

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA**

5 **CORAM:** ***HON. JUSTICE L.E.M.MUKASA-KIKONYOGO, DCJ.***
 HON.JUSTICE S.G.ENGWAU, JA.
 HON.JUSTICE C.K.BYAMUGISHA, JA.

CIVIL APPLICATION NO.98/05

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BETWEEN

THE ENVIRONMENT ACTION
NETWORK LTD:.....APPLICANT

15

AND

JOSEPH ERYAU:.....RESPONDENT

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[An application arising out of Civil Appeal No.78/02]

RULING OF THE COURT

25 This application was brought by Notice of Motion under the provisions of Rules 82 and 42(1)
of the rules of this Court. It is seeking orders to strike out Civil Appeal No. 78/02 on the
grounds that the subject matter of the appeal having been overtaken by events, no appeal lies.
The application is supported by the affidavit of one Stephen Zimula sworn on 21st October
2005. There was no affidavit in reply.

30 A brief background to this application is that the applicant filed Miscellaneous Application
No.39/01 in the High Court against the National Environmental Management Authority
(NEMA) and the Attorney General. It was brought under Article 50(1) (2) of the Constitution
seeking various declarations and orders. One of the declarations that were being sought was

that smoking in public places constitutes a violation of the rights of non-smokers members of the public to a clean and healthy environment.

The respondent as a smoker filed Miscellaneous Application No.470/01 seeking leave to be heard in opposition to the main application. His application was dismissed. He lodged an
5 appeal which is still pending before this Court. After lodging the appeal, he obtained an interim order staying proceedings in the High Court which expired in September 2002.

The High Court heard and determined the main application and granted some of the reliefs that were sought. As a result, Nema has since issued Statutory Instrument No.12/04- The National Environmental (Control of Smoking in Public Places) Regulations.

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When the application came before us for final disposal, Mr Sembatya, learned counsel for the applicant, in his submissions stated that the respondent in the appeal is seeking to be heard in a matter that has long been concluded. In essence the subject matter of the appeal has long been overtaken by events as the respondent cannot be joined to a completed case. Therefore

15 the appeal is moot

Another issue raised by learned counsel was that the Nema and the Attorney General who were party to Miscellaneous Application No.39/01 have not been made party to the appeal and therefore the appeal is incompetent. He cited two authorities namely *Samson Nyine Bitahwa v Longino IsahyaNdyanabo Longino Election Petition Appeal No.14/02* and *The*
20 *Environmental Action Network v Attorney General- Civil Application No.63/03* for that legal proposition.

He invited us to strike out the appeal with no order as to costs.

Mr Ebert Byenkya, learned counsel for the respondent did not agree. He submitted that the
25 applicant's claim that no appeal lies means that there is no right of appeal. The right of appeal according to counsel is created by statute. He stated that the application cannot be brought under rule 82.

He pointed out that in order for this Court to determine the issue it has to look at the memorandum of appeal.

30 It was his contention that the first ground should fail.

On the question of parties, Mr Byenkya submitted that it cannot be raised because it was not made one of the grounds.

On the authorities that were cited by Mr Sembatya, he stated that they were distinguishable. He stated that the appeal arose out of an interlocutory application and there were only two parties to it. He made reference to annexure A to the application. The annexure is an order which was extracted after the respondent was granted leave to appeal.

5 The rule under which the application was brought provided as follows:

“A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice of appeal or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time”.

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The rule provides for two instances in which a person who has been served with a notice of appeal either before the institution of an appeal or after the appeal has been filed can take to have the notice or the appeal itself struck out. The first instance is where the person claims that no appeal lies. The second instance is where the person claims that no essential step has
15 been taken in the proceedings or has not been taken within the time allowed by the rules.

The case for the applicant as we understand it is that no appeal lies because the subject matter of the intended appeal has been overtaken by events. The event or the events in question are that Miscellaneous Application No.39/01 was heard and determined by the High Court so the
20 applicant can no longer be heard. No authority was cited to us in support of that contention. On the other hand, the respondent contends that he has a right of appeal which is a statutory one.

This court has had occasion to judicially consider a matter where the subject matter of the suit
25 has been overtaken by events in the case of ***Uganda Electricity Board v Charles Kabagambe- Civil Appeal No.58/2000.***

The brief facts were that Charles Kabagambe sued Uganda Electricity Board in High Court Miscellaneous Application No. 928/99 for wrongful dismissal. Before the said application was heard, he filed Miscellaneous Application No.1074/99 seeking a temporary injunction to
30 restrain the Board from evicting him from the residential premises until the disposal of the main suit. The injunction was granted on 24th August 2000. The Board was aggrieved by the decision and filed Civil Appeal No.58/2000.

On 19th December 2002 the High Court gave its ruling in Miscellaneous Application No.928/99 –thus ending the temporary injunction.

When the appeal came up for hearing, counsel for Kabagambe raised a preliminary objection and submitted that there was nothing the appellant was appealing against as the injunction was vacated when the application was heard.

5 Counsel for the Board did not agree. He submitted that the appeal was against the whole ruling. He argued that the ruling sets a bad precedent which the court should reverse. He argued that there was no law to prevent the appeal from being heard. He implored court to hear the appeal for academic purposes.

In upholding the preliminary objection this court said:

10 ***“According to the memorandum of appeal the order sought is:
The temporary injunction granted to the respondent refraining(sic) the appellant from evicting the respondent from the appellant’s property comprised in plot 8 Windsor Crescent Kololo be discharged.
The appeal has obviously been overtaken by events. The relief sought was realized before
15 the appeal was heard. There are no more reliefs to be granted by this court.”***

On whether the court can hear the appeal for academic purposes, the court said:

***“It is a well known principle of law that courts adjudicate on issues which actually exist between litigants and not academic ones. See Uganda Corporation Creamaries Ltd & another v Reamaton Ltd. Civil Reference No.11of 1999, Court of
20 Appeal(unreported).”***

In the instant application, we have had the benefit of looking at the memorandum of appeal which the respondent herein filed in Civil Appeal No.78/02. The appellant’s major complaint was the refusal by the trial judge to grant him leave to be heard. He is seeking the following
25 reliefs and orders:

1. **The appeal be allowed and the appellant be heard on merits in Miscellaneous Application No.39 of 2001.**
2. **Miscellaneous Application No. 39 of 2001 proceeds on merits before another Judge.**
- 30 3. **Costs of the appeal and the Court below be awarded to the appellant.**

The reliefs which the respondent is seeking on appeal cannot be granted because there is no live dispute between the parties. Courts do not decide cases for academic purposes because court orders must have practical effect and must be capable of enforcement. The

determination of Miscellaneous No.39/01 by the High Court drove the respondent's case into a limbo of legal mootness.

5 Considering the facts of the entire case we allow the application and strike out Civil Appeal No.78/2002 with no order as to costs.

Dated at Kampala this...20th ..day of...February.....2008.

L.E.M.Mukasa- Kikonyogo
10 **Deputy Chief Justice**

S.G.Engwau
Justice of Appeal
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C.K.Byamugisha
Justice of Appeal