

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 92 OF 2004
(ARISING FROM MISC. CAUSE NO. 15 OF 2004)

GREENWATCH APPLICANT

- VERSUS.

1. UGANDA WILDLIFE AUTHORITY }
2. THE ATTORNEY GENERAL }.....RESPONDENT

BEFORE: HONOURABLE JUSTICE GIDEON TINYINONDI

RULING:

In this application preferred under 037, rr 2(1) and 9 of the Civil.

Procedure Rules the Applicant sought "**an order**

of temporary injunction to issue against the Respondents, their agents attorneys and assigns anybody or person acting in that or such similar capacity from exporting, transporting, removing, relocating any Chimpanzee from Uganda to the Peoples Republic of China or any other place or country in the world until the hearing and determination of the main application herein or until further orders of this Court. "

The grounds of the application were stated to be:

1. *That there is a pending application seeking a permanent injunction against the 1st Respondent and for declaration that the decision of the 2nd Respondent in respect of the subject matter herein is null and void abnition and the same is pending hearing in this Court.*

2. *That the pending application against the Respondents has great likelihood of success.*
3. *That activities the Applicants seek to restrain the Respondents from doing are illegal and ultra vires the powers.*
4. *That on a balance of convenience it is just and equitable that this application be granted.*
5. *The Respondents will not be prejudiced if the application is allowed but the Applicants will be prejudiced if the Order is not granted as it will render nugatory the main suit herein. "*

One Sarah Naigaga swore an affidavit in support of the application stating:

1. That I am the Executive Director of the Applicant and the person in charge of running its day to day affairs and swear affidavit in that capacity.
2. That the Applicant is a limited liability company limited by guarantee and incorporated under the laws of Uganda, and it is also registered in Uganda as a non-governmental institution under the Laws of Uganda.
3. That the Applicant members are all Ugandans citizens of age and sound mind.
4. That the objectives of the Applicant include among others the protection of the environment, including but not limited to flora and fauna, increasing public participation in the management of the environment and natural resources, enhancing public participation in the enforcement of their right to a healthy and clean environment.
5. That I have learnt from the 1st Respondent that it intends to export Chimpanzees, from Uganda to China or elsewhere.
6. That we have had to take Court action in view of the urgency of this matter and the fact that the Executive Director of the 1st Respondent and its official Mr. Daniel Ankankwasa refused to talk to me about this.
7. That this followed press reports that the 1st Applicant and other official of Government have already finalised plans to export Chimpanzees from their Sanctuary to Zoos in The peoples' Republic of China see annexure "A1 to A5."
8. That the decision would fundamentally affect the Chimpanzees and in turn impact negatively on the environment.

9. That by removing Chimpanzees from their natural habitat and exporting them to China the Respondents would violate the Applicants' right to a clean and healthy environment as enshrined in the constitution.
10. That the Constitution demands that state and all its organs protect the natural resources of Uganda including flora and fauna and as the decision to export Chimpanzees from Uganda contravenes this directive principle of state policy.
11. That the decision to export Chimpanzees is null and void as it was made *ultra vires the powers of the Applicants*.
12. That the law empowers the Applicants to protect flora and fauna where they are and have no powers to alter the environment or move flora and fauna in a way that is not in the best interest of the environment.
13. That the decision to export Chimpanzees contravenes the Constitution's directive principle of state policy that requires the state to ensure conservation of all natural resources.
14. That it is the duty of all the people of Uganda including the Applicants to uphold and defend the Constitution and that this application is made in that spirit.
15. That Applicants, and all other citizens of Uganda cannot enjoy a clean and healthy environment unless it has all its amenities, to wit air, water, land and mineral resources, energy including solar energy and all plant and animal life.
16. That the Applicant would therefore be aggrieved by the decision and the action of the Respondents in exporting Chimpanzees from Uganda, which action subtracts an essential ingredient of their environment.
17. That it is estimated that there are only 5000 Chimpanzees left in Uganda and therefore any further reduction in this number significantly affects the fauna component of the environment in Uganda.
18. That Chimpanzees are not goods, or chattels, they do not belong to the Government of Uganda but are Uganda's natural heritage, and a gift from God and the Respondents are only protecting them as trustees of the people of Uganda.

19. That it is just and equitable that this application be granted to maintain the *status quo* pending the final determination of the main application herein.
20. That if the *status quo* is not maintained and the Chimpanzees are exported it will be more difficult to reverse and therefore on a balance of convenience this application ought to be granted.
21. That I swear this affidavit in support of the Applicants' application herein.
22. That all I have stated hereinabove is true and correct to the best of my knowledge.

At the hearing Dr. Joseph Byamugisha appeared for the Respondent while Mr. Kenneth Kakuru represented the Applicant. Dr. Byamugisha raised a preliminary objection. He submitted that this application which arose out of Miscellaneous Cause No. 15/2004 between the same parties should be struck out under 07, r11 (d) of the Civil Procedure Rules. His bases for this were

a).The 1st Respondent is a scheduled corporation under the civil Procedure and Limitation [Misc. Provisions] Act, Cap.72 of the Laws of Uganda 2000. Section 2 thereof provides that no suit shall lie or be instituted against a scheduled corporation until the expiry of forty-five days after written notice has been delivered or left at its office etc. etc.

b). Before Miscellaneous Cause No. 15/2004, out of which this application arises was filed, no such notice as required in the Act (ante) was served on the Respondent.

Therefore Counsel's preliminary objection, he argued, was not directed against this application alone but also against Miscellaneous Cause No. 15/2004 which latter application was itself an incompetent suit on account of violating section 2 of the Act (ante).

In support of his submissions learned Counsel cited LYAKIYE -VS- ATTORNEY GENERAL: [1973] ULR 124 and KAYONDO-VS-ATTORNEY GENERAL: 1988/90 HCB 127. He prayed that this application and Miscellaneous Cause No. 15/2004 be struck out.

Mr. Kakuru replied as hereunder. He agreed that service of statutory notice on a corporation was mandatory. He also agreed with the Legal position in the cases cited by Dr. Byamugisha. He, however, pointed out that position obtains in ordinary suits brought under the Civil Procedure Act and the Civil Procedure Rules.

That this application and the cause out of which it arises were not one of such suits. That

Miscellaneous Cause No. 15 of 2004 was brought under section 50 of the Constitution and Statutory Instrument No. 26 of 1992. That in **DR. J.W. RWANYARARE AND 2 OTHERS -V-S- ATTORNEY GENERAL: MISC. APPLICATION NO. 85 OF 1993** the High Court held that in matters concerning the enforcement of human rights under the Constitution no statutory notice was required because to do so would result in absurdity as the effect of it would be to condone the violation of the right and deny the Applicant the remedy.

Learned Counsel further argued that the Rules (under Statutory Instrument 26 of 1992) are specific for the enforcement of the rights and there is no statutory provision for a notice.

He cited

MISCELLANEOUS APPLICATION NO. 140 OF 2002: GREENWATCH -VS- ATTORNEY GENERAL AND NEMA and MISCELLANEOUS

APPLICATION NO 139 OF 2001 : GREENWATCH -V-S ATTORNEY GENERAL AND NEMA.

Finally learned Counsel referred to the decision of the " Constitutional Court in ***UGANDA ASSOCIATION OF WOMEN LA WYERS AND 5 ,OTHERS -VS- ATTORNEY GENERAL*** where the "thirty days" rule under the provision of rule 4(1) of the Fundamental Rights and Freedoms [Enforcement Procedure] Rules 1992 (legal Notice no. 4/1960 was discussed.

Dr. Byamugisha's reply was as follows. Article 50 of the Constitution was clear. It had two heads

- a). whether a right has been infringed;
- b). where the right is being threatened with infringement.

That in the former the reasoning by the High Court that a statutory notice would delay the infringement of the right would not be right. That therefore if that reasoning cannot stand in (a) so also it cannot stand in (b). That section 2 of Cap. 72 was mandatory despite the Fundamental Rights and Freedoms (Enforcement Procedure) Rules.

Learned Counsel maintained that he would concede the point if the Constitutional Court had declared section 2 of Cap. 72 (ante) unconstitutional as taking out the suits under Article 50 of the Constitution. But that Court had not done so. And the High Court had no power to declare that this Act did not apply to Article 50 suits.

Such a declaration by the High Court would have no effect of declaring the Act unconstitutional.

It is pertinent that I reproduce the provisions of Article 50 (1) Of (4) the Constitution.

"(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 may include which compensation."

(2).....

(3).....

(4). Parliament shall make laws for the enforcement of rights and freedoms under this Chapter.

I will also reproduce the provisions of the Fundamental Rights and Freedoms (Enforcement Procedure Rules (S.I. 26 of 1992,

This is one of the laws envisaged in Article 50 (4) above. Rule 7 reads

"7. Subject to the provisions of these Rules, the Civil Procedure Act and the rules made thereunder shall apply in relation to the application."

[Emphasis is mine.]

In *THE ENVIRONMENTAL NETWORK LTD. -VS- THE ATTORNEY GENERAL AND NEMA: HC MISC. APPL. NO 13/2001* J.H. Ntabgoba, PJ. considered a similar preliminary objection as the present one. He stated

"-----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 ----.

Applying the so-called golden rule of interpretation, we assumed that besides Rule 7 of S.I. 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 section 1 of Act No. 20 of 1996 (read Cap. 72, S.2).....

I agree with this requirement that the Respondent usually the Government or a scheduled corporation 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 are about to be infringed. The people cannot afford to wait forty-five days before pre-emptive action is applied by Court. They need

immediate 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 an aggrieved party a forty-five 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.....'

[Emphasis supplied.]

I have no better words to use than these in order to overrule the preliminary objection before me. It is accordingly overruled..


GIDEON TINYINONDI
J U D G E
28-04-2004

Dr. Byamugisha for 1st Respondent.

Applicant and Counsel absent.

COURT:

Ruling read.

GODFREY NAMUNDI
DEPUTY REGISTRAR
28-04-2004