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**THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA  
AT KAMPALA  
CIVIL APPLICATION NO.15 OF 2013**

**KABALE HOUSING ESTATE TENANTS ASSOCIATION LTD ::::::::::::::::::::**

**·APPLICANT**

.....

**KABALE MUNICIPAL LOCAL**

**GOVERNMENT COUNCIL**

..... **RESPONDENT**

*Application from the decision and orders of the Court of Appeal in Civil reference No.94 of 2013, (Kiryabwire, Kakuru and Tibatemwa JJA) dated 9th September 2013)*

*RULING OF C.N.B. KITUMBA J.S.C*

This application is brought by Notice of Motion under Rules 2(2), 6(2) (b) and 43 of the Judicature (Supreme Court Rules) Directions.

1. *An interim order be granted staying execution of the orders of Court of Appeal in Civil Reference No.94 of 20 13.*
2. *Costs of this application are provided for.*

The application is supported by the affidavit of Byarugaba John deponed to on 2<sup>nd</sup> October 2013. The application is also supported by the affidavit of David Katarwa deponed to on 2<sup>nd</sup> October 2013. There is a supplementary affidavit in support deponed to by Byarugaba John on 23<sup>rd</sup> October, 2013. There are two affidavits in reply; one is by Augustine Bujara, Town Clerk of Kabale Municipal Council and the second one by his Deputy Reuben Ntegyerize. Both affidavits were sworn on 28<sup>th</sup>

October, 2013. The affidavit of Mpirirwe Simpson, the secretary of the applicant company was sworn on 11<sup>th</sup> November, 2013 is in opposition of the application. The grounds of this application are that;

- 1 *The Applicant has lodged a notice of appeal in this Honourable court and filed an application for stay of execution of the Court of Appeal orders in Civil Reference No.94 of 2013 which is still pending and the decision will be rendered nugatory if the application succeeds after execution.***
  
- 2 *The appeal has high chances of success.***
  
- 3. *The members of the Applicant Company will individually and collectively suffer irreparable damage if the houses are sold before the application for a temporary injunction is decided.***
  
- 4. *It is just and equitable that the application for an interim order be granted.***

Kabale Housing Estate Tenants Ltd, the applicant, is a company limited by guarantee and was registered on 28<sup>th</sup> April 2003. The company was formed by the residents of government houses known as Kabale Housing Estate who according to the Government Divesture Policy were to benefit when the respondent sells the houses. The Association's main objective is pursuing individual and collective rights. Kabale Municipal Local Government Council, the respondent, without following the Government Divesture Policy decided to sell the houses on open market without giving priority to the members of the applicant company as set out in the sale guidelines circular. The applicant through its lawyers *MIS* Rwaganika & Co. Advocates filed a suit in the High Court at Mbarara and applied for prerogative

5 orders of mandamus and prohibition which were successfully granted. Later the trial judge reviewed the said orders. The applicant aggrieved with the review decision appealed to the Court of Appeal.

According to paragraph 14, 15 and 16 of the affidavit in support of the application by Byarugaba John, a letter was written by a person purporting to be a chairman of  
10 the applicant on 10/09/2007 withdrawing instructions from Mr. Rwaganika.

The letter is attached to his affidavit as Annexure "K"1. On the same date other members of the applicant wrote to the same advocate dissociating themselves with the letter withdrawing instructions and the letter is Annexure "K" 2 to Byarugaba's affidavit.

15 Annexure LT' attached to the same affidavit is a letter written by Byamukama withdrawing instructions from Mr. Rwaganika. According to paragraph 17 of Annexure "M" to the affidavit is a letter dated 27/07/2009 appreciating Mr. Rwaganika's work and requesting him to continue.

Augustine Bujara deponed in paragraph 3 of his affidavit that the application has  
20 been overtaken by events. In paragraph 4 he avers that Civil Appeal No. 24 of 2008 was terminated /withdrawn on 27/07/2013 unconditionally and parties agreed to abide by the memorandum of understanding that was executed on 24<sup>th</sup> July.

The following documents are attached as Annexure "A" to his affidavit. The  
25 consent judgment, memorandum of understanding, minutes of the applicant's meeting and the company resolution dated 17<sup>th</sup> May 2013.

On 9<sup>th</sup> September 2013, when the parties appeared before the Court of Appeal the court noted the consent judgment and accordingly dismissed Civil Application *No.6 of 2008 and Civil Reference No.94 of 2073* between the same parties on the  
30 ground that they had abated upon entry of the consent termination/ withdraw.

5 Augustine Bujara averred in paragraph 6 of his affidavit that he had been informed by the Company officials that the applicant had not instructed *Mis Rwaganika and Co Advocates* to take any further legal action after entry of the consent judgment in *Civil Appeal No.24 of 2008*. That the respondent had already given lease offers to the members of the applicant.

10 When this application came for hearing on 12<sup>th</sup> November 2013, Mr. Henry Rwaganika appeared for the Applicant and Mr. Arthur Mwebesa appeared as counsel for the Applicant as well. Mr. Philip Mwaka, Principal State Attorney, together with Mr. Jonathan Bwogi of *MiS Bwogi & Co. Advocates* appeared for the Respondent.

15 Mr. Mwebesa raised a preliminary point of law on who is the duly instructed counsel for the Applicant. He stated that Mr. Rwaganika is not instructed to represent the Applicant. He further stated that instructions to represent the Applicant were withdrawn from Mr. Rwaganika from 10<sup>th</sup> September 2007. He relied on a letter from the Chairman of Kabale Housing Estates Tenant Association

20 Ltd marked annexure "C" to the affidavit of Simpson Mpirirwe .This letter was received by counsel Rwaganika. Mr. Mwebesa also relied on the minutes of the company meeting held on 17<sup>th</sup> May 2013 further confirming that instructions were withdrawn from Mr. Rwaganika. The minutes of the meeting and the resolution were attached to the affidavit in reply by Augustine Bujara. He contended that by

25 special resolution; dated 23<sup>rd</sup> October 2013 Mr. Mwebesa was instructed to represent the Applicant Company.

Mr. Mwaka, Principal State Attorney as officer of court also raised the issue of legal representation relying on the authority of **City African Textile Shop (U) Ltd v Jan Mohamed Ltd HMA No.0437 of 2002** (Unreported). He submitted that counsel  
30 cannot represent a company without its resolution authorizing him/her to do so.

5 The learned Principal State Attorney submitted that, therefore, all the actions of Mr. Rwaganika and Rwaganika & Co. Advocates are a nullity since they were conducted without instructions in form of a resolution. He stated further that what counsel did was against the resolution of the company. He prayed that the instant application before court has no standing and is, therefore, incompetent and should  
10 be dismissed. He prayed that Mr. Rwaganika should pay the costs of this Application personally.

In reply, Mr. Rwaganika stated that he had instructions by company resolution although he had not brought it in court. He filed the civil suit on behalf of the company in the High Court at Mbarara. He stated further that the instructions were  
15 never withdrawn from him. He referred to the affidavit in support of the Application deposed by Byarugaba John in particular annexure "KI". The letter in paragraph 1 stated;

He argued that this was not supported by a resolution of the company appointing  
20 him as counsel.

Mr. Rwaganika contended that the application before this court was competent because he had full instructions to represent the company from 2003 up to date. He argued that he had never received any notice of change of advocates from Mwebesa & Co. Advocates that their firm was representing the applicant. He  
25 prayed that the application should be heard on its merits and he should not be made to pay costs personally because he had full instructions.

I have considered the submissions of both counsel. The main issue for determination is whether Mr. Rwaganika was duly instructed to represent the Applicant.

5 The Learned Principal State Attorney cited the case of City African Textile Shop (U) Ltd v  
Jan Mohamed Ltd (supra).The case deals with the issue of representation and the  
basis on which counsel represents a client. The case laid down the principle that  
counsel represents a company as a client on the basis of a company resolution and if  
counsel proceeds without a resolution of a company, all his actions are a  
10 nullity. Mr.Mwaka correctly submitted that all the actions of Mr. Rwaganika and  
Rwaganika & Co. Advocates are a nullity since they were conducted without  
instructions in the form of a company resolution.

Mr. Rwaganika might have had instructions the first time he represented the Applicant  
Company in the High Court at Mbarara. These instructions were later  
15 withdrawn as seen from the special resolution filed by the Applicant Company with  
the Registrar of Companies on 17<sup>th</sup> May 2013 which was duly presented in court during  
the hearing of this Application. From the affidavit in support of Byarugaba John, Mr.  
Rwaganika received different instructions. Some shareholders of the applicant were  
requesting him to withdraw from the appeal and others telling him  
20 to pursue the appeal. That notwithstanding Mr. Rwaganika was aware of the  
uncontroverted evidence contained in the affidavits of Augustine Bujara and Mpirirwe  
Simpson. According to annexure "E" to the affidavit of Mpirirwe the applicant had  
reported Mr. Rwaganika to the Secretary Law Council for acting without instructions.

25 The consent judgment between the applicant officials, the memorandum of understanding,  
minutes of the extra ordinary meeting and the company resolution were attached thereto.  
The legal position must have been very clear to Mr. Rwaganika that instructions had been  
withdrawn from him.

*"Any application to or appearance or act in any court required or authorised by  
law to be made or done by a party in such court may, except*

*where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his or her recognised agent, or by an advocate duly appointed to act on his or her behalf; except that any such appearance shall, if the court so directs, be made by the party in person."*

10 Additionally, Regulation 2 (1) of the Advocates (Professional Conduct) Regulations S.1 267-2 provides;

*"No advocate shall act for any person unless he or she has received instructions from that person or his or her duly authorised agent."*

15 In cases where the instructions have been withdrawn, counsel cannot claim to have instructions to represent the client. Regulation 3(1) of the Advocates (professional Conduct) Regulations 5.1 267-2 provides;

*"An advocate may withdraw from the conduct of a case on behalf of a client where the client withdraws instructions from the advocate."*

20 A suit brought without instructions is incompetent. See: Buikwe Coffee Ltd (1962) EA 327. Counsel must thus appear in court with full instructions and authority from his client. Failure to do so, an advocate will be acting on his own and will not be entitled to any costs.

25 In the case of Danish Mercantile Co.LTD V Beaumont & Anor [1951] Ch C.A 680 Jenkins L.J at page 687 stated the position as follows:

*"I think that the true position is simply that a solicitor who starts proceedings in the name of a company without verifying whether he has proper authority so to do, or under an erroneous assumption of authority*  
30 *does so at his own peril, and that, so long as the matter rests there, the action is not properly constituted. In that sense, it is a nullity and can be*

*stayed at any time, provided that the aggrieved party does not unduly delay his application; but it is open at any time to the purported plaintiff to ratify the act of the solicitor who started the action to adopt the proceedings, to approve all that has been done, then in accordance with the ordinary law of principal and agent and in accordance with the ordinary doctrine of ratification, in my view, the defect in the proceedings as originally constituted is cured, and it is no longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were ,in the first instance, brought without authority".*

15 Clearly the company is not willing to ratify the acts of Mr. Rwaganika, thus rendering the application for stay of execution filed by him incompetent.

Mr. Rwaganika was only instructed by a few members of the company to represent them and not the company itself. As counsel he should have known how to proceed to represent the minority shareholders and not the company.

20 Where a wrong has been done to the company and an action is brought to restrain its continuance, or to recover the company's property or damages or compensation due to it, the company is the true plaintiff. See: Gray Vs Lewis [1873]8 Ch App 1035. The appropriate agency to start an action on behalf of the company is the board of directors, to whom the power is delegated as to manage the affairs of the  
25 company. See: United Assurance Co. Ltd v A.G [1995] KALR 308.

However, in instances where a shareholder is aggrieved with what the directors or majority shareholders did, the share holder could bring a derivative suit on behalf of the minority.

Mr. Byarugaba John as a member of the company should have brought a derivative suit against the company and not instructed counsel Rwaganika to make the



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5 application because his instructions as counsel for the applicant had ceased when  
the applicant passed the special resolution appointing Mr. Mwebesa as its counsel.

Having considered the above authorities and submissions of counsel, I uphold the  
preliminary objection that counsel Rwaganika did not have instructions and the  
10 only duly instructed counsel is Mr. Mwebesa. The application having been filed  
by counsel without instructions, it is, therefore, incompetent in law.

In the result I uphold the preliminary objection and the application for interim stay of  
execution is here by dismissed.

I am of the considered view that there has been a continuous misunderstanding  
between the individual shareholders which could have been solved through negotiation  
and mediation. It has been shown from affidavit evidence that different members of the  
applicant gave Mr. Rwaganika contrary instructions. Such  
20 misunderstanding might have unfortunately confused Mr. Rwaganika on the issue of the  
legal representation. Each party should, therefore, bear its own costs.

Dated at Kampala this 18<sup>th</sup> day of ... December 2013

C:-

**C.N.B KITUMBA**  
**JUSTICE OF THE SUPREME COURT**