

THE ENVIRONMENTAL ACTION NETWORK

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 470 OF 2001
[Arising from Misc. Application No. 39 of 2001]

JOSEPH ERYAU] APPLICANT

VERSUS

THE ENVIRONMENT ACTION]
NETWORK LTD] RESPONDENT

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

RULING

This is an application by notice of motion brought by one Joseph Eryau through M/S Byenkya & Kihika Advocates. The application is brought on motion pursuant to Rules 5 and 7 of the Fundamental Rights and Freedoms (Enforcement) Procedure Rules 1992, and Order 48 Rule 1 of the Civil Procedure Rules. It seeks orders that: -

(a) This Honourable Court be pleased to give leave to the applicant to be heard in opposition to Application No. 39/2001 between the respondent, The Environmental Action Network, Ltd and the Attorney General jointly with the National Environment Management Authority. Rule 5 of the Rules (i.e. S.I. No. 26/92) permits an application of this nature. It provides that: -

"On the hearing of an application the Court, if it thinks fit, may permit a person to be heard notwithstanding the fact that such person has not been served with notice of motion in respect of the application".

In his affidavit the said Joseph Eryau indicates that he is a person who would be affected by the declarations being sought in the Motion Application No. 39/2001. In particular, since he depones that he is a smoker, he argues that the following two declarations being sought would adversely infringe his rights and freedoms:

(a) a declaration that smoking in a public place constitutes a violation of the rights of the non-smoking members of the public 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.

(b) a declaration that smoking in a public place 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.

Mr. Eryau who deponed that for the last 20 years he has been smoking, argues that for him smoking has been his right and a freedom and the above and similar declarations sought would deprive him of or violate his said rights and freedoms.

In reply Mr. Phillip Karugaba for the respondent made an oral application for an order calling Mr. Eryau to be cross-examined on his affidavit. In his words Mr. Karugaba doubts the existence of Mr. Eryau whom he says could be a trojan horse. Mr. Byenkya complained against Mr. Karugaba's surprise oral application which he referred to as an ambush. He argued that such application should have been brought by a notice of motion pursuant to Rule 3 S. I No. 26/92. Mr. Karugaba argued that it is permissible under Order 17 Rule 2 of the Civil Procedure Rules to make an oral application to call a deponent and examine him on his affidavit. He cited the procedure in Election Petitions which are heard on affidavits and in which oral applications are admissible. Mr. Kakuru in support of Mr. Karugaba referred in particular to such procedure having been followed in the Presidential Election Petition No. 1 of 2001 - Retired Col. Kizza Besigye -vs- Yoweri K. Museveni. I was also referred to the decision in Bawa (D.D.) Ltd. -vs- Singh (G.S. Didar) [1961] E.A. 282.

Whereas I agree Bawa (D.D) Ltd. -vs- Singh (G.S.) Didar decided that an application to amend may be made orally, thing had nothing to do with an application to call a deponent to be cross-examined on his/her affidavit. But I do not agree with Mr. Byenkya that there would be any miscarriage of justice if Court ordered his client to appear in Court and be examined on his affidavit by the mere fact that the order was given on an oral application. I do not agree that the application is an ambush at all and that a formal application is necessary to build up a case for the necessity of cross-examining a deponent who is alleged to have sworn an affidavit and has not appeared in Court to be identified. I do not agree either that Rule 3 of S. I. No. 26 of 1992 and Rule 2 of Order 17 of the Civil Procedure Rules are mutually exclusive. On the contrary, they are made complementary by Rule 7 of the Statutory Instrument. I would, in the circumstances order, as applied for, that Mr. Joseph Eryau appears in Court for cross-examination on his affidavit. His Counsel, if they required a notice, this is sufficient.

I order accordingly. He will appear on 24/10/2001

J.H. NTABGOBA
PRINCIPAL JUDGE
20/09/2001

Present in Chambers when the Ruling is read are: -

Mr. Andrew Kasirye for the respondent and Mr. Innocent Kihika for the Applicant.
In the presence of Mr. Edward Kangaho, Court Clerk.

J.H. NTABGOBA
PRINCIPAL JUDGE

20/09/2001

"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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