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stop Using Tobacco**

LITIGATING TOBACCO CONTROL IN UGANDA

**IMPLICATIONS OF THE BRITISH AMERICAN TOBACCO LTD
VS
ATTORNEY GENERAL & CEHURD
(CONSTITUTIONAL PETITION NO. 46 OF 2016) JUDGMENT**

CASE DIGEST

APRIL 2020



CEHURD
social justice in health

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EXECUTIVE SUMMARY

Uganda enacted the Tobacco Control Act (hereinafter called “the TCA”) in 2015 as part of fulfilment of Uganda’s obligations and commitment as a party to the World Health Organisation Framework Convention on Tobacco Control (WHO FCTC). The Act commenced on 18th May, 2016.

In 2016, the British American Tobacco Uganda Limited (BATU) filed Constitutional Petition No. 46 of 2016 under Article 137 of the Constitution of the Republic of Uganda, 1995 contending that sections of the Act violated certain provisions of the Constitution. CEHURD successfully applied to join the case and support the Attorney General drawing on its expertise in litigating health-related cases but also the likely implications of the judgement (had it come out negative) on public health issues in the country.

The Constitutional Court heard the case and delivered the judgement against BATU. The lead Judgment was delivered by Justice Kenneth Kakuru, with whom all the other Justices unanimously agreed. The court reaffirmed that its jurisdiction is limited to interpretation of the Constitution, as such, it could not entertain attempts by the Petitioner to move away from constitutional interpretation issues. The Court noted that the Petitioner’s rights alleged to have been violated are not absolute but are subject to the limitation set out under Article 43 of the Constitution.

As such, the Court found that while the Petitioner has a constitutional right to practice lawful trade and business, that right is restricted in as far as it prejudices the rights of others including children, non-smokers, pregnant women and those who may have quit smoking. The Court ruled that the legislative objectives which the TCA sought to achieve were sufficiently important to warrant the overriding of the Petitioner’s rights.

This case digest has therefore been developed to guide the readers on the practical implications of the Court’s decision. The brief will give some background knowledge and information on the core issues that arose at trial, it will analyse the jurisprudential underpinnings that informed the Court’s decision and also serve as serve as a future reference point on matters concerning tobacco regulation and litigation. We are hopeful that the digest will be a reference tool for anti-tobacco activism and advocacy in Uganda.

1. INTRODUCTION AND CONTEXT

Uganda enacted the Tobacco Control Act (hereinafter called “the TCA”) in 2015.¹ The major objectives of the TCA are 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 socio-economic effects of tobacco production and consumption.

The TCA also seeks to promote research to promote research, surveillance and exchange of information on tobacco control; to insulate tobacco control policies, laws and programmes from interference by the tobacco industry; to strengthen coordination, partnerships and collaboration for tobacco control; to establish the Tobacco Control Committee; to fulfil 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. The Act commenced on 18th May, 2016.

At the time of enactment, more than 10,600 of Ugandans were being killed by tobacco-related diseases annually and more than 29,000 children (10-14 years old) and 1,117,000 adults (15+ years old) continued to use tobacco each day.² Concerning societal harm, buying tobacco robs families of the resources they may need to rise out of poverty.

A smoker in Uganda would have to spend 23.55% of their average income (measured by per capita GDP) to purchase 10 of the most popular cigarettes to smoke daily each year.³ Another aspect worth noting is the environmental harm since cigarette butts are the most commonly discarded pieces of waste worldwide. It is estimated that 1,934 tonnes of butts and packs wind up as toxic trash in Uganda each year.⁴

1 An online version of the TCA can be obtained via <https://ulii.org/ug/legislation/act/2015/22-3> (last accessed on 21/10/2019 at 10:30 hours).

2 See “The Tobacco Atlas” accessed via <https://tobaccoatlas.org/country/uganda/> (last accessed on 20/01/2020 at 08:30 hours).

3 The combined revenues of the world’s 6 largest tobacco companies in 2016 was more than USD 346 Billion, 1363% larger than the Gross National Income of Uganda.

4 743400 people still currently use smokeless tobacco, indicating an ongoing public health challenge, including heightened levels of oral cancers according to The Tobacco Atlas.

Tobacco leaf production in Uganda increased significantly after 2006, when BAT established Uganda as the hub of its Leaf Operations in Eastern Europe, Middle East and Africa (EEMEA), supplying 20 countries worldwide.⁵ By 2017, British American Tobacco Uganda (BATU) accounted for 44% of overall volume sales in the Uganda tobacco cigarette market.⁶

1.1. General Overview of Tobacco Control Legislations

There is a general increase in enactments of tobacco control legislation across the world.⁷ According to the Campaign for Tobacco-Free Kids,

“Tobacco use is the world’s leading cause of preventable death, killing more than eight million people worldwide and causing more than \$1.4 trillion in health care expenses and other economic harm each year. Tobacco companies aggressively market their lethal products and fight every effort to reduce tobacco use, often targeting the most vulnerable countries and populations.”⁸

The surge in tobacco legislation has some essential features based on comparative aspects from other countries such as Kenya, Brazil, Australia, the United Kingdom, the United States of America, Canada, Ecuador, Finland, Iceland, Malaysia, Nepal, the Republic of Korea, Switzerland, Thailand, and Uruguay. Some of the core tenets of these tobacco control legislations include;

- Institutional frameworks and mechanisms- the laws create, legitimise and finance authorities to implement and direct legislative and policy programmes for tobacco control in a specific country. It may be a centralised office within the Ministry of Health or another agency, or it may include several agencies

5 Tobacco Tactics, Uganda-Country Profile https://www.tobaccotactics.org/index.php/Uganda-_Country_Profile (accessed on 21/01/2020 at 09:07 hours).

6 BAT Uganda’s main competitor in the market is Continental Tobacco Uganda (a subsidiary of Kenyan owned Mastermind Tobacco Kenya).

7 See <https://www.tobaccofreekids.org/what-we-do/global> (last accessed on 20/01/2020 at 09:55 hours).

8 With support from Bloomberg Philanthropies and the Bill & Melinda Gates Foundation, the Campaign for Tobacco-Free Kids plays a leading role in the global fight against tobacco. They provide funding, legal, communications and research support to governments and non-governmental organizations to help them put in place effective tobacco control policies and expose and counter the deadly tactics of the tobacco industry.

as in Brazil (where a national committee was created) or a multisectoral coordinating body as in Australia and Thailand.⁹

- Public education and awareness campaigns- generally, anti-tobacco laws must establish a framework requiring mass public education campaigns is an important vehicle for changing public attitudes regarding tobacco and tobacco control.¹⁰
- Advertising, promotion and sponsorship- comprehensive bans on tobacco advertising, promotion and sponsorship is at the core of effective tobacco control legislation and programme generally. A comprehensive ban involves a ban on all forms of direct and indirect advertisements, promotion and sponsorship.¹¹
- Price and tax measures- increasing taxes and hence the price of cigarettes and other tobacco products, has a double advantage: it not only generates revenue for the government, but also produces a prompt decline in tobacco use, particularly among young people and low-income groups.¹²
- Elimination of second-hand smoking- it is also another characteristic of anti-tobacco laws to regulate smoking in workplaces and public places such as public parks, buildings, stadiums, facilities, et cetera. This is to protect workers and non-smokers from the hazards of exposure to tobacco smoke, discourage smoking initiation, reduce consumption and promote cessation in order to change the social acceptability of smoking. This goes hand-in-hand with the designation of “no-smoking” zones.¹³

9 According to World Health Organization, legislation can also provide for a funding mechanism by prescribing, for example, that a portion of revenue generated by cigarette taxes can be earmarked to fund part or all of the tobacco programme as has occurred in Australia, Canada, Ecuador, Finland, Iceland, Malaysia, Nepal, the Republic of Korea, Switzerland, Thailand, Uruguay and some States of the United States of America.

10 For example, public awareness campaigns in the states of California and Massachusetts in the USA, Ecuador, Malaysia, Peru and Romania have been shown to contribute significantly to reduced tobacco use in youth and overall tobacco consumption.

11 Examples of best practices on ban of advertisements include Ireland, Norway, India, New Zealand, Thailand and Iran.

12 Case studies of well implemented price and tax measures include Norway and South Africa. France has also raised tax rates to raise the price of cigarettes by at least 5% each year in the past decade.

13 Norway and Ireland have successfully adopted legislation banning smoking in all public places.

- Tobacco product regulation- tobacco regulators are empowered to address such matters as issuing and enforcing the regulations that require manufacturers to test the contents and emissions of tobacco products on a periodic basis; disclose on a periodic basis and according to a specified format, not only the results of the tests based on a per mg of tar or nicotine, but also all other characteristics, such as, paper porosity, moisture content; and label and package tobacco products with large, clear health warnings and informational messages, using rotating messages developed by national authorities, and without the use of misleading health claims.¹⁴
- Surveillance, monitoring and enforcement- the regulatory agencies are assigned the authority to issue penalties — enhanced penalties for late or incomplete disclosure where, in the first instance, could result in a warning, the second could result in a fine which should be high enough to be a deterrent against a reoccurrence, and the third could be the revocation of the license to manufacture the product. The regulation also includes provisions for appeals for due process and fair administrative action.

By and large, regulatory authorities must encourage innovative approaches to enforcement of tobacco legislation in order to secure the public health imperatives and foster the behavioural change required to enhance legal compliance with the anti-tobacco laws. Such initiatives include;

- Use of standards and scientific and evidence-based protocols for tobacco surveys.
- Building capacity on conducting and implementing surveys, as well as disseminating and using their results.
- Developing, maintaining and reporting data to monitor tobacco control policies.
- Developing, maintaining and reporting data on health outcomes related to tobacco use and exposure.

¹⁴ Labelling and packaging regulation, especially in the form of bold pictorial rotating graphic illustrations covering 50% of the main display panels of cigarette packages as is the case in Thailand, Brazil and Canada are examples of successful regulation in this area.

2. CONSTITUTIONAL PETITION NO. 46 OF 2016

2.1. Brief Facts of the Petition

British American Tobacco Uganda Limited (BATU) filed Constitutional Petition No. 46 of 2016 (hereinafter referred to as “the case”) under Article 137 of the Constitution of the Republic of Uganda, 1995 (as amended) (hereinafter called “the Constitution”) and the Constitutional Court (Petitions and References) Rules, 2005 against the Attorney General of Uganda contending that 22 sections of the TCA violated certain provisions of the Constitution. CEHURD successfully applied to join the case and support the Attorney General given its expertise in litigating health-related cases but also the likely implications of the judgement (had it come out negative) on public health issues in the country. The contested provisions of the TCA were;

- (a) Section 12 relating to the prohibition of smoking in public places, workplaces and means of public transport was challenged for allegedly violating the right to carry on any lawful occupation, trade or business under Article 40(2) of the Constitution.¹⁵
- (b) Section 14 which imposes a comprehensive ban on all tobacco advertising, promotion and sponsorship was challenged for allegedly violating Article 21(2) of the Constitution, which prohibits discrimination on the grounds of social and economic standing.¹⁶
- (c) Section 16(2) which restricts importing, manufacturing, distributing, processing, selling, offering for sale, or bringing into Uganda electronic nicotine delivery systems and vaporization devices was challenged for allegedly violating the right to own property under Article 26(1) of the Constitution.¹⁷

15 Article 40(2) of the Constitution of the Republic of Uganda (the Constitution) is to the effect that every person in Uganda has the right to practise his or her profession and to carry on any lawful occupation, trade or business.

16 Article 21(2) of the Constitution is to the effect that a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

17 Article 26(1) of the Constitution provides that every person has a right to own property either individually or in association with others

- (d) Section 16(3) which is to the effect that no person shall 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 was challenged for allegedly violating Article 29(1) of the Constitution which guarantees the right to freedom of speech and expression.¹⁸
- (e) Section 25(9) which provides for an order of compensation against any entity deemed to be in violation of the TCA to be executed as a Decree under section 25 of the Civil Procedure Act, Cap. 71 was challenged for allegedly violating Articles 28(1) which guarantees a fair hearing and 43, which provides for parameters of permissible general limitation on fundamental and other human rights and freedoms in public interest.¹⁹
- (f) Other sections that were challenged on the basis of the right to carry out any lawful trade or business are section 12(2) which imposes a 50-metre radius prohibition on smoking in public places, workplaces, public transport terminals or any other place that provides services primarily to children; waiting areas or queues; places of service or consumption of food or drink; or designated non-smoking areas.²⁰

18 Article 29(1) of the Constitution states that person shall have the right to (a) freedom of speech and expression which shall include freedom of the press and other media; (b) freedom of thought, conscience and belief which shall include academic freedom in institutions of learning; (c) freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution; (d) freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition; and (e) freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations.

19 Article 28(1) of the Constitution provides that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established bylaw. Article 43 of the Constitution is to the effect that in the enjoyment of the rights and freedoms prescribed under Chapter 4 of the Constitution (Bill of Rights), no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest. Public interest under this article does not permit (a) political persecution; (b) (c) detention without trial; any limitation of the enjoyment of the rights and freedoms prescribed by Chapter 4 beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in the Constitution.

20 Section 12 of the TCA governs prohibition of smoking in public places, workplaces and means of public transport. Section 12(2) states that a person shall not smoke in any outdoor space that is (a) within 50 meters of any public place, workplace, public transport terminal or any other place that provides services primarily to children; (b) within 50 meters of any window, door or air intake mechanism of any public place or workplace or any waiting area or queue; (c) within 50 meters from the place of service or consumption of food or drink; or (d) designated a non-smoking area by the person responsible for the premises.

- (g) Section 25 which provides for prevention and management of conflict of interest against persons who contribute to, or may contribute to the formulation, implementation, administration, enforcement or monitoring of public health policies on tobacco control was also challenged on economic discrimination grounds under Article 40(2) of the Constitution.²¹

The Petition was supported by BATU's Managing Director who inter alia contended that despite increasing strict tobacco control laws, many people smoke and thus it is important to ensure that regulatory proposals in the TCA do not lead to unintended consequences that risk untaxed and unrestrained illegal tobacco trade. He further deputed that the 65% graphic display area mandated by the TCA for the health warning on tobacco products unreasonably restricts the space available for BATU to display its trademarks as protected under the Trademarks Act, 2010.

It was further contended for BAT that the position adopted by Uganda under the TCA violates international obligations under the World Trade Organization's Trade Related Aspects of Intellectual Property Agreement of 1994,²² the General Agreement on Tariffs and Trade 1994,²³ and the Agreement on Technical Barriers to Trade 1995.²⁴

2.2 Responses by the Attorney General and CEHURD

Both the Attorney General (AG) and CEHURD filed answers to the Petition with supporting Affidavits. The learned AG responded that all the rights under Articles 26(1), (29)(1)(a) and 40(2) of the Constitution as enumerated above are not absolute. They are amenable to public interest restrictions such as public health and the right to a clean and healthy environment. It was also contended that the 65% health warning display does not violate the Petitioner's trademark and

21 Section 25 (1) of the TCA regulates prevention and management of conflict of interest. It is to the effect that a person who contributes to or may contribute to the formulation, implementation, administration, enforcement or monitoring of public health policies on tobacco control must not engage in any occupational activity that may create a conflict of interest. "Conflict of interest" is deemed to arise where such person (a) deals with a matter in which he or she has interest and where he or she is in a position to influence the matter, directly or indirectly in the course of his or her duty; (b) by virtue of the official position the person holds, the services he or she offers to another person or private body, another are in conflict with his or her official duties; or (c) solicits or gets a bribe to influence his or her actions.

22 Also known as "TRIPS Agreement"

23 GATT

24 TBT

commercial speech rights because section 15(2) of the TCA leaves adequate room for product differentiation.

For CEHURD, it was deposed that the 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 and the restrictions and prohibitions in the TCA are necessary to achieve these objectives.

It was further argued by the Respondents that sections 25(3) and 25(4) relating to control and management of conflicts of interest are necessary and appropriate to prevent the tobacco industry from unduly influencing and interfering with tobacco regulatory policy formulation, implementation, monitoring and enforcement.

The answers were further supported by expert Affidavits from Dr. Sheila Ndyabangi (RIP) and Dr. Jim Arinaitwe who annexed scholarly and research findings from other jurisdictions such as Kenya, United Kingdom, Canada, United States of America, South Africa and Australia on the extent of tobacco package labelling requirements and tobacco's association with non-communicable diseases (NCDs) such as cancer as contributing factors to tobacco related mortality as per the 2010 WHO Global Status Report on Non-Communicable Diseases.

2.3. Procedural Aspects of the Petition Hearing

The Petition first came up for hearing on 17th May, 2017 with a Coram constituted of Steven Kavuma Deputy Chief Justice (as he was then) and Hon. Justice Remmy Kasule, Hon. Justice Richard Buteera, Hon. Justice Cheborion Barishaki, and Hon. Lady Justice Hellen Obura. However, before delivery of the Judgment, Justices Kavuma, Kasule and Buteera ceased to be Justices of the Court. Consequently, on 11th September, 2018 the panel was reconstituted with the Honourable Deputy Chief Justice Alfonse Owiny-Dollo, and the Honourable Justices Kenneth Kakuru, Engonda-Ntende, Ezekiel Muhanguzi and Hon. Lady Justice Hellen Obura. The Petition was reheard, with the respective parties adopting their earlier oral and written submissions.

2.4. Issues for Determination

The Court set up fourteen (14) issues for determination, mainly based on the Petitioner's pleadings as analysed above. The main issue that formed the basis of the proceedings and the judgment was whether section 15(2) of the TCA contravenes and is inconsistent with Articles 40(2), 26 and 29 of the Constitution. The impugned section provides that;

“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.”

The Petitioner had conceded throughout the Petition that tobacco consumption poses real risk to health, and thus, the manufacture, distribution and sale of tobacco products should be lawfully regulated. BATU averred that it supports proportionate, effective, evidence-based regulation that measurably reduces the negative public health impacts of tobacco products.

Therefore, the learned Justices of the Constitutional Court were of the view that based on the above concession by the Petitioner, the Petition was about the extent of the limitation of the Petitioner's rights.

2.5. The Judgment

The lead Judgment was delivered by Justice Kenneth Kakuru, with whom all the other Justices unanimously agreed. He started off by reaffirming that the Constitutional Court's jurisdiction is limited to interpretation of the Constitution.²⁵ He observed that there appears to have been a very deliberate attempt by the Petitioner to move away from constitutional interpretation issues and drag the Court into the tobacco control debate.²⁶

25 A copy of the decision can be accessed via <https://ulii.org/system/files/judgment/constitutional-court-uganda/2019/4/constitutional-court-uganda-2019-4.pdf> (last visited on 21.10.2019 at 12:10 hours).

26 See pg. 28, paras 10-15 of the decision.

The learned Justice observed that the Petitioner's rights alleged to have been violated are not absolute and are subject to the limitation set out under Article 43 of the Constitution. The impugned Article is to the effect that;

(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;
- c. Any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

The Court ruled that while the Petitioner has a constitutional right to practice lawful trade and business, which includes advertising and packaging its products to make them attractive to its consumers under Article 40(2) of the Constitution, that right is restricted in as far as it prejudices the rights of others including children, non-smokers, pregnant women and those who may have quit smoking.



It was further held that, public interest being a broad concept, it is subject to various objective interpretational standards to determine whether or not the Petitioner's rights had been restricted beyond what is permissible under Article 43 of the Constitution. To this end, the binding Supreme Court decision in **Charles Onyango Obbo and Andrew Mujuni Mwenda v Attorney General** ²⁷ was cited for the proposition that;

■ *“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 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 exercise “prejudice” 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 the limitation’.

It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in 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 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

27 Constitutional Appeal No.2 of 2002

upon the limitation". The limitation on the enjoyment of a protected right in defence of public interest is in turn limited to 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 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.

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 rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance is permissible."²⁸

Basing on the above jurisprudence,

The Court ruled that the legislative objectives which the TCA sought to achieve were sufficiently important to warrant the overriding of the Petitioner's rights and that the means used are not more than necessary to accomplish the objectives of tobacco control since Uganda's requirement for 65% pictorial warnings and a ban on tobacco displays at the point-of-sale are consistent with the WHO FCTC Guidelines and will help Uganda to meet its obligations under the FCTC Treaty.²⁹

28 Per Joseph N Mulenga, JSC (RIP)

29 Page 39 of the decision.

3. CASE ANALYSIS

This section presents an analysis of the judgement through the broader aspects of tobacco control.

3.1. Application of the WHO Framework Convention on Tobacco Control (WHO FCTC)

The FCTC is the first global health treaty negotiated under the auspices of the World Health Organisation. This convention is an evidence-based treaty that reaffirms the right of all people to the highest standard of health. It represents a paradigm shift in developing a regulatory strategy to address addictive substances; in contrast to previous drug control treaties, the WHO FCTC asserts the importance of demand reduction strategies as well as supply reduction issues.³⁰

It was developed in response to the globalisation of the tobacco epidemic. The spread of the tobacco epidemic is exacerbated by a variety of complex factors with cross-border effects, including trade liberalisation, direct foreign investment, global marketing, transnational tobacco advertising, promotion and sponsorship, and the international movement of contraband and counterfeit cigarettes.³¹

The judgement under review took inspirations from the WHO FCTC in several ways first: Under the guiding Principles, every person must be informed of the health consequences, addictive nature and mortal threat posed by tobacco consumption

and exposure to tobacco smoke. Effective legislative, executive, administrative or other measures should also be contemplated at the appropriate governmental level to protect all persons from exposure to tobacco smoke.³²

Regarding tobacco advertising, promotion and sponsorship, each Party to the Convention must in accordance with its Constitution or constitutional principles

30 See WHO website <https://www.who.int/tobacco/framework/background/en/> (last accessed on 22.10.2019 at 15:00 hours).

31 *Supra*, n.10.

32 Article 4(1) of the Treaty. A copy can be obtained via <https://apps.who.int/iris/bitstream/handle/10665/42811/9241591013.pdf;jsessionid=31FB3CA45156E4C02BAC32E81ED91A6E?sequence=1> (last visited on 23.10.2019 at 09:28 hours).

undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship. This includes, subject to the legal environment and technical means available to that Party, a comprehensive ban on cross-border advertising, promotion and sponsorship originating from its territory. In this respect, within a period of five years after entry into force of the Convention for that Party, such Party to the Convention must undertake appropriate legislative, executive, administrative and/or other measures to comply with this provision.³³

3.2. TRIPS Agreement and the tobacco industry

The constitutional interpretations of the TCA reflects Uganda's steps towards domesticating principles of the WHO FCTC. This means, that this judgment unless overturned in the supreme court, it becomes the guiding authority on the force of the law on tobacco control in Uganda.

Intellectual property is one of the most contested areas in tobacco control globally. Concerning the Petitioner's contention that the TCA infringes its Intellectual Property (IP) rights, including the right to use its trademark, copyright and the goodwill generated therefrom, the Court agreed with CEHURD that this issue had been determined by the persuasive United Kingdom precedent in **British American Tobacco UK Ltd & Others v Secretary of State for Health**³⁴ which was in pari materia with the Constitutional Petition at hand.

In that case, the United Kingdom had enacted The Standardised Packaging of Tobacco Products Regulations 2015 ("the Regulations") to comply with the CFTC. BAT Petitioned Court arguing that the Regulations were unlawful under international law, EU law and domestic common law because the impugned Regulations unlawfully expropriated BAT UK's intellectual property rights and goodwill without compensation. The Court rejected this argument and reasoned that IP rights are negative rights that confer exclusive rights on use, and thus the legislative intervention in the case of restrictions on tobacco labelling did not bar/stop tobacco companies from using their trademarks.

33 Article 13 of the Convention. A Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles must apply restrictions on all tobacco advertising, promotion and sponsorship.

34 [2016] EWHC 1169

Furthermore, the Constitutional Court of Uganda analysed Justice Laddie's Judgment in *Inter Lotto (UK) Ltd v Camelot Group Plc*³⁵ where he held that;

■ *“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 trademark which are infringed by use of the trademark 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.”*

Therefore, the Court held that the IP rights in this matter were derogable rights and thus subject to the limitation under Article 43(2) (c) of the Constitution. Potentially, this part of the ruling re-affirms intellectual property principles in as far as the classification of intellectual property rights as negative rights is concerned.

Intellectual property obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (or ‘TRIPS’ Agreement), a World Trade Organisation (WTO) agreement that sets out minimum standards of intellectual property protection that WTO member states agree to implement into domestic law are major challenges in litigation by tobacco companies against countries that enact tobacco control legislation.³⁶ This case was no exception.

However, the arguments generally suffer from a number of misconceptions regarding the nature of the obligations under TRIPS. In particular:

- There is no right to use a trademark under international law, so a measure implementing the WHO FCTC cannot infringe that right.
- Article 20 of the TRIPS Agreement only prohibits encumbrances on IP Rights that are ‘by special requirements’ and ‘unjustifiable’.

35 [2003] EWHC 1256

36 Examples of legal challenges raising TRIPS-related issues include, the challenge to Australia's plain packaging before a dispute settlement panel of the WTO; the challenge to Uruguay's packaging and labelling laws before an arbitral tribunal conducted under the Uruguay-Switzerland Bilateral Investment Treaty; and the challenge to the UK's standardized packaging in the High Court and Court of Appeal of England and Wales

- TRIPS must be interpreted in line with its general principles and objectives, which affirm that TRIPS obligations should be interpreted with regard to public health considerations.³⁷

Specifically, Member States may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of the TRIPS Agreement.³⁸

Lastly, the Doha Declaration on TRIPS and Public Health is also instrumental in the interpretation of the TRIPS Agreement. The Declaration is to the effect that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health and that TRIPS can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect the public health of their citizens. Even though these provisions were drafted in the context of access to medicines, the scope of the Doha Declaration is clearly expressed in much broader terms and covers public health measures more generally- and by extension apply to tobacco control legislation.³⁹

Unfortunately, the Ugandan Constitutional Court did not delve much into this analysis of the substantive international instruments since they were deemed as matters not requiring constitutional interpretation as per the Court's strict jurisdiction conferred by Article 137 of the Constitution.

37 See "Intellectual property, including the protection of trademarks under the TRIPS Agreement" accessed via <https://untobaccocontrol.org/kh/legal-challenges/trade/intellectual-property/> (last visited on 23/10/2019 at 14:00 hours).

38 Article 8(1) of the TRIPS Agreement, accessed via https://www.wto.org/english/docs_e/legal_e/27-trips.pdf (last visited on 24.10.2019 at 06:00 hours).

39 The Doha Declaration was adopted by the WTO Ministerial Conference (a meeting of all WTO members) in 200. In interpretational terms, the Australia – Plain Packaging panel recognised that the Doha Declaration is a subsequent agreement to TRIPS under article 31(3)(a) of the Vienna Convention on the Law of Treaties, and that the specific flexibilities recognised in paragraph 5 of the Doha Declaration are therefore to be taken into account in interpreting the TRIPS Agreement.

3.3. Restrictions on Public Smoking

The Petitioner contended that section 12(2) of the TCA is unconstitutional because it allegedly offends Article 40(2) of the Constitution. The impugned section provides that;

A person shall not smoke in any outdoor place that is:

- (a) Within 50 metres of any public place, workplace, public transport terminal or any other place that provides services primarily to children;
- (b) Within 50 metres of any window, door or air intake mechanism of any public place or workplace or any waiting area or queue;
- (c) Within 50 metres from the place of service or consumption of food or drink; or
- (d) Designated as a non-smoking area by the person responsible for the premises.

The Court relied on the WHO Global Report Mortality Attributable to Tobacco, which stated inter alia that, direct tobacco smoking is responsible for the death of about five (5) million people globally per year, with many of the deaths occurring prematurely.⁴⁰ Furthermore, the Report estimated an additional 600,000 people as dying from effects of second-hand smoke. It was established that tobacco kills more than tuberculosis, Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome (HIV/AIDS) and malaria combined.⁴¹

Article 40(2) of the Constitution provides for economic rights specifically the right to practice a given profession and to carry out a lawful trade or business. In this progressive judgment, the court resounded the gist of Article 39 of the Constitution in protection of the right to a clean and healthy environment hence placing the importance of preserving a clean and healthy environment above the economic rights sought by the Petitioner.

⁴⁰ Page 4 of the Report.

⁴¹ According to the Report, the annual death toll from tobacco is projected to rise to 8 million, with more than 80% of those deaths projected to occur in low and middle-income countries in the next two decades. If urgent measures are not taken, tobacco could kill 1 billion people in the 21st Century.

3.4. Right to property

It was argued by the Petitioner Tobacco Company that restrictions on property use to comply with non-public smoking requirements offends Article 26(1) of the Constitution which provides for the right to own property. In resolving this issue, the Court relied on the Supreme Court decision in ***Godfrey Nyakaana vs National Environment Management Authority & Others***⁴² where it was held that the right to property is not absolute and property rights are held and enjoyed subject to the law.

Court concluded that the TCA is not unconstitutional for limiting enjoyment of the right to property on public interest grounds since all businesses are carried out subject to license and regulation, and the restrictions imposed on the tobacco industry are justifiable in a free and democratic society.



42 Supreme Court Constitutional Appeal No. 5 of 2011. Also see Dorothy Nandugwa Kabugo vs Attorney General, Constitutional Petition No. 039 of 2010.

4. REMEDIES AND IMPLICATIONS TO THE DIFFERENT STAKEHOLDERS

A remedy can be defined as the ultimate direction issued by a court of law after hearing a case on its merits and making a decision on the same.⁴³ Remedies are important because they are a form of relief that can atone for injury suffered.⁴⁴

Regarding remedies, the Petitioner had prayed for the challenged provisions of the TCA to be declared unconstitutional and thus null and void. The Respondents prayed for the Court to declare the challenged provisions as Constitutional, uphold them and dismiss the Petition.

4.1. Legal reliefs

The Court found the Petition without merit. In fact, the lead Justice Kenneth Kakuru described the same as “misconceived” and “brought in bad faith as part of a global strategy by the Petitioner and others to fight tobacco control legislation.”⁴⁵ Consequently, it was dismissed with costs on 28th May, 2019. The award of costs was peculiar because the Constitutional Court has invoked this remedy in very few circumstances. The rationale for not awarding costs in constitutional litigation is premised on the reasoning that the culture of constitutionalism should be nurtured, and not stunted by prohibitive litigation costs.⁴⁶

However, in this case, it is arguable whether this qualifies as “public interest litigation” (PIL). PIL has been defined as litigation that “focuses on issues of particular importance to the community at large, a major section of the public, or disenfranchised minorities. As is evident from its name, public interest litigation is defined as court action seeking remedies aimed at a broader public good, as opposed to the specific interests of the individual litigant(s).”⁴⁷

43 CEHURD, Protection Against Gender Based Violence and Litigation for HIV Related Rights, October 2018 at 57

44 Ibid

45 Page 54 of the decision.

46 Advocates for Natural Resources & 2 Others v Attorney General & Another (Constitutional Petition Number 40 Of 2013).

47 Prof. J. Oloka Onyango in his Article titled “Human Rights & Public Interest Litigation in East Africa: A Bird’s Eye View” cited with approval in Muwanga Kivumbi vs. Attorney General, Supreme Court Constitutional Appeal No. 06 of 2011.

A matter under Public Interest Litigation must require a legal remedy and be a public interest, which means it must;

- Affect a significant number of people not just the individual or;
- Raise matters of broad public concern or;
- Impact on disadvantaged or marginalised groups; and
- It must be a legal matter which requires addressing pro bono publico (for the common good).⁴⁸

Juxtaposed to the facts in this case, this appears to have been more of a commercial case brought by a tobacco multinational company to vindicate its business interests. It had almost nothing to do with public interest because the available research presented before the Court positively proves that smoking and tobacco exposure are injurious to the public interest due to the numerous public health challenges such as cancer and environmental pollution attributed to smoking cigarettes.

4.2. Ramifications on the stakeholders involved

This section enumerates the legal, regulatory and enforcement ramifications arising out of the case to the different parties affected by tobacco control legislation.

4.2.1. *The Tobacco Control Committee (hereinafter called “The Committee)*

Section 3 of the TCA establishes the Committee with the mandate to among other functions, implement the objectives of the TCA in accordance with the WHO FCTC and its implementing guidelines and protocols; coordinate and monitor tobacco control interventions; advise the Minister of Health on policies and legislative measures relating to tobacco control; monitor interference and insulate tobacco control related policies from commercial and other vested interests of the tobacco industry; perform any other function incidental to the effective implementation of the provisions of the Act as may from time to time be assigned to it by the Prime Minister.⁴⁹

The Committee comprises of a representative from the Office of the Prime Minister, who is the Chairperson; the Director General of Health Services; the

48 Justice Musa Ssekaana in *Aboneka Michael & Another vs. Attorney General* (Misc. Cause No. 386 Of 2018).

49 Section 5(2) of the TCA.

National Focal Point Person for Tobacco Control designated under section 7 of the Act; a representative of the Ministry responsible for trade; a representative of the Ministry responsible for education and sports; a representative of the Ministry responsible for agriculture, animal industry and fisheries; a representative of the Ministry responsible for gender, labour and social development; a representative of the Uganda National Bureau of Standards (UNBS); a representative of the National Environment Management Authority (NEMA); and one representative of the civil society engaged in tobacco control, nominated by a forum of organisations engaged in tobacco control.⁵⁰

With the decision of the Court, the Committee is empowered to act in accordance with its legal and regulatory mandate without any risk arising from implantation and enforcement actions as provided under the TCA.

4.2.2. Civil Society

Civil society actors and rights defenders engaged in tobacco control have also proved themselves as critical actors in advocacy and strategic litigation. Particularly, as co-Respondent, CEHURD has bolstered its experience and a key go-to partner in defence of the public interest. Furthermore, the decision demonstrates the potential gains and strides that Uganda can make when the civil society and government work together towards mutually beneficial goals and outcomes. Civil Society actors retain their role to make sure that due compliance and enforcement of the TCA are adhered to by the respective role bearers.

4.2.3. Attorney General (AG)

As the chief legal advisor to the Government, the Attorney General plays a key role in the justice system.⁵¹ By participating in this matter, the AG's Chambers have acquired expertise and experience in anti-tobacco litigation and familiarised themselves with the role of civil society in safeguarding constitutional values and principles such as public interest and the right to a clean and healthy environment.

⁵⁰ Section 3(2) of the TCA.

⁵¹ Article 199 of the Constitution is to the effect that shall be an Attorney-General who shall be a Minister appointed by the President with the approval of Parliament. The Attorney-General is the principal legal adviser of the Government mandated to give legal advice and legal services to the Government on any subject; draw and peruse agreements, contracts, treaties, conventions and documents by whatever called, to which the Government is a party or respect of which the Government has an interest; represent the Government in courts or any other legal proceedings to which the government party; and perform such other functions as may be assigned him or her by the President or by law.

The AG still retains the mandate to make sure enforcement of the TCA is adhered to in line with Uganda's national and international obligations.

4.2.4. BAT/Tobacco Companies

The tobacco companies are now well aware of their duties and obligations to comply with the national legal framework encompassed in the TCA. Furthermore, the Court clarified their expected levels of commitment to comply with tobacco control legislation as opposed to subverting the same through undercover means and activities aimed at weakening enforcement and administration of the tobacco industry.

4.2.5. Media

Some media houses were critical allies during the proceedings as information dissemination points. We also rely on them to educate the public through awareness campaigns in order to highlight the dangers of tobacco use and exposure. However, they also have duties to comply with under the TCA. Media houses are encouraged to shun all forms of tobacco advertising, promotion and sponsorship as required by section 14 of the TCA.

4.2.6. Judiciary

The Constitutional Court has paved the way for enforcement of the TCA. The Act gives a dual jurisdiction to both the Magistrate's Court and the High Court in respect of certain powers. For instance, upon an ex-parte application, a magistrate or judge of the High Court may issue a warrant authorising the officer named in the warrant to enter and inspect a dwelling place or premise, subject to the conditions specified in the warrant if any, where the magistrate or judge is satisfied by information on oath that entry to the dwelling place or premise is necessary for the administration or enforcement of the Act.⁵²

4.2.7. Police/law enforcement officers

The police force is given various powers under the Act. For instance, it can authorise use of force to execute a warrant issued under the Act.⁵³ Furthermore, police cells and prisons are designated as public places together with court

⁵² Section 24(1) of the TCA.

⁵³ Section 26 of the TCA.

buildings; factories; hotels; bars and restaurants; hospitals, clinics and other health institutions; education institutions of all levels; premises in which children are cared for; public places of worship; and other amenities such as public transport terminals for example airports.⁵⁴ Public smoking is expressly prohibited in the listed places.

As custodians of the stated public places, Police and its sister law enforcement agencies such as Prisons Service are encouraged to ensure compliance with the law at all times and to commence enforcement in case of violation.

4.2.8. Uganda Revenue Authority

The Uganda Revenue Authority is under Section 2 of the Uganda Revenue Authority Act.⁵⁵ Section 3 provides for the functions of the Act which include administering and giving effect to the Customs Tariff Act, Income Tax Act, Value Added Tax Act and other taxes and nontax revenue as the Treasury prescribes.

One of the effects of the case ruling might be a reduction in government revenue for the Uganda Revenue Authority as a result of increased trading in illicit tax evaded cigarettes. In the first quarter of 2019 alone, the tobacco industry recorded an increase in illicit tax evaded cigarette sale by 22.2% which translates to a loss of UGX. 30 billion in government revenue.⁵⁶

4.2.9. Uganda Investment Authority

Uganda Investment Authority is established under Section 2 of the Investment Code Act.⁵⁷ Under Section 3(2), the Authority is charged with the duty of promoting, attracting, advocating, facilitating, registering, monitoring and evaluating the development of all forms of investment and business activity in Uganda. The case decision has the potential to curtail investment in the tobacco industry if enforcement of the TCA is followed to the core. This is because tobacco sales would fall, resulting in a reduction of revenue for already existing tobacco companies. This would result in a failure by the Authority to execute its mandate to attract investment and business activity in Uganda insofar as the tobacco industry is concerned.

54 See the Third Schedule of the Act.

55 Cap. 196, Laws of Uganda

56 Tax evasion in Uganda's Tobacco market at 22% accounting to Ush30 billion, Busiweek, 30th July 2019 <https://www.busiweek.com/tax-evasion-in-ugandas-tobacco-market-at-22-accounting-to-ush30-billion/>

57 Act No. 6 of 2019

4.2.10. Ministry of Health

Among its numerous roles, the Ministry of Health is responsible for policy review and development on health-related matters.⁵⁸ Following the decision in the Case, the Ministry has a role of ensuring a favourable policy environment for tobacco control. Through the decision, the Ministry of Health is fortified in its role in enacting future policies modelled around the TCA. The Ministry is challenged through this decision to take on its mantle and pass policies in line with both the TCA and the decision of the court.

4.2.11. General Public

The TCA places a number of obligations on the general public. Under Section 11(1) of the TCA for instance, every person has a right to a tobacco smoke-free environment. Smokers are equally mandated to ensure that they do not expose other people to tobacco smoke. Owners of premises are mandated to ensure that notices stating that smoking is prohibited should be placed in visible places.⁵⁹ Through the progressive judgment of the case, all these obligations are upheld.



58 About Ministry of Health, accessible at <https://health.go.ug/about-us/about-ministry-health> [Accessed 11th March 2020 at 1248Hrs]

59 Section 13 of the TCA

5. STRENGTHS OF THE DECISION

The decision has several strengths which make it a global reference point on anti-tobacco litigation. These strengths include;

- (a) It was decided by a very experienced panel in regard to environmental rights and public interest litigation. The lead Justice, Kenneth Kakuru is one of the leading environmentalists in the land and constantly researches and publishes on the subject.⁶⁰ Therefore, his expertise and depth of understanding were of vital benefit to the Court.
- (b) The case was also handled by a panel of experienced lawyers in constitutionalism and public interest litigation. Specifically, CEHURD's litigation team had done considerable research on tobacco legislation and the public health considerations involved. This domain expertise helped to make sure that the right evidence and reference materials are availed to Court to support the arguments put forward.
- (c) Intensified activism and advocacy on the dangers of tobacco and public sensitisation and awareness campaigns generated a lot of public interest that made it possible for some members of the public to attend Court and demonstrate the overwhelming public interest in the case. This also fortified the arguments by the Respondents that indeed, the public interest tilts more in favour of limitation of the Petitioner's economic rights.
- (d) There was ample international jurisprudence on tobacco litigation that supported the Respondents' case. For instance, the Court relied on similar decided cases in South Africa, Canada, Kenya, Australia, India, Pakistan, Peru, Philippines, and the United Kingdom. This helped to build confidence in the Court's reasoning because the comparative jurisprudence was founded on similar facts and originated from some countries with a common law background like Uganda.

60 See "Enforcing Environmental Laws" by Kenneth Kakuru accessed via <http://greenwatch.or.ug/sites/default/files/2019-07/Enforcing%20environmental%20laws.pdf> (last visited on 24.10.2019 at 15:28 hours).

(e) Lastly, the Court was alive to the international tactics and strategies used globally by tobacco companies to thwart legal and regulatory frameworks. 61Such strategies include using trade agreements to attack public health measures; distorting the science of the health effects of tobacco use and second-hand smoking; promoting illicit tobacco trade (smuggling); and suing or threatening to sue governments; among others. With this context and background in mind, the Court was aware that it was dealing with a very sophisticated and manipulative industry.



61 Court cited a Report adduced by CEHURD entitled, “How Tobacco Companies Fight Tobacco Control” on pgs. 50 and 51 of the Judgment.

6. CONCLUSION

The decision offers a very solid benchmark in tobacco legislation in Uganda. Section 19 of the Act spells out the duties of government in implementation of the Act. These duties are to protect the public against the influence of and interference by the commercial and other vested interests of the tobacco industry; and ensuring that there is transparency in the interactions of Government with the tobacco industry. In order to promote transparency, the Act mandates all records and documents related to the interactions, communications and contacts held between the Government and the tobacco industry to open to the public.⁶² It remains to be seen how the Government and its agencies will score on enforcement of anti-tobacco legislation in Uganda. The ball is in their court.

⁶² Section 19(2) of the TCA.

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