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THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO.46 OF 2016

BETWEEN

BRITISH AMERICAN TOBACCO LIMITED..... PETITIONER

10

VERSUS

1. ATTORNEY GENERAL

2. CENTER FOR HEALTH HUMAN

RIGHTS AND DEVELOPMENT..... RESPONDENTS

CORAM: Hon. Mr. Justice Alfonse C. Owiny-Dollo, DCJ

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Hon. Mr. Justice Kenneth Kakuru, JA/ JCC

Hon. Mr. Justice Egonda-Ntende, JA/ JCC

Hon. Lady. Justice Hellen Obura, JA/ JCC

Hon. Mr. Justice Ezekiel Muhanguzi, JA/ JCC

JUDGMENT OF HON. JUSTICE KENNETH KAKURU, JA/ JCC

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The Petition is brought under *Article 137* of the 1995 Constitution of Uganda and the Constitutional Court (Petitions and References) Rules 2005 Statutory Instrument No. 91 of 2005.

Background

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The Petitioner is a renowned company dealing in tobacco products and has been operating in Uganda for more than 30 years. It is listed on the Uganda Securities Exchange. It carries on business of cigarette sale, distribution and marketing in

5 Uganda. This petition challenges the provisions of Tobacco Control Act (TCA) which  
came into force on 18<sup>th</sup> May, 2016. The petitioner alleges that the provisions of the  
Tobacco Control Act No.22 of 2015 are inconsistent with and in contravention of  
particular Articles of the 1995 Constitution of Uganda. The particular sections of the  
Tobacco Control Act which are the subject of this challenge are set out in paragraph  
10 15 of the petition, which I shall refer to later.

The Petitioner contends that:-

- a) *Section 15(2) of the TCA contravenes and is inconsistent with Articles 40(2), 26 and 29(1) (a) of the Constitution.*
- b) *Section 12(1), (2), (3) and (4) of the TCA contravenes and is inconsistent with*  
15 *Article 40(2) of the Constitution.*
- c) *Sections 14(10), 15(7), 16(10) and 17(7) of the TCA contravene and are*  
*inconsistent with Articles 21(2) and 40(2) of the Constitution.*
- d) *Section 16(1) of the TCA contravenes and is inconsistent with Article 40(2) of*  
*the Constitution.*
- e) *Section 16(2)(a) of the TCA contravenes and is inconsistent with Articles 40(2)*  
20 *and 26(1) of the Constitution*
- f) *Section 16(2) (c) of the TCA contravenes and is inconsistent with Articles 40(2)*  
*and 26(1) of the Constitution.*
- g) *Section 16(3) of the TCA contravenes and is inconsistent with Articles 40(2),*  
25 *26(1) and 29(1) (a) of the Constitution.*
- h) *Section 16(4) (a) of the TCA contravenes and is inconsistent with Article 40(2)*  
*of the Constitution.*
- i) *Section 25(3) and (4) of the TCA contravenes and is inconsistent with Article*  
*40(2) of the Constitution.*
- 30 j) *Section 25(7) and (8) of the TCA contravenes and is inconsistent with Articles*  
*40(2) of the Constitution.*

5 k) Section 25(9) of the TCA contravenes and is inconsistent with Articles 28(1) and 43 of the Constitution.

l) Section 23 of the TCA contravenes and is inconsistent with Articles 21(1) and 21(2) of the Constitution and

10 m) Section 15(5) (b) and (c) and sections 16(8) (b) and (c) of the TCA contravenes and is inconsistent with Article 40(2) of the Constitution.

The petition is accompanied by the affidavit of *Dadson Mwaura* the Petitioner's Managing Director.

The pertinent parts of that affidavit are set out as follows:-

15 13. Despite increasingly strict tobacco control policies, many people choose to smoke and it is important to ensure that the regulatory proposals in the TCA do not lead to unintended consequences that risk an untaxed and unrestrained illegitimate trade in tobacco products.

20 14. It is also important to ensure that the regulatory proposals achieve a fair balance between promoting the public health objective of combating smoking, and the legitimate constitutional and economic interests of tobacco companies such as the Petitioner, who are dealing in a legal product (tobacco and tobacco products) and contribute to the Ugandan economy in many dimensions.

25 15. Section 15(2) of the TCA provides that the graphic health warning that appears on the unit packet, package or outside packing of a tobacco product imported, manufactured, distributed, sold or offered for sale in Uganda shall occupy no less than 65% of the principal display area. The Petitioner notes that the 65% graphic health warning requirement is an increase on the previous  
30 standard of 30% prescribed by the Uganda National Bureau of Standards.

5 16. We consider that the increment of the graphic health warning to 65% has the  
effect of unreasonably restricting the space available to the Petitioner in its  
practice of a lawful trade, occupation and business, leaving your Petitioner only  
approximately one third of the pack to display its trademarks. The increment of  
10 the graphic health warning to 65% will deprive the Petitioner of some of its  
property rights, and will encumber the use of its trademarks on product  
packaging as protected under the Trademarks Act 2010, also impacting the  
goodwill associated with its brands.

15 17. The Petitioner, as a commercial entity engaging in a lawful trade, is entitled to  
enjoy intellectual and other brand property rights. Intellectual property rights, I  
am informed by Sebalu & Lule, whose advice I believe, are protected under the  
Trademarks Act 2010, the Copyright and Neighbouring Rights Act 2006 and the  
Industrial Property Act 2014. Brand property rights accrue as a result of  
goodwill, reputation and usage in the course of trade.

20 18. The increment of the graphic health warning to 65% will also infringe on the  
Petitioner's right of free speech, guaranteed by Article 29(1) (a) of the  
Constitution. The increment of the graphic health warning to 65% inhibits the  
ability of manufacturers to communicate with adult consumers in relation to a  
lawful product. This is unjustified as it must be acknowledged that there is  
25 already universal awareness of the risks of smoking, there are already warnings  
on the packs highlighting the risks of smoking and covering 30% of the pack,  
and evidence shows that graphic health warnings do not reduce tobacco  
consumption.

30 19. I am further informed by Sebalu & Lule, whose advice I believe, that Uganda has  
assumed international obligations to violation of Uganda's obligations under  
the World Trade Organization administered Trade Related Aspects of  
Intellectual Property Rights Agreement of 1994, the General Agreement on  
Tariffs and Trade 1994 and the Agreement on Technical Barriers to Trade 1995.

- 5 20. These rights, I am informed by Sebalu & Lule, whose advice I believe, are guaranteed and protected by Articles 40(2), 26(1) and 29(1)(a) of the Constitution of the Republic of Uganda 1995 ("the Constitution").
- 10 21. The Petitioner is the proprietor or licensee of intellectual property and trademarks associated with the packaging of DUNHILL, SPORTSMAN, REX and SAFARI and other cigarette brands sold in Uganda. These trademarks are protected through the registration under the Trademarks Act 2010 and include, word marks, logos, colours, devices, and combination marks.
- 15 22. We believe that the increment of the graphic health warning to 65% is unreasonable and unjustifiable. I am further advised by Sebalu & lule, whose advice I believe that, the legal obligation under the FCTC is to have a minimum of 30% text warnings on the front and back of the pack.
- 20 23. I am further advised by Sebalu & Lule, whose advice I believe, that Article 5 of the FCTC, which sets out the general obligations of parties, also acknowledges that the implementation of legislative measures must be in accordance with national laws and in "accordance with [Parties] capabilities", and Article 2.1 of the FCTC also confirms Parties' obligations to comply with international laws in respect of the implementation of any measures that exceed a party's obligations under the FCTC.
- 25 24. The importance of product packaging to business entities like the Petitioner cannot be emphasised enough. Packaging serves to distinguish the brand and differentiate it from its competition by communicating the unique combination of characteristics and attributes of that brand. It does this in two essential ways. First, packets of tobacco products will commonly provide information to adult smokers about their contents and innovative offerings, either through text or through the shape, size, nature or design of the packet itself. Secondly, the unique and distinctive branding on the packet serves to inform and remind consumers about the origin and quality of the product.
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5 25. The increment of the graphic health warning to 65% will prevent the Petitioner  
from fully using its trademarks and the full get up on its packages, thus  
prohibiting the Petitioner from exercising its right to use the protected  
intellectual property and trademarks associated with its brands, and effectively  
communicating with adult consumers. The warning requirements will make it  
10 impossible for the Petitioner to use some of its trademarks consisting of logos,  
colours, devices and combination marks, and trademarks placed at certain  
positions on the package (such as position marks and entire pack marks).

15 26. The Petitioner will not be able to use its trademarks to effectively serve their  
function of distinguishing products and identifying the commercial origin and  
the quality of the underlying product.

20 27. The encumbrance of intellectual property and branding rights through large  
warnings is not just a concern for the tobacco industry alone, but also affects  
various other industries that rely on intellectual property to differentiate their  
products.

25 28. The Petitioner believes that the 65% graphic health warning requirement is not  
necessary, adequate, or proportional because:

- 30 a. The warning requirement unjustifiably exceeds the minimum standard of  
30% text warnings prescribed in the FCTC. In conformity with the  
provisions of the FCTC and the requirements of Uganda standard of  
cigarettes US 841:2009, the Uganda National Bureau of Standards, an  
autonomous body which operates under the Ministry of Trade and  
Industry, prescribed requirements for the packaging and labelling of  
tobacco products in 2009. These standards include guidelines as to the size  
and clarity of health warnings, indications as to tar, nicotine and carbon  
monoxide content, principal locations of health warnings, size of the  
warning, and also meet the minimum requirement of 30% of the principal  
display area;

5 b. According to well established literature, the real drivers of smoking initiation are factors such as parental influences, risk preferences, peer influences, socioeconomic factors, access and price - not packaging;

10 c. The required warnings could create unintended consequences that undermine the health objectives, including by commoditising the product and therefore stimulating price competition and leading to an increase in down-trading, which may in turn lead to a few unintended consequences, including potential impacts on government revenues, retailers, tobacco growers, increasing consumption, increasing illicit trade and distorting competition.

15 d. Enlarged pictorial (graphic) health warnings have not been shown to reduce smoking or significantly alter beliefs and intentions about smoking;

20 e. There are a number of more effective and less intrusive measures that are more effectively targeted to reducing youth smoking, for example creating an offence of proxy purchase, implementing more targeted youth education programmes aimed at preventing young people from taking up smoking and increasing measures to prevent the trade of illicit tobacco.

25 29. Section 12(1) of the TCA prohibits smoking in public places, work places and means of public transport. Among the workplaces and means of public transport that are prescribed are hotels, bars and restaurants.

30 30. The Petitioner considers this blanket prohibition to be unreasonable and to, in effect, amount to the curtailment of the Petitioner's right to practice a lawful, trade, business or occupation. In a number of countries, hotels, bars and restaurants have designated smoking areas which are properly demarcated and designed with physical planning approvals by the relevant governmental institutions. This international practice has been developed to comply with the creation of a smoke free environment for non-smokers within these premises.

5 31. This is in recognition of the very important fact that tobacco **is not an illegal product**, and that adult consumers possess the right to smoke.

10 32. The principle of designated smoking areas is recognized and not alien to Uganda. I am informed by Sebalu & Lule, whose advice I believe, that this principle is incorporated in the National Environment (Control of Smoking in Public Places) Regulations, 2004 which is still good law that complements the TCA. The National Environment (Control of Smoking in Public Places) Regulations provide that the owner of a public place specified may designate rooms in which smoking is allowed, so long as the following conditions are met:

- 15 a. The room is fully enclosed by walls or partitions that join the ceiling and floor and with a functional door that meets the ceiling and floor;
- b. The rooms are physically detached and separately ventilated directly to the outside with negative air pressure in comparison with the rest of the premises; and
- 20 c. Non-smoking members of the public and workers are not required to enter the rooms while smoking is taking place.

25 33. The Petitioner considers the TCA, by completely prohibiting smoking without exception and without the recognition of designated smoking areas, contravenes the right to the use of property for lawful purposes and business or trade by stakeholders like hoteliers, bar operators and restaurant owners who are able and willing to comply with the National Environment (Control of Smoking in Public Places) Regulations, and, I am informed by Sebalu & Lule, whose advice I believe, this contravenes Article 40(2) of the Constitution.

30 34. The Petitioner equally objects to Section 12(2) of the TCA, which provides for a 50 metre radius restriction for smoking in outdoor spaces, whether designated smoking areas under the law or not. The Petitioner considers that this regulation, in providing an impractical 50-metre radius restriction for smoking in outdoor spaces, creates an effective ban on the right and choice to consume a



5 legal product [tobacco] exercisable by adults, constitutes an unnecessary  
obstacle to trade and is more trade restrictive than necessary to achieve the  
stated health objectives of the Tobacco Control Act.

10 35. The 50-metre radius restriction must be examined based on the practical  
reality of the country in which it is expected to operate. In view of Uganda's  
unique physical planning constraints, which the Petitioner shall demonstrate  
through expert evidence, the 50- metre radius restriction amounts to a total  
and effective ban on smoking. This, in effect, I am informed by Sebalu & Lule,  
whose advice I believe, curtails the Petitioner's right to practice a lawful trade,  
occupation or business and the right to the use of property for a lawful business  
or trade by stakeholders like hoteliers, bar operators and restaurant owners  
5 who are able and willing to designate an outdoor space for smoking, and is  
therefore in contravention of a guaranteed economic right under Article 40(2)  
of the Constitution.

20 36. The Petitioner believes that the 50 metre radius restriction is neither necessary,  
appropriate nor proportionate.

37. Equally onerous, unreasonable and unjustified is the obligation imposed in  
Sections 12(3) and 12(4) on owners of public places, workplaces or means of  
public transport to take reasonable effort to ensure the observance of the 50-  
metre radius restriction for smoking in outdoor spaces. The Petitioner considers  
this obligation imposes a vague, uncertain, unreasonable and impractical  
enforcement obligation on the owners of public places, workplaces or means of  
public transport, and is a hindrance to economic rights protected by the  
Constitution.

30 38. The Petitioner is concerned with the provisions of Sections 14(10), 15(7), 16(10)  
and 17(7) of the TCA, which provides that where an offence is committed under  
sections 14, 15, 16 and 17 of the TCA, a director, manager or officer of a  
corporate entity may be personally held liable for the offence committed.

5 39. Currently, I am an employee of the Petitioner and likely to be directly affected by these provisions of the TCA.

40. The legal effect of Sections 14(10), 15(7), 16(10) and 17(7) of the TCA have been explained to me in great detail by Sebalu & Lule, whose advice I believe to be true. The Petitioner considers these sections to be unconstitutional.

10 41. I am informed by Sebalu & Lule, whose advice I believe to be true, that it is a constitutional, legal and conceptual violation to hold directors, managers or officers personally liable for the commission of penal offences by corporate entities. These sections that provide for the personal liability of directors, managers or officers of corporate entities ignore the distinction between an  
15 individual and the company, as well as the general principles that govern the attribution of criminal responsibility to corporate entities

42. I am informed by Sebalu & Lule, whose advice I believe to be true, that as an autonomous entity, the Petitioner may be liable for criminal acts. However, the criminal liability of the directors, officers and managers will depend upon their  
20 actual personal involvement in the criminal act(s). This is both a factual and legal test, and it is not the type of liability which can be imposed by statute.

43. The Petitioner considers that the imminent threat of personal criminal liability for directors, officers and managers amounts to the discriminatory targeting and biased pre-judging of directors, managers and officers of tobacco companies.

25 44. There is another more latent impact caused by Sections 14(10), 15(7), 16(10) and 17(7) of the TCA. These sections, in effect, serve to act as a disguised statutory disincentive to directors from serving on the board of directors of tobacco companies, and managers and officers from serving on the management of tobacco companies. This will have the effect of deterring the  
30 inflow of talent into the lawful business, profession and occupation of the Petitioner, and other stakeholders related to the Petitioner's business.

5 45. I am informed by Sebalu & Lule, whose advice I believe to be true, that the effect  
of Sections 14(10), 15(7), 16(10) and 17(7) creates a contravention of the rights  
of possible officers, managers and directors to enjoy and practice their  
professions, vocations, occupation, trade and business as provided for under  
10 Article 40(2) of the Constitution. By singularly targeting directors, managers  
and officers of entities in the tobacco sector, these sections also amount to  
discriminatory treatment and violate the rights of directors, officers and  
managers to a fair hearing.

46. Section 16(1) and the Fifth Schedule to the TCA provide a 50-metre radius  
restriction in relation to the sale of tobacco products. The places listed include  
15 cinema and theatrical performance halls, sports stadia and any other place as  
shall be prescribed in the Regulations to be made under the TCA.

47. Yet again, we repeat our contention that the 50-metre radius restriction must  
be examined based on the practical reality of the country in which it is expected  
to operate. In view of Uganda's unique physical planning constraints, which the  
20 Petitioner shall demonstrate through expert evidence, the 50-metre radius  
restriction amounts to a severe and unjustified economic restriction on the sale  
of tobacco products. The petitioner considers this to be a form of legislative  
intervention that attempts to classify tobacco as an illegal product, and the  
trade in tobacco products to be illegal.

48. It is essential that the practical effect of Section 16(1) is closely interrogated.  
We consider the practical effect to be that the Petitioner and other concerned  
stakeholders (such as licensed vendors) will be unable to sell a legal product  
within legitimate commercial and retail spaces.

49. This, in effect, I am informed by Sebalu & Lule, whose advice I believe, curtails  
the Petitioner's right to practice a lawful trade, occupation or business and the  
right and choice to trade in a legal product [tobacco] exercisable by lawfully

5 licensed vendors and is therefore in contravention of a guaranteed economic rights under Article 40(2) of the Constitution.

50. The Petitioner believes and shall demonstrate that the 50 metre radius restriction is neither necessary, appropriate nor proportionate.

10 51. Section 16(2)(a) of the TCA provides that a person shall not import, manufacture, distribute, process, sell, offer for sale or bring into the country electronic nicotine delivery systems.

15 52. The prohibition on electronic nicotine delivery systems constitutes an unnecessary obstacle to trade and is more trade restrictive than necessary to achieve the public health objectives. In imposing a blanket ban on electronic nicotine delivery systems, the TCA effectively curtails the Petitioner's right to practice a lawful trade and business as guaranteed by the Constitution.

20 53. The blanket ban also disregards international evidence and advice from public health authorities which, Your Petitioner shall demonstrate, suggests that electronic nicotine delivery systems have the potential to help drive down smoking rates and improve public health. Secondly, and more importantly, we believe that there are alternative regulatory options that Uganda could pursue to better advance public health objectives by ensuring that electronic nicotine delivery systems meet appropriate criteria with regards to quality and safety, while remaining available to adult consumers as an alternative to smoking.

25 54. The Petitioner believes that the prohibition on electronic nicotine delivery systems is irrational and disproportionate.

55. Section 16(2)(c) of the TCA provides that a person shall not import, manufacture, distribute, process, sell, offer for sale or bring into the country a smokeless or flavoured tobacco product.

30 56. From the outset, the Petitioner notes that the TCA fails to provide any basis for identifying and measuring what amounts to a "flavoured tobacco product" and thus imposes a vague, uncertain and unreasonable restriction.

5 57. The prohibition on all flavoured tobacco products deprives the Petitioner of its  
legitimate property and economic rights as the Petitioner will be prohibited  
from selling certain brands, and using the trademarks associated with those  
brands, and will be deprived of the substantial goodwill inherent in those  
brands. A ban will severely restrict tobacco manufacturers' ability to compete  
10 with one another by way of product differentiation and distort market  
competition.

58. Further, flavoured tobacco products constitute a legal product, and the effect of  
Section 16(2) (c) is to curtail the Petitioner's right to practice a lawful trade and  
business as guaranteed by the Constitution.

15 59. The Petitioner believes that the prohibition on all flavoured tobacco products is  
not necessary or proportional.

60. Section 16(3) of the TCA provides that a person shall not prominently display or  
make visible a tobacco product at any point of sale, other than being visible  
momentarily at the time of a sales transaction.

20 61. Section 16(3), objectively read, effectively amounts to a ban on the display of the  
Petitioner's legal products at retail points of sale, in addition to a number of  
unreasonable violations.

62. To begin with, there is a particular problem with the inherent vagueness of  
Section 16(3). The section does not identify any basis for identifying and  
measuring what amounts to a "prominent display" and thereby imposes an  
uncertain and unreasonable restriction.

25 63. The Petitioner's grievance here, and as Sebalu & Lule has explained me, is that  
when legislative language is vague, the generality, imprecision and lack of  
clarity of the language used means that the provision in issue may be applied in  
a way that in fact goes beyond the stated goals of Parliament. The absence of  
adequate guidance in the provision will lend itself to abuse.  
30

5. 64. Further, there is a critical function that the display of the Petitioner's legal product at the retail point of sale serves: the right to communicate with adult consumers in relation to the origin, quality and other points of differentiation and innovation regarding its products.

10 65. Section 16(3) impairs the right of adult consumers to receive such communication in respect of lawful products. Prohibiting the display of tobacco-related trademarks at point of sale also deprives the Petitioner of its most fundamental tool for identifying and distinguishing its products at a critical point in time, when trademarks fulfil their core distinguishing functions in relation to legally available products. It also distorts fair competition by restricting the ability of companies to compete by way of product differentiation.

15 66. Section 16(3), I am informed by Sebalu & Lule, whose advice I believe, contravenes the Petitioner's right to practice a lawful trade, occupation or business guaranteed under Article 40(2) of the Constitution, and the right to free speech guaranteed by Article 29(1)(a) of the Constitution.

20 67. The Petitioner believes that the prohibition on the prominent display of tobacco products is not necessary or proportional.

68. Section 16(4) of the TCA provides that a person shall not sell a tobacco product through an automated vending machine.

25 69. I believe that Section 16(4) has the effect of creating an effective barrier on a legitimate avenue through which a legal product [tobacco] is traded in. I am also advised by Sebalu & Lule, whose advice I believe, that there is no requirement under the FCTC to prohibit the sale of tobacco products through vending machines.

30 70. I re-emphasise the fundamental point that tobacco is not an illegal product, and the automatic vending machine ban, I am informed by Sebalu & Lule, whose

5 advice I believe, contravenes the Petitioner's right to practice a lawful trade, occupation or business guaranteed under Article 40(2) of the Constitution.

71. The Petitioner believes that the prohibition on the sale of tobacco products through automated vending machines is not necessary or proportional.

10 72. The Petitioner contends, further, that the prohibitions under Section 16 of the TCA in contravening the Petitioner's right to property and right to practice a lawful trade, occupation or business, and operating as an unnecessary restriction to trade, constitutes a violation of Uganda's obligations under the World Trade Organization administered General Agreement on Tariffs and Trade 1994 and the Agreement on Technical Barriers to Trade 1995.

15 73. Sections 25(3) and 25(4) of the Tobacco Control Act attempt to manage conflicts of interest, but essentially result into the discriminatory treatment of persons employed by the tobacco industry and create an unfair, unreasonable and unjustified barrier to future employment.

20 74. The section bars individuals who have been involved in any occupational activity with the tobacco industry from being contracted or employed by the Government of Uganda in a position where the person is likely to contribute to the formulation, implementation, administration, enforcement and monitoring of public health policies on tobacco control within a period of two years from the end of the engagement with the tobacco industry. The same prohibition applies to those who have been employed by the Government.

25 75. It is noteworthy, as I am advised by Sebalu & Lule, whose advice I believe, that no other industry or sector in Uganda contains the employment restrictions described in Sections 25(3) and 25(4), particularly industries or sectors selling potentially harmful or controversial products.

30 76. The Petitioner considers this barrier to be arbitrary and out of scope with the objective of the TCA.

5 77. In using "occupational activity with the tobacco industry", the wording of  
Sections 25(3) and 25(4) is wide, and is designed to cover every single individual  
involved in any aspect of the tobacco value chain. It must be noted that the  
tobacco industry employs a wide range of professionals. These individuals will  
be barred from seeking legitimate employment opportunities with the  
10 Government of Uganda. Similarly, Government of Uganda employees will be  
barred from seeking legitimate employment opportunities with the tobacco  
industry.

15 78. The provisions of section 25(3) and 25(4) of the TCA, I am informed by Sebalu &  
Lule, whose advice I believe, provide for and amount to discrimination, and are  
inconsistent and in contravention of the right to practice a lawful trade,  
occupation or business guaranteed under Article 40(2) of the Constitution.

20 79. Sections 25(7) and 25(8) of the Tobacco Control Act provides for a criminal  
offence and penalty arising therefrom for violating section 25(3), (4), (5) and  
(6). The penalties prescribed are the payment of a fine and imprisonment for: a  
term of not less than five years, or both. In addition to this penalty, the former  
employee may be ordered to pay compensation to the Government of Uganda.

25 80. The Petitioner considers that Sections 25(7) and 25(8) of the TCA provide for a  
harsh, unreasonable, disproportionate punishment, and are in contravention the  
right to practice a lawful trade, occupation or business guaranteed under  
Article 40(2) of the Constitution

30 81. Section 25(9) of the TCA provides for the automatic conversion of a criminal  
penalty from a criminal offence into a civil decree under the Civil Procedure Act  
and goes ahead to provide for the automatic execution of that decree under  
section 39 of the Civil Procedure Act. I am informed by Sebalu & Lule, whose  
advice I believe, that the provisions of section 25(9) of the TCA are inconsistent  
with and in contravention with Articles 28(1) and 43(2) (c) of the Constitution.



5 82. Section 23 of the TCA provides that a person or entity which contributes or may contribute to the formulation, implementation, administration, enforcement or monitoring of public health policies on tobacco control is barred from providing incentives, benefits or privileges to the tobacco industry. The phrase "a person or entity which contributes or may contribute" is wide-ranging and if objectively  
10 read, covers the entire arm of government: the executive, legislature and judiciary.

83. The Petitioner considers Section 23 to be specifically discriminatory of entities conducting lawful tobacco business, trade and occupation. Like any legitimate business in Uganda, the Petitioner is entitled to benefit from lawful trade  
15 incentives, benefits, privileges and preferential tax exemptions formulated by the executive and by Parliament.

84. Importantly, I must stress that the Petitioner is a corporate entity that is owned and controlled by individuals who possess commercial interests as shareholders. The denial of lawful trade incentives, benefits or privileges to the Petitioner will  
20 have a wider impact on the legitimate economic interests of its shareholders.

85. I am informed by Sebalu & Lule, whose advice I believe to be true, that Section 23 is discriminatory and is not a justifiable limitation in a free and democratic society.

86. Sections 15(5) (b) and (c) of the TCA provide that where a corporate entity contravenes the provisions of Section 15 of the TCA, the court may order for the  
25 surrender of any proceeds of sale of the product to the government, or suspend the trading licence of that person for a period of not less than six months. Sections 16(8) (b) and (c) impose a similar penalty for the contravention of the provisions of Section 16.

87. The Petitioner considers these penalties to be arbitrary and out of scope with  
30 the objective of the TCA.

5 88. The Petitioner considers that the penalties prescribed in Sections 15(5)(b) and  
(c) and Sections 16(8)(b) and (c) of the TCA amount to harsh, unreasonable and  
disproportionate punishment and, I am informed by Sebalu & Lule, whose advice  
I believe, are in contravention of the right to practice a lawful trade, occupation  
or business guaranteed under Article 40(2) of the Constitution.

10 89. The Petitioner considers that the TCA, read as a whole, has the effect of  
unjustifiably singling out the tobacco industry for preferential discriminative  
treatment and amounts to a ban on the right to trade in and consume a legal  
product (tobacco and tobacco products).

15 90. Further, the Petitioner considers that the sections of the TCA highlighted in the  
petition, read as whole, violate the principle of proportionality, are un-justified  
and inappropriate for achieving the public health objective that is pursued by  
the TCA.

20 91. I swear this affidavit in support of a petition for a declaration that Sections  
15(2), 12(1), (2), (3), (4), 14(10), 15(7), 16(10), 17(7), 16(1), 16(2)(a), 16(2)(c),  
16(3), 16(4)(a), 25(3), (4), (7), (8), (9), 23, 15(5)(b), (c), 16(8)(b) and (c) of the  
TCA contravene and are inconsistent with the Articles of the Constitution as  
have been identified in the petition.

25 Both the first and second respondents filed answers to the petition in which they  
denied the allegations in the petition and described it as misconceived. The answers  
to the petition are accompanied by affidavits sworn by Elisha Bafirawala Principal  
State Attorney, Dr. Sheila Ndyabangi, Jackson Oremon on behalf of the first  
respondent and Kwagala Primah a human rights advocate for the second  
30 respondent in which they contest every Petitioner's allegation and set out grounds  
upon which they challenge the petition seeking that the petition be dismissed on  
account of being frivolous and vexatious and contend that it raises no issues or  
questions for interpretation.

5 Elisha Bafirawala deponed as follows:-

7. That contrary to what is stated in paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 of the affidavit in support of the Petition I know that;

a. the rights guaranteed under Articles 26(1), 29(1)(a) and 40(2) of the Constitution are not absolute

10 b. the petitioner's intellectual property rights have not in any way been curtailed by the requirements under Section 15(2) of the Tobacco Control Act as alleged or at all

15 c. the requirement to exhibit health messages that occupy no less than 65% of each principal display area of the unit packet does not unreasonably inhibit the Petitioner's right to carry out their business nor does it curtail the petitioner's freedom of speech and expression

d. the requirement under section 15(2) of the Tobacco Control Act cuts across the Tobacco Industry and leaves room for adequate product differentiation.

20 8. That contrary to what is stated in paragraphs 30, 31, 32 and 33 of the affidavit in support of the petition I know that Section 12(1) of the Tobacco Control Act does not contravene Article 40(2) of the Constitution.

25 9. That in further and specific response to paragraphs 30, 31, 32 and 33 of the affidavit in support of the petition I know Articles 39 of the Constitution guarantees every Ugandan a right to a clean and health environment.

10. That I know that Article 17 (j) of the Constitution enjoins all citizens to create and protect a clean and healthy environment.

30 11. That I know that the contents of paragraph are unsubstantiated by any evidence to the effect that the 50 meters radius restriction unders 12(2)(3)(4) of

5 the Tobacco Control Act contravenes the Petitioner's rights guaranteed under Article 40(2) of the Constitution as alleged under paragraph 35, 36 and 37 of the affidavit in support of the Petition.

10 12. That in response to paragraphs 39, 40, 43, 41, 42, 44 and 45 of the affidavit in support of the Petition, I know that sections 14(10), 15(7), 16(10) and 17(7) of the Tobacco Control Act define the offence and prescribe the penalty in the preceding provisions.

15 13. That in further response to paragraphs 39,40,43,41,42, 44 and 45 of the affidavit in support of the Petition, I know that sections 14(10), 15(7), 16(10) and 17(7) of the Tobacco Control Act is consistent with Article 28(1) of the Constitution.

20 14. Paragraph 46 of the affidavit in support of the Petition is admitted save to add that the fourth schedule to the Tobacco Control Act prescribes places where the selling of tobacco product is prohibited.

25 15. That I know that paragraphs 47, 48, 49 and 50 of the affidavit in support of the Petition are not based on any empirical evidence. Further, I also know that section 16(1) of the Tobacco Control Act is consistent with Article 40(2) of the Constitution.

30 16. That in response to paragraphs 52, 53 and 54 of the affidavit in support of the Petition, I know that section 16(2)(a) of the Tobacco Control Act is not inconsistent with Article 40(2) of the Constitution.

35 17. That I know that the prohibition entailed in section 16(2)(c) of the Tobacco Control Act is not inconsistent with Article 40(2) of the Constitution as alleged under paragraphs 56, 57, 58 and 59 of the affidavit in support of the petition.

40 18. That I know that Section 16(3) of the Tobacco Control Act is not inconsistent with Article 29(1) and 40(2) of the Constitution. The contents of paragraphs 61, 62, 63, 64, 65, 66 and 67 of the affidavit in support of the Petition are denied in their entirety.

19. That contrary to what is stated under paragraphs 69, 70, 71 and 72 of the affidavit in support of the Petition, I know that Section 16(4) of the Tobacco Control Act is not inconsistent with Article 40(2) of the Constitution.

5 20. That in specific response to the contents of paragraph 73, 74, 75, 76, 77, 78, 79, 80 and 81 of the affidavit in support of the Petition, I know that section 25(3) and (4) of the Tobacco Control Act is consistent with Articles 28(1), 40(2) and 43 (2) (c) of the Constitution.

10 21. That contrary to what is stated under paragraphs 82, 83, 84 and 85 of the affidavit in support of the Petition, I know that Section 16(4) of the Tobacco Control Act is not inconsistent with Article 40(2) of the Constitution

15 22. That I know that section 15(5)(b)(c) and 16(8)(b)(c) of the Tobacco Control Act is consistent with Article 40 (2) of the Constitution contrary to what is alleged under paragraphs 86, 87, and 88 of the affidavit in support of the Petition.

20 23. That in further response to paragraphs 86, 87, and 88 of the affidavit in support of the Petition, I know that the penalty prescribed under the Tobacco Control Act is not mandatory.

25 24. That I know that the contents of paragraphs 89 and 90 of the affidavit in support of the Petition are not true.

25 25. That I know that the provisions of the Tobacco Control Act cited under paragraph 91 of the affidavit in support of the Petition are consistent with Articles 21 (1)(2), 26, 26(1), 28(1) 29(1) (a), 40(2) and 43 of the Constitution.

30 26. That, in further reference to the allegations in the affidavit in support of the Petition, I know that the Petition is misconceived, frivolous and vexatious and raises no issues or questions for interpretation by this Honorable Court.

35 27. That I know that Respondent has not by any act or omission violated or infringed any provisions of the Constitution as alleged by the Petitioner.

40 28. That I know that the Petition is merely an abuse of Court process and intended to impede the administration and enforcement of the Tobacco Control Act.

5 The relevant parts of the affidavit of Kwagala Primah for the second respondent are set out as follows:-

10 6. *In response to Paragraph 13, 14 and 15 of the Petition, the Second Respondent shall contend that the Tobacco Control Act (TCA) promotes public health and protects the public against the detrimental health, social, environmental and economic consequences of tobacco consumption and production and exposure to tobacco smoke.*

15 7. *In specific response to Paragraphs 16, 17, 18 and 19 of the Petition, the Second Respondent shall contend that Section 15 (2) of the TCA discourages consumption of tobacco products and does not infringe on the Petitioner's use of the registered intellectual property rights in their products.*

20 8. *In specific response to Paragraphs 20, 21, 22, 23, 24, 25, 26 and 27 of the Petition, the Second Respondent shall contend that Sections 12 (1) and 12 (2) of the TCA protects the people in public places against the health effects of exposure to tobacco smoke and does not violate the rights of stakeholders to use their property for lawful purposes, trade and business.*

25 9. *In specific response to Paragraphs 28, 29, 30, 31 and 32 of the Petition, the Second Respondent shall contend that Sections 14 (10), 15 (7), 16 (10) and 17 (7) ensure compliance with the provisions of the Act and neither violate the rights of officers, managers and directors to lawfully practice their professions nor discriminate against them.*

30 10. *In specific response to Paragraphs 33, 34, 35 and 36 of the Petition, the Second Respondent shall contend that Section 16 (1) of the TCA discourages consumption of tobacco products in public places, protects the people in public places from being exposed to tobacco smoke and is necessary for the purposes of achieving its objective.*

5 11. In specific response to Paragraphs 38, 39, 40, 41, 42, 43, 44, 45, 46 and 47 of  
the Petition, the Second Respondent contends that electronic nicotine delivery  
systems and smokeless or flavored tobacco products are harmful products and  
Sections 16 (2) (a) and 16 (2) (c) of the TCA create measures necessary and  
10 appropriate to protect the public against the devastating health effects of using  
them.

12. In specific response to Paragraphs 48, 49, 50, 51, 52, 53, 54 and 55 of the  
Petition, the Second Respondent contends that Section 16 (3) of the TCA  
discourages the consumption of harmful tobacco products and creates  
measures necessary and appropriate to achieve this objective.

15 13. In further response to Paragraphs 49, 50 and 51 of the Petition, the Second  
Respondent contends that the restriction in Section 16 (3) of the TCA is clear,  
certain and unambiguous, and does not infringe on any of the applicant's  
registered intellectual property rights in their registered trademarks relating to  
their products.

20 14. In response to Paragraphs 57 and 58 of the Petition, the Second Respondent  
shall contend that Section 16 (4) (a) of the TCA discourages the consumption of  
tobacco products and is necessary and appropriate to achieve its objective.

25 15. In response to Paragraphs 59, 60, 61, 62, 63, 64 and 65 of the Petition, the  
Second Respondent shall contend that Sections 25(3) and 25(4) of the TCA  
prevent the tobacco industry from unduly influencing and interfering with the  
formulation, implementation, administration, or monitoring of public health  
policies on tobacco control and is necessary and appropriate for the purposes of  
achieving this objective.

30 16. In response to Paragraphs 66, 67, 68, 69 and 70 of the Petition, the Second  
Respondent shall contend that Section 23 of the TCA enforces the provisions of

5 *the TCA which protect public health and is necessary and appropriate for the purposes of preventing any conflict of interest for stakeholders who may be involved in the formulation, implementation, administration, enforcement or monitoring of public health policies on tobacco control.*

10 *17. In response to Paragraphs 71 and 72 of the Petition, the Second Respondent shall contend that Sections 15(5)(b) and (c) and 16(8)(b) and (c) of the TCA ensure compliance with the prohibitions in Sections 15 and 16, and are necessary and appropriate for the purpose of ensuring that the sections are complied with.*

*18. The Second Respondent contends and shall prove that;*

15 *(a) Tobacco is a harmful product which has negative health, social and economic consequences for people involved in its farming, production and consumption; and people who are exposed to its smoke,*

20 *(b) The government of Uganda has an obligation to protect the public health for all Ugandans by regulating products which are detrimental to their health and wellbeing, and*

*(c) The provisions of the TCA are necessary, appropriate and proportional to the achievement of the purpose of regulating the use, production and consumption of tobacco products in Uganda.*

25 This Petition first came up for hearing before this Court on 17<sup>th</sup> May 2017. The Coram was constituted as follows:-Kavuma DCJ, Kasule, Buteera, Cheborion and Obura, JJA/JJC. The Petition was heard and Judgment reserved to be delivered on notice to the parties.

Subsequent to that, Kavuma DCJ, Kasule JA/JCC and Buteera, JA/JCC ceased to be Justices of this Court, before delivery of the Judgment.



5 On 11<sup>th</sup> September, 2018 the current panel was constituted. The petition was reheard. Counsel adopted their oral submissions made on 17<sup>th</sup> May, 2017 as well as the written submissions on Court record. It is on the basis of that, this Judgment has been written.

The issues for determination are:-

- 10 1. *Whether Section 12(1), (2), (3) and (4) of the Tobacco Control Act are inconsistent with and/or in contravention of Article 40(2) of the Constitution.*
2. *Whether Sections 14(10), 15(7), 16(10) and 17(7) of the Tobacco Control Act are inconsistent with and/or in contravention of Articles 21(2) and 40(2) of the Constitution.*
- 15 3. *Whether Section 15(2) of the Tobacco Control Act is inconsistent with and/or in contravention of Articles 40(2), 26(1), 29(1)(a) of the Constitution.*
4. *Whether Sections 15(5) (b) and (c) and 16(8)(b) and (c) of the Tobacco Control Act are inconsistent with and/or in contravention of Article 40(2) of the Constitution.*
- 20 5. *Whether Section 16(1) of the Tobacco Control Act is inconsistent with and/or in contravention of Article 40(2) of the Constitution.*
6. *Whether Section 16(2) (a) of the Tobacco Control Act is inconsistent with and/or in contravention of Article 40(2) of the Constitution.*
7. *Whether Section 16(2) (c) of the Tobacco Control Act is inconsistent with and/or in contravention of Article 40(2) of the Constitution.*
- 25 8. *Whether Section 16(3) of the Tobacco Control Act is inconsistent with and/or in contravention of Article 29(1)(a) and 40(2) of the Constitution.*
9. *Whether Section 16(4) (a) of the Tobacco Control Act is inconsistent with and/or in contravention of Article 40(2) of the Constitution.*
- 30 10. *Whether Section 25(3) and (4) of the Tobacco Control Act is inconsistent with and/or in contravention of Article 40(2) of the Constitution.*

5 11. Whether Section 25(7) and (8) of the Tobacco Control Act is inconsistent with and/or in contravention of Article 40(2) of the Constitution.

12. Whether Section 25(9) of the Tobacco Control Act is inconsistent with and/or in contravention of Article 28(1) of the Constitution.

10 13. Whether Section 23 of the Tobacco Control Act is inconsistent with and/or in contravention of Article 21(1) and (2) of the Constitution.

14. Whether the parties are entitled to the remedies sought.

### **Representations**

When this petition came up for hearing learned Counsel *Mr. James Ssebugenyi* appeared for the Petitioner while *Mr. Sam Tsubira* appeared for the first  
15 respondent and *Mr. Peter Walubiri* together with *Mr. Robert Kirunda, David Kabanda* and *Gerald Batanda* appeared for the second respondent.

### **Resolution of issues arising from grounds for this petition**

#### **Issue 1**

20 Whether Section 15(2) of the Tobacco Control Act contravenes and is inconsistent with Articles 40(2), 26 and 29 of the Constitution.

Section 15(2) of Tobacco Control Act provides as follows:-

25 (2) Subject to subsection (1), the text and pictures comprising the health warnings and messages shall appear together and shall occupy no less than 65% of each principal display area of the unit packet, package of tobacco product or outside packing and shall not include the space taken up by any border surrounding the health warnings and messages.

It must be made clear from the onset that the Petitioner concedes in paragraph 12 of the affidavit in support of the petition and generally through the petition, that:-

5           *'Tobacco consumption poses real risk to health, further that, the manufacture, distribution and sale of tobacco products should be lawfully regulated. To this end the petitioner fully supports proportionate, effective, evidence-based regulation that measurably reduces the public health impacts of tobacco products.'*

10 In this regard therefore, this petition is about the extent of the limitation of rights of the Petitioner.

15 It has been submitted for the Petitioner that, *Section 15(2)* of Tobacco Control Act which provides that, the graphical health warning that appears on the unit packet of a tobacco product in Uganda shall occupy no less than 65% of the principal display area, unreasonably restricts the space available to the Petitioner for use in its trade. Further that, the said requirement infringed on the Petitioner's right to practice a lawful trade, occupation and business.

20 The Petitioner further argues that *Section 15(2)* of Tobacco Control Act having increased the space for the graphic health warning from the previous 30% to current 65% on product packaging infringed the Petitioner's Constitutional right to practice a lawful trade and deprived it of its intellectual property right under the Trademarks Act 2010. Further that, the said restriction deprives the petitioner of its property rights protected under the Copyrights and Neighbouring Rights Act 2006 and the Industrial Property Rights Act 2014 that have accrued as a result of good will, reputation and usage in course of trade.

25 The Petitioner argued that the impugned *Section 15* of Tobacco Control Act infringes the Petitioner's right of speech guaranteed under *Article 29 (1) (a)* of the Constitution as it inhibits the ability of the Petitioner to communicate with its adult consumers of its product. The Petitioner also contends that, the said law is

5 unreasonable and unjustifiable as there is evidence to show that graphic health warnings do not reduce tobacco consumption.

Further that, the increase of the graphic health warning space from 30% to 65% was unjustified in view of the provisions of the World Health Organisation's Frame Work Convention on Tobacco Control (the FCTC) which requires a minimum of 30% text  
10 warning on the front and back of the pack.

There appears to have been a very deliberate attempt by the Petitioner to move away from the issues of constitutional Interpretation and to draw this Court into the tobacco control debate.

I must firmly state here that the jurisdiction of this Court is limited to the interpretation of the Constitution. The Petitioner is at liberty to raise all its other  
15 grievances before an appropriate Court through established legal procedure. I shall therefore restrict myself only to issues that relate to constitutional interpretation.

For the 1<sup>st</sup> respondent it was argued that, the Petitioner's rights set in the petition as having been infringed are not absolute and are subject to the limitation set out  
20 under *Article 43(2)* of the Constitution

Further that the restrictions imposed under *Section 15 (2)* of Tobacco Control Act are justified as 65% of space of packers bearing a health warning, helps to warn children and illiterate consumers of the risks of tobacco consumption. For the 1<sup>st</sup>  
25 respondent it was submitted that the 65% is in compliance with Frame Work Convention on Tobacco Control standards, which are only the minimum.

The World Health Organisation guidelines recommended the use of pictures in recognition of the scientific evidence on the supremacy of pictures in comparison to texts. There are 43 countries in the world with a Health warning size of over 65% on average of package front and back. Counsel referred Court to the affidavit of Dr.  
30 Sheila Ndyabangi on which a report by Dr. David Hammond is annexed illustrating

5 that pictorial warnings have a broad reach among children and youthful non-smokers. The 1<sup>st</sup> respondent without much explanation denies that the impugned law in anyway infringes on the Petitioner's property rights, under the Trademarks Law and or the Copyright laws.

For the 2<sup>nd</sup> respondent it was submitted as follows on this issue:-

10 23. *We respectfully disagree with the allegation of the petitioner that the 65% restriction violates/ limits the ability of companies to compete by way of product differentiation using their trademarks. It is our humble submission that the Trademarks Act of Uganda does not recognise the right of the petitioner to display the registered mark. Section 36 and 37 of the*  
15 *Trademarks Act only confer negative rights, an exclusive right to prevent others from using the Trademark owners mark for their goods. As such the only enforceable right in a Trademark for the petitioner arises only when another person uses their mark on their product and does not arise when proprietor is restricted by law from using their mark.*

20 24. *This position as been relied on by the Court of Appeal of England with approval in the case of British American Tobacco V Department of Health [2016] EWHC 1169 (at page 737 - 743) in which it was held that intellectual property rights though greatly limited had not been appropriated by the*  
25 *Standard Packaging for Tobacco Regulations 2015 and that the applicants still had the right and ability to use their Trademarks to the exclusion of all others despite the limitation.*

30 25. *Furthermore, we submit that the requirement of 65% pictorial warnings is justified and necessary to serve the purpose of communicating the harmful nature of tobacco products. Pictorial health warnings are effective in promoting health and disease prevention including in the prevention and control of diseases arising from use of tobacco (Paragraph 17, Dr Jim Arinitwe's Affidavit). My Lords, tobacco causes Non-Communicable diseases*  
35 *and it is only necessary that consumers are notified in a prominent manner of the risks associated with the product they are consuming.*

5 26. The 65% prescription on pictorial warnings on tobacco products is reasonable and justified because while the prescribed minimum is 50%, there is no upper limit. Other Countries such as the UK, Australia and South Africa have adopted plain packaging with which the petitioner is already complying. (Para 19, Dr Jim Arinitwe's affidavit).

10 28 .Furthermore, the 65% restriction is wholly consistent with FCTC Article 11.1(b), which sets a 50% minimum standard of the pack's principal display area but shall be no less than 30% of the PDAs, and with the recommendations of the Guidelines for Implementation of Article 11 ("Article 11 Guidelines").

15 34. Evidence shows the benefits of strengthening existing warnings.

20 Strengthening warnings (for example, moving from text to pictorial warnings, increasing the size of the warnings) is associated with increased knowledge of smoking risks, increased calls to quit lines, reduced consumption and prevalence, increased quit attempts, and short-term smoking cessation.

25 35. Evidence of this comes from several countries, including Canada, where warnings were increased from 50% to 75% and Uruguay, when warnings were increased from 50% to 80%.

30 36. In *British American Tobacco versus Ministry of Health, Tobacco Control Board and AG of Kenya*, BAT challenged provisions of Kenya's Tobacco Control Regulations (TCR) , including: the requirement for picture-based health warnings as unnecessary and not proportional. The Court upheld limitations in the regulations as being constitutional in substance and in due process as well as consistent with the 2007 Tobacco Control Act, the FCTC and its implementation guidelines, and other domestic legislation.

35 46. The Petitioner contends that its right to freedom of speech and expression in Article 29(1)(a) is violated by section 15(2) of the law. A similar contention was raised in *Caceres Corrales v. Colombia*, Judgment C-830110, Corte Constitucional de Colombia [Constitutional Court] (2010).

5 47. Concluding that the rights of economy and enterprise are not absolute, the  
court held that the imposed restrictions are compatible with the freedom of  
enterprise and free private initiative and therefore not unconstitutional. ...  
10 according to the Court, commercial speech can be restricted in a higher  
degree than other speech because it is more closely linked to freedom of  
enterprise than to freedom of expression.

I have already stated above that, it is common ground, that the rights the Petitioner  
contends to have been infringed upon by the enactment of the impugned *Section*  
15(2) of the Tobacco Control Act are not absolute. They are subject to the limitations  
15 set out in the Constitution.

Indeed all rights set out in the Bill of Rights under our Constitution *albeit* being  
inherent and not granted by the state are nevertheless not absolute. They are all  
subject to limitations except those set out under *Article 44* of the Constitution. This  
petition is not concerned with any of the non derogable rights under *Article 44* of  
20 the Constitution.

The limitations permissible under *Article 43* as set out as follows:-

*43. General limitation on fundamental and other human rights and freedoms.*

25 (1) *In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.*

(2) *Public interest under this article shall not permit—*

(a) *political persecution;*

(b) *detention without trial;*

30 Article 43(1) is very instructive. It recognises the fact that in the enjoyment of one's  
fundamental rights and freedom set out in chapter 4 of the Constitution. There is  
bound to arise conflict, between competing rights. Article 43(1) sets out boundaries

5 for enjoyments of rights, restricting their enjoyment in such way as not to extend to the prejudice of fundamental or other human rights for others or the public interest.

Public interest being a broad concept that is subject to various subjective interpretations is itself restricted under *Article 43(2)* of the Constitution set out above.

10 We are required in this petition, to determine whether or not the rights of the Petitioner have been restricted beyond what is permissible under *Article 43* of the Constitution.

While dealing with clause 1 of *Article 43* in respect of the right and freedom of expression the Supreme Court in *Charles Onyango Obbo and Andrew Mujuni Mwenda vs Attorney General Constitutional Appeal No. 2 of 2002*, held as follows:- (per  
15 Mulenga JSC)

*"The provision in clause (1) is couched as a prohibition of expressions that "prejudice" rights and freedoms of others and public interest. This translates into a restriction on the enjoyment of one's rights and freedoms in order to  
20 protect the enjoyment by "others", of their own rights and freedoms, as well as to protect the public interest. In other words, by virtue of the provision in clause (1), the constitutional protection of one's enjoyment of rights and freedoms does not extend to two scenarios, namely: (a) where the exercise of one's right or freedom "prejudices" the human right of another person; and (b) where such  
25 exercise "prejudices" the public interest. It follows therefore, that subject to clause (2), any law that derogates from any human right in order to prevent prejudice to the rights or freedoms of others or the public interest, is not inconsistent with the Constitution. However, the limitation provided for in clause (1) is qualified by clause (2), which in effect introduces "a limitation upon  
30 the limitation". It is apparent from the wording of clause (2) that the framers of*



5 the Constitution were concerned about a probable danger of misuse or abuse of  
clause (1) under the guise of defence of public interest. For avoidance of that  
danger, they enacted clause (2), which expressly prohibits the use of political  
persecution and detention without trial, as means of preventing, or measures to  
remove, prejudice to the public interest. In addition, they provided in that clause  
10 a yardstick, by which to gauge any limitation imposed on the rights in defence  
of public interest. The yardstick is that the limitation must be acceptable and  
demonstrably justifiable in a free and democratic society. This is what I have  
referred to as "a limitation upon the limitation". The limitation on the  
enjoyment of a protected right in defence of public interest is in turn limited to  
15 the measure of that yardstick. In other words, such limitation, however  
otherwise rationalised, is not valid unless its restriction on a protected right is  
acceptable and demonstrably justifiable in a free and democratic society.

The Co-existence in the same constitution, of protection and limitation of the  
rights, necessarily generates two competing interests. On the one hand, there is  
20 the interest to uphold and protect the rights guaranteed by the Constitution. On  
the other hand, there is the interest to keep the enjoyment of the individual  
rights in check, on social considerations, which are also set out in the  
Constitution. Where there is conflict between the two interests, the court  
resolves it having regard to the different objectives of the Constitution.

25 As I said earlier in this judgment, protection of the guaranteed rights is a  
primary objective of the Constitution. Limiting their enjoyment is an exception  
to their protection, and is therefore a secondary objective. Although the  
Constitution provides for both, it is obvious that the primary objective must be  
dominant. It can be overridden only in the exceptional circumstances that give  
30 rise to that secondary objective. In that eventuality, only minimal impairment of

5           *enjoyment of the right, strictly warranted by the exceptional circumstance is permissible.*"

10           While under *Article 40(2)* the Petitioner has a constitutional right to practice lawful trade and business, which includes advertising its products packaging and related business practices in order to make its products attractive to its consumers in this case adults on one hand, that right is restricted in as far as it prejudices the rights of others. These others include children, non-smokers, pregnant women and those who may have quit smoking.

15           The Petitioner concedes that tobacco poses real health risks and concedes that the 1<sup>st</sup> respondent has an obligation to protect the public from those risks arising from the consumption of its products

          The burden of proving that the infringed right is prejudicial to the right of others lies upon with the state and not the Petitioner. See: *Charles Onyango Obbo and Andrew Mujuni Mwenda vs Attorney General Constitutional (Supra)*.

20           It is sufficient for the Petitioner to show that he or she enjoys a right which is being infringed by the impugned law or act. In *R vs Oakers 26 DCR (4) 2000* the Supreme Court of Canada while dealing with a similar matter held that:-

*"The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation."*

25           This holding was adopted and applied by the Supreme Court in *Onyango Obbo & Anor vs Attorney General (Supra)*.

          In this petition therefore the onus lies with the 1<sup>st</sup> respondent to show that the limitation imposed on the rights of the petitioner under *Section 15* of Tobacco Control Act falls within the ambit of *Articles 43(1) & (2)* of the Constitution.

5 In determining whether the limitation is justifiable the respondent had to show that,  
*'Legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations*

10 *The means used to impair the right or freedom must be not more than necessary to accomplish their objection.'*

See:- *Onyango Obbo & Anor vs Attorney General (Supra)* in which the Supreme Court adopted the reasoning of the Supreme Court of Zimbabwe in *Mark Gova & Another vs. Minister of Home Affairs & Another, [S.C. 36/2000: Civil Application No. 156/99]*

15 The objective of *Section 15* may be discerned from the long title and preamble to the Tobacco Control Act itself, which stipulate that:-

20 *"An Act to control the demand for the consumption of tobacco and its products, to control the supply of tobacco and its products to the population; to protect the environment from the effects of tobacco production and consumption and exposure to tobacco smoke; to promote the health of persons and reduce tobacco related illnesses and deaths; to protect persons from the socioeconomic effects of tobacco production and consumption; to promote research, surveillance and exchange of information on tobacco control; to insulate tobacco control policies, laws and programs from interference by the tobacco industry; to strengthen*  
25 *coordination, partnerships and collaboration for tobacco control; to establish the Tobacco Control Committee; to fulfill Uganda's obligation and commitment as a party to the World Health Organisation Framework Convention on Tobacco Control (WHO FCTC) and to provide for other related matters.*

5

**PREAMBLE**

*Whereas the World Health Organisation Framework Convention on Tobacco Control was signed at the United Nations Headquarters in New York on the 5th day of March 2004 on behalf of the Republic of Uganda as a member of the World Health Organisation;*

10

*And whereas Uganda ratified the Convention on the 20th day of June 2007 in accordance with Article 123 of the Constitution of the Republic of Uganda, section 3(b) (ii) of the Ratification of Treaties Act and Article 35 of the World Health Organisation Framework Convention on Tobacco Control;*

15

*And further whereas it is expedient to give the force of law to the Convention in Uganda.”*

The affidavit of Dr. Sheila Ndayabangi deponed in reply to the Petitioner’s affidavit in support of the petition, sets the reasons advanced by the 1<sup>st</sup> respondent in support of the limitation and restriction imposed on the petitioner under Section 15 of Tobacco Control Act as follows;-

20

*27. That in response to paragraphs 15, 16, 18, 21, 24, 26, 27 and 28 from the extensive research I have carried out on the Tobacco industry and the related issues I know that:*

25

- a. The concerns about the health effects of smoking are the primary reason why consumers make several attempts to quit smoking and further a key reason as to why the youth do not take up this harmful habit. Further, that health warnings on the cigarette packets are the primary source of information on the health effects of smoking for both smokers and non-smokers.*

- 5
- b. That I know that warning labels are effective in reducing tobacco consumption and highly cost effect for tobacco industry.
- c. Large, graphic warning labels on tobacco products is an effective way to inform consumers about the harmful impact of tobacco, encourage users to quit and deter non- users from starting to smoke.
- 10
- d. The practice and requirement to effectively package cigarettes with large, clear and visible health warnings is now an international practice as evidenced by the International Status Report titled **Cigarette Package Health Warnings by Canadian Cancer Society, 4<sup>th</sup> Edition, October 2016** attached and marked as annexure "C".

15

Annexure 'C' to that affidavit is a report titled 'Cigarette Package Health Warnings' International Status Report, by Canadian Cancer Society published October 2016. The report provides as follows at page 2:-

"Report highlights include:

- 20
- More than 100 countries/jurisdictions worldwide have now required pictorial warnings, with fully 105 countries/jurisdictions having done so. This represents a landmark global public health achievement. By the end of 2014, 77 countries/jurisdictions had implemented pictorial warnings. Canada was the first country to implement pictorial warnings in 2001.
  - Altogether 58% of the world's population is covered by the 105 countries/jurisdictions that have finalized pictorial warning requirements.
  - Nepal now has the largest warning requirements in the world at 90% of the package front and back. Vanuatu will implement 90% pictorial warnings in 2017. India and Thailand are tied for third, requiring 85% pictorial warnings. In the 2014 report, Thailand was top ranked at 85%.
- 25

5 • In total 94 countries/jurisdictions have required warnings to cover at least 50% of the package front and back (on average), up from 60 in 2014 and 24 in 2008. There are now 43 countries/jurisdictions with a size of at least 65% (on average) of the package front and back.

10 • Progress since the last report in 2014 includes Nepal implementing 90% pictorial warnings (up from 75%); India requiring 85% pictorial warnings (up from 20% (on average) – 40% front, 0% back), thus improving India's ranking from 136th to 3rd; Myanmar requiring 75% pictorial warnings (no previous warning requirement on package front/back); Lao improving from 30% text to 75% pictures; and Uruguay implementing its 8th round of pictorial warnings (Uruguay's size is 80%). The new Directive for the 28-country European Union (EU) requires pictorial warnings to cover 65% of the package front and back, and was intended to go into effect May 20, 2016; 22 EU countries have transposed this provision into national law, while 6 EU countries are in the process of doing so.

20 Well-designed package warnings are a highly cost-effective means to increase awareness of the health effects and to reduce tobacco use, as recognized by Guidelines to implement Article 11 (packaging and labelling) adopted under the WHO Framework Convention on Tobacco Control (FCTC). A picture says a thousand words. Pictures can convey a message with far more impact than can a text-only message. For size, the effectiveness of warnings increases with size. A larger size allows for bigger and better pictures, a larger font size, and/or additional information, including cessation information”

25 In the same affidavit Dr. Ndyabangi annexed another report prepared by David Hammond Ph.d and submitted in support of the 1<sup>st</sup> respondent's answer to this petition dated May 10<sup>th</sup> 2017 at page 9 it summarises the impact of 65% public health warning on Tobacco product packaging as follows:-

5 "Uganda's requirement for 65% pictorial warnings and a ban on tobacco  
displays at the point-of -sale are consistent with the scientific consensus on  
effective tobacco control policies, as well as recommendations from the world's  
most esteemed public health agencies, including the International Association  
for Research on Cancer(IARC), the U. S. Surgeon General's Report and the U.S  
10 Institute of Medicine.

Uganda's requirement for 65% pictorial warnings and a ban on tobacco  
displays at the point-of-sale are consistent with international regulatory  
practice.

15 Uganda's requirement for 65% pictorial warnings and a ban on tobacco  
displays at the point-of-sale are consistent with WHO FCTC Guidelines and will  
help Uganda to meet its obligations under the FCTC treaty.

Large pictorial warnings and product display bans do not violate international  
treaties and have repeatedly withstood legal challenge from tobacco  
companies.

20 Overall 65% health warnings and a ban on tobacco displays represent effective  
measures that would help Uganda to control the demand for tobacco  
consumption, to fulfil Uganda's obligation and commitment as a party to the  
FCTC, and to promote the health of persons and reduce tobacco- related  
illnesses and deaths."

25 The report goes on to set out information on the extent of knowledge of health  
effects from smoking in Uganda as follows at pages 12- 13.:-

*"LEVELS OF HEALTH KNOWLEDGE AMONG UGANDANS*

*The scientific literature on risk perceptions clearly indicates that smokers and  
non-smokers are not fully informed of the health effects of smoking. Although*

5 most smokers in Uganda have a general awareness that smoking is harmful,  
general awareness of a risk does not constitute being fully informed. Indeed  
knowledge of health effects caused by smoking remains low in Uganda. The US  
surgeon General's report- the authoritative source of evidence on the health  
10 effects of smoking- identified 29 specific diseases that are caused by smoking,  
including 14 different types of cancer. General awareness of a few of these  
health effects such as lung cancer, is relatively high in Uganda, 94 % of adults  
agree that smoking causes lung cancer. However, knowledge of other primary  
health effects is lower. For example only half of Ugandans adults agree that  
smoking cause stroke (58%) or premature birth (56%). In addition only 60%  
agree that smoking causes heart attacks in non-smokers –a primary risk from  
second-hand smoke. To my knowledge, there is no evidence on agreement by  
Ugandans with other important health effects, such as emphysema, peripheral  
vascular disease, impotence and blindness, however data from other countries  
20 suggests that agreement would be substantially lower than health effects such  
as stroke and premature birth. Furthermore, health knowledge is substantially  
lower among Ugandans with lower levels of education and literacy those who  
are most likely to smoke. The disparity in health knowledge among those with  
the least education is consistent with findings from other African countries.”

25 In the reply to the Petition, the respondent annexed a report titled 'Health cost of  
Tobacco use in Uganda, dated February 2017 by the Centre for Tobacco Control:  
Africa, Makerere University School of Public Health, America Cancer Society and the  
Republic of Uganda Ministry of Health.

In its introduction the report states at page 1-2 as follows:-

30 “The World Health Organization (WHO) identifies tobacco as the leading  
cause of preventable death in the world. If effective measures are not  
taken urgently, tobacco use will likely kill more than 1 billion people in  
the 21st century. Many of these deaths occur prematurely, and impact



5 negatively on the socio-economic development of any nation. Tobacco  
use causes six million deaths globally per year, while second hand smoke  
causes 600,000 deaths globally per year. The annual death toll from  
10 tobacco use is expected to rise to over 8 million by the year 2030 with  
more than 80 percent deaths projected to occur in Low and Middle-Income  
Countries.

15 Estimates that tobacco kills one of every two users and has a mortality  
rate higher than any other disease globally. Many of these deaths which  
are largely preventable, by appropriate life measures, occur prematurely  
and negatively impact on the socio-economic development of any  
nation.

### **1.1 Tobacco Use Prevalence and Exposure**

20 The 2013, Global Tobacco Adult Survey (GATS), indicates that 7.9 percent  
of Ugandans aged 15-49 years use tobacco products. Tobacco usage  
among men is 11.6 percent and 4.6 percent among women. Overall  
5.8 percent of adults (10.3 percent men and 1.8 percent women) use  
25 smoked tobacco products while 2.4 percent (1.7 percent men and 3  
percent women) use smokeless tobacco products. Cigarette use stood at  
5.3 percent for adults (9.6 percent men and 1.4 percent women), while  
exposure to secondhand smoke at the workplace was 20.4 percent, at  
home 13.1 percent and 62.3 percent in bars and night clubs.

The Global Youth Tobacco Survey (GYTS) report for Uganda 2011, which  
studied school-going youths aged 13-15 years, found that 17.3 percent were  
current users of any form of tobacco; 4.8 percent were currently smoking  
cigarettes and 15.6 percent were currently using other tobacco products.<sup>7</sup> In  
addition, the report shows that 38.3 percent of youths in Uganda were exposed  
to SHS. This demonstrates that tobacco use is a serious problem to Uganda's  
youthful population and clearly predicts a gloomy picture for the future  
5 generation.

### **1.2 Tobacco Related Mortality**

The 2010 WHO Global Status Report on Non-Communicable Diseases (NCDs)

5 shows that NCDs are the biggest cause of death worldwide. It reveals that more  
than 36 million people died from NCDs, mainly cardiovascular diseases (48  
percent), cancers (21 percent), chronic respiratory diseases (12 percent) and  
diabetes (3 percent). Premature deaths from NCDs stood at 22 percent among  
10 men and 35 percent among women in low-income countries. In Uganda, NCDs  
account for 25 percent of all deaths. The estimates indicate that cancers  
account for 127 deaths per 100,000, chronic respiratory diseases account for  
159 deaths per 100,000 while cardiovascular diseases and diabetes account for  
15 562 deaths per 100,000. Tobacco use and exposure to secondhand smoke is  
associated with disability and death from non-communicable diseases such as  
lung cancer, heart disease, stroke and respiratory diseases. Tobacco use is also  
associated with an increased risk of death from communicable diseases. These  
may include: respiratory infections and tuberculosis, and increased rates of  
stillbirth, low birth weight, congenital malformations, death attributed to  
20 sudden death syndrome in infancy, disability from respiratory diseases in  
childhood and adolescence and young adulthood, and increased rates of  
cardiovascular death in relatively young middle-aged adults.”

It is not in contention that, tobacco smoking kills, many of its users, when used  
according to directions of the manufactures. There is evidence that it also kills,  
25 harms or otherwise causes adverse health effects on those who do not use it, but are  
exposed it.

Since the Petitioner’s products when used properly and in accordance with the  
proposed instructions of the manufacturer kills, it infringes on the right to life as  
enshrined in *Article 22* of the Constitution, which requires the State to protect the  
30 right to life. The respondent has a duty to protect the citizen’s right to life, which  
extends to making polices and laws in that regard. The long title and the preamble to  
the Tobacco Control Act already set out above clearly illustrates the intention of the  
1<sup>st</sup> respondent in its enactment. The right to life cannot be separated from the  
enjoyment of good health.

5 The 1<sup>st</sup> respondent also has a duty to ensure that every citizen enjoys the right to a clean and healthy environment. The right to a clean and healthy environment includes the right to clean air free from tobacco smoke among other air pollutants.

10 I have no hesitation in finding that, the legislative objective set out in *Section 15* of Tobacco Control Act is designed to limit smoking and the impacts of tobacco on life and human health is therefore sufficiently important to warrant the respondent to limit the Petitioner's right to engage in lawfully occupation, trade or business enriched in *Article 40 (2)* of Constitution.

15 The requirement of *Section 15 (2)* of Tobacco Control Act for the respondent to place text and pictorial health warnings and messages on tobacco products covering 65% of the outside packing appears to me to be clearly designed to meet the law and is rationally connected to it and not arbitrary in view of the world wide practices and regulations set out above. I am unable to find that such law is unfair or based on irrational consideration.

20 The requirement that 65% of the tobacco product packaging carries a health warning does not go beyond what is necessary to achieve the objective. I say so considering that other free and democratic countries have regulations requiring that the warning covers more than 65% of the package. The WHO Guidelines sets 30% as the minimum requirement. I am not persuaded by the submissions of Counsel for the Petitioner, in view of the glaring evidence before me, that this requirement is irrational, arbitrary or unjustifiable. The Petitioner's Counsel provided no cogent evidence to support his contentions in this aspect.

25 The other leg of the above issue concerns the Petitioner's contention that, the impugned section infringes its intellectual property rights, including the right to use its trademark, copyright and the loss of good will generated therefrom.

5 The 2<sup>nd</sup> respondent submitted in reply to the above, that this issue had been determined by the Court of Appeal of England in *British American Tobacco (UK LTD) and others vs Secretary of State for health (2016) EWHC 116*, in which it was held that Trademark laws confer negative rights upon the use, with exclusive rights to prevent others from using the Trademark for their goods.

10 I have had the opportunity of perusing the above cited authority and it appears to be very instructive on this issue. In that case the Court of Appeal of England observed as follows:-

15 *"It is not in dispute that a registered trade mark is a species of property. Nor is it in dispute that although one cannot "possess" a trade mark in the sense that one can possess a chattel or a piece of land, it counts as a "possession" for the purposes of the ECHR, the Charter and similar provisions. However, before one can say that a person's proprietary rights have been affected, it is necessary to identify what those proprietary rights are. Thus before going any further it is necessary to consider what a trade mark is, and what rights the registration of a trade mark confers, because there is a fundamental difference between the parties. BAT says that the registration of a trade mark gives it a positive right to use the mark on the goods in the class for which it has been registered. JTI and Imperial do not go that far, but say that restrictions on their ability to use their registered trademarks in consumer-facing situations are an interference with the rights or freedoms conferred by a registered trade mark. The Secretary of State on the other hand says that the rights conferred by a trade mark are purely negative rights: that is to say the right to stop someone else doing things.*

20 *Traders have attached signs to their goods to denote their origin since antiquity. Roman potters often stamped their amphorae with their names, initials or symbols; and mediaeval masons left distinguishing marks on the stones with which they built cathedrals. Goldsmiths and silversmiths applied*

5 distinguishing marks to their wares as early as the fourteenth century. They needed no registered trade mark to be able to do this. At common law, subject to the law of passing off which depends on misrepresentation, rival traders were entitled to use similar marks.

10 One of the key features of intellectual property, unlike corporeal property, is that infringement of intellectual property rights does not exhaust the property itself. If A takes possession of B's land, or borrows his car, B is deprived of the use of his land or his car, at least temporarily. But if A works B's invention, that does not prevent A from working it too, although it may affect the profitability of exploiting it. Likewise if A marks his goods with a sign that is confusingly similar to B's registered trade mark, that will not prevent B from continuing to use his own registered mark. In addition, registered trademarks, like other intellectual property rights but unlike land or chattels, do not exist in nature. They are the products of legislative intervention."

15 In *Inter Lotto (UK) Ltd v Camelot Group Plc* [2003] EWHC 1256 (Ch), [2004] R.P.C. 8, Laddie J. at [35] noted as follows:-

20 "The section does not stipulate that the proprietor of the registered mark has an 'exclusive right to use' the mark. It stipulates that he has the 'exclusive rights in the trade mark which are infringed by use of the trade mark in the United Kingdom without his consent'. In other words, registered trademarks, like all other statutory intellectual property rights do not give a right to the proprietor to use, but give him the right to exclude others from using."

25 The Trademarks Act (Cap) 217 does not anywhere stipulate that the proprietor of the trademark has an exclusive right to use the trade. It provides a right to exclusive use of a trademark by one who has registered it. Such right may be infringed by use of that trademark by another person in relation to goods connected in the course of

5 trade with the proprietor or registered user of the trademark. The right like other intellectual property right is a right to exclude others from using the trademark.

This right, just like all other non-derogable rights is subject to limitation set out under *Article 43(2) (c)* of the Constitution.

10 A law such as *Section 15* of the TCA that limits the space within which the Petitioners can display its trademark or otherwise enjoy the use of other intellectual right is not unconstitutional. I am satisfied that the 1<sup>st</sup> respondent has submitted that the impugned section of the TCA sets out limits to the Petitioner's right only to the extent permissible under *Article 43 (2) (c)* of the Constitution. I am satisfied that the respondents have demonstrated that the limitations imposed upon the  
15 Petitioner under Section of the TCA are justifiable in a free and democratic society and I find so.

The second leg of issue one is also resolved in favour of the respondent.

20 The second issue is whether *Section 12(1)* of the TCA which prohibits smoking in public places, work places and means of public transport contravenes *Articles 40(2)* of the Constitution. I have carefully read the provisions of *Section 12(2)* and *Article 40(2)* of the Constitution and the submissions of both Counsel in respect thereto. I have also studied the literature, reports and authorities submitted to us by all parties to this petition. I am satisfied that the respondents have demonstrated that, the limitations imposed upon the Petitioner, a Tobacco company, restricting areas in  
25 which smoking of tobacco products is permitted are not unreasonable, vague, uncertain or in any way a hindrance, to the economic rights of the Petitioner.

The respondents from the evidence I have already set out above, while determining the first issue, demonstrated that the limitations set out under *Section 12(2)* of the TCA are justifiable in a free and democratic society.

5 Dr. Sheilla Ndyanabangi annexed to her affidavit in support of the respondent's  
reply to the petition a report authored by WHO titled WHO Global Report Mortality  
Attributable to Tobacco at page 4 of that report, it sets out in summary the burden  
of tobacco as follows:-

10 *"Tobacco is the only legal drug that kills many of its users when used exactly as  
intended by manufacturers. Direct tobacco smoking is currently responsible for  
the death of about 5 million people across the world each year with many of  
these deaths occurring prematurely. An additional 600,000 people are  
15 estimated to die from effects of second- hand smoke. Tobacco kills more than  
tuberculosis, human immunodeficiency virus/acquired immunodeficiency  
syndrome (HIV/AIDS) and malaria combined. In the next two decades, the  
annual death toll from tobacco is expected to rise to over 8 million, with more  
than 80% of those deaths projected to occur in low and middle-income  
countries. If effective measures are not urgently taken, tobacco could, in the 21<sup>st</sup>  
centenary, kill over 1 billion people.*

20 *Although often associated with ill-health, disability and death from non-  
communicable chronic diseases, tobacco smoking is also associated with an  
increased risk of death from communicable diseases. Exposure to tobacco  
smoking negatively impacts on health across the life-course. Examples include  
25 increased rates of stillbirth and selected congenital malformations during fetal  
life, death attributed to the sudden infant death syndrome in infancy, disability  
from respiratory diseases in childhood and adolescence and young adulthood.  
The negative impact of tobacco use becomes particularly important from about  
age 30 and includes increased high rates of cardiovascular death (ischemic  
heart disease and stroke) in relatively young middle-aged adults, high rates of  
30 cancers (especially lung cancer) particularly later in life, as well as death*

5 associated with diseases of the respiratory system and communicable diseases such as tuberculosis and infection of the lower respiratory tract.

10 The adverse repercussions of tobacco use and exposure extend well beyond the health risks to individuals. For families, communities and governments, tobacco use and exposure to second-hand smoke represent a significant social and economic handicap, but also importantly constitute a major risk factor in a looming epidemic of non-communicable diseases that threaten to undo many of the global health gains achieved with difficulty over the past 50 years.”

15 The adverse effects of tobacco on the smoking and non-smoking public including children born and unborn demonstrates clearly the requirement for strategies and legislative measures, to protect the public from the adverse effects of the Petitioner’s products.

This legislative objective cannot be attained without limiting the rights of the Petitioner. I have already stated that, the limitations imposed under this impugned law are justified as has been demonstrated by the respondents.

20 In *Amooti Godfrey Nyakaana vs National Environment Management Authority & Others, Supreme Court Constitutional Appeal No. 5 of 2011, Dorothy Nandugwa Kabugo vs Attorney General, Constitutional Petition No. 039 of 2010*, both this Court and the Supreme Court held that a right to property is not absolute and that property rights are held and enjoyed subject to the law. A law that limits the enjoyment of a right to property through regulation in public interest is not  
25 unconstitutional. All businesses are carried out subject to licence and regulation.

In this regard, I find that the limitations imposed under the impugned section are justifiable in a free and democratic society and are therefore not unconstitutional and I find so.



5 In an attempt in resolving the rest of the issues as set out in this petition, I will fall into a trap of having to repeat myself over and over. All the issues raised in this petition have been conversed and adjudicated upon in a number of Countries, including Uganda, United Kingdom, United States of America, Kenya, South Africa, India, Pakistan, The Philippines, Peru among others. See:-

- 10
- *British American Tobacco Kenya Ltd vs Cabinet Secretary The Ministry of Health, Tobacco Control Board and The Attorney General No. 143 of 2016 and Tobacco Control Alliance and Consumer Information Network.*
  - *British American Tobacco South (pty) Ltd vs Minister of Health and National Council Against Smoking, Supreme Court of Appeal South Africa No. 463 of 2011.*
  - *British American Tobacco UK Limited, British American Tobacco (Brands) Inc vs Secretary of State for Health [2016] EWCA 1182.*
  - *K. Ramakrishnan & others vs The State of Kerala & others High Court at ERNAKULAM No. 24160 of 1998.*
  - *Ms Shehla Zia & others vs Water and Power Development Authority (WAPDA) Pakistan Supreme Court Case No. 15-K of 1992.*
  - *Juan Antonio Oposa & others vs Hon. Fulgencio Factoran & another Supreme Court of the Philippines GR. No 101083.*
  - *British American Tobacco vs The Environmental Action Network Ltd, High Court of Uganda Miscellaneous Application No. 27 of 2003. Among many others.*
- 15
- 20
- 25

5 These cases, suits and petitions are now collectively known as Tobacco Litigation Suits. In almost all of them the arguments of the tobacco companies are similar or the same as those advanced herein by the Petitioner in this petition.

Annexure E to the affidavit of Primah Kwagala for the 2<sup>nd</sup> respondent is a report titled "How Tobacco Companies Fight Tobacco Control."

10 The report was not challenged by the Petitioner in any way. It lists a number of strategies employed by tobacco companies which I must state include the Petitioner to influence policy and thwart effective legal and policy framework world-wide. The report quoting a number of primary sources set out in its index states:-

15 *"The tools exist to reduce tobacco use and the number of people who die from tobacco use. Increased tobacco taxes, smoke-free workplace laws, mass media campaigns, tobacco advertising bans, and large, graphic warning labels have been proven to work when implemented and are endorsed by the World Health Organization's (WHO) Framework Convention on Tobacco Control (FCTC).*

20 *The tobacco companies recognize the impact of these approaches and actively fight against these efforts because they curb their sales. Time and time again they have used their resources to kill these policies, water them down when they cannot stop them altogether, and undermine their enforcement when they are passed. Their efforts take many forms.*

25 *That is why governments should curtail tobacco companies' involvement in public health policy. Article 5.3 of the FCTC obligates Parties to "protect these [public health] policies from commercial and other vested interests of the tobacco industry." World Health Assembly resolution 54.18, the FCTC preamble and FCTC articles 12(e) and 20.4(c) provide governments with the support of the international community to stand up to interference from the tobacco industry."*

5 The report goes on to set out a number of strategies employed by the tobacco industry to influence policy and thwart effective legislation as follows:-

- *Using trade agreements to attack public health measures*
- *Distorting the science of the health effects of tobacco use, and secondhand smoke*
- 10 • *Challenging ad bans, restrictions on secondhand smoke and tax increases*
- *Promoting illicit tobacco trade (smuggling)*
- *Suing or threatening to sue governments*
- *Demanding a seat at the table in order to prevent consensus*
- *Drafting and then exploiting tobacco friendly loophole ridden legislation*
- 15 • *Promoting and funding ineffective "youth smoking prevention" programs*
- *Interfering with FCTC ratification*
- *Challenging government timelines for implementing laws*
- *Influencing legislators with contributions and attempting to bribe legislators*
- 20 • *Gaining favor by bankrolling government health initiatives on other issues in return for inaction on tobacco*
- *Providing funds directly to government regulatory bodies*
- *Using PR efforts claiming to be responsible corporations to mask their harmful behavior*
- 25 • *Promoting ineffective voluntary regulation as a substitute for enforceable laws"*

Further the report details strategies employed by the tobacco industry to undermine WHO and FCTC as follows:-

*"In 2000, WHO released a report detailing the tobacco industry's tactics in obstructing tobacco control policy processes. The report found that the tobacco*

5 companies spent vast amounts of money "diverting attention from the public health issues raised by tobacco use, attempting to reduce budgets for the scientific and policy activities carried out by WHO, pitting other UN agencies against WHO, seeking to foster views that WHO's tobacco control program was a 'First World' agenda carried out at the expense of the developing world, 10 distorting the results of important scientific studies on tobacco, and discrediting WHO as an institution."

15 A 2002 study exposed internal industry documents showing that in 1997, Philip Morris hired public relations firm Mongoven, Biscoe & Duchin to lobby against the FCTC to weaken its regulations and discredit the WHO officials behind the effort."

On undermining policy the report states:-

20 "In August 2006, U.S. District Court Judge Gladys Kessler ruled that the tobacco companies use of the terms "light" and "low-tar" is false and misleading, and subsequently banned them from using these terms. The major tobacco companies then argued that they should still be allowed to continue to use the terms outside the U.S. In March 2007, Judge Kessler ruled,

25 "The Court sees no justification, either legal or ethical, for concluding that Congress intended to allow defendants to continue to tell the rest of the world that 'low tar/light' cigarettes are less harmful to health when they are prohibited from making such fraudulent misrepresentation to the American public." Nonetheless, the tobacco companies continue to use these misleading terms both in the U.S. and where not specifically banned elsewhere."

30 I have carefully studied this petition and listened carefully to the arguments of all Counsel. I have found nothing in this petition other than issues I have resolved above that require Constitutional interpretation. The averments set out in the

5 petition appear to me to be diversionary and do not raise issues for constitutional  
interpretation. They may perhaps fall under *Article 50* of the Constitution for  
enforcement of rights but not under *Article 137* of the Constitution. The Jurisdiction  
of this Court is limited to interpretation of the Constitution. See:- *Mbabaali Jude vs*  
10 *Hon. Edward Kiwanuka Ssekandi Constitutional Petition No. 0028 of 2012, Serugo vs*  
*KCC and Attorney General, Supreme Court Constitutional Appeal No. 2 of 1998,*  
*Attorney General vs Major General David Tinyenfuzza, Supreme Court Constitutional*  
*Appeal No. 1 of 1997.*

Be that as it may, the restrictions imposed upon the Petitioner complained of in the  
petition are all justifiable in a free and democratic society and the respondents have  
15 ably satisfied me that they do. I have found no reason to delve into each and every  
one of them.

This petition, I have no doubt in mind is part of a global strategy by the Petitioner  
and others engaged in the same or related trade to undermine legislation in order to  
expand the boundaries of their trade and increase their profits irrespective of the  
20 adverse health risks their products pose to human population. As already set out  
above, the Petitioner admits that its products when used in accordance with their  
instructions result into serious adverse health effects to their users and others. They  
also concede that, the products they manufacture and sale cause death. Legislation  
such as the TCA that seeks to protect the public from the adverse effects of the  
25 Petitioner's products cannot be said to be unconstitutional for the reasons I have  
already set out above. The Constitution firmly protects the rights of its citizens,  
Parliament by passing the TCA was putting into effect the provisions of the  
constitution.

I have found nothing in this petition to suggest that any of the rights of the  
Petitioner have been curtailed or otherwise abridged beyond what is justifiable in a

5 free and democratic society as provided for under Article 43(2)(c) of the Constitution.

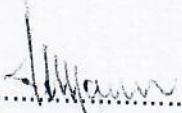
10 I am satisfied with the evidence adduced by the respondents that they have ably demonstrated that the limitation imposed upon the Petitioners, the public, property owners any other persons or entities under the impugned sections of the TCA are all justifiable in a free and democratic Country.

I find no merit whatsoever in this petition, which appears clearly to have been misconceived or worse still brought in bad faith as part of a global strategy by the Petitioner and others to fight Tobacco control legislation.

Accordingly I dismiss the entire petition, as it has neither merit nor substance.

15 I would award the costs of this petition to the respondents who were unduly burdened to defend it.

Dated at Kampala this ..... day of ..... 2019.

20  
.....  
  
Kenneth Kakuru

JUSTICE OF APPEAL/ JUSTICE CONSTITUTIONAL COURT

**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**  
**CONSTITUTIONAL PETITION No. 46 OF 2016**

*Coram: Owiny - Dollo, D.C.J.; Kakuru, Egonda-Ntende, Obura, & Muhanguzi (JJ.A./JJ.CC)*

5  
BRITISH AMERICAN TOBACCO LIMITED } ..... PETITIONER

**VERSUS**

10 ATTORNEY GENERAL } ..... RESPONDENT

**JUDGMENT OF OWINY - DOLLO, D.C.J.**

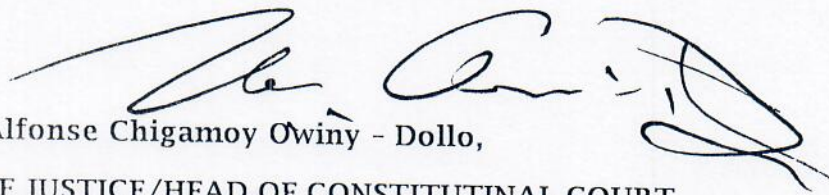
The facts of this petition are set out in the judgment of Kakuru JA/JCC, which I have had the benefit of perusing in draft. I am in full agreement that the  
15 petition is without merit and should be dismissed with costs. As I understand it, the petitioners do not challenge the need and legality of the imposition, by Parliament, of health warning on tobacco products. Rather, their concern is the extent of the warning coverage on tobacco products. This then brings to the fore, the clash between the Constitutional obligation or duty of the  
20 State to the public, and the need to promote trade without imposing unnecessary hindrance thereon.

On this, I think the petitioners have shot themselves on the foot in pointing out that even the 30% warning coverage on tobacco products, has apparently not had any significant effect on the public about the dangers of consuming  
25 tobacco products. This, to my mind, fully supports and justifies the contention that more needs to be done to caution the public about the dangers to their health that result from consuming tobacco products; and that this can better be achieved by extending the warning coverage from 30% to 65% as is contained in the provision of *Section 15(2) of the Tobacco Control*  
30 *Act*. This does not in any way offend any provision of the Constitution. If

anything, it is in the category of prohibitions against smoking in public places.

5 Since Egonda-Ntende, Obura, & Muhanguzi, JJ.A./JJCC, also agree with the orders proposed by Kakuru JA/JCC; namely that the petition should be dismissed with costs to the respondent, orders are accordingly hereby made in the terms proposed by Kakuru J.A./JCC in his judgment.

Dated at Kampala; this ..... day of ..... 2019



Alfonse Chigamoy Owiny - Dollo,

DEPUTY CHIEF JUSTICE/HEAD OF CONSTITUTINAL COURT

10



THE REPUBLIC OF UGANDA  
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA  
CONSTITUTIONAL PETITION NO. 46 OF 2016

BETWEEN

BRITISH AMERICAN TOBACCO LIMITED :::::::::::::::::::::::::::::::::::PETITIONER

AND

1. ATTORNEY GENERAL
2. CENTER FOR HEALTH, HUMAN RIGHTS  
AND DEVELOPMENT :::::::::::::::::::::::::::::::::::RESPONDENT

(Coram: Owiny-Dollo, DCJ, Kakuru, Egonda-Ntende, Obura & Muhanguzi, JJA/JCC)

**JUDGMENT OF HELLEN OBURA, JA/JCC**

I have had the benefit of reading in draft the judgment of my brother Hon. Justice Kenneth Kakuru, JA and I concur with his conclusion that the petition be dismissed with costs.

Dated at Kampala this 20 day of May 2019.



.....  
Hellen Obura

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

**THE REPUBLIC OF UGANDA**

**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**

[Coram: Owiny-Dollo, DCJ; Kakuru, Egonda-Ntende, Obura & Muhanguzi,

JJCC / JJA]

**CONSTITUTIONAL PETITION NO.46 OF 2016**

**BETWEEN**

BRITISH AMERICAN TOBACCO

LIMITED..... PETITIONER

**AND**

1 ATTORNEY GENERAL

2 CENTER FOR HEALTH HUMAN

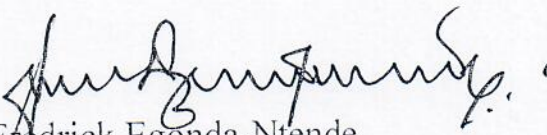
RIGHTS AND DEVELOPMENT

.....RESPONDENTS

**JUDGMENT OF FREDRICK EGONDA-NTENDE, JA/ JCC**

1. I have had the opportunity to read in draft the judgment of my brother, Kakuru, JCC/ JA. I agree with it and have nothing useful to add.
2. I would dismiss this petition with costs.

Dated, signed, and delivered at Kampala this 28 day of May 2019

  
Fredrick Egonda-Ntende

Justice of the Constitutional Court / Justice of Appeal