IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: YEBOAH, CJ (PRESIDING)

BAFFOE-BONNIE, JSC

APPAU, JSC

PWAMANG, JSC

MARFUL-SAU, JSC

AMEGATCHER, JSC

KOTEY, JSC

WRIT NO.

J1/13/2018

5TH MAY, 2020

YAW BROGYA GYAMFI ……. PLAINTIFF

VRS

THE ATTORNEY-GENERAL ……. DEFENDANT

JUDGMENT

MARFUL-SAU, JSC: -

This action was originally consolidated with two other suits namely Writ No. J1/14/2018 and JI/15/18, which were discontinued in the early stages of the proceedings. The Plaintiff in this action, Yaw Brogya Gyamfi was left alone to pursue the writ he issued on the 26th of March 2018. On the 5th of May 2020, this Court by a unanimous decision dismissed the Plaintiff claims against the Defendant and reserved its reasons which we hereby deliver.

On the 26th of March 2018 the Plaintiff in his capacity as a citizen of Ghana, by a writ invoked the original jurisdiction of the Supreme Court pursuant to Articles 2 and 130 of the 1992 Constitution, seeking against the Defendant the following reliefs:

"a. A declaration that the ratification by Parliament of the supposed Agreement between the Government of the Republic of Ghana and the Republic of the United States of America on Defence Co-operation, the status of United States Forces and Access to and use of Agreed Facilities and Area in the Republic of Ghana on March 24, 2018 when the supposed agreement had not been executed by the President or a person authorized by the President as provided for by Article 75 of the 1992 Constitution is contrary to the said Article 75 of the 1992 Constitution and same is null and void.

b. A declaration that the Minister of Defence acted in contravention of Articles 58 (1), 75 and 93 (2) of the 1992 Constitution when he laid or caused to be laid before Parliament an unexecuted draft of the supposed Defence Co-operation Agreement for ratification under Article 75 of the 1992 Constitution.

c. A declaration that by the provision of Article 75 of the 1992 Constitution all bilateral and multilateral agreements entered into by the government of the Republic of Ghana must be executed by the President or a person authorized by the President before it is laid before Parliament for ratification.

d. A declaration that the Government and Parliament of Ghana acted in contravention of Articles 2, 58(1), 33, 93(2), 125, 130(1)(b), 135 and140 of the 1992 Constitution when they supposedly entered into and supposedly ratified a Treaty(Defence Co-operation Agreement) with the United States of America under Article 75 of the 1992 Constitution that provided in its terms and conditions that the interpretation, application or enforcement of the said agreement cannot be subject to the courts of Ghana (including this Honourable Supreme Court) or any other court in the world.

e. A declaration that either the executive nor legislative branch of government has the power to enter into or ratify a treaty that oust the jurisdiction of the superior courts Ghana in matters concerning the interpretation, application or enforcement of any international agreement and further provide that such international agreement cannot be subject to any other court in the world.

f. A declaration that the supposed Defence Co-operation Agreement between Ghana and the United States of America in respect of which Parliament passed a resolution on March 24, 2018, is not in the "national interest' 'of Ghana and inconsistent with Articles 2, 1(2),33, 125, 130, 135, 140 and 73 of the 1992 Constitution on grounds that it (i) excludes the jurisdiction of Ghanaian courts over its terms and conditions (ii) waives or precludes the right to the enforcement of judicial rights of Ghanaian individuals who may be adversely affected by the operation or implementation of the said agreement, and (iii) grants unfettered entity, rights and access to the United States of America over our custom borders and Ghana's telecommunications infrastructure.

g. A declaration that the word ''ratify'' used within the provisions of Article 75 of the 1992 Constitution is a term of art which has a true meaning incorporating international law and treaties into the domestic legal system of the Republic of Ghana and not prior approval or approval.

h. An order setting aside the supposed Defence Co-operation Agreement between Ghana and the United States of America on grounds that it is not in the national interest of Ghana and contravenes Articles 1(2),2, 11, 33, 125, 140, 75, and 73 of the 1992 Constitution.

i. Any other reliefs that this Honourable Court deems fit under the circumstances.''

The Plaintiff's case is that the ratification by Parliament of the Agreement between the Government of the United States of America and the Republic of Ghana titled ''Defence Co-operation, the Status of United States Forces and Access to and Use of Agreed Facilities and Areas in the Republic of Ghana, (simply referred to as the Agreement), on the 28th of March 2018, was unconstitutional, since the said agreement failed to satisfy article 75 of the 1992 Constitution. Plaintiff's contention is that the Agreement which was submitted to Parliament by the Minister of Defence for ratification under Article 75 of the Constitution was not signed by the State parties and for that matter it was not an executed agreement envisaged under Article 75 of the 1992 Constitution. The Plaintiff posited that in the world it is the Executive arm of Government that has the mandate and power to execute international Agreements on behalf of the State, so it was wrong for the Executive to have presented an unsigned agreement to Parliament for ratification.

According to the Plaintiff by sending an unsigned agreement for ratification, Parliament was being given an opportunity to alter the text of what the Executive has agreed with another State. The Plaintiff contended that ratification does not give Parliament the power of prior approval and vetting of the Agreement before the Executive signs the

Agreement. Accordingly, Plaintiff argued that the Executive should have executed the Agreement before submitting same to Parliament for ratification and its failure rendered the ratification unconstitutional, null and void having breached Article 75 of the Constitution.

The Plaintiff finally submitted that the Agreement was not in the national interest as it contravenes Articles 1(2), 2, 11, 33, 125, 130, 135, 140, 75 and 73 of the 1992 Constitution.

The Plaintiff annexed to his Statement of Case the following documents which were labelled as Exhibits to support his case, urging this Court to declare the ratification of the Agreement by Parliament as unconstitutional; and further declare that the Agreement is not in the national interest as same contravenes the 1992 Constitution.

Exhibit 'A'- The Agreement between the Government of the United States of America and the Republic of Ghana on Defence Cooperation, the Status of United States Forces and Access to and Use of Agreed Facilities and Areas in the Republic of Ghana.

Exhibit 'B'-Ministry of Defence Memorandum to Parliament dated March 2018 and a letter dated 12th March 2018, from the Secretary to the Cabinet indicating Cabinet's approval of the Agreement.

Exhibit 'C'- Parliamentary Report of the Joint- Committee on Defence, Interior and Constitutional, Legal and Parliamentary Affairs dated 22nd March 2018.

Exhibit 'D'- Agreement between the Government of the Republic of Kenya and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defence Co-operation.

Exhibit 'E'- Report on Status of Forces Agreements issued by the International Security Advisory Board of the United States of America, Department of State, dated 16th January 2015.

The Defendant's case is that due to increased trends of terrorism on the international scene Ghana and the USA signed an Acquisition and Cross – Servicing Agreement on 28th April, 2015 for security co-operation between the two States. Upon the expiration of the Agreement, the two States decided to renew their respective commitment on security co-operation which necessitated the Agreement the subject matter of this action. The Defendant contends that pursuant to Article 75 of the 1992 Constitution, unsigned copies of the Agreement was submitted to Parliament for ratification and same was ratified on 24th March 2018. The Defendant argued that this was done in order to take on board any inputs by Parliament being the representatives of the people of Ghana. Defendant further contended that there is nothing unconstitutional about the method adopted to get Parliament to ratify the Agreement, which was in the best interest of Ghana, in the light of global and regional security challenges. The Defendant therefore urged the Court to dismiss the action brought by the Plaintiff.

On the 17th February 2020, the parties filed a Joint Memorandum of Issues setting out the following issues for determination:

"a. Whether or not the ratification of the Defence Co-operation Agreement by Parliament contravenes Article 75 of the Constitution;

b. Whether or not the submission of an unsigned international agreement to Parliament for ratification by the Executive contravenes Articles 75 and 58 (1) of the 1992 Constitution;

c. Whether or not the Defence Co-operation Agreement between the Government of Ghana and the United States of America contravenes Articles 1 (2), 2, 11, 33, 125, 130, 135, 140, 75, 73, of the 1992 Constitution and

d. Whether or not the supposed Defence Co-operation Agreement between Ghana and the United States of America in respect of which Parliament passed a resolution on March 24, 2018 is in the ''national interest''.

We observed that the clear and undisputed facts in this action are:

a. That the Governments of Ghana and the United States of America entered into a Defence Co-operation Agreement in March 2018 (The Agreement).

b. That an unsigned copy of the Agreement was submitted to Parliament by the Executive for ratification pursuant to Article 75 of the 1992 Constitution.

c. That Parliament by a resolution ratified the Agreement on 24th March 2018.

d. That Plaintiff is challenging the constitutionality of Parliament's ratification for the sole reason that the Agreement submitted to Parliament was unsigned.

Now, from the undisputed facts above, we are of the opinion that the fundamental issue of import to be determined in this action is whether Parliament's ratification of the unsigned Agreement was contrary to Article 75 of the 1992 Constitution. We shall therefore address issues (a), (b) and (c) of the Joint Memorandum of Issues together under this fundamental issue and thereafter deal with agreed issue (d).

Article 75 provides as follows:

> ***"(1) The President may execute or cause to be executed treaty, agreement or conventions in the name of Ghana.***
>
> ***(2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by-***
>
> ***(a) Act of Parliament; or***

(b) a resolution of Parliament supported by the votes of more than one- half of all the members of Parliament.''

As already observed, the Plaintiff has invoked the original jurisdiction of this Court under Articles 2 and 130 of the 1992 Constitution, to interpret Article 75 of the 1992 Constitution, being the major pivot on which this action is centered. We need therefore to remind ourselves of the nature of our Constitution and the valued guidelines this Court has formulated over the years to aid the interpretation of the 1992 Constitution. We refer to the celebrated case of **Tuffour v. Attorney- General {1980} GLR 637**, where at page 647, Sowah JSC (as he then was) delivered himself as follows:

'' A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of the people. It mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life. The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of the three arms of government possesses and exercises. It is a source of strength. It is a source of power…….Its language, therefore, must be considered as if it were a living organism capable of growth and development. Indeed, it is a living organism capable of growth and development, as the body politic of Ghana itself is capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time. And so, we must take cognizance of the age-old fundamental principle of constitutional construction which gives effect to the intent of the framers of this organic law. Every word has an effect. Every part must be given effect.''

We need also to reflect on the useful guide in the interpretation of the 1992 Constitution provided by Section (10) (4) of the Interpretation Act, 2009, Act 792. The Section provides thus:

'' (4) Without prejudice to any other provision of this section, a court shall construe or interpret a provision of the Constitution or any other law in a manner:

(a) ***that promotes the rule of law and the values of good governance,***

(b) ***that advances human rights and fundamental freedoms,***

(c) ***that permits the creative development of the provisions of the Constitution and the laws of Ghana, and***

(d) ***that avoids technicalities and recourse to niceties of form and language which defeat the purpose and spirit of the Constitution and the laws of Ghana.''***

In this action the Plaintiff is urging us to interpret the term 'executed agreement' as used in Article 75 of the 1992 Constitution. The Plaintiff case is that since the Agreement sent to Parliament for ratification was not signed by the parties, it fell outside the category of agreements that require Parliamentary ratification, since the submitted agreement was not executed as envisaged under Article 75 of the Constitution. Put differently, the Plaintiff is urging that the Agreement submitted to Parliament was not one that Parliament could consider for ratification or approval since it was not signed or executed as required under Article 75. The Plaintiff by his argument is urging us to interpret Article 75 mechanically and hold that since the Agreement was not signed it cannot be described as executed agreement for which Parliament could ratify under Article 75 of the 1992 Constitution.

The question we ask ourselves is will such an interpretation achieve the intention of the framers of the Constitution and thus meet the aspirations of the people of this country? The provisions of Article 75 of the 1992 Constitution has its roots from the

1969 Constitution. The Memorandum on the Proposals for a Constitution for Ghana, 1968 at paragraph 373, under International Relations provided as follows:

''373. In appointing the representatives of the country abroad the President, it is proposed, should act in accordance with the advice of the Prime Minister. And any treaty, agreement or convention executed by the President which relates to any matter within the Legislative authority of the National Assembly should be ratified by the National Assembly either by an Act of Parliament or by a resolution of the Assembly passed by not less than half its total membership. To avoid any doubts the proposed Constitution declares that any treaty or agreement or convention to which Ghana is a party on the coming into force of the final Constitution shall still be valid.''

Flowing from this proposal, the framers of the 1969 Constitution provided at

Article 59 as follows:

''(1) The President shall, acting in accordance with the advice of the Cabinet, execute or cause to be executed treaties, agreements, or conventions in the name of Ghana.

(2)Any treaty, agreement or convention executed by or under the authority of the President which relates to any matter within the legislative competence of the National Assembly shall be subject to ratification by the National Assembly

(a) by the enactment of an Act of Parliament; or

(b) by a resolution of the National Assembly supported by the votes of not less than one-half of all the members of the National Assembly.''

This was followed by the 1979 Constitution which re-enacted the above provisions at Article 62 in the same words as Article 75 of the 1992 Constitution. The Report of the

Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana, dated 31st July 1991 provided at paragraph 38 as follows:

> ***''The Committee recommends that the Presidential prerogative of mercy(Article 59 of the 1979 Constitution) be retained, as should the President's right to receive and accredit diplomatic envoys and to execute treaties, agreements and conventions in the name of Ghana, subject to ratification by Parliament.''***

We are of the view that the intentions of the framers of all our past Constitutions including the 1992 Constitution was to ensure that any international agreement entered into by the President shall be subjected to Parliamentary ratification or approval. This in our minds was to guarantee that the people of Ghana, through their representative in Parliament had an opportunity to scrutinize such agreements before their implementation.

The question we ask again is will this noble and progressive intention of the framers of the Constitution be defeated if the President should submit an unsigned international agreement to Parliament for ratification as happened in this case? We think not, since it is obvious that all the framers of the Constitution sought to do was to ensure that the people's representative in Parliament do sight such international agreements and either ratify or reject same. In other words, the framers wanted to avoid a governance situation where the executive would commit the country to international obligations without consulting Parliament which represents the people, hence the decision by the executive to submit to Parliament an unsigned copy of the Agreement. In any case, if the Agreement is already signed, what will be the role of Parliament in ratifying or rejecting it?

We are of the opinion that we will be doing a disservice to this country should we apply a mechanical approach in interpreting the phrase ''executed agreement'' in Article 75, as urged on us by the Plaintiff, who is only looking at the form of the Agreement and not

the substance. In substance we are very much convinced that the document which was submitted by the Executive to Parliament though unsigned, was an agreement creating legal obligations between the Republic of Ghana and the United States of America. We therefore affirm that the said agreement annexed by the Plaintiff to his Statement of Case as 'Exhibit A', though unsigned still belonged to the category of agreements that required Parliamentary ratification as stipulated under Article 75 of the 1992 Constitution. Relying on the very useful guide that had been laid by this court and Section 10 of the Interpretation Act, 2009 Act 792, we are of the view that, the intention of the framers of the 1992 Constitution will be achieved, if we adopted a very flexible and purposeful approach in interpreting Article 75 of the 1992 Constitution. We hold this view, especially as the constitution did not stipulate any special format for such agreements apart from the use of the term 'executed', which only refers to signatures.

In the recent case of **Margaret Banful and Henry Nana Boakye vrs. The Attorney-General**, Writ No.J1/7/2016,Supreme Court, dated the 22nd June 2017, this Court speaking through Sophia Akuffo, CJ delivered as follows:

> ***''The Constitution makes no mention of any formal distinctions that are dependent on the formality with which such an instrument is formatted or brought into being. From the aforementioned principles of constitutional interpretation in Ghana there is no doubt that where, by various forms of documentation, the Government of Ghana binds the Republic of Ghana to certain obligations in relation to another country or group of countries, an international agreement comes into existence*.** **Taking into account the substance of exhibit A, we are in no doubt that despite the form in which it has been drafted and the context couched, it is intended to create an obligation on the part of Ghana to the USA whereby, inter alia, Ghana binds herself to 'receive' and 'resettle' the said two persons and assure that,' for at least two years, or longer if warranted by circumstances, 'these persons are kept under such conditions (i.e. monitored and**

surveilled) as would accord with 'the security assurances in this agreement to be implemented.'

In the case cited above, this court was called upon to interpret whether documents exchanged between the Governments of Ghana and the United States of America described as 'Note Verbal' is in the category of agreement contemplated by Article 75 of the 1992 Constitution, which therefore ought to have been submitted to Parliament for ratification. This Court relying on the same guides to the interpretation of the Constitution held that the 'Note Verbal' exchanged by the two States constituted an Agreement envisaged under Article 75 and as such needs Parliamentary ratification. Clearly, if this Court categorized documents described as 'Note Verbal', and exchanged between two States as Agreement under Article 75 of the 1992 Constitution, then we can safely conclude that the Agreement the subject matter of this action can be classified as an agreement under Article 75 of the Constitution. Indeed, we are bound by the decision of this Court in the Margaret Banful case (supra).

Concluding on the fundamental issue, we hold that the Defence Cooperation Agreement did not contravene Article 75 of the 1992 Constitution neither did the submission of the unsigned international agreement to Parliament for ratification by the Executive contravened Article 75 and any provision of the 1992 Constitution.

The next issue we will address is issue (d) of the Joint Memorandum of Issues, which is whether the Defence Cooperation Agreement is in the national interest. Plaintiff's contention on this issue is at paragraph 109 of his Statement of Case as follows:

''My Lords it is humbly submitted that no right or advantage ensures to the benefit generally of the whole of the people of Ghana. It will be shown in this statement of case that rather the people of Ghana are denied their inalienable human rights, the independence of the judiciary provided for under Article 125 (3) is nullified, the supremacy of the 1992 constitution under

Article 1 is rendered nugatory, the original jurisdiction of the Supreme Court under Article 130 and that of the High Court under Articles 33 and 140 are cancelled and the right of citizens of Ghana to invoke the jurisdiction of the Supreme Court to enforce the constitution by challenging unconstitutional acts under article 2 have been taken away by the supposed Treaty with the United States of America,''

The provision of the Agreement which makes the Plaintiff classify the Agreement as against the national interest is article 18, which deals with Dispute Settlement. The said article provides as follows:

'' Settlement of Dispute

Any dispute regarding the application, implementation, or interpretation of this Agreement, or its implementation arrangements, shall be resolved at the lowest level possible and, as necessary, elevated to the Executive Agents for consideration and resolution. Those disputes that cannot be resolved by the Executive Agents shall be referred to the Parties for consultation and resolution, as appropriate, and shall not be referred to any national or international court, tribunal, or similar body, or to any third party for settlement, unless otherwise mutually agreed.''

We find the above provision in the Agreement as a regular Dispute Resolution Clause in an Agreement, which seeks to fashion out how the parties to the Agreement would attempt to settle any dispute that arises from the implementation of the Agreement. In this era of a new judicial culture hinging on Alternative Dispute Resolution (ADR), with various dispute resolution mechanisms, the above provision in the Agreement is not uncommon in most if not all international agreements or contracts. An advantage of such clause in an agreement is to enable the parties, who own the dispute at a first tier find their own solutions to the dispute without involving third parties or institutions, until

the parties fail at settlement, where upon the parties may agree to refer the dispute to a court or for arbitration.

Clauses such as article 18 in the Agreement are unavoidable in this era of judicial dispensation where parties are seeking speedy resolution of disputes which arises during the implementation of international agreements and or contracts. With these trends in mind, we do not see how article 18 of the Agreement operates to take away the inalienable human rights of Ghanaians, the independence of the Supreme Court as well as the High Court as argued by the Plaintiff.

As submitted by the Defendants, the Agreement in issue is a renewal of an earlier one made between the Government of Ghana and the United States of America, to safeguard the national security of both States in view of increased terrorist activities on the international scene and the West Africa sub-region. We think that national security and defence are of primary concern to every government. Thus Article 35(2) of the 1992 Constitution provides as follows:

> ***'' The State shall protect and safeguard the independence, unity and territorial integrity of Ghana, and shall seek the well- being of all her citizens.''***

We are convinced that by the terms of the Agreement, the Executive seeks to enhance or strengthen the defence and security framework of Ghana in terms of Article 35 (2) of the 1992 Constitution and rather hold that the Agreement is in the national interest hence the ratification by Parliament.

On the whole, we are of the considered view that for the reasons assigned in this Judgment, the writ taken by the Plaintiff is without merit and was properly dismissed by the court on the 5th of May 2020.

S. K. MARFUL-SAU

(JUSTICE OF THE SUPREME COURT)

YEBOAH, CJ:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

ANIN YEBOAH

(CHIEF JUSTICE)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

Y. APPAU

(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

AMEGATCHER, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

PROF. KOTEY, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

COUNSEL

ELIKPEM AGBEMAVA WITH HIM EDWIN KPEDOR FOR THE PLAINTIFF.

PATIENCE ADUMUA-LARTEY (MRS), CHIEF STATE ATTORNEY AND JOSELINE SEIDU (MS), ASSISTANT STATE ATTORNEY BEING LED BY GODFRED YEBOAH DAME, DEPUTY ATTORNEY-GENERAL FOR THE DEFENDANT.