

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

MISC. APPLICATION NO. 140 OF 2002.

GREENWATCH APPLICANT

VERSUS

**ATTORNEY GENERAL AND
NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY (NEMA)..... RESPONDENT**

BEFORE: THE HON. MR. AG. JUSTICE LAMECK N. MUKASA

Civil Procedure : whether the plaint disclosed a cause of action.
Civil Procedure : whether Order 1 Rule 8 of the CPR was complied with.
*Civil Procedure : whether the affidavit contravened Order 17 Rule 3(1) CPR hence
Should be dismissed as hearsay*

This miscellaneous cause was brought by notice of motion under Article 50 (1) and (2) of the Constitution of the republic of Uganda, Rule 3(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules; 8,1 No. 26 of 1992, Order 2 Rule 7 and Order 48 Rules 1 and 3 of the Civil Procedure Rules.

The applicants sought the regulation of the manufacture, use, distribution and sale of plastic bags and restoration of the environment to the state it was before the menace caused by the plastic.

Counsel for the respondents raised preliminary objections; that the application had no cause of action, that it didn't comply with Order 1 Rule 8 of the CPR which stipulates rules of representative action and that the application was supported by a defective affidavit which should be rejected.

Held.

1. The essential elements to support a cause of action against each of the two respondents have been satisfied.
2. 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. Court is under an obligation to hear the concerned citizen, in the instant case, the applicant.
3. In the two affidavits in support of this application, the deponent avers that the

matter contained in each of the affidavits were based on the deponents knowledge. Therefore, the third preliminary objection is overruled.

In the final result, the preliminary objections raised on behalf of the respondents are overruled.

Signed
LAMECK N. MUKASA
AG. JUDGE
4/7/03.

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RULING:

This Miscellaneous cause is brought by Notice of Motion under Article 50 (1) , (2) of the Constitution of the Republic of Uganda, Rule 3 (1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, S.I No. 26 of 1992, Order 2 Rule 7 and Order 48 Rules 1 and 3 of the Civil Procedure Rules. The application is brought by Greenwatch, a Non-Governmental Organisation registered and incorporated in Uganda as a company limited by guarantee. The objectives of the organisation include focusing on issues and problems of the Environment and using all avenues possible to monitor and expose danger to environment however caused and by whomsoever.

The application is brought against the Attorney General and the National Environmental Management Authority. The Applicant seeks for the following orders and declarations

1. A declaration that manufacture, distribution, use, sale sell, disposal of plastic bags, plastic containers, plastic food wrappers, all other forms of plastic commonly known and referred to as "Kaveera" violates the rights of citizens of Uganda to a clean and healthy environment.
2. An order banning the manufacture, use, distribution and sale of plastic bags and plastic containers of less than 100 microns.
3. An order directing the second Respondent to issue regulations for the proper use and disposal of all other plastics whose thickness is more than 100 microns including regulations and directions as to recycling, re-use of all other plastics.
4. An environmental restoration order be issued against both Respondents directing them to restore the environment to the state in which it was before the menace caused by plastics.
5. An order directing the importers, manufacturers, distributors of plastics to pay for the costs of environmental restoration.
6. No order be made as to costs.

Under the Fundamental Rights Freedoms (Enforcement Procedure) Rules 1992, Rule 6 evidence at the hearing of an application shall be tendered by affidavit unless court directs that evidence be given orally on any particular matter. In that regard the Applicant filed two affidavits both sworn by Sarah Naigaga, the National Co-ordinator and Chief Executive Officer of the applicant. The first Respondent filed an affidavit in reply deponed to by Mr. Malinga Godfrey, a State Attorney in the Attorney Generals Chambers. The second Respondent filed an affidavit in reply deponed to by Mr. Patrick Kamanda, an Environmental Inspector with Second Respondent.

When the cause came up for hearing Mr. Oluka, who represented the Attorney General raised three preliminary points of objection. The first objection was that the application did not disclose a cause of action against the Attorney General. The second objection was that the application was not properly before this Court in that it was brought by the Applicant on behalf of other Ugandans who had not authorised the Applicant to do so and without leave of Court as legally required under Order 1 rule 8 of the Civil Procedure Rules before filing a Representative suit. Thirdly that the application is supported by defective affidavits which should be rejected.

Mr. Robert Wabunoha, a Senior Legal Officer with the Second Respondent, on behalf of the Second Respondent associated himself with the objections raised on behalf of the first Respondent. He particularity raised an objection that the application did not disclose a cause of action against the second Respondent. I will start with the first objection, Whether the application discloses a cause of action against any of the Respondents. Mr. Oluka, Counsel for the Attorney General submitted that the application did not satisfy the

three essential elements to support a cause of action as set out in *Auto Garage vs Motokov (No.3) r 197/11* EA 514. that;

- (i) The Plaintiff (Applicant) enjoyed a right;
- (ii) The right has been violated, and
- (iii) The Defendant (Respondent) is liable.

The Applicant is a Ugandan Company and Article 39 'of the Constitution provides;

"Every Ugandan has a right to a clean and healthy environment"

See also Section 4 (1) of the National Environment Statute No. 4 of 1995.

Sarah Naigaga in paragraph 4 and 5 of the affidavit in support of this application avers that uncontrolled and discriminate use and disposal of plastics has caused harm to the environment and the plastics used as carrier bags, containers are dangerous to human health and life. Such averments amount to a plea of violation of every Ugandan's right to a clean and healthy environment.

Article 20 (2) of the Constitution provides;

" The rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld and promoted by all organs and agencies of the Government and by all persons"

And Article 245 of the Constitution provides;

"Parliament shall, by law, provide for measures intended

- (a) to protect and preserve the environment from abuse, pollution and degradation;
- (b) to manage the environment for sustainable development and
- (c) to promote environmental awareness".

The Constitution under the National Objectives and Directive Principles of State Policy; Objective (XXV11) provides

" The Environment

(i) The state shall promote sustainable development and public awareness of the need to manage land, air, water resources in a balanced and sustainable manner for the present and future generations.

(ii) -----

(iii) The state shall promote and implement energy policies that will ensure that people's

basic needs and those of environmental preservation are met" .

I have studied the Application and the two affidavits filed in support and I found them pointing a finger at the State that it has failed or neglected its duty towards the promotion or preservation of the environment. The State owes this duty to all Ugandans. By so failing or neglecting the Government is in breach of its duty towards the citizens of Uganda. Any concerned Ugandan has a right of action against the Government of the Republic of Uganda, for that matter against the Attorney General in his representative capacity, to seek the enforcement of that failed or neglected duty of the State.

The National Environmental Management Authority (Second Respondent) is a body corporate established under Section of 5 of the National Environmental Statute No.4 of 1995 capable of suing or being sued in its corporate name. The Second Respondent has a mandatory duty, under the Statute, Section 3, to ensure that the principles of environmental management are observed. These principles include

(a) to assure all people living in the country the fundamental right to an environment adequate for their health and well being.

(g) to establish adequate environment protection standards and to monitor changes in environmental quality.

(i) to require prior environmental assessments of proposed projects which may significantly affect the environment or use of natural resources.

(k) to ensure that the true and total costs of environmental pollution are borne by the polluter.

See also Section 7 as to the functions of the Authority.

In paragraphs 5,6,7 and 10 of the affidavit in support dated 21st November 2002 are averments to the effect that the use of plastic containers is dangerous to the human health and life of Ugandans and in paragraph 9 that plastics are dangerous to domestic and wild animals and in paragraph 8 that plastic disposal is degrading the environment and threatening food security. Such averments read together with the prayer in the Application for an order directing the second respondent to issue regulations for the proper use disposal, recycling and re-use of plastics amount to a plea that the second Respondent is in breach of its statutory duty to ensure that the principles of environment management are observed, which duty it owes to the citizens of Uganda.

I therefore find that the three essential elements to support a cause of action against each of the two Respondents have been satisfied. The first objection is overruled.

The second ground of objection is that the application was improperly before this court as it did not comply with the provisions of Order 1 Rule 8 of the Civil Procedure Rules.

Mr. Oluka argued that the first prayer in the Notice of Motion makes reference to the fact that "Kaveera violets the rights of citizens of Uganda to a clean and healthy environment".

He submitted that there was not leave of Court allowing the Applicant to represent all Ugandan and he contended that the application amounted to a representative suit. He made reference to Rules 7 of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 which make the Civil Procedure Act and the Rules made thereunder applicable to proceedings under these Rules.

Counsel also referred to Constitutional Petition No. 11 of 1997 *James Rwanyarare & Another vs Attorney General* in which it was argued for the first Petitioner that he had properly brought the Petition on behalf of a group known as the Uganda Peoples Congress since under Article 50 (2) of the Constitution a group may bring a petition on grounds of violation of their human rights and or freedoms and further that the group's petition is not a representative action requiring compliance with Order 1 Rules 8 CPR requiring leave of Court. The Constitutional Court held, inter alia, that the first Petitioner acted unlawfully in bringing the representative action as he did. That he could only bring the Petition on his own behalf. The group's petition was held incompetent.

The above Petition is distinguishable from the instant Application. Order 1 Rules 8 CPR provides

“where there are numerous persons having the same interest in one suit, one or more 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”. (the underlining is mine).

The rule concerns a group of persons identifiable by their common interest in the suit. Unlike in Petition No. 11 (above) where the group was members of the Uganda Peoples Congress, in this Application the subject matter of the complaint is of common and general interest not just to a group but to all citizens of Uganda. Consequently it is impracticable, to make all the citizens of Uganda give consent to the application as required under the rule for a representative suit.

In *The Environmental Action Network Ltd vs The Attorney General and National Environment Management Authority*, Application No. 39 of 2001 the Principle Judge, Mr. Justice J.H. Ntabgoba stated:

"-----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. 1 No. 26 of 1992. The two actions are distinguishable by the wording of the enactment 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 parties that they seek to represent and they must have similar interest 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".

Article 50 of the Constitution provides

" (1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed and threatened is entitled to apply to a competent Court for redress which may include compensation.

(2) Any person or organisation may bring an action against the violation of any person's or groups human rights"

From the wording of clause (2) above any concerned person or organisation may bring a public interest action on behalf of groups or individual members the country even if that group or individual is not aware that his fundamental rights or freedoms are being violated.

There is limited public awareness of the fundamental rights or freedoms provided for in the Constitution, let alone legal rights and how the same can be enforced.

Such illiteracy of legal rights is even evident among the elites. Our situation is not much different from that in Tanzania where Justice Rugakingira, in the case of **Rev. Christopher Mtikila vs The Attorney General**, High of Court of Tanzania Civil Case No.5 of 1993 (unreported), stated

"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".

It is just appropriate that a body like the Applicant, comes up to discharge the Constitutional duty cast upon every Ugandan to promote the Constitutional rights of the citizens of Uganda and the institution of a suit of this nature is one of the ways of discharging that duty. This court is under an obligation to hear the concerned citizen, in the instant case the Applicant. The Second preliminary objection is accordingly overruled.

The third ground of objection is that the Application is supported by defective affidavits which should be rejected. Mr. Oluka argued that in both affidavits in support of the Application, the deponent, Sarah Naigaga, avers that what was stated in each of the affidavits was true and correct to the best of her knowledge. Yet in paragraphs 4 and 7 of the affidavit dated 11th March 2003 she states that she has obtained from the Environmental Law Alliance Worldwide which is an International Non-Governmental

Organisation Network a scientific' study analysing Plastic Waste Management in India by Priya Narayan which study was annexed to the affidavit. Counsel argued that the findings as annexed and referred to in the affidavit were not by the deponent, Sarah Naigaga, since she was not involved in the research. He submitted that these findings were hearsay and contravened the provisions of Order 17 rule 3 (1) CPR.

Further that Sarah Naigaga was not an Expert on Environmental matters

Order 17 rule 3 (1) CPR provides:

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except an interlocutory application, on which statements of his belief may be admitted, provided that the grounds thereof are stated".

Counsel submitted that this application was not an interlocutory application.

In the two affidavits in support of this application the deponent avers that the matters contained in each of the affidavits were based on the deponent's knowledge. Knowledge can be acquired through human senses like seeing, hearing, smelling, tasting or touching followed by understanding and perceiving what are has sensed.

In paragraph 5 of the second affidavit in support of the second affidavits in support of the application the deponent gives the means of her knowledge as opposed to information. She avers:

"5. That I have read and understood the study I do agree with its findings and recommendations".

The veracity and credibility of the study by the means of which the deponent acquired knowledge deponed to and attached to her affidavit could be challenged but not at this stage. That can be done at the hearing of the application by adducing evidence to disprove, discredit or contradict the study's findings and conclusions.

In Miscellaneous Application No. 39 of 2001 (above), the Deponent to the affidavit in support of the application deponed that he had recently learnt of several medical reports high-lighting the damages of exposure to second hand smoke or environmental tobacco smoke. The deponent set out various reports which he said had high-lighted the dangers of exposure to second hand smoke or environmental tobacco smoke. The learned Principle Judge reproduced some of these reports and went on the state:

"I would myself hesitate to challenge his averments because they are supported by research reports and scientific disclosures".

I am of a similar view. The third preliminary objection is accordingly overruled. In the final result, the preliminary objections raised on behalf of the Respondents are overruled. The hearing of the Application should proceed on merit. Since in the main Application it

is prayed that no order be made as to costs, in the same spirit, I accordingly make no order as the costs occasioned by the objections.

Signed

LAMECK N. MUKASA

AG. JUDGE

4/7/03.