THE ENVIRONMENTAL ACTION NETWORK LTD. –VS- THE ATTORNEY GENERAL & NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA)

HC. MISC. APPLIC. NO. 39 OF 2001

Before :The Honourable Principal Judge – Mr. Justice J. H. Ntabgoba

Evidence : *Whether evidence that smoking in public was hearsay*

Evidence : *Whether experts were essential in establishing the effects of public smoking as provided for in Section 43 of the Evidence Act*

Civil Procedure : *Whether the Attorney General and NEMA ought to have been given 45 days notice as provided for in S.1 of Act No. 20 of 1969 (as amended)*

Civil Procedure : *Whether the application ought to have been brought under Order 1 Rule 8 of the CPR*

On the 31st May 2001 an application by notice of motion was filed in this court by a limited liability company called The Environmental Action Network Ltd. Herein referred to as the applicant. In the affidavit of Phillip Karugaba sworn in support of the application, he described the applicant as a public interest litigation group bringing the application bona fide in its own behalf and on behalf of the non-smoking members of the public under Article 50(2) of the Constitution, to protect their rights to a clean and healthy environment, their right to life and for the general good of public health in Uganda.

The respondents brought preliminary objections which are put in the issues there above.

Held;

a) The veracity and credibility of evidence is challenged during the hearing when such evidence is adduced and not preliminary objection. This preliminary objection is over ruled basing on the evidence the applicant seeks to adduce by affidavits.

b) Application brought under Article 50 of the Constitution are governed by the fundamental rights and freedoms (enforcement procedure) Rule (S.I No. 26/92) therefore the objection that the application did not comply with S.I of Act No. 20 of 1969 (as amended) is over ruled

c) Order 1 Rule 8 of the Civil Procedure Rules governs actions by or against the parties (i.e plaintiff or defendant) together with other parties, that they seek to represent, and they most have similar interest in the suit. On the

other hand, Article 50 of the constitution as not require that the applicant must have the same interest as the parties he or she seeks to represent or for whose benefit the action is brought. Therefore objection (c) is overruled.

d) The preliminary objections raised on behalf of the Attorney General and NEMA, the respondents are overruled. And they are ordered to pay costs for the consequent delay in hearing the main application

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. APPLICATION No. 39 OF 2001

THE ENVIRONMENTAL ACTION NETWORK LTD:::::::::::: APPLICANT

VERSUS

THE ATTORNEY- GENERAL }
NATIONAL ENVIRONMENT } :::::::::::::::::::::::::: RESPONDENTS
MANAGEMENT AUTHORITY (NEMA)}

BEFORE:- THE HON. PRINCIPAL JUDGE – MR. JUSTICE J.H. NTABGOBA

RULING

On the 31st May, 2001 an application by notice of motion was filed in this Court by a Limited Liability Company called The Environmental Action Network Ltd. I will herein refer to it as the applicant. In the affidavit of Phillip Karugaba sworn in support of the application, he describes the applicant as a Public Interest Litigation group bringing the application bona fide in its own behalf and on behalf of the non-smoking members of the public under Article 50(2) of the Constitution, to protect their rights to a clean and healthy environment, their right to life and for the general good of public health in Uganda.

Mr. Karugaba depones that he has recently learnt of several medical reports highlighting the dangers of exposure to second hand smoke or environmental tobacco smoke. He sets out various reports which he says have highlighted the dangers of exposure to second hand smoke or environmental tobacco smoke. They include:-

The United States Surgeon General's Report: - " The Health consequences of Involuntary Smoking (1986) which contains the following conclusions: -

- involuntary smoking is a cause of disease, including lung cancer, in healthy non-smokers;
- the children of parents who smoke compared with children of non-smoking parents have increased frequency of respiratory infections, increased respiratory symptoms and slightly smaller rates of increase in lung functions as the lung matures;
- the simple separation of smokers and non-smokers within the same air space may, reduce, but not eliminate the exposure of non-smokers to environmental tobacco smoke (ETS).

The United States Environmental Protection Agency (EPA) Report: Respiratory health effects of passive smoking: Lung cancer and other disorders in children (1992) made the following major conclusions: -

- that based on the weight of the available scientific evidence, exposure to Environmental Tobacco Smoke presents a serious and substantial health impact;
- Environmental Tobacco Smoke is a human lung carcinogen, responsible for approximately 3,000 lung cancer deaths annually in us non-smokers;
- Environmental Tobacco Smoke exposure is usually associated with increased risk of lower respiratory infections such as bronchitis, pneumonia. 150,000 to 300,000 cases annually in infants and young children up to 18 months of age are attributed to ETS;
- Environmental Tobacco Smoke is casually associated with increased prevalence of fluid in the middle ear, symptoms of upper respiratory tract irritation and small but significant reduction in lung function;
- Environmental Tobacco Smoke exposure is casually associated with additional episodes and increased severity of symptoms in children with asthma 200,000 to 1,000,000 asthmatic children have their condition worsened by exposure to Environmental Tobacco Smoke;
- Environmental tobacco smoke is a risk factor for new cases of asthma in children who have not previously displayed symptoms;
- Environmental Tobacco Smoke is classified as a Group A Carcinogen under EPA's Carcinogen assessment guidelines. This classification is reserved for those compounds or mixtures, which have been shown to cause Cancer in humans, based on studies in human populations and for which no safe level of exposure is known.

The National Health and Medical Research Council Report: "the Health Effects of Passive Smoking: A scientific Information Paper" concludes that: -

- Passive smoking contributes significantly to the risk of Sudden Infant Death Syndrome;
- Children Exposed to Environmental Tobacco Smoke are about 40% more likely to suffer from asthmatic symptoms than those who are not exposed;
- About 8% of childhood asthma is attributed to passive smoking (about 46,500 children per year);
- The risk of heart attack or death from coronary heart disease is about 24% higher in people who never smoke but who live with a smoker, compared to unexposed people who never smoke;
- People who never smoke and live with a smoker have a 30% increase in risk of developing lung cancer compared to people who never smoke and live with a smoker, to about 12 new cases of lung cancer and 11 deaths from lung cancer per year who never smoke".

I would stop here but suffice it to say that Phillip Karugaba, in his affidavit gave many more details about the dangerous effects of Passive smoking.
I would myself hesitate to challenge his averments because they are supported by research reports and scientific disclosures.

In paragraph 17 of his affidavit he depones that " non-smoking Ugandans have a constitutional right to life under Article 22 and constitutional rights to a clean and healthy

environment under Article 39 of the Constitution of the Republic of Uganda".

In paragraph 18 of the affidavit he refers to the United Nations Convention on the Rights of the Child, to which Uganda is a signatory and states that " children have rights to adequate standards of health under Article 24, a right to life under Article 6 and a right to an adequate standard of living under Article 27". He adds in paragraph 19 of the affidavit that " according to a recent report: -
"Tobacco and Children's' rights" released by the World Health Organization, exposure to second hand smoke is an infringement of a child's right to life and to an adequate standard of health".

Mr. Karugaba concludes that " the said rights of non-smokers and the rights of the children are being threatened by the unrestricted practice of persons smoking in public places". (See paragraph 20 of the affidavit).
It is in light of the above that this application seeks from this Court the following declarations and orders: -
A declaration that smoking in public places constitutes a violation of the rights of non-smokers to a clean and healthy environment as prescribed under Article 39 of the Constitution of the Republic of Uganda and s. 4 of the National Environment Statute 1995.

If I may comment on this declaration being sought, my view is that it is too sweeping. It could have been worded thus :-

1) "A declaration that unregulated smoking in public places constitutes a violation of the rights of non-smoking members of the public; and that the respondents should take appropriate measures to regulate smoking in public places so as to provide a clean and healthy environment to the non-smoking members of the public".

2) A declaration that smoking in public places constitutes a violation of the rights of the non-smoking members of the public to the right to life as prescribed under Article 22 of the Constitution of the Republic of Uganda.
   Here again I thought that the wording of the prayer should have been that " Un-regulated smoking in public places violates the right to life of non-smoking members of the public contrary to Article 22 of the Constitution ---.
3) A declaration that smoking in a public place constitutes an offence under Ss. 156 and 172 of the Penal Code.
4) An order that the 1st Respondent (i.e. The Attorney- General) take steps to ensure the prosecution of persons committing offences under sections 156 and 172 of the Penal Code Act.
5) An order that the second respondent takes the necessary steps to ensure the enjoyment by the Ugandan public of their right to a clean and healthy environment.

It is pertinent, at this juncture, to point out that in my ruling of 17/07/2001, I struck out prayers 3 and 4 of this application on the ground that smoking in public is not a crime either under the Penal Code Act or under any of our statutes, and Courts have no

jurisdiction to create crimes or criminalise any acts. Nor do Courts possess any powers to order prosecution, which is the power strictly reserved for the Director of Public Prosecution.

This present ruling is on several preliminary objections raised by Mr. Oluka Henry, a State Attorney which appear in paragraph 8 of his Additional Affidavit in Reply sworn on the 18th July, 2001. I will do no better than extract the entire paragraph: -

> "That the Respondent will at the hearing of this application raise preliminary objections seeking to declare that the applicant has no cause of action, that the evidence on the affidavit in support is based on hearsay; that the applicant company is not an expert on the effects of secondary cigarette smoke; that the applicant cannot claim to represent the Uganda public and that no notice that the present suit would be filed against the respondents was filed as provided for in the Civil Procedure and Limitations (Miscellaneous Provisions) Act as amended of 1969 and the Civil Procedure and Limitations (Miscellaneous Provisions)(Amendment) Act 2000".

Paragraph 8 of Mr. Oluka's affidavit raises the following issues which I must discuss in this ruling: -

- That the evidence on the affidavit in support of application No. 39/2001 is based on hearsay.
- That the applicant company is not an expert on the effects of secondary cigarette smoking.
- That the applicant company cannot claim to represent the Ugandan public. (Here I suppose Mr. Oluka is referring to the non-smoking members of he Ugandan public).
- That the applicant (suit) did not comply with the provision S. 43 of the Evidence Act. The section is about persons who give opinion on foreign law, or science or art etc. as experts.

In some situations Court may wish to call such experts to give opinion, but in some other situations the Court could take Judicial notice of the opinions without having to necessarily call them. I, however, agree with Counsel for the applicant that even if it was compulsory for experts mentioned in S. 43 of the Evidence Act to testify, that would not be necessary with regard to evidence produced by affidavit because that is the import of S. 2 of the Evidence Act.

Besides, Mr. Oluka's preliminary point in which he brands the documentary presentation, by affidavit, of scientific findings and reports, is premature and therefore misplaced. The veracity and credibility of evidence is challenged during the hearing when such evidence is adduced and not preliminary objection. I would overrule this preliminary objection based on the evidence the applicant seeks to adduce by affidavits.

I will now deal with another preliminary objection by Mr. Oluka where he challenges the application on the ground that it did not comply with s. 1 of Act No. 20 of 1969 (as amended), which requires the Attorney-General and specified corporations, including NEMA, to be given a notice of intention to sue of 45 days. Here again, with due respect,

Mr. Oluka's objection is misconceived and should be overruled. Applications brought under Article 50 of the Constitution are governed by the Fundamental Rights and Freedoms (Enforcement Procedure) Rules (S.I. No. 26/92). Although Rule 4 provides that no motion (under Rule 3) shall be made without notice to the Attorney-General and any other party affected by the application, Rule 7 clearly stipulates that " subject to the provisions of these Rules, the Civil Procedure Act and the Rules thereunder shall apply in relation to application".

Applying the so called golden rule of Statutory Interpretation, we would be wrong if we assumed that besides Rule 7 of S.I. No. 26 of 1992, Parliament meant that any other rule of procedure should be applied. It is for this reason that I think that applications pursuant to Article 50 of the Constitution must be strictly restricted to the Civil Procedure Act and the rules thereunder and not under S.1 of Act No. 20 of 1969. The Attorney-General and NEMA in this application therefore got the notice they are supposed to get. Incidentally, this was also the decision in ***Rwanyarare & 4 others Vs. Attorney-General*** (High Court Miscellaneous. Application No. 85 of 1993). If the rationale for applying the Civil Procedure Act and the Rules thereunder instead of S.1. of Act 20 of 1969, the Court has this to say: -

> "The object of S. 80 is to give the Secretary of State for India an opportunity of settling the claim, if so advised, without litigation or, to enable him to have an opportunity to investigate the alleged cause of complaint and to make amends, if he thought fit, before he was impleaded in the suit".

I agree with this requirement that the respondent, usually Government or a Scheduled Corporation which is supposed to be busy as Government, needs sufficient period of time to investigate a case intended to be brought against it so as to be able to avoid unnecessary expense on protracted litigation. This rationale cannot apply to a matter where the rights and freedoms of the people are being or about to be infringed. The people cannot afford to wait 45 days before pre-emptive action is applied by Court. They would need immediate and urgent redress. They need a short period which is one provided under the ordinary rules of procedure provided by the Civil Procedure Act and its Rules. To demand from the aggrieved party a 45 days notice is to condemn them to infringement of their rights and freedoms for that period which this Court would not be prepared to do. Any alleged infringement must be investigated expeditiously before damage is done.

Other preliminary objection raised by the learned State Attorney is that the applicant cannot claim to represent the Ugandan Public and therefore they should have brought the application under Order 1 Rule 8 of the Civil Procedure Rules which demands that: -

8(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct".

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under

sub-rule (1) may apply to the Court to be made a party to the suit".

Here again the State Attorney failed, in his preliminary objection, to distinguish between actions brought in a representative capacity pursuant to Order 1 Rule 8 of the Civil Procedure Rules, and what are called Public Interest Litigation which are the concern of Article 50 of the Constitution and S.I. No. 26 of 1992. The two actions are distinguishable by the wording of the enactments or instruments pursuant to which they are instituted. Order 1 Rule 8 of the Civil Procedure Rules governs actions by or against the parties (i.e. plaintiff or defendant) together with other parties that they seek to represent, and they must have similar interests in the suit. On the other hand, Article 50 of the Constitution does not require that the applicant must have the same interest as the parties he or she seeks to represent or for whose benefit the action is brought.

The wording of Article 50 of the Constitution, especially clauses (1) and (2) clearly show what I am saying. It is instructive to quote them: -

"50 (1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent Court for redress which may include compensation.
(2) Any person or organization may bring an action against the violation of another person's or group's human rights".

Clause (2) answers Mr. Oluka's argument that the applicant in this application cannot claim to represent the Ugandan non-smoking public. There are also decided cases which decided that an organization can bring a public interest action on behalf of groups or individual members of the public even though the applying organization has no direct individual interest in the infringing acts it seeks to have redressed. In the case of RE. – Vs-. I.R.C. Exp. Federation of Self- Employed (H.L. (E)) [1982] A. C. 643, Lord Diplock said: -

> "It would , in my view, be a grave lacuna in our system of public law, if a pressure group, like the federation or even a single public – spirited tax payer, were prevented by out-dated technical rules of locus standi, from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped". (See also [1901] 2 All. E.R. 93 at p. 107]".

In his rather politico-judicial reasoning to support public interest litigation on behalf of the poor, indigent and unprivileged members of the Tanzanian Society by Public spirited organizations such as The Environmental Action Network Ltd., Rugakingira, J. of the High Court of Tanzania (as he then was) had this to say in the case of ***Rev. Christopher Mtikila –Vs- The Attorney General*** in Tanzanian Civil Suit No.5 of 1993 (unreported): -

> "The relevance of public litigation in Tanzania cannot be over-emphasized. Having regard to our socio-economic conditions, these (sic) development promise more hopes to our people than any other strategy currently in place. First of all, illiteracy is still rampant. We were recently told that Tanzania is second in Africa in wiping out illiteracy but that is a statistical juggling which is not reflected on

> the ground. If we were that literate it would have been unnecessary for Hanang District Council to pass by laws for compulsory adult education which were recently published as Government Notice No. 191 of 1994. By reason of this illiteracy a greater part of the population is unaware of their rights, let alone how the same can be realised.

Secondly, Tanzanians are massively poor. Our ranking in the World on the basis of per capita income has persistently been the source of embarrassment. Public interest litigation is a sophisticated mechanism which requires professional handling. By reason of limited resources that the vast majority of our people cannot afford to engage lawyers even where they are aware of the infringement of their rights and the perversion of the Constitution. Other factors could be listed out but perhaps the most painful of all is that over the years since Independence Tanzanians have developed a culture of apathy and silence. This, in large measure is a product of institutionalized mono-party politics which, in its repressive dimension, like detention without trial supped up initiative and guts, the people found contentment in being receivers without being seekers. Our leaders very well recognize this, and the emergence of transparency in governance they have not hesitated to affirm it. When the National Assembly was debating Hon. J. S. Warioba's private motion on the desirability of a referendum before some features of the Constitution were tampered with, Hon. Sukwa said Sukwa, after the interruptions by his colleagues, continued and said -----

> " Given all these and other circumstances., if there should spring up a public-spirited individual and seek the Court's intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise-up to the occasion and grant him standing".

My understanding of Lugakingira J's lengthy statement is that the interest of public rights and freedoms transcend technicalities, especially as to the rules of procedure leading to the protection of such rights and freedoms. This is also the message in Lord Diplock's words cited above in [1901] 2 ALL E.R. 93 at p. 107.

If I may revert to Miscellaneous Application No. 39 of 2001, the applicant say they are especially interested in the infringement of the rights and freedoms of the poor, and children – those who cannot know and appreciate their rights and freedoms and who do not know where to go and how to go there for redress. It is not compelling that a body like the applicant stands up for them and fights for their cause. I think the applicant deserves hearing and I will hear it.

The preliminary objections raised on behalf of the Attorney-General and NEMA, the respondents, are overruled –And they are ordered to pay costs for the consequent delay in hearing the main application. It should be urgently fixed for hearing on merit. I so order.

J.H. NTABGOBA
PRINCIPAL JUDGE
28.08.01