Application 5/2013*) and **Guiliano Gargio vs. Calaudio Casadio**, (*Civil Application 3/2013*); this Court stated that "*the granting of interim orders is meant to help the parties to preserve the status quo and then have the main issues between them determined by the full court as per the Rules.*"

Considerations for the grant of an interim order of stay of execution or interim injunction are whether there is a substantive application pending and whether there is a serious threat of execution before the hearing of the substantive application. Needless to say, there must be a Notice of Appeal. (See: **Hwan Sung**

5 **Industries Ltd. vs. Tajdin Hussein and 2 Others (SCCA No. 19 of 2008)**. Upon
perusal of the application, affidavits in support and in reply and after a thorough
consideration of the submissions by counsel for both sides in this application, we
find that the applicants have filed not only a Notice of appeal but have also
requested for a record of proceedings of the Constitutional Court. Besides there is
10 also a draft memorandum of appeal.

We are also satisfied that there is a real threat to execute the decree before the
disposal of the pending substantive application which would render the
substantive application nugatory, if not restrained. In our considered opinion the
15 letters of the Rt. Hon. Speaker and of the Clerk to Parliament did not complete
the execution of the decree. Therefore, this application has not been overtaken by
events.

As for the rest of the legal arguments raised by Counsel on both sides, we think
20 that they should be left for the substantive application and the appeal.

We think there are sufficient grounds shown upon which we should exercise our
discretion. In the result, we hereby allow the application and make the following
orders—

- 25 a) We grant an interim order of stay of execution of the Orders of the
Constitutional Court dated 21st February 2014 and consequential
decree in respect of Petitions Nos. 16, 19,21 and 25 of 2013; and
- b) We grant an interim injunction restraining the Rt. Hon. Speaker of
30 Parliament and the Rt. Hon Deputy Speaker of Parliament as well as
the Electoral Commission, from implementing the orders of the

5 Constitutional Court until the substantive application for stay of execution and a temporary injunction is disposed of by this Court.

c) The costs of this application shall abide the result of the substantive application.

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We so order.

Dated at Kampala this day of 2014.

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M.S. Arach – Amoko.
Justice of the Supreme Court.

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B. J. Odoki
Ag. Justice of the Supreme Court.

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J. W. N. Tsekooko.
Ag. Justice of the Supreme Court.

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G.M. Okello.
Ag. Justice of the Supreme Court.

C.N.B. Kitumba.
Ag. Justice of the Supreme Court.