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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CIVIL APPEAL NUMBER 0243 OF 2013

10 E.B. NYAKANA AND SONS LIMITED APPELLANT

VERSUS

- 15 1) MRS. BEATRICE KOBUSINGE
2) MR. KIIZA SAMUEL
3) MRS ROSEMARY BALINDA
4) MS. TEREZA KAAHWA
5) SAM IRUMBA
6) MRS BEATRICE SAGORO NYAKANA
7) NORAH NYINDOMBI NYAKANA
20 8) KUGONZA JENNIFER
9) APOLLO NYAKANA
10) BOB KAGABA
11) EDITH BYANJERU LUCY
12) BEATRICE MUGISHA NYAKANA
25 13) KENNETH KABISWA
14) LYDIA NYAKANA
15) DOROTHY NYAKANA
16) JOYCE NYAKANA
17) THE OFFICIAL RECEIVER/LIQUIDATOR

.....RESPONDENTS

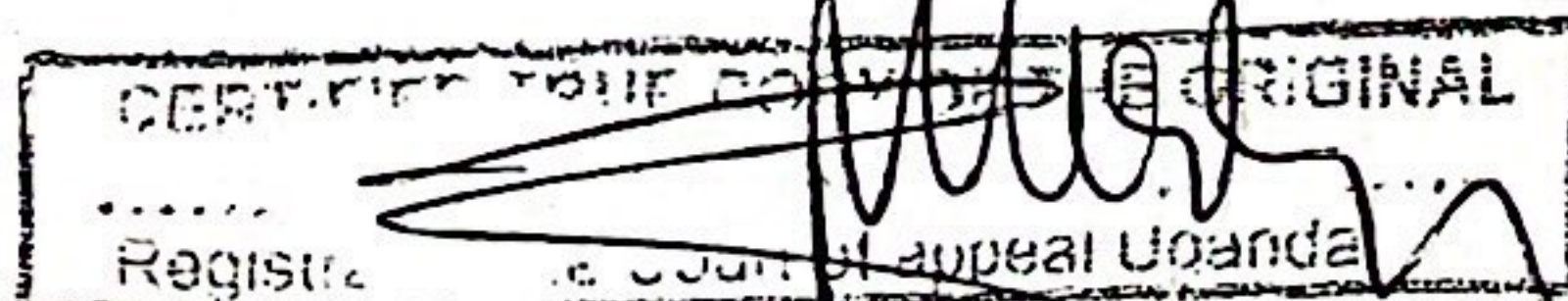
30 CORAM:

HON. MR. JUSTICE KENNETH KAKURU, JA
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON LADY JUSTICE HELLEN A. OBURA, JA

35 *[Appeal from a Judgment of the High Court of Uganda at Fort Portal before Hon. Mr. Justice Mike Chibita dated the 4th day of July 2014, in Company Cause No. 0001 of 2005]*

JUDGMENT OF THE COURT

40 This appeal arises from the decision of the High Court in *High Court Company Cause No.1 of 2005* delivered on 4th July 2014 by Hon. Justice Mike Chibita J.



5 **Background**

This appeal has a very long and checkered history. It is neither practical nor desirable to set it out fully in this Judgment. However, we have tried to set out the facts we consider to be most relevant to the resolution of the issues raised in this appeal.

10 The appellant, a limited liability company was incorporated on 19th February 1973. The subscribers were:- Ezira Binondo Nyakana, Charles Nyakana, John Mugisa and Samwiri Kiiza. The share capital of the company was shs. 500,000/= divided into 100 ordinary shares of 5,000 each. Shares were taken out by each
15 subscriber as follows:- Ezira Binondo Nyakana five and the rest one each.

Ezira Binondo Nyakana the majority shareholder appears to have been solely in control of the appellant company. From the record it appears that he was a successful businessman who overtime had
20 acquired a number of properties, which included farms, a tea estate, and cattle. He had a number of wives with whom he had many children, 24 of whom survived him while others had pre-deceased him.

On 10th of May 1985 he made a will in which he listed his known
25 children and their mothers. He set out the properties he owned at the time and directed how they should be dealt with upon his death. Ezira Binondo Nyakana died on 30th December 1988.

On 20th February 1991 the High Court granted Probate to Beatrice Nyamaizi Nyakana Kobusinge, Katarina Nyakana, Durusira
30 Nyakana and Samuel Kiiza Nyakana,= as executors of the will of the Late E.B Nyakana. In March 1991 the executors proceeded to transfer the land titles from the deceased's names to their own, and to manage the estate of the deceased.

Between 1991 and 1998 the executors managed the estate of the deceased but did not distribute the property to the beneficiaries. Many of the beneficiaries were dissatisfied with management of the estate. They claimed that the executors had mismanaged the estate, had failed to account for its funds and had also failed to file returns in court. The dissatisfied beneficiaries filed a suit against the executors at the High court at Fort Portal, *vide Civil Suit No. 16/93. Fiona Kabahweza and 11 others vs Beatrice Kobusinge and Another.*

On 6th September 2001, the parties agreed to settle the above suit and a consent Judgment was entered. It is stipulated as follows:-

- 1. All the estate property of the Late Ezira Binondo Nyakana be transferred to M/S E.B Nyakana and Sons Limited by the 31st day of December 2001 at the expense of E.B Nyakana & Sons Limited.**
- 2. All parties to this suit concede that Plot No. 7 Babiha Road formerly known as Plot No.7 Bwamba Road comprised in LRV 560 Folio 20 belongs to the first defendant Beatrice Nyakana Kobusinge.**
- 3. The first plaintiff Fiona Kabahweza Nyakana unconditionally vacates the premises on Plot 7 Babiha Road by the 31st day of December 2001**
- 4. The plaintiff's claim in Toro Tobacco Store against the defendants be withdrawn.**
- 5. Each party bears its own costs.**

The land titles of the estate property were transferred into the names of E.B Nyakana & Sons Ltd in May 2004. The wrangles and

5 misunderstandings between beneficiaries did not end there. There were accusations and counter accusations among the beneficiaries. This time it was claimed that the Directors of the company in which the estate property had been vested were mismanaging the estate and putting it to waste.

10 On 3rd October 2010, the company E.B. Nyakana & Sons Ltd filed a suit against Beatrice Nyakana, Kenneth Kasibwa and the administrator of the estate of John Nyakana a deceased son of the Late E.B. Nyakana *vide* (HCCS N. 0033 of 2010). In the plaint the company contended among other things that;-

15 **6. The Plaintiff Estate Company is an umbrella company to administer the Estate of the late EZIRA BINONDO NYAKANA (deceased) on behalf of all the beneficiaries thereto (see Annexure "6").**

20 **7. The suit property known as BURAHYA BLOCK 82 comprised in LRV 598 FOLIO 8 at Nyabushenyi and known as Nyabusenyi Estate was registered in the names of the late Ezira Binondo Nyakana in 1968 (see Annexure "C") who died in 1988.**

25 **8. The deceased by his Will dated the 10th day of May 1995 appointed Executors and Trustees of his will and bequeathed, unless expressively excluded, and devised all his properties movable and immovable to the Plaintiff Estate Company and directed the Executors to apply for Probate of the Will and administer the deceased's estate to be known as E. B. NYAKANA & SONS LTD. (see Annexure "8").**

30 **10. The Executors and Trustees mismanaged the estate of the deceased and refused to transfer the immovable property of the deceased in the names of the Plaintiff Estate Company and the dispute**

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culminated in Civil Suit No. 16 of 1998 by the beneficiaries against the Executors and Trustees (see Annexure "D") and the parties therein entered a consent judgment, inter alia, in the terms that "All the Estate property of the late Ezira Binondo Nyakana be transferred to M/S E.B Nyakana & Sons Ltd by the 31st day of December, 2001 at the expense of E.B Nyakana and Sons Limited" (see Annexure "E") and the Plaintiff Estate Company was in 2003 registered as proprietor of the suit property and the Plaintiff Estate Company shall rely on the law of Limitation.

20
11. The Plaintiff Company shall contend that the Defendants, namely the 1st and 2nd Defendants did not contest the said consent judgment nor the transfer of all the estate property of Ezira Binondo Nyakana into the names of the Plaintiff Estate company.

25
They sought to recover property that had not been transferred to the company by the executors and a number of other orders and declarations that are not very relevant here.

30
On 1st February 2011, Beatrice Nyakana, Kugonza Jennifer, Apollo Nyakana, Bob Kagabi, Edith Byanjeru Lucy and Nyakaana Nyindombi filed a suit against E.B.Nyakana & Sons Ltd at the High Court in Fort Portal vide High Court Civil Suit No. 32 of 2011. They sought the following orders;-

35
a) An order for the cancellation of both of the Defendant's Certificates of Title to the suit property comprised in LRV 958 Folio 25 situate at Plot 11/13 Ruhandika and LRV 959 Folio 1 situate at Plot 4 Kabafuma Road.

5 b) **A permanent injunction restraining the defendants or his agents from trespassing on the suit property or dealing with it in any manner.**

10 c) **General damages.**

d) **Interest on a) and c) above at the commercial rate of 25% per annum from the date of filling this suit until payment in full.**

15 e) **Costs of the suit.**

20 On 14th February 2013, E.B Nyakana & Sons Ltd brought a suit against Mrs. Beatrice Kobusinge as the executrix of the estate of the Late E.B Nyakana and Nyakana Tobacco Stores Ltd. It was contended that;-

5. The plaintiff's cause of action against the defendants arose as follows:-

25 a) **Late Ezra Binondo Nyakana was the owner and director of the plaintiff's company which was in his names E.B.Nyakana.**

30 b) **Late Ezira Binondo Nyakana also owned a company called Toro Tobacco Store limited to which he was Chairman/Managing Director with the 1st defendant as a daughter and a co-director.**

35 c) **The late Ezira Binondo Nyakana died on the 30th day of December 1988 and in his will, dated 10th May 1985 the deceased among others appointed Mrs. Beatrice Kobusinge the 1st defendant as his executrix and trustee of his will and or estate. A copy of the will of late Ezra Binondo Nyakana dated 10th May 1985 is hereto attached as annexure "A".**

40

- 5 d) *The 1st defendant applied for and was granted letters of probate of the deceased's will on 20th February 1991.*
- 10 e) *M/s Toro Tobacco Store Limited had 800 nominal shares with directors/shareholders namely Ezira Binondo Nyakana with 500 shares, Beatrice Kobusinge (Nyakana) with 100 shares, Katoke Patrick with 100 shares and John Mugisa with 100 shares.*
- 15 f) *The deceased late Ezra Binondo Nyakana in clause 28 of his will directed that all cash on account of Toro Tobacco Store Limited was to be transferred to the account of M/s E.B Nyakana & Sons limited and shareholders of Toro Tobacco Store Limited, will continue to draw their profits or dividends from the account of M/s E.B Nyakana & Sons Ltd with regard to the income accruing from M/s Toro Tobacco Store Limited aforesaid.*
- 20 g) *Contrary to the deceased's directives in clause 28 of the will, the 1st defendant formed the 2nd defendant company purportedly in recognition of the deceased and transferred all assets, money and business of Toro Tobacco Store to the 2nd defendant company (M/s Nyakana Tobacco Stores Limited) hence causing M/s Toro Tobacco Store Limited to collapse. A confirmation letter is hereto attached as annexure "8".*
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- 30
- 35 h) *The plaintiff shall contend that the deceased had 500 shares in M/s Toro Tobacco Store Limited, assets and cash worth shs.13,905,224/= (thirteen million nine hundred five thousand two hundred twenty four) which were all taken over by the 2nd defendant company contrary to the wishes of the deceased and to the detriment of the shareholders/beneficiaries of M/s E.B Nyakana & Sons Ltd (plaintiff).*
- 40

5 Prior to the above suits, Samwiri Kiiza Nyakana and Beatrice Kobusinge Nyakana had brought a suit against their siblings Kato Saguru, Fiona and George Nyakana *vide* High Court (Fort Portal) *Company Cause No. 1/98* seeking the following declarations and orders;-

- 10 a) ***A Declaration that the 1st Applicant is still the only Director of E.B. Nyakana & Sons Limited and no other person has ever been validly appointed or co opted as a Director.***
- 15 b) ***A Declaration that the shareholding in the said Company is still as it was at the time of Incorporation and no valid allotment of shares has ever been made to anyone other than the subscribers to the Company's Memorandum of Association.***
- 20 c) ***An Injunction to restrain the Respondents from - purporting to act as the said Company's directors, and to restrain their purported allottees (ās well as themselves) from holding out as shareholders of the company.***
- 25 d) ***An Order setting aside the purported appointment/co-option of the Respondents as directors of the said Company, and also setting aside their purported allotment of shares to some Twenty-One persons***

30 This matter appears to have been dismissed without having been heard. The order of dismissal is dated 10th May 1999.

35 There was also an earlier suit that had been filed challenging the application for grant of probate, Civil Suit No 84 of 1989. The above are the series of events that eventually culminated into the respondents some of whom are the beneficiaries of the estate of Late E.B. Nyakana filing of *Company Cause No. 1 of 2005* at the High Court at Fort Portal in September 2005 seeking to wind-up the appellant company citing mismanagement and several other

5 allegations. On 4th July 2013, the High Court made a final winding up order, hence this appeal.

The memorandum of appeal states as follows:-

- 10 **1. The learned Judge of the High Court misdirected himself when he made a final winding up order and appointed a liquidator without hearing the appellant's case.**
- 15 **2. The learned Judge of the High Court misdirected himself when he made a final winding up order without hearing and determining other suits by and against the appellant pending before him namely HCT - 01 - CV - CS - 0033 OF 2010, Civil suit No. 32 of 2011 and HCT - 01 - CV - CS - 0011 OF 2013.**
- 20 **3. The learned Judge of the High Court misdirected himself when he made a final decision without hearing and determining Miscellaneous Application No. 0046 of 2013 for review which was fixed for hearing before him on 4th July 2013.**
- 25 **4. The learned Judge of the High Court erred in law and fact when he failed to evaluate evidence on record and came to a wrong decision**

30 When the appeal came up for hearing on 31st Mach 2016, learned counsel **Mr. Ahabwe Sam** appeared for the appellants **Mr. Tibaijuka Ateenyi** appeared for the 1st, 2nd 3rd, 4th and 5th respondents. **Mr. Oscar Kihika** appeared for 6th, 7th, 8th, 9th, 10th, 11th, 12th, respondents while **Mr. Geoffrey Komakech** appeared for 13th, 14th, 15th and 16th respondents. The official receiver the 17th respondent was not represented by counsel, however, **Ms. Caroline Nazziwa**, an officer from that office, represented him.

5 The Appellant's case

It was submitted for the appellant both orally and in their conferencing notes that the learned trial Judge misdirected himself when he made a final winding up order and appointed a liquidator without hearing the appellant's case.

10 Counsel for the appellant contended that the respondents (then petitioners) had called 4 witnesses, Rose Bahinda PW1, Sam Irumba PW2, Tereza Kaahwa PW3, and Beatrice Kobusingye PW5. That before PW4 could be cross examined by counsel for the appellant (then petitioner) the trial Judge upon hearing from the
15 interim official receiver, made a final winding up order and appointed a liquidator.

Counsel contended that the Judge did not give the appellant an opportunity to present its side of the case, and therefore condemned it unheard.

20 On the second ground of the appeal, the appellant contended that the Judge erroneously stayed all the suits related to the winding up petition without giving any reason. Counsel contended further that the fate of the appellant company's property the subject matter of the stayed suits remained unknown upon the issuance of the
25 winding up order. He contended further that the Judge ought to have determined first the pending suits involving the appellant company before the hearing and determination of the winding up petition.

30 The 3rd and 4th grounds of appeal were argued together. It was submitted for the appellant that the learned Judge did not at all evaluate the evidence adduced at the hearing before arriving at the decision that he did. Further that he did not give reasons for his decision as required by the law. Counsel argued that had the Judge

5 evaluated the evidence he would have found that no grounds existed for winding up the appellant company.

He asked the Court to allow the appeal and to set aside the decision of the High Court with costs.

The Respondent's case

10 The submissions of Mr. Tibaijuka for the 1st, 2nd, 3rd, 4th and 5th respondents were adopted by counsel for the rest of the respondents with a few additions and variations. We have therefore summarised together the arguments of all the respondents on each issue.

15 It was submitted that the law applicable to the facts giving rise to this appeal is the now repealed Companies Act Chapter 110 of the Revised Laws of Uganda 2000 and not Act 1 of 2012 which came into force on 1st July 2013.

20 On issue one, it was submitted for the respondents that the learned trial Judge did grant the appellant a hearing at the trial. The evidence adduced at the trial by both parties was by way of affidavits. It was contended further that it was the appellant company which initiated affidavit evidence when in its defence to the petition it filed several affidavits making it necessary for the
25 respondents to file affidavits in reply, which were again followed by the appellant's affidavits in rejoinder.

Counsel submitted that, the appellant's affidavit in opposition, the supplementary affidavits, the respondents' affidavits in reply thereto and the appellant's affidavits in rejoinder, the appellants bank
30 statements and audited accounts all constituted evidence upon which the trial court based to his decision.

5 Counsel also argued that the appellant had no right to be heard having committed contempt of court and had by the date of hearing of the petition refused or failed to purge itself of the contempt.

Counsel concluded that the appellant had been granted a fair hearing and an opportunity to be heard within the meaning of
10 Article 28(1) of the Constitution. He asked court to dismiss this ground.

On the second issue, counsel submitted that the winding up petition, the subject of this appeal was filed on 1st September 2005 before *H.C.C.S No. 0032 of 2010, H.C.C.S No.32 of 2011 and H.C.C.S*
15 *of 2013* were filed between 2010 and 2013. The petition for the winding up of the appellant company, he argued, had already commenced and had been pending for a number of years before the suits were filed.

He submitted further that an order for winding up a company had
20 the effect of automatically staying all proceedings against it as a measure to preserve its assets pending the final decision upon its winding up, under section 226 of the companies Act (Cap 110).

Furthermore. that, when a winding up order has been made, no action can be taken or pending proceedings against the company
25 can proceed without leave of court. It was again submitted that the Judge had taken into account the legal expenses the company was incurring in prosecuting all the pending suits for and against it and had considered them unnecessary and therefore exercised his discretion properly when he stayed all the suits pending the hearing
30 and determination of the winding up petition.

On the 3rd ground of appeal it was submitted for the respondent that, *Miscellaneous Application No. 46 of 2013* which sought orders to review the appointment of a receiver had been overtaken by events as there was no longer a receiver in place the Judge having

5 appointed a liquidator. Further, that the application (No. 46 of 2013) expressly sought orders to be issued pending the outcome of High Court Company Cause No. 1 of 2005 the subject of this appeal; and that matter having been determined before the hearing of Miscellaneous Application No. 46 of 2013 the former had lapsed.

10 On 4th ground it was submitted for the respondents that the court had indeed evaluated the available evidence before coming to its final decision. Counsel contended that the Judge based his decision on the exhibits, agreed facts, affidavits and their annexures and oral evidence that was adduced.

15 Counsel further argued that even if the trial Judge had not evaluated all the evidence, this court could still do so as a first appellate court. As his authority for this proposition he cited, **Henry Kifamunte versus Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported)**.

20 He contended further that if this court was to find that the trial Judge had made errors, it would correct them without having to order a re-trial as was held in **Crescent Transportation Co. Ltd vs Nuru Kaaya (Supreme Court Civil Appeal No. 6 of 2002)**.

25 Lastly counsel submitted that the appellant had failed to prove any of the grounds of appeal herein and as such this appeal ought to be dismissed with costs here and in the Court below.

30 **Resolution of the grounds of appeal**

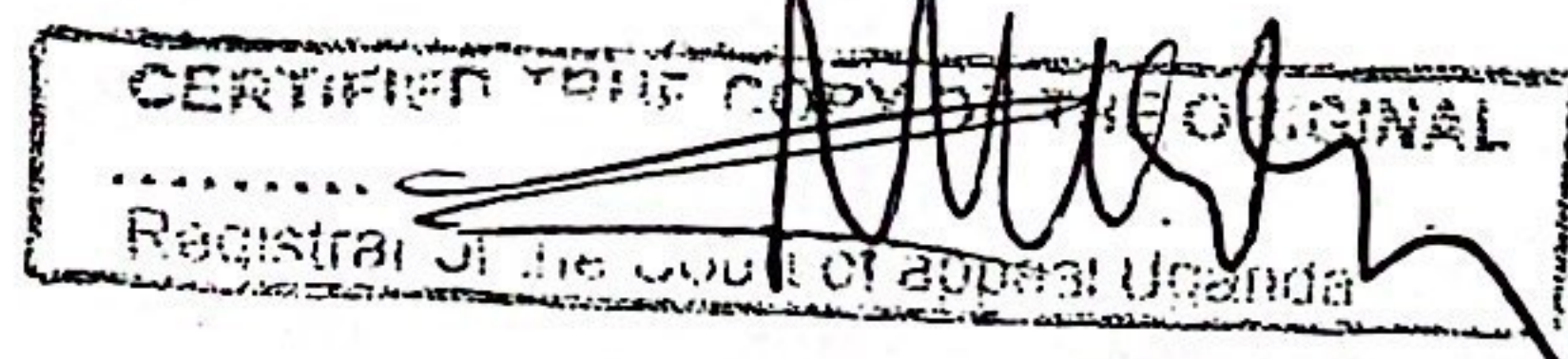
We have carefully listened to the submissions of all counsel. We have read court record and authorities cited to us. We are also mindful of the duty of this court as a first appellate court.

35 Rule 30(1) of the Rules of this Court imposes on us a duty when sitting as a first appellate court to reappraise all the evidence and

5 draw our own inferences of fact. Mulenga, JSC in *Fr. Narsensio Begumisa Vs Eric Tibebaga in the Supreme Court of Civil Appeal No. 17 of 2002*, put this duty of the first appellate court as follows;-

10 *"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen*
15 *nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. This principle has been consistently enforced, both before and after the slight change I have just alluded to. In Coghlan vs. Cumberland (1898) 1 Ch. 704, the Court of*
20 *Appeal (of England) put the matter as follows -*

25 *'Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration*
30 *the court comes to the conclusion that the judgment is wrong When the question arises which witness*



5 is to be believed rather than another and that
question turns on manner and demeanour, the Court
of Appeal always is, and must be, guided by the
impression made on the judge who saw the
witnesses. But there may obviously be other
10 circumstances, quite apart from manner and
demeanour, which may show whether a statement is
credible or not; and these circumstances may
warrant the court in differing from the judge, even
on a question of fact turning on the credibility of
15 witnesses whom the court has not seen.'

In Pandya vs. R (1957) EA 336, the Court of Appeal for
- - Eastern Africa quoted this passage with approval,
observing that the principles declared therein are basic
20 and applicable to all first appeals within its jurisdiction."

Taking into account the position of the law as set out above, we
shall proceed to re-evaluate the evidence and make our own
inferences on all issues of fact and law.

25 **Ground one**

1. ***The learned Judge of the High Court misdirected himself
when he made a final winding up order and appointed a
liquidator without hearing the appellant's case.***

30 It is contended for the appellant under this ground that the learned
trial Judge came to the decision that he did without having heard
the appellant's case.

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High Court (Fort Portal) Company Cause No. 1 of 2005 was filed on 1st September 2005 and was advertised in the Uganda Gazette Vol. XCVIII No. 59 of 16th September 2005. On 6th October Fiona Nyakana filed an affidavit in opposition to the petition in which she set out the reasons why the appellant company was opposed to the winding up petition. Attached to her affidavit were 11 annextures.

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On 26th October 2005 the 1st respondent Beatrice Kobusinge (then 1st petitioner) filed an affidavit in reply to that of Fiona Nyakana, it had three annextures. On 1st December 2005 Fiona Nyakana filed another affidavit entitled supplementary affidavit in reply to petition it was in reply to that of Beatrice Kobusinge and had two annextures.

15

On 9th of January 2006 Beatrice Kobusinge filed an affidavit which she termed as supplementary affidavit in reply it was filed in reply to that of Fiona Nyakana dated 1st December 2005. It has a number of annextures

20

The petition first came up for hearing at the High Court on 11th January 2006 before His Lordship *Hon Justice Rugadya Atwooki J.* He dealt with preliminary issues and was unable to hear the matter as he was assigned other duties.

25

After several adjournments, including attempts to have a settlement reached between the parties, the matter was set for hearing before *Hon. Justice Owiny-Dollo J* (as he then was). The appellants who were then respondents objected to Justice Owiny-Dollo presiding over the matter alleging bias. They contended he was formerly a partner with Mr. Tibaijika Atenyi the petitioners', (now respondent's) advocate. The Judge stood down. The matter did not come up again for hearing until 11th November 2011 when it came before Hon. Justice Mike Chibita J.

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On that day the parties and their counsel were present and the matter proceeded with the respondent company's counsel raising preliminary objections to the competence of the petition. The learned Judge then adjourned the matter to 1st December 2011, for ruling on the objections raised.

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On 1st December 2011 the preliminary objections were dismissed, prompting counsel for the respondent to apply for an adjournment to seek instructions to appeal. The Judge declined to grant the adjournment insisting that the matter had been pending in court since 2005 and no sound reason had been advanced for grant of such an adjournment.

20

25

Counsel for the petitioners then sought leave of court to have all the annexures to the various affidavits which had been filed by the parties admitted in court as exhibits. Court allowed both parties to exhibit their documents, which were tendered in court and duly marked as exhibits. A total of over 50 documents were exhibited by both parties. The matter was adjourned by consent to 27th February 2012 for hearing oral evidence and cross examination of witnesses on their affidavits.

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35

On 27th February 2012 when the matter was called for hearing, counsel for the petitioners (now respondents) sought an adjournment stating that he had just been served that morning with a fresh affidavit and they required time to reply to it. They accused the appellant company of deliberately delaying the trial and asked court to appoint an official receiver. The Judge appointed an official receiver and adjourned the matter to 21st May 2012 for hearing. On 25th May 2012 the matter came up for hearing and this time witnesses were in Court. The petitioners presented three witnesses PW1, Rose Balinda, PW2, Sam Irumba Nyakana PW3 Tereza Kaahwa who testified.

5

The matter came again on the 9th July 2012 and on the 13th September 2012. During this time parties were allowed to file in Court more documents specifically the appellant company's Bank statements. A Bank manager, Stanbic Bank Fort Portal, appeared in Court on 13th September 2012 and tendered in court the company's bank statements. The matter was again adjourned. Before the adjournment the trial Judge made the following statement:-

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"It would seem that one side is aggrieved because the other side is enjoying the benefits of the Company to the exclusion of others. To level the playing field and avoid such thinking and to enable the case proceed without due regard to who is in control and who is not, I am getting closer to the point where I am getting convinced that a Receiver is inevitable.

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Yet the issues in this petition are not that difficult to resolve even by the family members themselves. I therefore call upon the parties to try and resolve this matter amicably by the next hearing date, failing which I am likely to have appointed a Receiver by then.

30

The case is adjourned to 4th December, 2012. Costs of today will abide the outcome of the Petition."

35

On 26th February 2013 the court made an order appointing Mr. Bemanya Twebaze of Uganda Registration Services Bureau as the official receiver of the appellant company. The hearing of winding up petition however remained pending in Court.



5 On 13th June 2013 when the matter came up again for hearing the official receiver presented a provisional report as to the state of affairs of the respondent now appellant company.

The Judge then made the following orders;-

10

1. **All suits related to this matter are hereby stayed.**
2. **All records of the Company are hereby ordered to hand them over to the Receiver in accordance with the law.**
- 15 3. **All properties of the Company should be handed over to the Official Receiver.**
- 20 4. **Any trespass on Company property should cease forthwith**
5. **Any violation of any of these orders will result in a citation for contempt of court.**
- 25 6. **The matter is adjourned to 4th July for a further update from the Official Receiver.**

On 4th July 2013 when the matter came up again for hearing the court record indicates the following to have transpired in court;-

30

"Komakech: The last time we were here, the official receiver made some prayers some of which were granted. May be he has to first report back and then we can proceed.

35

Darius Ruter (Receiver): The last time I was in court I informed court about the status of our exercise. My lord today I report that the status has not changed, the tress-pass by family members continues, land titles have not been delivered, the estate continues to waste, and am preparing a report to give to

5 you this morning but the conclusion still remains that the company should be wound up. I pray for directions from here.

10 **Court:** I make the following Orders in addition to the earlier Orders I made. Under the relevant Laws specifically 222(f), the company EB Nyakana and sons is here by wound up. Darius Ruter (receiver) is hereby appointed the liquidator and under Section 237 of the Companies Act, all parties are advised to cooperate with the liquidator.

Dated at Fort Portal this 4th day of July 2013.

15 **Signed**
Mike J. Chibita
Judge

20 It is the above court order that is the subject of this appeal, where it is contended in ground one that the decision was arrived at without the appellants (then respondents) having been heard.

Section 223(f) of the Companies Act (Cap 110) upon which the order was made stipulated as follows:-

25 223“ A company may be wound up by court if-
(f) *The court is of the opinion that it is just and equitable that the company should be wound up.*”

30 We have endeavored to reproduce in detail the background to the trial Judge's decision in this matter. The facts giving rise to this appeal arose in 1988 immediately after the death of E.B Nyakana who was the majority shareholder in the appellant company. Multiple suits had been filed in court between the time of his death in 1988 and the time the order appealed from was made in 2013, a period of about 25 years.

35 The directors and shareholders of the company had failed to agree on how the company should be run. The company does not appear

5 to have been carrying out the objectives set out in its memorandum of association. Instead it was being used to run the affairs of the estate of its late Director and share holder. Even then it had failed in that role hence the petition to have it wound up.

10 We are satisfied that there existed sufficient evidence on record for the Judge to arrive at the decision that he did.

15 It appears clearly from the records, parts of which we have reproduced above that the parties in the winding up petition, the subject of this appeal, especially the appellants, decided from the onset to adduce evidence by affidavit. Indeed a number of affidavits were filed in support of their case. At the commencement of the hearing the appellants did tender in court a number of documents that had been attached to their affidavits as annexures. Those
20 documents were admitted in court as exhibits and marked as such. It is trite law that contents of an affidavit constitute evidence.

Needless to say, that a number of suits in courts of law are determined solely on affidavit evidence. The parties having agreed to
25 proceed by way of affidavit evidence, it was unnecessary for them again to call oral evidence. The procedure in this case should have been for parties to indicate which of the witnesses of the opposite side they required to be re-called for cross-examination on the evidence already adduced by way of affidavit. The oral evidence in
30 chief adduced by the respondents at the hearing was therefore unnecessary and waste of time since the evidence in support of their case was already on record and exhibits had already been admitted. There is no indication that the appellant sought court's permission to call any deponent for cross examination and was
35 denied the same.

We do not accept the appellant's contention that Judge made the order winding up the company without giving them an opportunity

5 to be heard. We find that the appellants were availed an opportunity
to be heard and that the evidence in support of their case was
adduced by affidavits and the documentary evidence they intended
to adduce was admitted as exhibits and formed part of the court
record. This ground has no merit and it therefore fails.

10

Ground 2

15 ***The learned Judge of the High Court misdirected himself
when he made a final winding up order without hearing
and determining other suits by and against the appellant
pending before him namely HCT - 01 - CV - CS - 0033 OF
2010, Civil suit No. 32 of 2011 and HCT - 01 - CV - CS -
0011 OF 2013.***

20 We are unable to accept the argument of counsel for the appellants
that the trial Judge ought to have heard and determined the suits
set out in this ground of appeal before making the final winding up
order.

25 Firstly, all the suits referred to, were filed long after the petition for
winding up the company had been filed. They were therefore not
pending at the time the winding up petition was instituted.

30 Secondly it is not correct to state that all the matters raised in the
cases referred to in this ground would abate upon the winding up
order being made. Upon a winding up order being issued, the
matters of the company including litigation, would be handled by
the liquidator, and as such the claims for or against the company,
do not abate.

35 Section 226 of the now repealed Companies Act which was
operative at the time stipulated as follows;-

5

“226. Power to stay or restrain proceedings against a company.

10

At any time after the presentation of a winding up petition, and before a winding up order has been made, the company, or any creditor or contributory, may-

15

(a) where any suit or proceeding against the company is pending in the High Court or Court of Appeal apply to the court in which the suit or proceeding is pending for a stay of proceedings therein; and

20

(b) where any other suit or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the suit or proceeding and the court to which application is so made may, as the case may be, stay restrain the proceedings accordingly on such terms as it thinks fit.”

25

30

The above law is very instructive. Not only does it give court the power to stay all pending suits upon presentations of a winding up petition, it appears to suggest that it is desirable to do so. The fact that the law allows stay of suits pending the determination of the winding up petition implies that the suits so stayed would not automatically abate upon a winding up order being made.

This ground has no merit and it fails.

35

Ground 3

The learned Judge of the High Court misdirected himself when he made a final decision without hearing and determining Miscellaneous Application No. 0046 of 2013

5 **for review which was fixed for 4th July 2013 for hearing before him .**

10 *High Court Miscellaneous Application No. 46 of 2013* was filed on 25th June 2013 seeking to review the courts order which had been made on 13th June 2013 appointing an interim official receiver. That application sought to keep the officers of the company in office and in charge of the company until the determination of the winding up petition, *Company Cause No. 1 of 2005*. The application was fixed for hearing on 4th July 2015. Before that application could be heard *Company cause No. 1 of 2005* was determined. The application thus abated, as it was seeking temporary orders only pending the determination of winding up petition.

This ground is misconceived and has no merit whatsoever, it is accordingly dismissed.

20 **Ground 4**

The learned Judge of the High Court erred in law and fact when he failed to evaluate evidence on record and came to a wrong decision.

25 We have already substantially dealt with this ground in our resolution of ground one. We are satisfied that the Judge took into account all the evidence available before him before coming to the decision that he did. In a *Company Cause* of this nature, brought under Section 222(f) of the then *Companies Act (CAP 110)* all that is required of Court is to satisfy itself as to whether or not it is just and equitable to wind up a company.

35 The Judge could have done better by writing a more detailed and reasoned Ruling. However, we find that his Ruling was sufficient to determine the matter under the provisions of Section 222(f). As a first appellate Court we have carefully re-evaluated the evidence

5 and have come to the same conclusion as the trial Judge. This ground also has no merit and therefore fails.

CONCLUSION

10 The winding up of the appellant company by court was the tail end of a series of events that were set in motion by the death of E.B Nyakana in 1988. It would be unjust and an abdication of the duty of this Court if the issues that culminated into the winding up of the appellant company and which would certainly continue afterwards were not addressed and finally determined.

15 We have a duty to do so, under Rule 30(1) of the Rules of this Court and Section 11 of the Judicature Act which grants this Court the same powers as that of the trial Court which stipulated as follows:-

“11. Court of Appeal to have powers of the court of original jurisdiction.

20 ***For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated.”***

25 It appears to us that the respondent company was not carrying on any serious business between 1973 when it was incorporated and 1988 when its major shareholder E.B. Nyakana died. We say so because the company registry had no records of the company's annual returns or audited accounts over this period of time. There is nothing on record to indicate that the company operated any business prior to 1988, or owned any property.

35 In his Will dated 18th May 1985, E.B. Nyakana does not make any distinction between himself and the respondent company. Wherever his signature appears on his will below it is a rubber stamp bearing

5 the name of the respondent company, as if he was signing a
company document. He appeared to have perceived the company as
his own without making a distinction between what was his and
what belonged to the company. It is with this mindset that he
proceeded to make his will. This mistake seems to have been the
10 origin of conflict and misunderstanding between the beneficiaries of
his estate and the respondent company. The mistake also made it
impossible for the company to run independently of the late
Nyakana's estate and eventually it had to be wound up.

15 In order to make this mistake understood we are constrained to
reproduce the relevant parts of E.B. Nyakana's Will as it relates to
the respondent company.

20 "3. ***I direct the Executors of this my will to apply for
PROBATE of this will and administer my estate
(which shall be known as E.B.Nyakana & Sons Ltd to
which Company I hereby bequeath and devise all my
property moveable and immovable) except what is
hereafter expressly excluded.***

4. ***I have left my children whose names and their
respective mothers appear on the attached list.***

25 5. ***I hereby state expressly that the children whose
names appear below are not my children, (I have
disowned them) and shall not receive anything from
my estate.(a) Cezear, (b) Kaijuka, (c) Jubilee Edison (d)
Kabagambe.***

30 6. ***I direct that all my children living at the date of my
death shall be allocated ten (10) shares of Shs.
100/= each in M/s E.B. Nyakana & Sons Ltd while
each of the directors of the said company shall hold
twenty-five (25) shares of Shs. 100/= each shares.***

5 7. I direct that any of my daughters who shall be properly and lawfully married shall be given a sum of shs. 20,000/= from my estate and this shall be taken to be her share in E.B Nyakana & Sons Ltd. At present my daughters who are properly and lawfully married are as follows;- Mary Liki (Mrs.),

10 Cesiria Musiru (Mrs.),

Beatrice Rutata (Mrs.),

Kabaramagi Balinda (Mrs.),

Beatrice Kobusinge (Mrs.),

15 Edith Sanyu (Mrs.)

These six daughters of mine shall be given shs. 20,000/= each in accordance with this directive on a date and occasion which the Trustees and the Committee of advisors shall decide.

20 8. a) I give and bequeath the residential house and tea estate at Nyabusenyi to John Mugisa Nyakana. - -

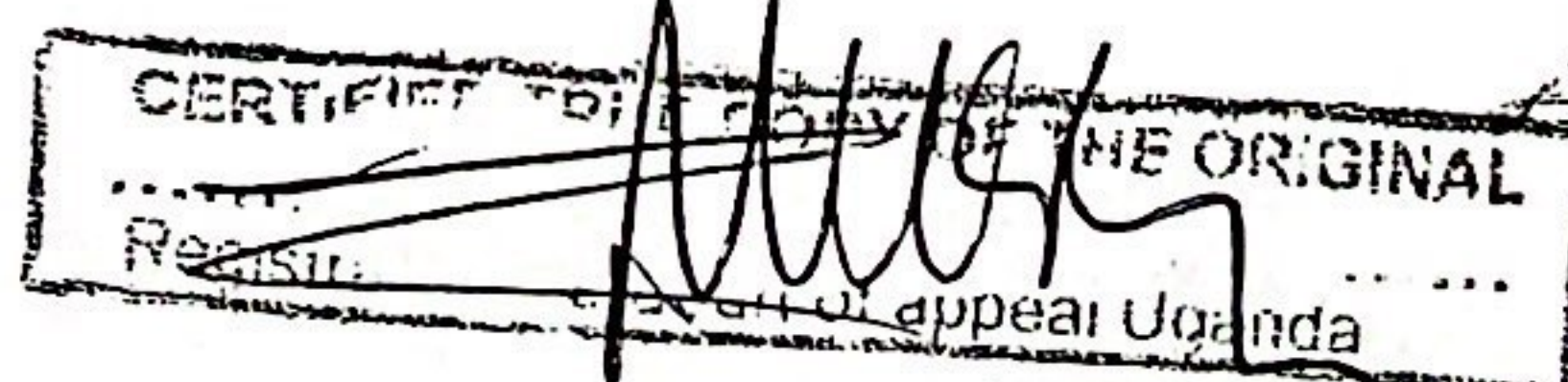
b) I give and bequeath the building at Kyakatimba Tea Estate to Samwiri Kiiza Nyakana.

25 c) I give and bequeath the building on plot No.3 Kamuhigi Road, Fort portal to my grandson, Edmund Kahuma.

d) I give and bequeath the main house at Kaihura to Mrs. Durusira Nyakana to occupy during her life time and therefore the property shall revert to M/S. E. B Nyakana & Sons Ltd.

30 e) I give and bequeath the residential house at Katoke Farm and Bukombe Farm to Mrs. Katalina Nyanjura Nyakana to use and occupy during her life time thereafter the farms and house shall to revert to M/s. E.B Nyakana & Sons Ltd.

35 f) The Second house at Kaihura shall be reserved for all my children to occupy and live in the same as the property of



5

M/s. E.B. Nyakana & Sons Ltd. It must be clearly understood that unless where it is specifically stated, no director is to be given property or title in the house occupied to him or her. All titles and property in the buildings shall remain vested in E.B. Nyakana & Sons Ltd, unless sold or properly transferred by those authorized, to do so under this my will.

10

15

9) I gave to Beatrice Kobusinge the building on Plot 7 Babiha Road, Fort portal during my life and allowed her to obtain the Certificate of Title of the same in her own names.

20

10) I direct that Fiona, the daughter of Edith Mukidi be given five (5) acres of my sixty -five acres of land situated at Kaihura, Mwenge near the land of her grandfather Adam Mukidi.

25

11) I direct that all Directors of E.B-Nyakana & Sons Ltd be bound by the provisions of this my will and that in the event of any director contravening any of the provisions of this my will he or she shall loss his or her membership in the company and shall surrender and vacate the residential house to the company.

30

12) I appoint YOSAMU KABUZI, JOHN RUBAIJANIZA, S.KATEEBA, V.R KAGABA, IR.KABWA, ERYARU KYANIIFIMBA and T.K. RUBALE, to act as guardians and advisors of my children and I also direct that the said persons together with the Directors of M/S E.B. Nyakana & Sons Ltd shall decide on the appointment and termination of any Director to or from the Company respectively.

35

13)

5 14) I charge the persons named in paragraph 12 above
together with the Executors of my will with the responsibility
of settling any issues relating to the company including
whether or not to sell any of the property such as buildings,
motor-vehicles, farms e.t.c, expulsion of member from the
10 company and the recovery of any debts owing to the company.

15 15) I direct that all money realized from the premises
hereinafter listed, whether the money is realized as rent or
otherwise shall be used on the education of my children and
grandchildren until such children and grandchildren shall
finish their formal education and thereafter the rents realized
from the said premises shall be credited to the account of M/s.
E.B.Nyakana and Sons Ltd and be managed by the Directors of
the said company.

- 20 a) the premises on Plot No. 13/14 Kahinju , Fort portal
b) the premises on Plot No. 13 Ruhandika Road, Fort
Portal
c) the premises on Plot No. 1 Kahinju Road, Fort portal
d) the premises on Plot No. 1 Kagate Estate,
25 Fort portal.

30 16) Except as is expressly provided in this my will, no child of
mine shall have power to remove or regard or take away any
property and assets claiming the same to be his/her own
property and assets of whether description to E. B Nyakana &
Sons Ltd and no one who is not a member of the said company
including former members thereof shall have any share in the
company and on no account may they become members.

35 17) I direct that all my children whether male or female alive
at the time of my death and being of good character and are

5 **hard-working shall become members of M/s. E.B Nyakana & Ltd.**

18)

10 19) **I have left twenty four (24) children, all my issue male and female are members of the company and are all equally charged with responsibility of securing and preserving the interests of the company from loss or damage and to take charge of the company's affairs. A full list of my children living is in a schedule attached hereto.**

15

20)

20 21) **I direct that in the event of failure by the Executors of this my will together with the committee of guardians and - - advisors I have appointed in paragraphs I and 12 to solve any issue relating to the administration of my estate such issue shall be taken to court of law for determination.**

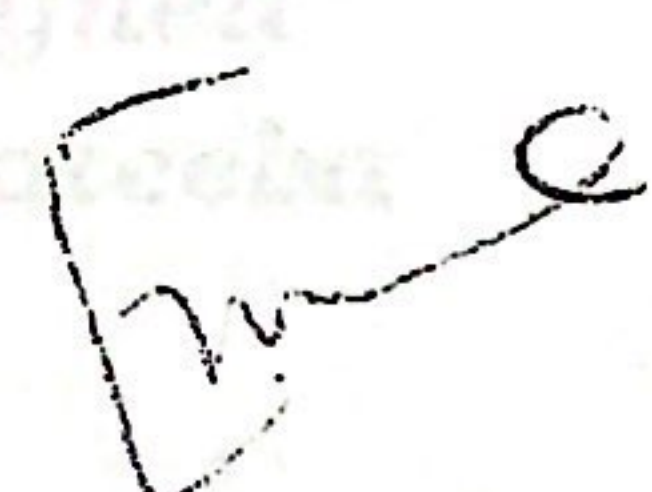

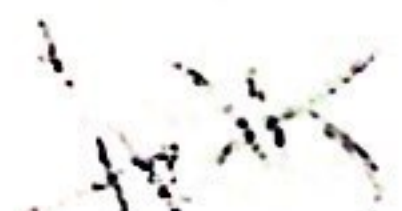
25 22) **I direct that any of my children, male or female who have proved his/her worth in the running of the affairs of the company and who is obedient shall be provided with a room for residence at the principal Kaihura house but such a child shall not be allowed to sell, lease to anyone who is not a member of the company so that all property and interest there shall always remain vested in the company.**

30

23)

35 24)

25)

Signed
S. K. K. 
 

Signed
V.R Kagaba

Signed
Kesi Kalemera

From the above excerpts of E.B Nyakana's will a number of legal issues emerge. Firstly, whether a person may bequeath his/her property to a limited liability company. We have found no legal impediment to such a bequest. We have also found no legal impediment to a person bequeathing his/her shares in a limited liability company. We only wish to add, that upon the grant of probate or letters of administration in case of an intestate the shares so bequeathed may only be dealt with in accordance with the company's memorandum and articles of association and the Companies Act.

The second issue is whether a shareholder and or Director may in his/her Will direct how the affairs of a company would be conducted after his/her death. It is trite law that a company is a separate legal entity, distinct from its shareholders. *See; - Solomon vs Solomon (1896) HL 22*. The affairs of a company may only be directed as provided for in the Companies Act and its memorandum and articles of association but not otherwise. The decisions of members of the company and its directors may only be taken at legally constituted meetings but not otherwise.

Ordinarily a shareholder may bequeath his/her shares to whosoever he /she wishes and in case one dies intestate the shares would be dealt with like any other property. The first step being the transfer of those shares from the name of the deceased to that of administrators or executors. Thereafter, the administrators or executors would step in the shoes of the deceased shareholder and carry on with the business of the company in that capacity. A company may also in its Articles of Association specify different

5 ways in which shares of a deceased shareholder would be dealt with.

In this regard the articles of association of E.B Nyakana & Sons Ltd provide as follows:-

10 **40) In case of the death of a member, the survivors, where the deceased was a joint holder, shall be the only person recognized by the Company as having any title to his shares; but nothing herein contained shall release the estate of a deceased joint holder from any liability in**
15 **respect of any share jointly held by him with other persons.**

20 **41) In case of the death of a member where he was a sole holder, the executors or administrators shall be recognised by the Company as having any title to his shares except that the rights of the estate of the deceased and the executors or administrators thereof shall be limited as hereinafter provided.**

25 **42) On receipt of a written notice by the Board from the executors or administrators of their appointment under the order of a competent court, or on such appointment coming to the knowledge of the Board otherwise, the shares of the deceased shall be deemed to be available for disposal as if the same had been offered under Article 29 hereof and the Board shall proceed to deal with the said shares under. Articles 29 to 39 both inclusive**
30 **hereof.**

35 **43) Any purported gift, bequest or legacy of any share by a member under a will or codicil shall be in-effective and of no validity and in the event of a member dying intestate it shall be deemed that he had expressly authorised the Board to deal with his shares as per**

5 **Article 42 hereof to the exclusion of the claim of any beneficiary and in such an event it shall be deemed as if such deceased member made an offer under Article 29 hereof immediately before his death. (Emphasis added)**

10 From the above excerpts it appears clearly to us that bequests made by E.B. Nyakana in respect of his shares in the respondent company were invalid and we hold so. We also find that the directives he made in his Will regarding the running of the company were not legally binding on the company or on the other
15 shareholders and directors.

We have carefully read the will of E. B Nyakana. We find that the intention of the testator and the effect of his testament was to use the respondent company as a means of administering his estate in
20 perpetuity. The will provides that most of the property would be transferred to the company which would thereafter manage it on behalf of the beneficiaries. The beneficiaries would then be paid by the company over an unspecified period of time. In effect he had tried to create a trust. We find that this would offend Section 101 of
25 the Succession Act which provides as follows;-

“101. Rule against perpetuity

30 **No bequest is valid by which the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who is in existence at the expiration of that period, and to whom, if she or he attains full age, the thing bequeathed is to belong.”**

35 We find that all the provisions of E. B Nyakana's Will that vest property in the respondent company are invalid as they contravene and offend Section 101 of the Succession Act. Those bequests are therefore void and unenforceable.

We now make following orders, directions and declarations;-

- (1) *This appeal hereby fails and is accordingly dismissed.*
- (2) *It is hereby declared that all the bequests made by E.B. Nyakana in his Will dated 18th May 1985 to the appellant company were invalid and therefore, void abnatio.*
- (3) *The Commissioner for Land Registration is hereby directed to cancel the registration of the appellant company E. B. Nyakana & Sons Ltd as proprietor of all property belonging to the estate of the Late E.B.Nyakana and to reinstate as proprietor, the executors of his Will namely Beatrice Nyakana Kobusinge, Katalina Nyakana and Samuel Kiiza Nyakana.*
- (4) *The Registrar of this Court is hereby directed to return this file to High Court and have it placed before the Head of family division with instructions to ensure that within 12 months from date hereof all the property of the Late E.B. Nyakana is distributed equitably and in accordance with the law to beneficiaries of his estate taking into account the fact that some of the beneficiaries had already received their share of the estate as set out in the Will and are not affected by the decision in this matter.*
- (5) *No order is made as to costs.*

5 Dated at Kampala this.....day of..... 2016.

[Handwritten signature]

.....
HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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.....
HON. LADY JUSTICE ELIZABETH MUSOKE
JUSTICE OF APPEAL

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.....
HON. LADY JUSTICE HELLEN A. OBURA
JUSTICE OF APPEAL

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CERTIFIED TO BE TRUE TO THE ORIGINAL
[Handwritten signature]
Registrar of the Court of appeal Uganda