

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

{Coram: Katureebe, Tumwesigye & Dr. Kisaakye, JJSC.; Tsekooko & Kitumba, Ag. JJSC.}

Civil Application No. 15 of 2014.

Between

THEMI NAKIBUKA SEBALU

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APPLICANT.

And

1. PETER SEMATIMBA
2. MUYENGA RESORT HOTEL LTD.
3. THE COMMISSIONER LAND
REGISTRATION.

} :=====

RESPONDENTS.

{Ruling on an Application for Stay of Execution of the Orders of Court of Appeal at Kampala (Nshimye, Aweri Opio & Prof. Tibatemwa, JJA.) dated 21st July, 2014 in Civil Application No. 251 of 2014.}

Majority Court Ruling:-

Ms. Themis Nakibuka Sebalu (the applicant) instituted an application in this Court under Rules 2 (2), 6 (2) (b), 41, 42 and 43 of the Rules of this Court seeking for an order to stay the execution of orders of the Court of Appeal issued on 21st July, 2014 in the Court of Appeal Civil Application No. 251 of 2014 which, among other orders, ordered the applicant to vacate the disputed property described later in this ruling.

The grounds in support of the application are set out in the Notice of Motion and in the two affidavits. The first affidavit was sworn on 22nd June, 2014, by Themis N. Sebalu, the applicant. The applicant swore the second affidavit on 29th July, 2014, in rejoinder to an opposition affidavit sworn by Peter Sematimba, the first respondent. The grounds as set out in the Notice of Motion are:—

a) The applicant intends to appeal against the Ruling and Orders of the Court of Appeal and has filed a Notice of Appeal which appeal is yet to be heard and determined.

b) The intended appeal has a very high likelihood of success and will be rendered nugatory if the Orders sought are not granted.

c) The applicant will suffer substantial and irreparable loss if this application is not granted.

d) The balance of convenience is in favour of grant of the Orders sought.

e) It is the interest of Justice that execution of the Ruling and / Orders of the Court of Appeal be stayed pending the hearing and determination of the appeal.

The respondents opposed the application and as already stated, Peter Sematimba, the first respondent, swore an affidavit on 29th July, 2014 in opposition to the application.

Background:-

The applicant is apparently the only child of a well known Uganda lawyer and advocate and businessman, Paulo Sebalu, who died intestate on 08th November, 2013. He left no spouse. By the time of his death, he was the registered proprietor of a number of properties. These included land
5 known as Kyadondo Block 244 Plots Nos. 1791, 1792, 3646 and 5867 situate at Muyenga in Kampala. Available records also show that the deceased held majority shares in Muyenga Club Ltd. (99%) and the same Muyenga Club Limited operated business on the four plots.

10 On 11th December, 2013, Peter Sematimba, the first respondent, became the registered proprietor of the four plots. He also took possession of the plots as well as the business of Muyenga Club Ltd., the second respondent, of which he (the first respondent) has been the Managing Director since he took over the property.

15 Early this year (2014) the applicant instituted HCCS 29 of 2014 in the Family Division of the High Court against the first respondent, the second respondent and the Commissioner, Land Registration (herein referred to as the third respondent), claiming that the suit property was fraudulently
20 transferred to the first respondent. The suit is still in the High Court pending hearing and determination.

However after the institution of that suit the applicant made two applications in the High Court, Family Division, namely High Court Miscellaneous Application No. 05 of 2014 by which she sought for a temporary injunction and Miscellaneous Application No. 53 of 2014 by which she sought an interim injunction. The latter application was heard and granted on 04th March, 2014 by Her Worship Lillian Mwandha, the Deputy Registrar, High Court. The Deputy Registrar made four orders when she granted the said interim injunction. In the first order, the Deputy Registrar directed the first and second respondents, their agents, servants or any other person acting on their authority from interfering, intermeddling with or managing the business of Muyenga Club situated at Kyadondo Block 244 Plot Nos. 1791, 1792, 5867 and 3646 all at Muyenga that comprises part of the Estate of the late Paulo Sebalu.

On 30th June, Lady Justice Tuhaise of the High Court heard and dismissed the substantive High Court Miscellaneous Application No. 52 of 2014 and vacated the said orders granted by the Deputy Registrar on 04th March, 2014.

The applicant, who was dissatisfied with the orders of Tuhaise J., appealed against the decision to the Court of Appeal. The Court of Appeal upheld the decision of Tuhaise J. The applicant was dissatisfied with the decision of the Court of Appeal so she filed a Notice of Appeal intending to appeal to

this Court. Meantime, she, through her lawyers, Muwema & Mugerwa, Advocates, has instituted this application seeking for an order to stay **“execution of the Ruling and or orders of the Court of Appeal in Civil Application No. 251 of 2014”** pending the determination of the intended appeal. Thereafter she filed Civil Application No. 16 of 2014 against the present three respondents in this Court seeking for an interim order of stay pending the hearing of this application. That application was on 25/07/2014 heard and dismissed by Tumwesigye, JSC.

During the hearing of this motion Mr. Muwema and Mr. Mulema Mukasa appeared for the applicant. Mr. Nsubuga Ssempebwa and Mr. Semakula Mugerwa C. represented the respondents. Mr. Muwema informed Court that the third respondent was not participating in these proceedings.

Mr. Muwema led the submissions on behalf of the applicant. Mr. Muwema correctly observed that in order to succeed, the applicant must establish at least two things. First, that she has filed a Notice of Appeal and also has requested for a copy of the record of Proceedings of the Court of Appeal. Learned counsel submitted that the applicant has filed the requisite Notice of Appeal and also applied for the proceedings of the Court of Appeal. The notice and copy of the request are marked as annexures **“A”** and **“B”** to the applicant’s affidavit in support of the motion.

Secondly, Mr. Muwema submitted that the applicant must show that the appeal has a likelihood of success. For this he relied on paragraphs 4 to 12 of the applicant's affidavit in support of the motion and emphasized this by reading paragraphs 11 and 12 of the affidavit. These two paragraphs read as follows—

“11. *That I am informed by my lawyers M/S Muwema and Mugerwa Advocates and Solicitors, which information I verily believe to be true, that the intended appeal to this Court has a very high likelihood of success given that the Court of Appeal misdirected and or erred in law and in fact.*

12. *That the Court of Appeal misdirected itself or erred in law and fact in so far as it:*

(i) *Predetermined the appeal before it.*

(ii) *Ordered vacant possession to be given to the respondents thus altering the status quo.*

(iii) *Validated transfer of property and protected the transferee (first respondent) thereof after the death of the alleged transferor (the late Paulo Sebalu).*

(iv) *Irreparable loss likely to be occasioned was not properly considered.*

Learned counsel referred to the ruling of the Court of Appeal (Annexure B) particularly to page 2 (3rd paragraph), page 8 (2nd and 3rd paragraphs). These paragraphs read as follows—

Page 2, 3rd paragraph reads:

“A prominent and distinguished advocate one Paulo Sebalu

(now deceased) was up to March, 2013, the registered proprietor of land situated at Muyenga known as Muyenga Club comprised in Kyadondo Block 244 Plot Nos. 1791, 1792, 5867 and 3646.

5 In his view, the appeal has least likelihood of success because the property is not part of the Estate of the late Paulo Sebalu. Secondly, the respondent was not interested in the succession or administration of the deceased's Estate.

10 **With regard to irreparable damage or rendering the appeal nugatory**, counsel submitted that the applicant had not demonstrated in her affidavit or otherwise that the property was in danger. The applicant had not shown any legal justification under which this Court could stop a registered proprietor from enjoying his property. He relied on the case of **Uganda Revenue Authority vs. Golden Leaves Hotel and Resort Ltd. and Another High Court Miscellaneous Application No. 0783 of 2007** (for persuasive purposes) where Egonda Ntende, J., (as he then was) emphasized the need to prove by affidavit or otherwise irreparable damage or likelihood to render the appeal nugatory if the injunction order is not granted.”

Learned counsel criticized the Court of Appeal for what he described as its mistaken view. He further contended that because the deceased died on 08/12/2013, the Court of Appeal should have held that the property belong to the deceased. Therefore, the Court of Appeal decision was erroneous because a dead person cannot transfer property. Property vests in legal representative. He relied on S. 25 of the Succession Act and submitted that the transfer was not in line with the law and that gifting of the deceased's property has to show consideration. He further relied on S.92

of the Registration of Titles Act and contended that because by 08/12/2013 Sebalu was dead, he could not have transferred property. So the Court of Appeal erred to hold that property was transferred.

5 Section 25 of the Succession Act reads as follows—

“All property in an intestate estate devolves upon the personal representative of the deceased upon trust for those persons entitled to the property under this Act.”

10 Section 92 of the Registration of Titles Act reads this way—

(1) *The proprietor of land or of a lease or mortgage or of any estate, right or interest therein respectively may transfer the same by a transfer in one of the forms in the Seventh Schedule to this Act; but where the consideration for a transfer does not consist of*
15 *money, the words “the sum of” in the forms of transfer in that Schedule shall not be used to describe the consideration, but the true consideration shall be concisely stated.*

(2) *Upon the registration of the transfer, the estate and interest of the proprietor as set forth in the instrument or which he or she is*
20 *entitled or able to transfer or dispose of under any power, with all rights, powers and privileges belonging or appertaining thereof, shall pass to the transferee; and the transferee shall thereupon becoming the proprietor thereof, and while continuing as such be*
25 *subject to and liable for all the same requirements and liabilities to which he or she would have been subject and liable if he or she had been the former proprietor or the original lessee or mortgagee.*

(3) *Notwithstanding this Act, the Registrar may register any transfer*
30 *executed under Section 5 of the Possession of Land Law of the Kingdom of Buganda.’*

We may observe hear that the issue arising from these two provisions are matters to be properly decided after hearing the pending suit.

5 Learned counsel further contended that the Court of Appeal erred by holding that the applicant abused Court process by evicting the respondent as there was no eviction order. Learned counsel submitted that the applicant explained how she got the property. Counsel referred to the applicant's affidavit in rejoinder particularly to annexures R1 (Her affidavit also in rejoinder in the Court of Appeal Civil Application No. 251 of 10 2014) and R2 (A Kabalagala Police Station document containing information about what took place on 05/03/2014 at the disputed property site). Counsel contended that the applicant only took possession of property but did not evict anybody and therefore, the Court of Appeal erred in holding otherwise.

15 Mr. Nsubuga Ssempebwa, counsel for the respondents, in a way correctly, contended that the application before the Court of Appeal was similar to the present application and that the Court of Appeal was not considering merits of the appeal before it. Learned counsel further contended that the intended appeal from the ruling of the Court of Appeal has no likelihood of success. Counsel cited ***Banco Arabe Espanola vs. Bank of Uganda*** (Supreme Court Civil Appeal No. 08 of 1998), (page 28), where this Court stated the principles upon which an appellate Court should interfere with

the exercise of discretion by a lower Court. These principles are referred to and considered by Oder, JSC., (RIP), in his lead judgment and we find no need at this stage for us to either reproduce them or discuss them here on the facts of this application. Counsel submitted that, in the matter before us the principles were not satisfied. He contended that the intended appeal was unlikely to succeed.

Mr. Nsubuga Ssempebwa again contended that the single Judge in the High Court, the three Justices of the Court of Appeal and the single Judge of this Court all held that the applicant is in illegal possession of the property in dispute. He referred to the land transfer form (Annexure "E" to the respondent's affidavit in reply). Annexure "E" is dated 03rd March, 2013 and it is a land transfer form and is signed by Paulo Sebalu and witnessed. Mr. Nsubuga Ssempebwa submitted that by the time Paul Sebalu died on 08th November, 2013, he had transferred property ownership to the first respondent. Learned counsel submitted that the question of ownership of the property will be decided by the High Court after the trial of the pending suit.

Pausing here for a moment, we had heard arguments by both sides on the five points (i.e.: a, b, c, d and e in the Notice of Motion). It is our considered opinion that there is no dispute in respect of the first point, namely, whether the applicant has filed a notice of intention to appeal. A

copy of the Notice of Appeal and indeed of request for proceedings are available.

In our considered opinion the issue of ownership of the disputed property is the most important point in the dispute between the parties. In our opinion, the ownership of the property will be decided after the full trial of the suit. What needs urgent consideration is occupation. We should, therefore, consider the arguments of both sides on this aspect and after our conclusion we decide whether it is necessary or desirable to consider any or all the remaining three points set out in the Notice of Motion.

Although we are not now considering the merits of the intended appeal itself against the ruling of the Court of Appeal, we find it appropriate to refer to page 12 of the said ruling. The Court of Appeal stated—

“While we have sympathy for the applicant, if it is true that the said properties to which she would be the sole beneficiary was fraudulently transferred in the names of the first respondent, the legal reality now, is that until the High Court decides in the above suit, the property belongs to the first respondent. What the applicant is seeking to do is to get a short cut of obtaining remedies she has sought in the pending High Court suit without first proving fraud on the part of the respondents as alleged.

Like the learned Judge in the High Court rightly found, the question in issue to be decided by the High Court is not about succession or administration of the Estate of the late Paulo Sebalu, but ownership of the suit property. The interim order of the Registrar, which the judge

vacated was erroneous and nullity. The applicant used it to abuse court process.

That was the main basis upon which the Court of Appeal declined to grant the applicant her application for stay of execution. Essentially that was the same position upon which a single Judge of this Court dismissed the application for an interim order of stay of execution.

As submitted by counsel for the respondent, the application before the Court of Appeal was of the same nature as the one now before us. There, the applicant sought an order for stay of execution of the decision of the High Court. Likewise in the present application the applicant is praying that we grant an order of stay of execution of the order of the Court of Appeal refusing to allow her to, in effect, manage the disputed property. Before the Court of Appeal made its conclusions, it stated at page 13 of its ruling that—

“According to the affidavit before us, the suit property is not ‘yet’ part of the estate of the deceased. The Judge was right to vacate the interim order of the Registrar, because a registered owner in possession cannot be thrown out of his property save by a final decree of Court.”

Upon perusal of the Notice of Motion, the affidavit in support of and against the motion, we are of the same view. In the result and on the facts set out in respective affidavits, therefore, we are unable to say that the appeal has a likelihood of success.

It is our considered opinion that on the basis of the affidavits available in this application the position remains as it was when the Court of Appeal decided the application before it on 21st July, 2014.

5 From both the legal and the practical point of view we think that on the facts available and the relevant law, the intended appeal against the ruling of the Court of Appeal by the present applicant does not appear to have likelihood of success. The best course should be for the applicant to have the pending suit heard and decided as quickly as possible.

10 We do not find it necessary to consider the remaining three other points as we are satisfied that the conclusion we have just reached disposes of this application.

15 In the result we dismiss the application.

We Order that the Costs should abide the determination of the intended appeal

Delivered at Kampala, this day of August, 2014.

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**B.M. Katureebe,
Justice of the Supreme Court.**

**J. Tumwesigye,
Justice of the Supreme Court.**

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**Dr. E. Kisaakye,
Justice of the Supreme Court.**

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

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**C.N.B. Kitumba,
Ag. Justice of the Supreme Court.
THE REPUBLIC OF UGANDA**

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE; TUMWESIGYE;KISAAKYE;JJ.S.C;
TSEKOOKO;KTTUMBA; AG. .JJ.S.C]

CIVIL APPLICATION NO. 15 OF 2014

BETWEEN

THEMI NAKIBUUKA SEBALU..... APPLICANT

AND

1. PETER SEMATLMBA

2. MUYENGA RESORT HOTEL LTD.

3. THE COMMISSIONER, LAND

5 REGISTRATIONS RESPONDENTS

[Application arising out of the Ruling of the Court of Appeal at Kampala (Nshimye, Opio & Tibatemwa, J.A) dated 21st July, 2014 in Civil Application No. 251/2014]

RULING OF DR. KISAAKYE. JSC. (DISSENTING).

10 The applicant, (Themis Nakibuuka Sebalu), is the only known child of the late Paulo Sebalu, (hereinafter referred to as the deceased). The deceased died intestate on 8th November 2014, and did not leave behind a known surviving widow. The deceased was the majority shareholder in Muyenga Club, which
15 operates its business on Kyadondo Block 244 Plots 1791 1792, 3646 and 5867. All the four Plots were registered in the names of the deceased at the time of his death.

20 Peter Sematimba (hereinafter referred to as the first respondent), is a nephew to the deceased; He is also the Managing Director of the second respondent, (Muyenga Resort Hotel Ltd). On
25 11th December 2013, just over one month after the death of the applicant's father, the first respondent became the registered proprietor of the above mentioned Plots on which Muyenga Club operated

its business. The second respondent also took over the business of Muyenga Club and managed the same until March 2014.

5 In March 2014, the applicant and four other persons were appointed administrators ***pendente lite***, to the estate of the deceased under an interim Court Order that was issued by the Deputy Registrar of the High Court Family Division. The same Order
10 also directed the respondents to stop intermeddling in the affairs of Muyenga Club. Consequent upon the service of this Order, the respondents ceased to be in both possession and management of the Club and the four Plots of land already referred to.

15 Muyenga Club resumed its operations under the management of the applicant and her co-administrators ***pendente lite*** and remains in their management at the time of writing this Ruling.

20 The applicant filed this Application seeking for a Stay of Execution of the Orders of the Court of Appeal that dismissed her appeal against the order of Tuhaise J. (the trial Judge) which vacated the interim order of the Deputy Registrar and ordered her and her co-administrators to vacate the
25 management of Muyenga Club.

The application was brought under Rules 6(2) (b) and 2(2) of the ***Judicature (Supreme Court) Rules***. Rule 6(2)(b) provides in the relevant part, as follows:

“Subject to sub-rule (1) of this rule,... the Court may:

a) ...

5 b) In any civil proceedings where a notice of appeal has been lodged in accordance with rule 72 of these rules, order a stay of execution **...as** the Court considers just.”

10 I will highlight and discuss the relevancy of Rules 2(2) later in this Ruling. The applicant is seeking from this Court the following Orders:

15 “(i) An Order of Stay of Execution doth issue against the Respondents, its agents or servants, staying execution of the Ruling and/or Orders of the Court of Appeal in Civil Application No 251 of 2014 made on the 21st day of July, 2014, pending the hearing and final determination of the intended Appeal.

(ii) Costs of this Application to be provided for. ”

20 I have had the benefit of reading in draft the majority Ruling of the Court dismissing this Application. With the greatest respect to my colleagues, I am unable to agree with their decision. I would instead, in the interests of justice, allow this application. The reasons for my holding are given in this Ruling.

25 Before I give the background to this application, it is necessary to point out that this application raises the following issues which I will consider and dispose of in my Ruling.

1. *Whether the applicant has satisfied the requirements for a grant of Stay of Execution by this Court.*

2. *Whether it is just for this Court to grant the applicant a Stay of Execution.*

3. *Whether the applicant engaged in an illegality which would stop Court from granting a Stay of Execution.*

4. *Whether it was proper to appoint Administrators pendente lite in an application brought under H.C.C.S. No. 29 of 2014.*

Background to the Application

Paulo Sebalu (the deceased), was a prominent lawyer in Uganda. By the time he died on November 8th 2014, he was, among others, the registered proprietor of four Plots of land comprised in Kyadondo Block 244 Plots 1791, 1792, 3646 and 5867, (hereinafter referred to as the Plots of land), all situate at Muyenga, Kampala. The late Sebalu was also, according to the Application for Letters of Administration which is on the record of appeal, the majority shareholder in Muyenga Club, with 99% shareholding. Muyenga Club operated its business on the above mentioned Plots.

However, on 11th December 2013, almost one month after Sebalu's death, the first respondent became the registered proprietor of the Plots of land already referred to. He also took over possession of

not only the said Plots but also the business of
Muyenga Club. Thereafter,

5 Muyenga Resort Hotel Ltd. (the second
respondent), where the first respondent is the
Managing Director, started operating the business
of Muyenga Club at the same business premises.

10 The applicant contends that all the four Plots of land
mentioned above, as well as the business of Muyenga
Club are part of her late father's estate. The first
respondent, on the other hand, contends that the
deceased gave him the Plots of land and signed
transfers in his favour to that effect in March 2013.

15 Early this year, the applicant instituted High Court
Civil Suit No. 29 of 2014 in the Family Division against
the first respondent, the second respondent and the
Commissioner, Land

Registration, (hereinafter referred to as the third
respondent), seeking for the following reliefs:

- 20 (i) An order of cancellation of the first respondent's
names from the register of titles with respect to
the said four plots of land;
- (ii) vacation by the second respondent from the
premises and management of Muyenga Club located
on the suit property;
- 25 (iii) an order requiring the respondents to file an
inventory and account of the estate of the late
Sebalu;
- (iv) a declaration that the suit premises belong to the
estate of the late Sebalu;
- 30 (v) a permanent injunction restraining the first

respondent from intermeddling with the late Sebalu's estate;

- (vi) general damages for the first and second respondents' intermeddling with the late Sebalu's estate; and
- (vii) costs of the suit.

The above prayers were outlined in the Ruling of Tuhaise, J. dated 30th June 2014.

The applicant also brought Miscellaneous Application No. 52 of 2014 under High Court Civil Suit No. 29 of 2014, seeking for a temporary mandatory injunction directing the 1st and 2nd respondents to vacate the business premises of Muyenga Club situate on said Plots; to give an inventory and full account of the assets and liabilities of the said Muyenga Club; and to restrain the respondents, their servants or any person acting on their authority from interfering, intermeddling or managing the business of the said Muyenga Club operated under Muyenga Club Ltd. The applicant also sought for an order appointing five administrators ***pendente lite*** to preserve the estate of the late Paulo Sebalu and manage it in the meantime; further Orders deemed fit by Court and costs of the application.

On 4th March 2014, the applicant also filed Miscellaneous Application No. 53 of 2014, where she sought an interim Order from the Deputy Registrar of the Family Division. The Deputy Registrar heard the application ex parte and allowed it. She ordered the respondents to stop the intermeddling into the

business of Muyenga Club Ltd; to file an Inventory and an account of the assets of Muyenga Club and also appointed the applicant and the four other persons as Administrators pendente lite.

5 On 5th March 2014, the interim order was served by Mr. Kirunda Moses of Spear Link Auctioneers and Court Bailiffs on the first and second respondents' general manager, one John Muwonge, who received it on behalf of the first and second respondents, in
10 the presence of the area Local Council Chairman and Police Officers. According to the Assets/Inventory Record, which was attached to the applicant's Affidavit in Rejoinder, 27 members of staff of the respondents who were found on the
15 premises were also served with the interim order and accepted to leave the Muyenga Club business and premises voluntarily. The applicant and her co-administrators ***pendente lite*** thereafter took possession of the business of Muyenga Club and by
20 necessary implication, possession of the four Plots of land where the Club was operating from. According to the applicant's pleadings, some staff of Muyenga Club stayed behind. They were still working at Muyenga Club Ltd by the time this
25 application was heard.

On 30th June 2014, Tuhaise J. disposed of High Court Misc. Application No. 52 of 2014. She vacated the orders of the Deputy Registrar and dismissed the applicant's application for an injunction

with costs to the respondents. The Judge based her Ruling on several grounds which included the fact that the administrators *pendente lite* had been wrongly appointed since the Civil Suit under which they were appointed was not contesting a grant of letters of administration; that administrators *pendente lite* are supposed to be appointed on a temporary basis but that in this case, it was not clear when their appointment would expire; that the applicant had unlawfully executed the interim order stopping the respondents from intermeddling when she evicted the respondents from the four plots of land and from the business premises of Muyenga Club when the order did not direct eviction. The Judge accordingly held that since the applicant had engaged in an illegality, she was coming to court with unclean hands and did not therefore deserve the equitable orders of injunction which she was seeking from court.

Dissatisfied with the orders of Tuhaise J., the applicant filed a Notice of Appeal in the Court of Appeal. She also instituted Civil Application No 251 of 2014, seeking for a stay of the Judge's Orders until her appeal in the Court of Appeal was heard and disposed of. The Court dismissed her application on 21st July, 2014, on grounds, among others, that the four Plots and the business of Muyenga Resort Hotel were not yet part of the estate of the late Sebalu, having been owned by the first respondent since March 2013 when the Plots were transferred to him by the late Sebalu. The court further held that the interim Order which had been made by the Deputy Registrar was erroneous and a nullity because "*a registered owner in possession cannot be thrown out of his*

property save by a final decree of Court. ” Lastly, the Court held that the balance of convenience favoured the first respondent since the disputed property could easily revert back to the late Sebalu’s estate and the first respondent could be ordered to account for the benefits and to pay damages if he lost H.C.C.S. No. 29 of 2014. Yet, the reverse was not true for the applicant, who would refuse to settle the respondents’ damages if she lost the case on grounds and argue that she had been put in possession by an order of the Court. The Court of Appeal reached its decision on the first respondent’s having managed Muyenga Club (now Muyenga Resort Hotel Ltd) as his business since March 2013, in the absence of any affidavit evidence showing how and when Muyenga Club Ltd had been transformed into Muyenga Resort Hotel Ltd. The Court directed the applicant to vacate the four Plots of land forthwith and not to take with her any property from the premises. The effect of this Order was that the applicant would also stop managing the business of Muyenga Club and that the Club would close because no consequential orders was made in respect of the Club’s property or its continued operation.

Aggrieved with the decision of the Court of Appeal, the applicant instituted this Application, based on Rules 6(2) and 2(2) of the Judicature (Supreme Court) Rules. The application is also based on the grounds which are set out in the Notice of Motion, namely that the applicant has already filed a Notice of Appeal in this Court; that her intended Appeal has a very high likelihood of success; that she will suffer

5 substantial and irreparable loss if this Application is not granted and that it is in the interest of Justice that the execution of the Ruling and Orders of the Court of Appeal be stayed pending the hearing and determination of the Appeal.

10 The application is also supported by an Affidavit the applicant dated on the 22th day of July, 2014 as well as her Affidavit in Rejoinder dated the 29th day of July, 2014.

15 The first and second respondents opposed the Application. The first respondent swore an Affidavit in Reply on his own behalf and also on behalf of the second respondent, where he is the Managing Director.'

20 The applicant was represented by Mr. Fred Muwema and Mr. Mulema Mukasa, while Mr. Nsubuga Sempebwa and Mr. Muganwa Semakula represented the first and second respondents. The third respondent was not represented and did not participate in the proceedings before the High Court and the Court of Appeal. Counsel for the applicant informed Court that the third respondent had also been duly served with Court process for the present application.

25 Counsel for both sides made oral submissions for and against the application. I will deal with these submissions in the course of considering and

resolving the issues in contention in the discussion that follows.

Whether the applicant has satisfied the requirements for a grant of Stay of Execution by this Court?

This Court has on several occasions pronounced itself on the factors that it takes into account in deciding whether or not to grant an order for stay of execution under Rule 6(2) (b) of the Judicature (Supreme Court) Rules. See for example ***Akankwasa Damian v. Uganda, Supreme Court Const. Appl. Nos. 7 and 9 of 2011*** and ***Muhammed Kisuule v. Greenland Bank (In Liquidation, Supreme Court Civil Application No. 07 of 2010)***, among others.

These factors include proof that the applicant has lodged a Notice of Appeal; that the applicant's intended appeal has a high likelihood of success; and that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay of execution is not granted. Where the above factors are not sufficient for the Court to dispose of the application, the Court will also consider where the balance of convenience lies.

The question that arises in the present application is whether the applicant has satisfied these factors to warrant a grant of stay of execution by this Court. I answer this question in the affirmative.

First, the applicant lodged a Notice of Appeal and also requested for a Record of Proceedings on 22nd July 2014. Both documents were attached to her

Notice of Motion and Supporting Affidavit marked “A1” and “A2” respectively. This was not contested by the respondents.

Likelihood of success of the intended appeal
5 Counsel for the applicant contended that there were a high of likelihood of success of the applicant’s intended appeal because the Court of Appeal had misdirected itself in law in the several holdings it made. These included the holding that the first
10 respondent became, the owner of the property in March 2013 and hence that the four plots and Muyenga Club were not part of the Estate of the late Sebalu. Counsel relied on section 25 of the **Succession Act, Chapter 162, Laws of Uganda** and
15 section 92 of the **Registration of Titles Act, Chapter 230 Laws of Uganda**, respectively to support his submissions. Counsel also submitted that the Court of Appeal also misdirected itself in holding that the applicant had engaged in illegal conduct of evicting
20 the respondents when the interim Order issued by the Deputy Registrar of the Family Division, did not order the respondents to vacate. Counsel for the respondents, on the other hand, argued that the applicant’s intended appeal had no
25 chances of success because it was challenging the denial of the grant of a temporary injunction, which order could be denied or granted at the discretion of the trial Court.

Counsel for the respondents further argued that the applicant was required to plead the facts which would warrant an appellate Court to interfere with the exercise of discretion of a lower Court. They relied on Banco Arabe Espanol v. Bank of Uganda SCCA No.8 of 1998 to support their submissions. Counsel submitted that since the applicant had failed to plead these facts, her intended appeal had no chances of success.

It should be noted that the applicant is not required at this stage to establish that there is a prima facie case in order to demonstrate that her appeal has high chances of success. All she has to show, through her submissions, is that the intended appeal is not vexatious or frivolous and that there are serious issues of law which the Court will have to hear and decide, after it has examined the evidence brought before it. See American Cyanamid Co v Ethicon Ltd [1975] 1 ALL ER 504.

Having reviewed the Ruling of the Court of Appeal in this matter and considered the submissions of both parties, I am satisfied that there are serious questions of law that the applicant's intended appeal will raise before this Court. These include the holding by the Court of Appeal that the plots of land in dispute were not part of the estate of the late Sebalu when the said plots were registered in the names of the late Sebalu at the time of his death. This holding, in my view, ran contrary to the clear provisions of, among others,

section 25 of the Succession Act which governs the devolution of the property of a person who dies intestate. This section provides in the relevant part as follows:

5 “All property in an intestate estate devolves upon the personal representative of the deceased upon trust for those persons entitled to the property under the Act. ”

10 The other part of the Ruling which, in my view, raises questions of law that would be considered is the Court of Appeal’s transfer of the onerous burden to beneficiaries/family members of deceased persons who may either be seeking to protect the estate of a deceased

15 person from intermeddling or wastage and to also protect their inheritance. The effect of the holding is to require such beneficiaries to first prove fraud on the part of persons who become registered proprietors of land registered in the names of a deceased person and prior to a grant of Probate to an Executor or Letters of Administration to that estate. This runs contrary to the provisions of, among others, section 191 of the Succession Act which provides as follows:

25 “Except as hereafter provided, but subject to section 4 of the Administrator General’s Act, no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of

30 competent jurisdiction”.

5 The other area where there is a high likelihood of success is in respect of the Court of Appeal's holding that the first respondent became owner of the four plots of land in March 2013 whereas he became the registered proprietor on 11th December 2014. This holding contradicts the clear provisions of sections 54, 46, 92, and 95 of the Registration of Titles Act which provide for, among others, when interest in registered land passes from the registered proprietor to a transferee. I will only cite two of these provisions as examples.

Section 54 provides in the relevant part as follows:

15 "No instrument until registered in the manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this **Act...**"

On the other hand, section 46 of the same Act also provides for the effective date of registration as follows:

20 (1) Subject to section 138(2), every certificate of title shall be deemed and taken to be registered under this Act when the registrar has marked on it—
(a) the volume and folium of the Register Book in which it is entered; or
25 (b) the block and plot number of the land in respect of which that certificate of title is to be registered.

(2) Every instrument purporting to affect land or any interest in land, the title to which has been registered under this Act, shall be deemed to be registered when a memorial of the instrument as described in section 51 has been entered in the Register Book upon the folium constituted by the certificate of title. ”

The other holdings which, in my view, also raise questions of law that the intended appeal would consider include:

- (a) the holding that the first respondent became owner of the four plots of land in March 2013 whereas the Affidavit evidence and the copies of the Certificate of Title on the record of appeal clearly show that he became the registered proprietor of the Plots on 11th December 2014;
- (b) the holding that the order of intermeddling did not require the respondents to cease operating and to vacate the business of Muyenga Club and the property where Muyenga Club was operating;
- (c) the holding that the first respondent was the owner of Muyenga Club, a limited liability company, without any evidence on record to show any transmission of the shares in the Club held by the late Sebalu to either the first or the second respondent or both;
- (d) the holding that the protection accorded to

5 registered proprietors under the Registration of
Titles Act applied to protect the respondent as a
registered proprietor and not the estate of the
deceased who by the time of his death was a
registered proprietor of the four plots in question,
thereby denying the estate and the beneficiaries
of the said estate, the protection of the law; and
lastly the holding that

10 (e) the rights of the first respondent claiming to have
been given a gift of four plots by the deceased
took precedence over the interests of the
applicant as a lineal descendant of the deceased.

15 I am therefore satisfied, based on the issues of law
raised in the several holdings of the Court of Appeal
highlighted, that the applicant has proved that her
intended appeal has a likelihood of success. In so
holding, I am also aware that section 59 of the
Registration of Titles Act Cap 230, Laws of Uganda
requires Courts to treat as conclusive evidence the
20 fact that the person named in a Certificate of Title is
the proprietor of the land in question. The section
provides in the relevant part as follows:

25 “every certificate of title issued under this Act shall
be received in all courts as evidence of the particulars set
forth in the certificate and of the entry of the certificate in the
Register Book, and shall be conclusive evidence that the
person named in the certificate as the proprietor of or ha ving
any estate or interest in or power to appoint or dispose of the

land described in the certificate is seized or possessed of that estate or

interest or has that power. ”

5 The evidence on the record of appeal clearly shows that the deceased was the registered proprietor of the four plots at the time of his death, and that no letters of administration had been issued in respect of his estate by the time the main High Court Civil Suit and the

10 Miscellaneous Applications were filed. In my view, this section should apply to protect the deceased’s estate, because the copies of the Certificates of Title which are on record are conclusive evidence that the deceased was the registered proprietor of the Plots of
15 land where Muyenga Club is operating. I do not find anything in this section which requires this Court to hold that the conclusive evidence provided by the said Certificate applies to uphold the rights of the first respondent as the registered proprietor over the
20 rights of the deceased’s estate when the deceased was still a registered proprietor of the same land, by the time he died.

Proof of irreparable damage

25 The other requirement an applicant is required to show is that she or she will suffer irreparable damage or that the intended appeal will be rendered nugatory if the stay of execution is not granted.

Counsel for the applicant contended that the Court of Appeal was wrong to hold that the applicant would not suffer irreparable damage. Counsel relied on the applicant's Affidavit in Support and submitted the first respondent's actions of selling off of the Bakery, which was part of the equipment belonging to Muyenga Club was evidence that the property of the Club would be wasted if the injunction was not granted.

Counsel for the applicant further submitted that the law accords special protection to estates of deceased persons. He reiterated the applicant's prayer for a stay of execution of the Orders of the Court of Appeal to be granted in favour of the applicant, as the only lineal descendant of the late Sebalu, who was the registered proprietor of the four plots of land and of Muyenga Club, at the time of his death.

Counsel for the respondents, on the other hand, disputed the applicant's submissions. They contended that while the applicant had pleaded that she would suffer irreparable damage, she had not shown in her pleadings or submissions how her damage would be irreparable.

In resolving the question whether the applicant satisfied Court through her pleadings that there would be irreparable damage if the Stay of Execution is not granted, there is need to put the concept of

irreparable damage in its proper context when dealing with applications concerning estates of deceased persons who have died intestate. While in ordinary civil applications, the focus should have been on whether the applicant will suffer irreparable damage, it is my view that in an application of this nature, the focus should first be on whether the estate will suffer irreparable damage before considering whether the damage, if irreparable, would also extend to the applicant, as a beneficiary to the estate.

Secondly, it should be noted that death in most cases creates a vacuum in the running of the affairs of the deceased person's estate, especially where the deceased died intestate. This is especially so where the deceased was either the head of the household or the person who was most knowledgeable about the immovable and movable property constituting the estate. Greedy nuclear or extended family members and/or even non family members sometimes take advantage of this vacuum, to the detriment of the estate. Furthermore, fraudsters, land grabbers and other "vultures" may also pounce on the estate and the vulnerable family members to intermeddle or grab all or part of the estate of the deceased. It is not uncommon for bereaved family members to lose not only the property of the deceased family member during or immediately after the death and/or burial but also the personal belongings and other property of surviving family members, especially those who were living with the deceased. Inexperience with

the legal system for some family members who may be coming in contact with the legal system for the first time, coupled with the emotional adjustment to the death can also combine to create or exacerbate existing
5 vulnerability on the part of surviving family members.

Although the office of the Administrator General was set up to fill in the void created by death especially in cases of intestacy, Courts should take judicial notice of the fact that the office of the Administrator General
10 does not have adequate ground coverage to intervene on its own knowledge or through its agents, in a timely manner. Usually, it is the bereaved members of the family that will bring cases of intermeddling and/or property grabbing, to the attention of the
15 Administrator General.

Thirdly, with the customary land tenure where even land is not always registered and not easily delineated among the nuclear family members and the extended
20 family, even what constitutes the estate of a deceased person may not easily be determinable. In *Rwabinumi v. Bahimbisomwe*, Supreme Court Civil Appeal No. 10 of 2009, this Court noted the different forms of property ownership that exist in Uganda in
25 the absence of legislation defining what is joint property and what is not in a marriage context.

Furthermore, the HIV/AIDS epidemic and internal armed conflicts have also given rise to a high
30 percentage of orphaned children who in some cases end up as living in child headed families. These

orphans do not only usually lack the basic knowledge of what property their late parents heard but also knowledge of how to legally secure the estates of their late parents.

5 Sometimes the land grabbers and intermeddlers may act in groups, hence making it difficult for beneficiaries to identify them or to bring them to book, because of their close family relationship with the deceased's family. Hence the harm that may be inflicted on the estate will be irreparable. There is therefore a need for Courts to take judicial notice of these realities and ensure that estates of deceased persons are protected from harm and damage, for the benefit of the beneficiaries.

15 Turning to the property and business of Muyenga Club Ltd, the likelihood that it would suffer irreparable damage is very evident. According to the applicant's affidavits on record, the late Sebalu owned 99% shareholding in the Muyenga Club. The Club was occupying the premises, situate on the disputed suit property. The first respondent did not depone at all as to how and when Muyenga Club ceased to occupy the suit premises and what the fate of its assets were. The locus of the second respondent is also not known, since the Affidavit in reply was silent on how and when Muyenga Resort Ltd took over the business and property of Muyenga Club. In the absence of such evidence, the first respondent's takeover of the property and management of Muyenga Club would be illegal, not

only during the lifetime of the late Sebalu but also after his death. The first respondent did not also dispute the fact that he had already disposed of some property belonging to Muyenga Club.

5
The loss occasioned by the first and second respondents to the estate of the late Sebalu would be difficult to quantify if the court found them guilty of intermeddling into the affairs of Muyenga Club. In the event that the applicant and the estate of the late Sebalu are successful in their suit challenging the respondent's actions, it will not be easy to compensate the estate with an award of damages, since it will be difficult to establish how much income the respondents would have earned from the Muyenga Club business and how much the respondents would have benefitted and earned from the goodwill of Muyenga Club. This is especially so, in light of the applicant's contentions that the first respondent was banking the proceeds from the operations of the second respondent on his personal bank account.

25
Furthermore, if the property of Muyenga Club and the land were to revert back to the first and second respondent unconditionally as was ordered by the High Court and the Court of Appeal and as the majority decision in this Court has ordered, the first and second respondents will deal with the business of Muyenga Club as owners without any duty to account to the estate of the late Sebalu. This will definitely prejudice not only the

interests of the estate of the late Sebalu but also of the applicant. In the worst case scenario, the respondents may even dispose of part or all of the property of Muyenga Club, as was allegedly done with the Bakery and even the Plots of land if no caveats have been lodged or those that were lodged are removed. While it is true as was argued by the Court of Appeal that the applicant can protect her interest by lodging caveats on the contested Plots, the holding that the respondents will compensate “the estate” if the High Court rules in favour of the applicant is flawed.

In light of the above, I therefore find that the applicant has proved that Muyenga Club, which forms part of the estate of her late father, would suffer irreparable damage through the wanton disposal and possible misappropriation of its property and/or diverted income that would have been earned from the business if the first and second respondent are left to continue managing the business of Muyenga Club until the High Court Civil Suit is finally disposed off.

Although I do not believe that it was necessary for the applicant to prove how she would suffer in her individual capacity, it is obvious from the foregoing discussion that she too, as the main beneficiary of her late father’s shareholding in Muyenga Club, would suffer irreparable damage arising from loss of her inheritance from the business and income that would be generated by the Club.

Balance of Convenience

5 Since the factors already discussed are sufficient for the court to dispose of the application, I will not consider in detail the issue where the balance of convenience lies. Suffice it to say that if I had to consider this factor, it would still favour granting of a stay of execution to the applicant for the following reasons.

10 In determining the balance of convenience, the court will weigh the likely inconvenience or damage which would be suffered by the applicant if the injunction is not granted against the likely inconvenience or cost for the respondent if it is. See Robert Kavuma v. Hotel International [Supreme Court Civil Appeal No.8 of 1990] and American Cyanamid Co v Ethicon Ltd [1975] 1 ALL ER 504.

20 The respondents argued that if the applicant claimed any interest in the suit property, she should have availed herself of the provisions of section 139 (1) of the Registration of Titles Act rather than illegally evicting the first respondent from the suit property.

Section 139(1) provides as follows:

25 “Any beneficiary or other person claiming any estate or interest in land under the operation of this Act... or by devolution in law or otherwise may lodge a caveat with the registrar... forbidding the registration of any person as transferee or proprietor of and of any instrument affecting that estate or interest until after notice of the intended registration

or dealing is given to the caveator or unless the instrument is expressed to

be subject to the claim of the caveator as is required in the caveat, or unless the caveator consents in writing to the registration. ”

I agree with the respondent and the Court of Appeal that the applicant should have taken advantage of this section to lodge a caveat. I also note that such a caveat could have only operated to prevent the transfer of the four Plots of land and not the property of Muyenga Club Limited which was situate on the same. The applicant cannot use a caveat to prevent the mismanagement and the wanton sale of Muyenga Club's assets which the first respondent is alleged to have embarked on.

I therefore find that the balance of convenience favours a grant of stay of execution to the applicant, to enable the estate and her share to be preserved accordingly. I also find that the balance of convenience is tilted in favour of the applicant staying in possession of the disputed property until the main suit is heard so that the fate of the disputed plots and Muyenga Club can be determined. The interests of the first respondent will not in this interim period be adversely affected since he is already registered as proprietor.

Whether the applicant engaged in an illegality which would warrant the court to deny her prayer for a stay of execution?

This is another issue that this application raises. Both the High Court and the Court of Appeal declined to grant the applicant relief on grounds that the applicant had abused court process and wrongly evicted the respondents from possession of the plots and the running of the business of Muyenga Club, when the first respondent was the registered proprietor of the said Plots of land.

Responding to this holding, counsel for the applicant submitted before us that the interim order directed the respondents to stop intermeddling with the property of Muyenga Club, which was part of the estate of the late Sebalu. Counsel further submitted that by virtue of this order, the applicant was required to serve the Order on the respondents for them to stop the intermeddling.

Counsel for the respondent, on the other hand, submitted that the respondents were illegally evicted since the first respondent was the registered proprietor. Counsel submitted that the respondents' eviction which was based on the interim order meant that the applicant had come to Court with unclean hands. Relying on ***Hon. Anifa Kawooya v. Attorney General & Anor, Constitutional Court Misc. Application No. 46 of 2010***, counsel requested the Court to deny the applicant's prayer for a stay of execution.

Following the death of a person, especially the head of the household, it is not unusual for unscrupulous people to take advantage of the

vacuum created by the death. This usually exposes the deceased's estate to intermeddling and wastage. The Succession Act of Uganda, cognizant of this fact, entrenched provisions prohibiting intermeddling into the estate of a deceased person, except for purposes named in the section. This is provided for under section 268 of the Succession Act as follows:

"A person who intermeddles with the estate of the deceased or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself or herself an executor of his or her own wrong; except that—

(a) intermeddling with the goods of the deceased for the purpose of preserving them, or providing for his or her funeral, or for the immediate necessities of his or her own family or property; or

(b) dealing in the ordinary course of business with goods of the deceased received from another, does not make an executor of his or her own wrong."

Furthermore, the **Administrator General's Act (Cap 157 Laws of Uganda, 2000Ed.)**, makes it an offence for any person to intermeddle with the property of the deceased. This is provided for in section 11 (1) of the Act as follows:

“When a person dies, whether within or without Uganda, leaving property within Uganda, any person who, without being duly authorized by law or without the authority of the Administrator General or an agent, takes possession of, causes to be moved or otherwise intermeddles with any such property, except insofar as may be urgently necessary for the preservation of the property, or unlawfully refuses or neglects to deliver any such property to the Administrator General or his or her agent when called upon so to do, commits an offence; and any person taking any action in

regard to any such property for the preservation of the property shall forthwith report particulars of the property and of the steps taken to the agent, and if that person fails so to report he or she commits an offence. ”

As is the case with section 268 of the Succession Act, section also leaves a window for persons who intermeddle with the property of a deceased for purposes of preserving the property. Such persons are, however, under a duty to forthwith report the particulars of the property and any steps taken, to the agent of the Administrator General. Failure to report is an offence,

Black’s Law Dictionary 5th Edition at Page 418 defines “intermeddle” as “to interfere wrongly with property or the conduct of business affairs officiously or without right or title. ”

Before discussing the merits of the parties' submissions, it is important to highlight the background to the applicant's takeover of the possession of the plots of land and the

5 management of Muyenga Club Ltd. As I noted earlier, the applicant sought for an interim injunction directing the respondents to stop intermeddling with Muyenga Club, after filing a Civil Suit in the High Court against the respondents. She then applied to Court for an interim
10 order of injunction, which was granted by the Deputy Registrar of the Family Division as follows:

*" 1. An Interim Injunction doth hereby issue directing the 1st and 2nd Respondents, their agents, servants or any other person acting on their authority
15 from interfering, intermeddling with or managing the business of Muyenga Club situated at Kyadondo Block 244 plot Nos. 1791, 1792, 5867 and 364C all at
Muyenga that comprises part of the Estate of the Late Paulo Sebalu.*

20 *2. A further Interim Mandatory Injunction doth issue directing the 1st and 2nd Respondent to file in this Court an inventory and full account of the assets and liabilities of the said
Muyenga Club as at the time of service of this
25 order.*

*3. The following persons are forthwith hereby appointed Administrators pendente
lite of the Estate of the late Paulo Sebalu to preserve and manage it in the interim;*

- 5
- i) Former Deputy Chief Justice, Alice Mpagi Bahigeine,*
 - ii) Prof. Gordon Wavamuno,*
 - Hi) Dr. Stephen Kijjambu,*
 - iv) Mr. Njuki Samuel*
 - v) The Applicant, Themis Nakibuuka Sebalu.*

10

4. The five persons named in (3) above will be subject to the immediate control and supervision of this Honourable Court for purposes of this order.

15

5. This interim order subsists till 7th April 2014 when the main application Misc. App. No. 52 of 2014 has been fixed for hearing before a Judge of this Honourable Court, or till further orders of this Honourable Court.

6. Costs of this Application shall abide the outcome of the main Application."

20

Armed with this Order, the applicant together with the other administrators pendente lite took possession of Muyenga Club which was also operating on the disputed Plots of land. Indeed, as the applicant stated in her Affidavit, the administrators pendente lite discovered that the respondents had already disposed of some property belonging to Muyenga Club, namely the bakery. It is this taking over of possession of the disputed Plots and the management of

25

Muyenga Club that both the trial Judge and the Court of Appeal found to have been an unlawful eviction, hence making the applicant to have unclean hands and undeserving of a grant of execution.

There is nothing on the record of appeal to show that the applicant and her co-administrators pendente lite dispossessed the first respondent of any part of the disputed land which had not hitherto been occupied by Muyenga Club before the death of the late Sebalu. Neither is there anything on record to show when either the first or the second respondents took over the management of Muyenga Club or what kind of interest, if any, the respondents individually or jointly held in Muyenga Club. In the absence of such vital evidence on record, I find that the Deputy Registrar was justified to issue an interim order directing the respondents and their agents/servants to stop intermeddling with the property of Muyenga Club.

By its very nature, an Order stopping intermeddling requires the intermeddler to cease the actions named in the Order immediately. In the instant case, the very effect and result of issuing of this Order was to require the respondents to stop managing the affairs of Muyenga Club. How else were the respondents supposed to stop the intermeddling into the estate of the late Sebalu, if they were supposed to remain in the management of Muyenga Club, which was being operated as Muyenga Resort Hotel Ltd?

5 It therefore follows that after the order had been served, the second respondent could not continue operating Muyenga Club or remain in possession of the same premises and property that Muyenga Club was occupying. Though the land on which Muyenga Club was operating at the time of the deceased's death had been transferred into his names, even the first respondent could not have remained in possession of the disputed Plots after being served with an order to stop intermeddling. This is because 10 Muyenga Club was also operating on the same premises.

15 Similarly, it is inconceivable that after requiring the respondents to stop intermeddling and taking inventory of the Club's property, a proper interpretation of the interim order required that the respondents who in the first place had been asked to stop intermeddling should continue with the intermeddling by remaining in possession and management of Muyenga Club! Such an interpretation 20 would have led to bizarre results.

25 If, on the other hand, the administrators pendente lite had not taken possession of Muyenga Club and continued to manage it in the interim as a way of preserving it, the estate, especially the property of Muyenga Club and the buildings situate on the disputed plots of land, would most likely have become wasted and vandalized.

30 It is illogical to me that both the Court of Appeal and the High Court could have found that the

dispossession of the first and second respondent from the suit property and Muyenga Club were illegal given the order against them to stop intermeddling. How were the applicant and her fellow administrators pendente lite supposed to enforce the order if the applicant and her co-administrators were not expected to take possession of the property of Muyenga Club? Since the takeover of the applicant and her co-administrators pendent lite was in accordance with a Court Order, it could not at the same time be illegal or unlawful.

There is nothing on the record of appeal to show that the first respondent dealt with the property of Muyenga Club for the purpose of preserving it, or for providing for the funeral of the deceased, or for providing immediate necessities to the deceased's family. On the contrary, the available evidence on the record of appeal shows that the first respondent dealt with the estate of the late Sebalu to his own advantage when he transferred into his names the Plots of land and started managing the Muyenga Club business. The first respondent took all these actions before letters of administration had been granted to him or to any other duly appointed administrators of the estate of the deceased who could have authorized him to act as he did. The respondent's actions would therefore seem to fall under acts which are prohibited by section 268 of the Succession Act and section 11(1) of the Administrator General's Act.

In view of the above analysis, I therefore find, contrary to the holding of the Court of Appeal and the High Court, that the applicant and her co-administrators pendente lite did not abuse court process or the interim order. On the contrary, I find that the manner in which the

applicant and her co-administrators pendente lite took over possession of the suit property and the management of Muyenga Club from the respondents was legal and in accordance with a Court order that had directed the respondents to stop intermeddling with the property of Muyenga Club.

Whether it was proper to appoint Administrators pendente lite in an application brought under H.C.C.S. No. 29 of 2014?

Before I take leave of this application, it is important to comment on when a Court can appoint administrators pendente lite under the law. Both the trial Judge and the Court of Appeal made an additional finding that the appointment of the applicant and her co-administrators pendente lite had not been in accordance with the law.

Section 218 of the Succession Act provides for the appointment of administrator pendente lite as follows:

“The court may, pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, appoint an administrator of the estate of the deceased person, who shall have all the rights and powers of

a general administrator, other than the right of distributing the estate, and every such administrator shall be subject to the immediate control of the court, and shall act under its direction. ”

5 *Black’s Law Dictionary, 5th Edition, at page 23 defines an administrator pendente lite as a “temporary administrator appointed before an adjudication of intestacy has been made for purpose of preserving assets of the estate. ”*

10 One of the situations that section 218 of the Succession Act was intended to cover, in my view, was the period between the death of a person and the grant of either probate or letters of administration in case of a person who died intestate. The wording of this section is wide enough to cover both situations where there is a suit
15 pending before court before an application for probate or letters of administration has been filed in court, as well as those situations where the application for appointment of administrators pendente lite is made when a
20 Petition for either probate or letters of administration is pending before the Court.

A narrow interpretation of section 218 to only cover the latter situation, would, in my view,
25 result in ousting the jurisdiction of the Court to appoint administrators pendente lite to preserve and protect estates of deceased persons in times when such estates are most vulnerable to intermeddling, vandalizing, and/or wastage in any one or more of the following situations: the period immediately after

5 death of a person before the Will is found; before the Will is read to family members; before the Administrator General is notified and requested to intervene; before letters of administration are sought and lastly, where the application for letters of administration has been made but no grant has been made by the court.

10 Turning to this application under consideration, the applicant attached to her Notice of Motion and Affidavit in Support a copy of the Petition filed in Administrative Cause No 320 of 15 2014. The Petition was lodged in the High Court Family Division on April 25, 2014. This
15 Petition for letters of administration was pending by the time Civil Application No. 52 of 2014 was disposed of by Tuhaise J. Since it is not true that administrators pendente lite can only be appointed in a suit touching the validity of the will of a
20 deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the pending Administration Cause No. 320 of 2014 should, in my view, have satisfied the requirements of section 218 of the Succession Act.

25 But even if there was no Administration Cause or suit pending for the grant of letters of administration as discussed above, I do not read anything in Section 218 of the Succession Act 25 to stop a Court from appointing administrators pendente lite in a suit where an application to that effect has been made and where the Court finds it

necessary to protect the estate of a deceased person before a grant of probate is made or letters of administration are issued.

Whether it is just for this Court to grant a Stay of Execution ?
Having considered the submissions of the parties, the issues raised in this application, and the relevant provisions of the law, the last issue for me to consider and dispose of is whether it would be just for this court to grant the applicant's prayer for a stay of execution.

Rule 6 (2) (b) of the Judicature (Supreme Court) Rules gives this Court power to stay execution as the Court may consider just. By using the terms "may... order a stay of execution ... as the Court may consider just", the Rule reserves the power of this Court, having considered the evidence on record of appeal before it and the law, to exercise its discretion in deciding whether or not to grant an order of stay of execution.

Furthermore, Rule 2 (2) of the Judicature (Supreme Court) Rules also vests inherent powers in this Court to make such orders as are necessary to meet the ends of justice. It provides in the relevant part as follows:

"Nothing in these rules shall be taken to limit or otherwise **affect** the inherent power of the court ...to make such orders as maybe necessary for achieving the ends of justice".

5 One of the cardinal considerations a Court should take into account whether to grant a stay of execution or not, is the need to preserve the status quo pending the outcome of the main appeal. In my view, the status quo that should be preserved in applications involving ownership of property which was registered in the names of a deceased person and where neither probate nor letters of administration have not been granted should be date when the deceased died. In 10 the case of the estate of the late Sebalu, this was on 8th November 2013. The status quo to preserve cannot be, as was argued in this application, the status quo that subsisted when the main Civil Suit under which this application was filed in the High Court,

15 when the first respondent had already got himself registered as proprietor of the Flots of land where Muyenga Club was operating. It cannot also be, in my view when the first and second respondent took over Muyenga Club since this evidence is not on record.

20 According to the record of appeal filed in this Court, the late Sebalu died when he was the registered proprietor of the four Plots of land. The provisions of the Succession Act governing estates of persons who have died intestate ought to have immediately come into 25 effect. The estate of the deceased, which includes Muyenga Club and all the land that was registered in the late Sebalu's names automatically devolved to the personal representatives of the late Sebalu by virtue of Sections 25 of the Succession Act which I cited earlier in 30 this Ruling. This is a matter of law and does not have to

await the outcome of the pending High Court Civil Suit between the applicant and the respondents.

5 The position stated above stands irrespective of the fact that the late Sebalu may indeed have gifted the four Plots of land to the first respondent, as he claimed in his Affidavit in reply. The fact that the Plots had not yet been transferred into the first
10 respondent's names by the time the late Sebalu died brought the Plots into the ambit of section 25 of the Succession Act. It would therefore be just to order a stay of execution, which would ensure that the issue of whether the Plots and Muyenga Club belong to the estate or the respondents is first resolved, before the respondents resume possession.

15 There are several other reasons why it would be just to grant this application. First, the record of appeal does not bear any evidence to show when the first respondent took possession of the property or when the transfers were lodged with the Land Registry.
20 Secondly, the transfer was registered in December 2013 immediately after the late Sebalu had died but after a period of seven months from the date when the transfer of the Plots to him as a gift was done by the late Sebalu. There is nothing on the record to
25 explain this delay to register the transfer when the deceased was still alive. The first respondent waited for seven months before the Plots of land were eventually registered in his names. No reason was advanced why he did not wait until after

Administrators to the estate of the late Sebalu had been appointed.

5 The other point to consider is that the first respondent is already registered as the proprietor. His loss cannot be substantial as he claims in paragraph 5 (h) of his affidavit in reply. This is especially so since he got the Plots as gifts and he was not as a bonafide purchaser for value.

10 The last consideration to take into account is that beyond the ownership of the four Plots of land in issue, is the ownership of Muyenga Club. There is no evidence on record to show that Muyenga Club was part of the gift the first respondent received from the late Sebalu. Yet, by the time the applicant filed the suit and secured an
15 interim order, the respondents had already taken over its property and management.

20 The interests of justice demand that the first respondent should await the outcome of the legal challenge to his ownership of the four Plots of land before he retakes possession of the land and the business of Muyenga Club. If the trial court finds in his favour, then he will be able to quietly enjoy the gift of four prime Plots of land from his dear late uncle. Until
25 the court finds in his favour, the first respondent's pleadings that he is a registered proprietor of the four Plots of land should not override the interests of the deceased's estate, where the deceased was the

registered proprietor of the same land by the time of his death.

5 The respondents' interest in the Plots of land should not override the applicant's prayer for a stay execution of the rulings of the Court of Appeal and the High Court. This is especially so, in view of the fact that the first respondent is only a nephew to the late Sebalu, whereas the applicant is the only child descendant of the late Paulo Sebalu. As the only child of the deceased, she not only stands to inherit the largest share of the estate. She is also entitled under the law to apply for letters of administration to her late father's estate.

15 In addition, it should be noted that the applicant's rights and obligations, as the only surviving member of the deceased's nuclear family, to care take her father's estate did not start when she took possession and the management of Muyenga Club, by virtue of the interim order that was granted by the Deputy Registrar.

20 It should also be noted that neither does the Succession Act nor the Administrator General's Act require immediate family members who have been living with the deceased to first vacate the home or his or her estate until a grant of probate or letters of administration has been issued. On the contrary, immediate family members (surviving widow or widower, their young and even older children and/or sometimes dependent relatives who were living with the deceased, usually continue in occupation of the

home and to care take the estate of a deceased, if they were living there until the Executors or Administrators, respectively, distribute the estate.

However, even in cases where nuclear family members did not live in the deceased's home or other property forming part of the estate, surviving nuclear members usually make arrangements for the caretaking of the estate in the interim, in fulfillment of their social and/or cultural obligations towards the deceased and the estate. These caretaking arrangements usually involving identifying one family member or engaging an employee to care take the property pending the completion of funeral rites with respect to the deceased, appointment of the customary heir and the commencement and completion of appointing the Administrators of the estate. In some cases, the process of appointing administrators of an estate may take many years to complete. While family members remain in occupation, the immediate family members continue to use the land for their livelihood and subsistence of the family.

In the application before us, where the deceased did not leave behind any known widow or other children, there was nothing illegal for the applicant to step in the vacuum created by her late father's death and set in motion the process of protecting her father's estate from the actions of her cousin, the first respondent, and the second respondent, which were clearly

contrary to the provisions of the law already cited. She did this by not only initiating court action to stop the intermeddling and secure the appointment of administrators pendente lite, who, are not only related to the late Sebalu, but are also persons of repute and high standing in society. She also reported the death and sought the letter of no objection from the Administrator General; and also jointly, with her co administrators ***pendente lite***, applied for letters of administration for the estate of her late father in a timely manner.

Even if it were true, which I have disputed earlier in this Ruling, that the interim order issued by the Deputy Registrar was erroneous or a nullity, as the Court of Appeal held, or that the said Order did not give the applicant and her co-administrators pendente lite the right to require the respondents to vacate the management of Muyenga Club and the land on which it operates, it is my view, that the applicant does not deserve condemnation by the Courts. By setting in motion a process where her late father's estate would be preserved and saved from wastage and stepping in to care take the estate (particularly Muyenga Club); seeking court's intervention to appoint administrators pendente lite, she acted as a responsible daughter. If any legal errors were committed in the issuance of the interim order and in enforcing it,

they should be treated by court as technicalities committed by her lawyers, the Auctioneers, the Police and even the Administrator General's office which failed to step in when the death was reported to them and an application for a letter of no objection was sought. These technicalities should not override substantive justice which Article 126 (2) (e) of the Uganda Constitution demands. The failures, if any of the above named actors, should not be visited on the applicant. There are several authorities where this Court has absolved applicants and appellants from errors which were committed either by their lawyers or Court officials. See for example Horizon Coaches Ltd v. Rurangaranga & Another, Supreme Court Civil Application No. 18 of 2009 and Tropical Bank Ltd. v. Grace Were Muhwana, Supreme Court Civil Application No. 3 of 2012. In Muhwana, Katureebe, JSC noted as follows:

“This court has laid down in a long line of cases, that mistakes or inadvertence by counsel should not be visited on the litigants themselves who come to court seeking substantive justice. ”

He further went on to hold that:

.. the failure to produce the record of proceedings in time or certify as to the period required for its preparation, was a failure of court officials. It would be wrong for this court to visit these mistakes, omissions or failures on the applicant who is only yearning for justice which he can only get by having his appeal heard or determined by this court. ”

Similarly, the applicant in the present case should not be blamed if the Deputy Registrar issued the interim order in error or if the Auctioneers wrongfully executed the order.

5 Article 21 of the Constitution of Uganda guarantees all Ugandans equality and the equal protection of the law. This equal protection of the law requires Courts to protect an estate of a
10 deceased person where such a deceased person was a registered proprietor at the time of his or her death, just as the same Courts are expected to extend the equal protection of the law to the living registered proprietors.

15 The equal protection of the law also requires that Courts should protect estates of deceased persons for the lawful beneficiaries, against all persons who may wish to take advantage of the vacuum created by death to either intermeddle or grab property belonging to the estate.

20 Where the deceased was the registered proprietor, the protections afforded by the Registration of Titles Act should operate to create a rebuttable presumption that all property, which was not jointly owned by a
25 deceased registered proprietor and his or her spouse by virtue of either direct monetary or indirect monetary or non-monetary contributions as was laid out by this court in our decision in ***Rwabinumi v. Bahimbisomwe (supra)*** and was registered in the names of a deceased

person, belonged to him or her. This presumption would, be subject to anyone who claims any interest in the land, and could be rebutted by a claimant adducing evidence showing that he or she has a lawful claim or right therein and was therefore properly registered. Transferring the burden of proof from the claimant of any interest in the land to those seeking to protect the interests of the estate and requiring the latter to first prove fraud on the part of the newly registered proprietor first before their titles can be impeached, is improper. In cases where the beneficiaries are minors or are economically disempowered or are not knowledgeable about the law, there will be dire consequences. It would also be inconsistent with the letter and spirit of the Constitution of affording equal protection of the law.

The Court would, in my view, be setting a dangerous precedent where it fails to protect the interests of the estate of a deceased person who was a registered proprietor of land at the time of his death and instead protected the interests of a living registered proprietor who claimed that land as a gift from the deceased and who went ahead to transfer that land before letters of administration to the estate of the deceased had been issued. If courts cannot protect registered land forming part of the estate, what will happen in cases of estates of deceased

persons who were owners of unregistered land, and yet such unregistered land form the bulk of land in Uganda?

5 I am satisfied that although this application arose from an interlocutory decision of the trial court which would ideally warrant us to defer our intervention until the trial court has heard the merits of this case, this is a case where our
10 intervention is warranted to invoke our inherent jurisdiction vested in this Court under Rule 2(2) of the Judicature (Supreme Court) Rules to "***make such orders as maybe necessary for achieving the ends of justice***".
15

Conclusion & Orders

20 In conclusion, I am satisfied that this is an application where it would be proper and just for this Court to grant a Stay of Execution in favour of the applicant under Rules 6(2) (b) and 2(2) of the Judicature (Supreme Court) Rules. I also find that there is sufficient justification for this Court to interfere with the
25 discretion of both the Court of Appeal and the trial Court to grant a Stay of Execution to the applicant. I would accordingly allow this application and make the following orders:

30 a) That execution of the Ruling and/or Orders of the Court of Appeal made in Civil

Application No. 251 of 2014 on the 21st day of July, 2014 and the Ruling of the High Court made in Civil Application No. 52 of 2014 be stayed until Letters of Administration to the estate of the late Sebalu in Administration Cause No. 320 of 2014 are granted and also until High Court Civil Suit No. 29 of 2014 is disposed of.

b) That the applicant and her co-administrators ***pendente lite*** continue managing the business of Muyenga Club, for purposes of preserving it as part of the estate and that they remain in possession of the four Plots currently registered in the names of the first respondent until the disposal of High Court Civil Suit No. 29 of 2014.

c) That the applicant reports any intermeddling in her late father's estate which is known to her and the actions she and her co-administrators ***pendente lite*** have taken, with respect to the estate of the late Sebalu to the office of the Administrator General, not later than 30 days from the date of this Ruling. The Report should not only cover actions taken with respect to the plots of land and Muyenga Club, but should also cover the remainder of the Estate of the late Sebalu's Estate. This Report would be in accordance with section 11 of the Administrator General's Act and the Succession Act, pending the disposal of Administration Cause No. 320 of 2014.

d) That the High Court, if it has not already done so, expedite the disposal of

Administration Cause No. 320 of 2014, which according to record of appeal, was filed on 25th April 2014, and High Court Civil Suit No. 29 of 2014.

- 5 e) That, if, by the time of issuing this Ruling, the High Court has already disposed of Administration Cause No. 320 of 2014 and Administrators have been duly appointed, the Orders in (a), (b) (c) and (d) above should, either cease to have effect or be accordingly modified to enable the duly appointed Administrators of the Estate of the late Sebalu to take over and manage the Estate in accordance with the provisions of the Succession Act.
- 10 f) Costs of the Applications before this Court as well as the costs for High Court Misc. Applications No. 52 and 53 of 2014 and Court of Appeal Civil Application No. 251 of 2014 shall be borne by the respondents.

15 Dated at Kampala this 26th day of November 2014.

JUSTICE DR. ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT