THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 39 OF 2001
[Arising from Misc. Application No. 39 of 2001]

JOSEPH ERYAU ] APPLICANT

VERSUS

THE ENVIRONMENTAL ACTION NETWORK ] RESPONDENTS

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

RULING

This is an application by notice of motion under Rules 5 and 8 of the Fundamental Rights and Freedoms, (Enforcement) Procedure Rules, 1992 and order 48 rule 1 of the Civil Procedure Rules. The application filed by one Joseph Eryau through his lawyers, M/s Byenkya and Kihika Advocates, sought from this Court the following orders: -

(a) That this Honourable Court be pleased to give leave to the applicant to be heard in opposition to the main application, namely, Miscellaneous Application No. 39 of 2001 filed by M/s Environmental Action Network Ltd., against the Attorney General of Uganda and M/s National Environmental Management Authority (popularly referred to by its acronym, NEMA).

Miscellaneous Application No. 39 of 2001 aforementioned sought three declarations and two orders from this Court. I set out the declarations and orders as follows: -

1. A declaration that smoking in a public place constitutes a violation of rights of the non-smoking members of the public denying them a right to a clean and healthy environment as prescribed under Article 39 of the Constitution of the Republic of Uganda and Section 4 of the National Environment Statute 1995.

2. A declaration that smoking in a public place constitutes a violation of the rights of the non-smoking public by denying them a right to life as prescribed under Article 22 of the Constitution of the Republic of Uganda.

3. A declaration that smoking in a public place constitutes an offence under Sections 156 and 172 of the Penal Code.

4. An order that the first respondent take steps to ensure the prosecution of persons committing offences under Sections 156 and 172 of the Penal Code.

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 health environment.

It is also prayed that the costs of this application be paid to the Applicant in any event. Mr.

Karugaba and Mr. Kakuru, representatives of the Applicant, during the course of the hearing, indicated that they would not press for costs. I will deal with the application handling the declarations and orders sought when it comes to the hearing of Miscellaneous Application No. 39 of 2001. Suffice it to say, however, that at the outset in my ruling dated 17/07/2001, I struck out prayers 3 and 4 of the application on the ground that smoking in public is not a crime either under the Penal Code Act or under any law or statute and I added that "Courts have no jurisdiction to create crime or criminalize any acts. Nor do Courts possess any powers to order prosecution, which is the power strictly reserved for the Director of Public Prosecutions".

I repeated this statement in my ruling dated 28/08/2001. But I suppose I should have only emphasized that the specific crimes mentioned in orders 3 and 4 sought were not in any statute although Sections 96 to 102 of the National Environment Statute (No. 4 of 1995) create offences not strictly analogous to the ones proposed under the two declarations sought.

What then remains of concern to the Applicant (Joseph Eryau) are prayers numbers 1 and 2 of the Miscellaneous Application No. 39 of 2001 since Mr. Byenkya Ebert has branded prayer number 5 innocuous. Mr. Eryau, hereinafter to be referred to as the applicant for leave to be heard in Miscellaneous Application No. 39 of 2001 as follows: -

"That the Applicant is a smoker and the orders sought by the Respondent in the main application, if granted shall directly compromise the enjoyment of the Applicant's own inherent, fundamental and inalienable human rights".

When I read Mr. Eryau's affidavit in support of this application my understanding is that he heavily relied on the prayer fro declaring smoking in public a crime, which he now cannot rely on since prayers 3 and 4, as I have stated, were struck out. But in his affidavit he relies on other grounds, thanks to the last paragraph in the notice of motion where he states: -

"Further take notice that this application shall rely on this and such further grounds as are set out in the affidavit in support of this application".

Those such further grounds appear to me to be those specifically stated in paragraphs 7, 8 of his affidavit which are: -

"(7) That the type of conduct that the Respondent seeks to have declared unconstitutional, to wit smoking in public, is the type of conduct that I am currently entitled to engage in, exercising my free - will, good sense and conscience I verily believe that neither the office of the Attorney General, nor the National Environment Management Authority, a statutory body, [is] capable of the activity of smoking which is carried out by natural persons".

"(8) That the application does not in any way limit or define the type of public places in which it is proposed that smoking be proscribed and I verily believe that it is intended that smoking be proscribed in all public places to which I would normally be entitled to go as a member of the general public without hindrance in the conduct of lawful activities".

The Applicant's averments or deponents in paragraphs 9, 10, 11 and the paragraphs that follow in his affidavit, express his fears about the prayers sought by the Respondent's application.

I must then look at answers of the Applicant in his examination and re-examination in Court.

In his cross-examination by Mr. Phillip Karugaba he states the "I perceive that a smoker, I would be subjected to degrading treatment because TEAN (i.e. the Respondent) asks for prosecution of those smoking in public places. They think smoking is a health hazard to non-smokers, I am not aware that this Court has declined to order the prosecution of the people who smoke in public. If Court has so refused then my concerns are no longer there"

This is why I have said that the Applicant when he filed this application he heavily relied on the prayers for criminalizing smoking in public places. And now that his concerns are allayed by the Court's striking out those prayers can he argue any longer that he is a person "affected" by application No. 39/2001? He testified that he was yet to consult his advocates to consider whether or not to withdraw the application, meaning that it is his advocates who would decide for him whether he is "a person affected" by the application.

In a very interesting sort of equivocation, he says he does not believe that smoking is dangerous to health. "I am not convinced," he said "that cigarette smoke is dangerous to non-smokers, I only think it is inconvenient to people".

I must say that I do not believe that Mr. Eryau is serious. A person who claims to have been B.A.T. Quality Controller should surely be aware that cigarette smoke is not only harmful to him as a direct smoker but more so to the passive unknowing smokers who directly inhale, against their wish, cigarette smoke. I say this because I take judicial notice of the overwhelming scientific evidence that whereas the direct smoker has some safeguard, i.e. the cigarette filter and the expulsion of the cigarette smoke through puffing, the unsuspecting non-smokers have no such safeguards and they inhale every smoke the cigarette smoker exhales.

The Applicant, by his own admission says that he smokes in his home and that when B.A.T. employed him he could not smoke in office. This is what he said: -

" I smoke in my home. While I was employed by B.A.T., I would not smoke in the Office. I would go out to smoke because I did not want to inconvenience other. Some of them would not like to smell cigarette smoke. I had to respect certain places by not smoking in there".

He surely appreciates the fact that cigarette smoke is hazardous to health more than merely being inconvenient to other people. Scientific proof on this is undoubted.

But I appreciate his very concern when he says: -

"You have to define which public places not to smoke in-- I would not smoke at a bus stage where people are waiting with children".

Indeed I have from the outset, informed the Applicant in application No. 39 of 2001 that what is necessary is to define what public places should be excluded from cigarette smoking. A blanket exclusion of every public place from cigarette smoking would be inappropriate and unacceptable to smokers like the applicant. In that case, the application would affect the applicant and his point is appreciated. If you like there would be no further need for him to be heard further on the matter. Court appreciates that he and the likes of him "would like to smoke in some places and not in others". (undermining mine). I appreciate what he says and that is what it should be that: -

"When limiting my rights, other peoples' rights like mine should be taken into account. I cannot smoke in a public place. My concern is that (public place is too general".

I must repeat that the applicant would not be a person affected in terms of Rule 4 of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992. Having said thus I do not think that there is any further need for him to be heard because I think he has been sufficiently heard and as I said his concerns will be taken into consideration when hearing the main application, namely, Miscellaneous Application No. 39 of 2001.

The applicant says that he does not believe that smoking is dangerous to health and life and therefore a health hazard. He states that he should be left alone to smoke even if it may be injurious to his health. I wish to agree with him that he is free to smoke and destroy his health as he says. However, he cannot be heard t be saying that his smoking is not injurious to unsuspecting, unknowing and innocent non-smokers. He himself agrees that he cannot smoke in any public places indiscriminately because, he says, it is uncomfortable for non-smokers. He shies away from using the expression dangerous to non-smokers.

I find that Mr. Eryau is either a hiring obstructionist or a person far removed from international concerns about the dangers of cigarette smoking. The former is more likely to be the correct assessment of what he is, as I do not think that a person of his education who was a B.A.T. Quality Controller would not know that cigarette smoking is hazardous to the life of both the direct smoker like him but more so to the passive smoker. He needs to have attended to the address to the nation of Hon. Beatrice Wabudeya, Minister of State for Primary Health on 30/05/2002, the eve of the International campaign against smoking. He would have learnt that four and half million people die every year of tobacco-smoking related diseases.

Cigarette smoking kills, and that is why smoking of cigarettes in the public places needs to be regulated. That is the crucial issue and not whether or not cigarette smoking is dangerous to life.

In the result I have decided that Mr. Joseph Eryau is merely an obstructionist who has nothing useful to offer to this Court if he were allowed to be heard. I dismiss his application. There will be no need for him to be heard in Miscellaneous Application No. 39/2001, which I order should proceed to hearing without further interference.

J.H. NTABGOBA
PRINCIPAL JUDGE

Mr. Byenkya for the Applicant
Mr. Karugaba for the Respondent

Ruling read in Chambers.
19th June 2002

"Speak up for those who cannot speak for themselves, for the rights of all who are destitute,

Speak up and judge fairly; defend the rights of the poor and needy." Proverbs 31: 8-9

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