

UGANDA / JUDGMENT

Eryau v Environmental Action Network (Civil Appl. No. 39 of 2001) [2002] UGHC 133 (19 June 2002) [2002] UGHC 133

COURT
High Court of Uganda

BEFORE
Ntabgoba, PJ

CASE / FILE NUMBER
Civil Appl. No. 39 of 2001

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THE REPUBLIC OF UGANDA

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IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPL. NO. 39 OF 2001

(Arising from Misc. Appl. No. 39 of 2001)

JOSEPH ERYAU APPLICANT

-versus-

THE ENVIRONMENTAL ACTION NETWORK RESPONDENT

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

RULING

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

- (a) referred to by its acronym, NEMA). ^t (popularly of 2001 (_, 0|- Uganda and M/S. National Environmental Management Authority 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 filed by M/S. Environment?.' Action Network. Ltd. against the Attorney

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Miscellaneous Application No. 39 of 2001 aforementioned sought three declarations and tv\o oi dei s 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 the 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 the right to life as prescribed *!* under Article 22 of the Constitution of the Republic of Uganda.
- ^A declaration that smoking in ^a public place constitutes an offence under IO 3. Sections 156 and 172 of the Penal Code.
- 4. committing offences under Sections 156 and 172 of the Penal Code. 4n order that the first respondent take steps to ensure the prosecution of persons
- that the second respondent takes the necessary steps to ensure the 5. enjoyment environment. An order by the Ugandan public of their right to a clean and health

nr;ly event ¹ -is also prayed that the costs of this application be paid to the Applicant in Mr Karugaba and Mr. Kakuru, representatives of the applicant, during the

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at the outset in Code Act or under any law or statute and I added that "Courts have no jurisdiction to create crimes or criminalise any acts. No do Courts possess any powers to order prosecution, which is the power strictly reserved for the Director of Public Prosecutions". 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 the application hearing, indicated that they would not press for costs. I will the application handling the declarations and orders sought when it comes to e heat ing of Miscellaneous Application No. 39 of 2001. Suffice it to say, however, that

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I repeated this statement in my ruling dated 28/8/2001. 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 Edyau) are prayers He gives the reason for his for leave to follows: numbers ¹ and 2 of Miscellaneous Application No. 39 of 2001 since Mr. Byenkya Ebert number 5 innocuous. Mr. Edyau, hereinafter to be referred to as has branded prayer "affected". the applicant, alleges that he would be application be heard in Miscellaneous Application No. ³⁹ of ²⁰⁰¹ as

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". " That the applicant is

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

"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 iO application".

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

That the type of conduct that the respondent seeks to have declared nor the "(7) 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. National Environment Management Authority, a statutory body, [is] ^I le of the activity of smoking which is carried out by natural persons. cal'a

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

The applicant's averments or deponements in paragraphs 9, 10, 11 and the paragraphs that follow in his affidavit, express his fears about the prayers sought by the ^t respondent's application.

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

In his cross-examination by Mr. Philip Karugaba he states the "I perceive that ^a smoker. ^I would be subjected to degrading treatment because TEANfi.e. the as 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 (he prosecution of the people who smoke in public. If Court has so refused then my concerns are no longer there-".

allayed by the Court's striking out those prayers can he argue any This is why ¹ have said that the applicant when he filed this application he the prayers for criminalising smoking in public places. And now that "affected" by application No. 39/2001? He testified that he heavily relied on *his concerns arc longer that he is a person*

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affected" by the application. " as ^y el to consult his advocates to consider whether or not to withdraw this application, meaning that it is his advocates who would decide for him whether he is "a person

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

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I must say that I do not believe that Mr. Edyau is serious. A person who claims to have been B. A. T's 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 \O because ^I take judicial notice of the overwhelming scientific evidence that whereas the direct snicker 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.

when he was The applicant, by his own admission says that he <smof.es> in his home and that employed by B. A. T. he could not smoke in the office. This is what he said:_

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

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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:-

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ou 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". (underlining mine). I appreciate what he says and that is what it should be, that:-

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

that the applicant would be a person affected in terms of Rule 4 thus ^I do not) I said ^I must repeat of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992. Having thought that there is any further need for him to be heard because I

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consideration when hearing the main application, namely, Miscellaneous Application No. 39 of 2001. • think he has been sufficiently heard and as ^I said his concerns will be taken into

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 to 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 >0 dangerous to non-smokers.

^I find that Mr. Edyau is either a hiring abstractionist or a person far removed from international concerns about the dangers of cigarette smoking. The former is more smoker. He He would have learnt that four and half Wiburdeya Minister of State for Primary Health on

30/05/2002, the eve of the International campaign against smoking. [I] people die every year of tobacco - smoking related diseases. 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 needs to have attended to the address to the nation of Hon. Beatrice

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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 Edyau 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. Mr Byennya for the applicant
Mr Kangaba for the respondent
Ruling is read in Chambers. 10 Mr. By engu I have instructions &
Fundamental Phinapa B of law do and
with A gare to apported Cases with

ti Constitutional provisions \$9 - -178 -\$ Mr. Kanugaba - I do not oppose the application for lave to appeal Court : Leave to appeal is granted. MAN 2
19/6/2002 $\mathcal{F}(\mathbf{r})$ $\mathbf{r}$ $\mathcal{L}(\mathcal{A})$

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