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REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

MISC. CAUSE NO. 436 OF 2019

CENTER FOR FOOD AND ADEQUATE LIVING RIGHTS APPLICANT

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VERSUS

1. ATTORNEY GENERAL OF UGANDA

2. COMMUNICATIONS COMMISSION..... RESPONDENTS

BEFORE: JUSTICE ESTA NAMBAYO

RULING

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The Applicant, Center for Food and Adequate Living Rights brought this application under **Article 50 (2) of the Constitution, Section 98 of the Civil Procedure Act, Section 4(1) (k), (g) (1) and 5 of the Children Act, The Human Rights (Enforcement) Act and Rule 7 of the Judicature (Fundamental and Other Human Rights and Freedoms) (Enforcement Procedure) Rules, 2019** against the Attorney

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General and the Uganda Communications Commission (hereinafter referred to as the 1st and 2nd Respondents respectively) for: -

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1. A declaration that Government’s failure and omission to restrict marketing, broadcast and advertisement of unhealthy foods to children in Uganda threatens and is a violation of their rights to adequate food, health and safety contrary to Objectives XIV (b) and XXII (c) of the National Objectives and Directive Principles of State Policy, Articles 20,22,24,8A. 45,34 and 33 of the Constitution as amended, Section 4 (1) (g) and (L) of the Children Act as amended and a contravention of advertising standards 13(b), Annex 3 Rules 1,3,4,8,11,12 and

30 3.1,5.1,5.3,5.5,20,20.3 and 20.4 of the standards for general broadcast programming in Uganda.

2. A declaration that Annexes 7 and 3, rules 13(a) (b) and (d) of the advertising standards are a threat and in violation of children's rights to safety, health and adequate food contrary to Objectives XIV (a) and (b) and XX of the National Objectives and Directive Principles of State Policy, Articles 20, 22, 33, 45 and 8A of the Constitution as amended and Section 4 (1) (g) and (L) of the Children Act as amended.

3. A declaration that the Government's failure to regulate nutrition labeling threatens and is a violation of the right to health, safety and adequate food in Uganda.

4. An order banning the marketing, broadcast and advertisement of unhealthy foods to children in Uganda.

5. An order against the 2nd Respondent to ban all unhealthy foods advertisements and programme sponsorship or broadcast before and after the watershed in all media platforms including online media in Uganda.

6. An order banning all the in-school advertisement and promotion of unhealthy foods to children in Uganda.

7. An order to the 1st Respondent to pass regulations on front nutrition labelling to all foods and beverage industries in Uganda.

8. An order against the Respondents to ban the use of children in the promotion and advertisement of processed foods and sugar- sweetened beverages in Uganda.

9. An order to the 2nd Respondent to amend the advertisement standard of Uganda Annex 26, rules 6, 8, 10, 11, 12 and 13; and the standards for general broadcast programming in Uganda rules 2.3, 2.4, 2.5, 4.5, 6.3 to

include unhealthy diets and restrict their advertisement and broadcast to watershed period only.

60 10. That the 2nd Respondent reports to Court on orders 2 to 6 within 6 months after passing judgment in this application.

11. Each party bear its own costs.

The grounds of this application are laid out in the affidavits in support of the application by Kimera Henry, a Consumer Protection Activist, Kaddu Gonzaga, an agri-business specialist, community nutritionist and Director of programs with the Applicant and Nkasiima Janet a human rights lawyer by training and legal officer with the Applicant but briefly are that: -

- i. **The Government of Uganda is under a legal mandate to uphold, protect and fulfill the rights of all Ugandans including children rights to safety, health, adequate food and wellbeing.**
- 70 ii. **Many Ugandans are however suffering and are at a risk of chronic, non-communicable diseases (NCDs) including cardiovascular disease, diabetes, cancers and other obesity related conditions yet these can be prevented.**
- iii. **In Uganda non-communicable diseases kill up to 100,000 people annually, which is 35% of the total annual deaths.**
- 75 iv. **Uganda is member of the World Health Organisation and passed a resolution to act on the main risk factors for non- communicable diseases, namely, the unhealthy diet.**
- v. **Unhealthy diets start in childhood and build up throughout life; associated with overweight and obesity and children must maintain a healthy weight and consume foods that are low in saturated fat, trans-fatty acids, free sugars, or salt in order to reduce future risk of non-communicable diseases.**
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- 85 vi. Unhealthy food marketing affects children's preferences, purchase requests, diets and consumption patterns, yet in Uganda the marketing is extensive and other forms of marketing of food to children are widespread where a significant amount of this marketing is for foods with a high content of fat, sugar or salt.
- 90 vii. Marketing, advertising and broadcast of unhealthy foods and beverages in Uganda by the media is done before and after the watershed time lines, exposing children to unhealthy diets compromising their safety, right to health and the right to adequate food.
- 95 viii. The Respondents have failed and omitted to protect children from the adverse impact of marketing of unhealthy diets on children's health in accordance with the rights of children as acknowledged by the United Nations Convention on the Rights of the child, the right to adequate food, as set out in the International Covenant on Economic, Social and Cultural Rights and consistent with the United Nations guidelines for consumer protection.
- 100 ix. The provisions in the advertising standards and broadcasting standards omit unhealthy foods exposure to children as a danger to children safety, well-being, right to health and the right to adequate food.
- x. The Respondents have failed and omitted to put in place advertising and broadcasting standards in Uganda on the credulity of children and do not specifically protect them from the unhealthy foods marketing.
- 105 xi. The actions and omissions of the Respondent amount to a violation of the fundamental human rights children to safety, health, adequate food and wellbeing as enshrined in the Constitution of the Republic of Uganda, 1995 and other laws.

xii. That it is just and equitable that the declarations and orders sought in this suit be granted.

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Ms. Esther Nayebare, the Senior Legal Officer-compliance of the 2nd Respondent has sworn an affidavit in reply opposing this application. The 1st Respondent did not file an affidavit in reply, although there is proof that it was served.

Representation

115 Learned Counsel Kabanda David appeared for the Applicant while Learned Counsel Martha Kamukama was for the 2nd Respondent. Counsel filed written submissions for the parties.

Issues for trial are: -

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i. Whether the 2nd Respondent is a right party to be sued in this application and whether the application is properly before Court.

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ii. Whether the 2nd Respondent's failure and omission to restrict marketing, broadcasting and advertisement of unhealthy foods to children threatens and is in a violation of their right to adequate food, health and safety contrary to objectives XIV (b) and XXII (c) of the National Objectives and Directive principles of the State policy, Article 20, 22, 24, 8A, 45, 33 and 34 of the Constitution as amended.

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iii. Whether annex 3 rule 13 (a) (b) and (d) of the advertising standards are a threat and in violation of children's right to safety, health and adequate food contrary to Objectives XIV (a) and (b) and XX of the National Objectives and directive principles of state policy, Articles 20, 22, 33 and 8A of the Constitution as amended and Section 4 (1) (g) and (L) of the Children Act.

iv. Remedies available to the parties.

135 In his submissions, Counsel for the 2nd Respondent raised three preliminary objections as follows;

- i. That the application was prematurely brought before this Court against the 2nd Defendant;
- ii. The application does not disclose a cause of action against the 2nd Respondent; and that
- 140 iii. The application is misconceived, frivolous and vexatious.

In this case, I find it proper to first address myself to the preliminary objections as provided under Order 6 Rule 28 of the Civil Procedure Rules and following the holding of Justice J. N. Mulenga (JSC) in ***Attorney General –v- Major General David Tinyefuza, Constitutional Appeal No. 1/1997***, where while referring to Order 6 rule 145 28 of the Civil Procedure Rules held that;

“Clearly under these provisions, the Court has options. It may or may not hear the point of law before the hearing. It may dispose of the point before, at or after the hearing and it may or may not dismiss the suit or make any order it deems just. I would therefore not hold a Court to be in error, which opts to hear a preliminary 150 objection but postpones its decision to be incorporated in its final judgment, unless it is shown that material prejudice was thereby caused to either party, or that the decision was reached at un-judicially.”

Preliminary Objection 1: That the application was prematurely brought before this court against the 2nd defendant.

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Submissions

In his submissions, Counsel for the 2nd Respondent stated that this application was prematurely brought to Court. He relied on Section 4 of the Uganda Communications Act, 2013 which establishes the 2nd Respondent and mandates it to receive, investigate and arbitrate complaints relating to communications service and to take actions where necessary, among others. Counsel explained that following the above legal provision, the Applicant ought to have first filed a complaint before the Commission in respect of any unhealthy foods advert or marketing promotion that allegedly violates and threatens the children's rights before coming to Court and that in any case, the Applicant did not refer to a specific advert or any communication platform where the alleged unhealthy foods were being advertised. He relied on the cases of ***Environmental Action Network Ltd -v- the Attorney General & Anor HCMA, No. 39 of 2001***; and ***Abudu Katuntu -v- MTN and 6 Others HCCS No. 248 of 2012*** where Court held that;

"Where a specific procedure has been provided for by legislation, parties should exhaust that procedure or other remedies before filing an action in Court."

Counsel submitted that in this case, the Applicant filed this matter in court without making use of the 2nd Respondent's competent complaints resolving mechanism which is an impropriety that prematurely places this application before this Court and as such, it should be dismissed with costs.

In reply, Counsel for the Applicant submitted that this suit should be distinguished from the duty of the Commission to investigate complaints under Section 45 of the Uganda Communications Act. That section 45 specifically regards advertisements that breach the advertising standards that are set by the Commission, unlike this suit which challenges the omission of the 2nd Respondent to set adequate standards to

protect Children's health which are not covered under Section 45 of the Uganda Communications Act. Counsel also submitted that the Uganda Communications Tribunal established under Section 60 of the Uganda Communications Act has not been constituted and as such, this court should not let the violation of children's rights to continue when it has jurisdiction to hear cases where alleged violations have taken place. That the court declining to hear the merits of this case would be unjust and would allow the violation of the children's rights to continue. Counsel prayed that this preliminary objection be over ruled so that this court hears the case against the 2nd Respondent on merit.

190 **Analysis**

S. 5 (1) of the Communications Act, 2013 provides that the functions of the Commission are—

(b) to monitor, inspect, licence, supervise, control and regulate communications services;

195 Under S. 5(1) (i) the Commission is mandated to set national standards and ensure compliance with national and international standards and obligations laid down by international communication agreements and treaties to which Uganda is a party; and under S. 5 (1) (j), the Commission is mandated to receive, investigate and arbitrate complaints relating to communications services, and take necessary action.

200 S. 45 of the same Act provides that the Commission may investigate any matter within its functions under this Act which relates to—

(a) communications services or apparatus provided or supplied in Uganda; and

Under S. 46 (1) of the Act, the Commission may appoint any person or committee to inquire into and report to the Commission on any matter pending before the
205 Commission.

The above provisions of the law mean that the Commission has the mandate to receive complaints on communications and to appoint either or a person or a committee to investigate the complaint and report to the Commission which then takes appropriate action. If the complainant is not satisfied with the decision of the
210 Commission, he/she may appeal to the tribunal under S.64 (1) of the Act which provides that the tribunal shall have jurisdiction to hear and determine all matters relating to communications services arising from decisions made by the Commission or the Minister under this Act.

S.65 of the Act provides that the tribunal shall in the exercise of its jurisdiction have
215 powers of the High Court.

Counsel for the Applicant submitted that there is no tribunal in place to handle complaints. Under S.5(1) (j) of the Act it is the 2nd Respondent and not the tribunal mandated to handle communications complaints. The tribunal only handles appeals from the decision of the Commission or the Minister as seen under S. 64 (1) of the
220 Act. In this case, the Applicant has not presented any evidence to show that it has ever filed a complaint with the 2nd Respondent.

In the case of ***Sewanyana Jimmy –v- Kampala International University HCMC No. 207/ 2016***, court noted that;

“where there exists an alternative remedy through statutory law, then it is desirable
225 that such statutory remedy should be pursued first.”

In ***Charles Nsubuga -v- Eng. Badru Kiggundu & 3 Others, HCMC No. 148 of 2015***, Musota J. (as he then was), while citing with approval the decision of the

Constitutional and Human Rights Division of the High Court of Kenya in the case of
Bernard Mulage -v- Fineserve Africa Limited & 3 Others Petition No. 503 of
230 ***2014***, noted that;

*“There is a chain of authorities from the High Court and the Court of Appeal that
where a statute has provided a remedy to a party, this court must exercise restraint
and first give an opportunity to the relevant bodies or state organs to deal with the
dispute as provided in the relevant statute. This principle was well articulated by the
235 Court of Appeal in Speaker of National Assembly -v- Ngenga Karume [2008] 1 KLR
425 where it was held that: In our view there is merit ... that where there is clear
procedure for the redress of any particular grievance prescribed by the Constitution
or an Act of Parliament, that procedure should be strictly followed”.*

In this case, I find that the Applicant should have first filed its Complaint with the 2nd
240 Respondent as provided under S.5 (1) (j) of the Communications Act and only come
to the High Court in case need arose and/or in the absence of the tribunal to hear
the matter on appeal. Therefore, I agree with the objection raised by Counsel for the
2nd Respondent that this application was prematurely brought before this court
against the 2nd defendant and I find it proper to dismiss it with costs to the 2nd
245 Respondent.

I so order.

Dated, signed and delivered by mail at Kampala this 25th day of May, 2022.

Esta Nambayo

250 **JUDGE**

25th/05/2022.