

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

10 *[Coram: Katureebe, Tumwesigye, Kisaakye, JJSC.& Odoki, Tsekooko, Okello & Kitumba, Ag. JJSC]*

*Constitutional Application No. 03 of 2014.*

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<p>1. HON. THEODORE SSEKIKUBO 2. HON. WILFRED NIWAGABA 3. HON. MOHAMMED NSEREKO 20 APPLICANTS. 4. HON. BARNABAS TINKASIMIRE 5. HON. ABDU KATUNTU</p>	}	<i>Between</i>
		=====
		<i>And</i>
<p>25 1. THE ATTORNEY GENERAL 2. HON. LT. (RTD.) SALEH M. W. KAMBA 3. MS. AGASHA MARY. RESPONDENTS. 4. JOSEPH KWESIGA 30 5. NATIONAL RESISTANCE MOVEMENT</p>	}	<i>And</i>
		=====

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

**Ruling of the Court.**

40 The Hon. Theodore Ssekikubo, Hon. Wilfred Niwamanya, Hon. Mohammed Nsereko, Hon. Barnabas Tinkasimire and Hon. Abdu Katuntu, (herein after referred to as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> applicants) instituted a Notice of Motion under Rules 2(2), 6(2)(b),

42, 43(1), 50 and 51 of the Supreme Court Rules seeking for three orders.

The first order sought for stay of execution of the decision and orders of the Constitutional Court in Constitutional Petitions Nos. 16, 5 19, 21, 25 of 2013 delivered on 21<sup>st</sup> February, 2014 until final determination of an appeal which has now been instituted in this Court.

The second and third orders sought are a temporary injunction—

- 10 (i) *to restrain the Hon. the Speaker and the Hon. the Deputy Speaker of Parliament from implementing the decision of the Constitutional Court, stopping the first four applicants from continuing to sit in Parliament, and;*
- 15 (ii) *to restrain the Electoral Commission from conducting elections in each of the Constituencies of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants.*

The Notice of Motion sets out the grounds in support of the application. They are that:—

- 20 **1. The Applicants who are dissatisfied with the judgment and the orders of the Constitutional Court filed a Notice of Appeal and have requested for a record of proceedings.**
- 25 **2. The Applicants' intended appeal to the Supreme Court challenging the decisions and orders of the Constitutional Court raises several constitutional and legal issues that warrant serious judicial consideration by the Supreme Court and this prima facie has a high chance of success.**
- 30 **3. Unless restrained by the Supreme Court, the Rt. Hon. Speaker, the Rt. Hon. Deputy Speaker of Parliament and the Electoral Commission shall soon implement the orders of the Constitutional Court and this will irreparably occasion loss to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants of their political, economic**

*and other fundamental rights and freedoms and render the intended appeal nugatory.*

5 **4. The balance of convenience in maintaining the status quo is in favour of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants retaining their seats in Parliament till prima facie appeal is heard and disposed of.**

10 **5. The application has been brought without undue delay.**

The first applicant swore an affidavit on 24<sup>th</sup> February, 2014, outlining grounds in support of the application. The Attorney General, Hon. Saleh Kamba, Ms. Agasha Mary, Joseph Kwesiga and the National Resistance Movement (NRM) [hereinafter referred to  
15 as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents] oppose the application. Mr. Elisha Bafirawala, a Senior State Attorney in the Attorney - General's Chambers, and Mr. Joseph Kwesiga of Karuhanga, Kasajja and Co., Advocates, and Mr. Sam Mayanja C/o J. Mugisha & Co., Advocates have each sworn separate affidavits in reply to that of  
20 Hon. Ssekikubo and in opposition to the application. It is not clear why Mr. Mayanja, an advocate, annexed to his own affidavit sworn on 20<sup>th</sup> March, 2014, Jane Kibirige's affidavit which she had sworn on 03<sup>rd</sup> March, 2014 in opposition to a different Notice of Motion (Application No. 04 of 2014) which was disposed of by Court on 06<sup>th</sup>  
25 March, 2010. If Jane Kibirige's affidavit was necessary then the proper course was for the advocate to prepare a fresh affidavit for her to swear in opposition to this application.

## **BACKGROUND:**

30 The background to the motion is as follows:—

Hon. Lt. (Rtd.) Saleh M. W. Kamba and Ms. Agasha Mary (2<sup>nd</sup> and 3<sup>rd</sup> respondents) instituted Constitutional Petition No. 16 of 2013 against the Attorney - General, (the first respondent), Hon. T. Ssekikubo, (1<sup>st</sup> applicant) Hon. W. Niwagaba, (2<sup>nd</sup> applicant) Hon. M. Nsereko (3<sup>rd</sup> applicant) and Hon. B. Tinkasimire (4<sup>th</sup> applicant). The same two respondents also instituted Constitutional Applications No. 14 of 2013 and No. 16 of 2013 against the same said parties. The National Resistance Movement (NRM) [the present 5<sup>th</sup> respondent] separately instituted constitutional petition No. 21 of 2013 and this was followed by Constitutional Application No. 21 of 2013 and No. 25 of 2013 against the first four applicants.

Joseph Kwesiga (the 4<sup>th</sup> respondent) also separately instituted Constitutional Petition No. 19 of 2013 against the Attorney - General of Uganda while Hon. Abdu Katuntu (the 5<sup>th</sup> applicant) also separately instituted Constitutional Petition No. 25 of 2013 against the same Attorney - General of Uganda.

Except for the petition of Hon. Katuntu, in the other petitions and applications, the petitioners and the applicants (present respondents) challenged the constitutionality of the decision by the Speaker of Parliament by which she declined to declare as vacant the seats in Parliament of each of the present four (1<sup>st</sup> to 4<sup>th</sup>) applicants following their expulsion from the NRM party.

25

The Constitutional Court consolidated the petitions and the applications, heard parties and delivered judgments on 21<sup>st</sup>

February, 2014. By a majority of four to one, the Court allowed the petitions and the applications and ordered, *inter alia*, that:—

- 5 **1)** *The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents (i.e., the present four applicants) are hereby ordered to vacate their seats in Parliament forthwith.*
- 10 **2)** *The Electoral Commission is directed following the service to it of a copy of this judgment by the 1<sup>st</sup> respondent to conduct by-elections in the constituencies hitherto represented by Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko and Hon. Barnabas Tinkasimire in accordance with the electoral laws of this country.*
- 15 **3)** *A Permanent Injunction is hereby issued restraining the Rt. Hon. Speaker of Parliament and the Rt. Hon. Deputy Speaker of Parliament from allowing the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents to continue sitting in Parliament or to take part in any Parliamentary activity or any committees and stop payment to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents of any salaries, allowances, other emoluments and entitlements, save those that may have accrued to them immediately before the issuance of these orders.*
- 20 **4)** *The mandatory injunction issued by this Court on 10<sup>th</sup> September 2013 is hereby vacated.*
- 25

The orders were reduced into a Court Decree which was served on the Speaker of Parliament by the 1<sup>st</sup> respondent on 24<sup>th</sup> February, 2014. Consequently the Speaker declared the seats vacant and by  
30 letter dated 25<sup>th</sup> February, 2014, the Speaker advised the four applicants in the language directed by Constitutional Court. Meantime on 24<sup>th</sup> February, 2014, the four applicants instituted a Notice of Appeal intending to appeal to this Court against the majority Constitutional Court decision. The following day (on 25<sup>th</sup>  
35 February, 2014), the same applicants instituted Constitutional

Applications No. 03 of 2014, and No. 04 of 2014. This Court disposed of the latter application on 06<sup>th</sup> March, 2014. The former is now the subject of this ruling.

5 **SUBMISSIONS:**

During the hearing, Mr. Peter Walubiri assisted by Mr. Alaka, represented the applicants. The 1<sup>st</sup> respondent was represented by Ms. P. Mutesi (PSA) assisted by Ms. M. Ijang (PSA). The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents were represented by Mr. J.M. Mugisha who was  
10 assisted by Mr. J. Matsiko, Mr. C.J. Bakiza and Mr. S. Twinobusingye. Lastly Mr. Elison Karuhanga represented the 4<sup>th</sup> respondent.

Mr. Peter Walubiri opened the submissions on behalf of the applicants. He based the submissions on the grounds set out in the  
15 Notice of Motion and on the contents of the supporting affidavit of Hon. Ssekikubo, the first applicant. Learned counsel contended that the Applicants were dissatisfied with the majority decision of the Constitutional Court and so they filed a Notice of Appeal and had also requested for the record of proceedings. Learned counsel  
20 stated that the applicants had filed Constitutional Appeal No. 01 of 2014 by the time Court was hearing this application. Learned counsel contended that the appeal raises serious constitutional issues and is likely to succeed. Counsel submitted that in terms of **Rule 6 (2) (b)** of the Rules of this Court, where an applicant has  
25 instituted a Notice of Appeal, this Court has discretion to decide whether to grant stay of execution or an injunction or not. He argued that the applicants have appealed in exercise of their

unrestricted right enshrined in **Article 132 (3) of the Constitution**. He therefore prayed that the Court grants stay of execution and an injunction so as to maintain the status quo pending the determination of the appeal.

5

Learned counsel submitted that the second ground in the Notice of Motion raises several constitutional and legal issues to be determined by this Court and that the appeal has chances of success. He contended, quite correctly in our opinion, that it was  
10 not necessary to argue the merits of the appeal at this stage. He however pointed out that the controversy is, *inter alia*, about the interpretation of Article 83 (1) ((g) of the Constitution which the Constitutional Court interpreted erroneously. He again contended that Article 83 (1) (g) is about voluntary crossing of a Member of  
15 Parliament from one party to a different party but not where a member is expelled from his own party as in this case. He further contended that during the hearing of the appeal, the applicants shall argue that it is only the High Court which has jurisdiction to declare that a seat of an MP in Parliament is vacant and that on the  
20 facts in the present case that Article was not applicable because the Constitutional Court had no jurisdiction. Learned counsel also stated that during the hearing of the appeal, the applicants will challenge the erroneous interpretation of Article 119 of the Constitution by the Constitutional Court regarding the binding  
25 nature of the advice of the Attorney General on the Speaker of Parliament. Learned counsel submitted that the intended appeal raises serious issues to be determined by this Court.

Arguing the 3<sup>rd</sup> ground, Mr. Walubiri submitted that if orders sought in the Notice of Motion are not granted by this Court, the four applicants will suffer irreparable damage because the Constitutional  
5 Court made findings which are injurious to the four applicants and that they are entitled to a fair hearing and will incur enormous costs if the Notice of Motion is not allowed.

With regard to the fourth ground, Mr. Walubiri submitted that the  
10 balance of convenience favours stay of execution and grant of an injunction.

Finally Mr. Walubiri submitted that the application was instituted without delay. He prayed Court to allow the application.

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Mr. J.M. Mugisha, lead counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents, opposed the motion. He relied on two affidavits filed in reply to the affidavit of the first applicant. He contended that the Notice of Motion is grossly misconceived because it does not satisfy the Rules  
20 of the Court such as Rule 6 (2) (b). Learned counsel contended that the applicants have not shown that the appeal has great chances of success. He further contended that the four applicants have not demonstrated irreparable damage and loss, and have not tilted the balance of convenience in their favour if the application is not  
25 granted. Learned counsel cited and relied on the following cases in which the principles governing the granting of stay of execution or



injunction have been laid down by the courts. These cases include:

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5           **1)** Dr. Ahmed Muhammed Kasule vs. Greenland Bank in Receivership, (*Supreme Court Civil Application No. 07 of 2010*).

10           **2)** National Housing & Construction Corporation vs. Kampala District Land Board (*Supreme Court Civil Application No 06 of 2002*).

15           **3)** Akankwasa Damian vs. Uganda (*Supreme Court Constitutional Application Nos. 07 & 09 of 2011*).

20 He contended that the applicants have not shown the possibility of success of the appeal and how the appeal will be rendered nugatory and that the grounds set forth by the applicants do not pass the test. Further Mr. Mugisha relied on the case of **John Ken Lukyamuzi vs. Attorney - General & Electoral Commission** (***Supreme Court Constitutional Appeal No. 02 of 2007***) for the view that none of the four applicants is entitled to compensation. (This is a matter to be considered when determining the appeal.) Learned counsel submitted that the balance of convenience favours the respondents. Finally learned counsel prayed that in case the  
25 application is granted, the intended appeal should be prosecuted within fourteen days. Learned counsel was constrained to say that he learnt through reading news papers that after the Court's order of 06<sup>th</sup> March, 2014, the Speaker allowed the applicants back in Parliament.

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Mr. Joseph Matsiko supplementing Mr. Mugisha for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, contended that the four applicants have not adduced evidence to show that they are still in Parliament. He relied on the affidavit of Ms. Jane Kibirige (which incidentally was  
5 sworn on 03/03/2014 in support of Constitutional Application No. 04 of 2014 and which was disposed of by this Court on 06/03/2014) and contended that the four applicants had been ejected from Parliament. Ms. Patricia Mutesi (PSA) representing the first respondent associated herself with the submissions of Mr. J. M.  
10 Mugisha. She relied on Article 81 (2) of the Constitution and the affidavit of Bafirawala and submitted that since action had already been taken by the Speaker, the Constitution cannot be contravened. Unfortunately, she could not give a satisfactory answer to the question raised by Court as to whether the Electoral Commission  
15 can hold by - elections in the four constituencies before the appeal is heard and determined by this Court.

Mr. Karuhanga for the 4<sup>th</sup> respondent also associated himself with the submissions of Mr. Mugisha. He submitted that the matters  
20 raised by the application are matters of national importance. He contended, correctly, that Rule 2 (2) gives this Court powers to make just orders. He urged Court to hear the pending appeal expeditiously.

25 In reply, Mr. Walubiri pointed out that after the hearing of Constitutional Application No. 04 of 2014, this Court had on 06<sup>th</sup> March, 2014, granted stay of execution and a temporary injunction.

Counsel referred to a letter from the Speaker of Parliament showing that indeed the Speaker had allowed the four applicants (MPs) back into Parliament after this Court granted the stay of execution and an interim injunction after determination of Constitutional Application  
5 No. 04 of 2014 on 06<sup>th</sup> March, 2014. The said letter was apparently copied to the Attorney - General (the first respondent) among others. Learned counsel contended that the learned Principal State Attorney (Ms. Mutesi) misinterpreted Article 81 (2). Mr. Walubiri further contended that the Court has to consider Article 81 (2)  
10 alongside Articles 83 (1) (g), 86 and the right of appeal set out in Article 132 (3) of the Constitution. He urged Court to hear the pending appeal expeditiously. Mr. Alaka who assisted Mr. Walubiri supplemented Mr. Walubiri's submissions. In effect he contended that the cases of **Kasule** (*supra*) and **Akankwasa** (*supra*) are  
15 distinguishable and that the two cases were decided on their own merits. Learned counsel submitted that Article 81 (2) of the Constitution should be read together with Article 132 which regulates appeal to this Court. According to learned counsel, the Speaker of Parliament obeyed the decision of this Court dated 06<sup>th</sup>  
20 March, 2014, when she allowed the four applicants back into Parliament.

**CONSIDERATION:—**

It is an undisputed fact that on 06/03/2014, this Court granted an  
25 interim order staying execution of the decree of the Constitutional Court by which that Court had ordered the expulsion from Parliament of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants. It is also clear from

the letter written by the Speaker on 07/03/2014 which letter  
counsel for the applicants showed to the respondent's counsel in  
Court during the hearing of the application that the Speaker  
rescinded her previous decision of 25<sup>th</sup> February, 2014, by which  
5 the Speaker had ordered the four applicants to vacate Parliament.  
The Speaker's letter to the four applicants was issued as a result of  
our orders made on 06<sup>th</sup> March, 2014, granting an interim stay of  
execution and an injunction. Learned counsel for the respondents  
stated in Court during submissions that they read from the press  
10 that the Speaker had indeed allowed the applicants back in  
Parliament. So it is now public knowledge that the applicants are  
back in Parliament.

The most important law regulating the granting of temporary order  
15 of stay of execution and or an injunction is Rule 6 (2) (b) of the  
Rules of this Court. It is couched in the following words:—

*6 (2) Subject to subrule (1) of this rule, the institution of an  
appeal shall not operate to suspend any sentence or to stay  
execution, but the Court may—*

20 " (a)

.....;

25 **(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, an injunction or stay proceedings  
as the Court may consider just."**

In the 3<sup>rd</sup> paragraph of his affidavit, the first applicant deponed that  
the applicants "..... **have filed a Notice of Appeal and**  
30 **requested for a typed copy of the proceedings .....**"

He annexed to the affidavit a copy of the Notice of Appeal and a copy of the letter requesting for the proceedings. This averment has not been challenged nor contradicted by anybody leave alone  
5 the respondents.

Further, in the fourth paragraph of the same affidavit, the 1<sup>st</sup> applicant deponed that **“the intended appeal raises several constitutional legal issues warranting serious judicial  
10 consideration by the Supreme Court and *prime facie* has good chances of success.”**

He annexed to the same affidavit a proposed memorandum of appeal setting out nine grounds of appeal in which Articles 86 (1)  
15 (g), 83 (1) and 119, among others, are proposed to be argued during the hearing of the appeal. In view of the foregoing, we are not persuaded by Mr. Mugisha’s contention that the application is misconceived. In our opinion, the motion satisfies the basic requirements set out in Rule 6 (2) (b). The Articles of the  
20 Constitution in contention are 81 (2) (b), 83 (1) (g), 86, 119 and 132 (3).

**Article 81 (2) states:—**

25 **(2)** *Whenever a vacancy exists in Parliament, the Clerk to Parliament shall notify the Electoral Commission in writing within ten days after the vacancy has occurred; and a by-election shall be held within sixty days after the vacancy has occurred.*

This clearly refers to a vacancy in Parliament. The matter needs decision from this Court when determining the appeal.

**Article 83 (1) (g) states:—**

5 A Member of Parliament shall vacate his or her seat in Parliament;  
**(g)** *if that person leaves the political party for which he or she stood as a candidate for election to Parliament to join another party or to remain in Parliament as an independent member;*

10

A perusal of the majority judgment and that of the minority shows very clearly that there is a controversy to be cleared by this Court when determining the pending appeal.

15 **Article 86 (1) and (2) reads:—**

**(1)** *The High Court shall have jurisdiction to hear and determine any question whether—*

20 **(a)** *a person has been validly elected a member of Parliament or **the seat of a member of Parliament has become vacant; or (emphasis added).***

In the light of these provisions this Court shall have to decide as to which Court has the jurisdiction to declare that a seat in  
25 Parliament is vacant in a situation such as that obtaining in this case.

30 **(2)** *A person aggrieved by the determination of the High Court under this article may appeal to the Court of Appeal.*

This is clear about appealing against a decision of the High Court.

**Article 132 (3) reads:—**

5 *Any party aggrieved by a decision of the Court of Appeal sitting as a constitutional court is entitled to appeal to the Supreme Court against the decision; and accordingly, an appeal shall lie to the Supreme Court under clause (2) of this article.*

This is clear about appeals in Constitutional matters.

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In so far as the effect of the Attorney - General's advice is concerned, the relevant parts of Article 119 (3) and (4) of the Constitution spell out his role in these words:—

15 (3) The Attorney General shall be the principal legal adviser of the Government.

(4) The functions of the Attorney General shall include the following—

20 (a) *to give legal advice and legal services to the Government on any subject;*

(b) .....  
...

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(c) *to represent the Government in courts or any other legal proceedings to which the Government is a party; and*

30 The advice of the Attorney - General does not appear to operate as binding orders but again this Court will decide this issue after hearing arguments of both sides in the appeal.

35 As for the rest of the legal arguments raised by Counsel on both sides, we think that these are matters for decision after the appeal

itself has been argued. But there can be no doubt that the appeal raises constitutional and legal issues that warrant serious judicial consideration by this Court.

5 The principles which govern the grant of stay of execution and or injunctions are well known. The authorities cited to us by Mr. Mugisha all refer to those principles in one form or another. Thus at page 7 of the Ruling of this Court in **Dr. A.M. Kisule** case (*supra*) this Court stated, *inter alia* :—

10 *For an application in this Court for a stay of execution to succeed, the applicant must first show, subject to other facts in a given case, that he / she has lodged a Notice of Appeal in accordance with Rule 72 of the Rules of this Court. The other facts, to which lodgment of the Notice of Appeal is subject, vary*  
15 *from case to case but include the fact that the applicant will suffer irreparable loss if a stay is not granted; that the applicant's appeal has a high likelihood of success.*

20 *The most often cited authority in applications of this type is **Lawrence Musiitwa Kyazze vs. Eunice Busingye, (Supreme Court Civil Application No. 18 of 1990)**, in which this Court held that "Parties asking for a stay" should meet conditions like:*

- 25 *1) That substantial loss may result to the applicant unless the order is made.*  
*2) That the application has been made without unreasonable delay.*

30 Naturally no two cases have identical facts. So situations vary from case to case. Accordingly, the nature of decisions depend on the facts of each case. We think there are sufficient grounds shown upon which we should exercise our discretion. We are satisfied that in this case the interest of justice demands that the issues in



dispute should be heard and determined on appeal. In the result, we allow the application and make the following orders:—

- 5 a) We order stay of execution of the Orders of the Constitutional Court dated 21<sup>st</sup> February 2014, and the consequential decree in respect of *Constitutional Petitions Nos. 16, 19,21 and 25 of 2013*; and
- 10 b) We grant an injunction restraining the Speaker of Parliament and the Deputy Speaker of Parliament as well as the Electoral Commission, from implementing the orders of the Constitutional Court until the determination of the pending appeal by this Court or until further orders.
- 15 c) Everything possible must be done to ensure that the Record of the pending Appeal is served on each of the respondents as soon as possible.
- d) Appropriate steps should be taken to have the appeal disposed of expeditiously.
- 20 e) The cost of this application shall abide the final determination of the appeal.

Consequently the orders which we granted on 06<sup>th</sup> March, 2014, after the hearing of Constitutional Application No. 04 of 2014

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between the same parties shall lapse upon service of these orders on institutions, persons and officers affected by these orders.

**Dated at Kampala** this ..... day of ..... **2014.**

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

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

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

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

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

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

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