IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA
AD 2015

CORAM: ANSAH, JSC (PRESIDING)
ANIN YEBOAH, JSC
BAFFOE BONNIE, JSC
GBADEGBE, JSC
AKOTO BAMFO (Mrs.), JSC
BENIN JSC
AKAMBA, JSC

WRIT NO.J1/8/2014

28TH JULY 2015

PROGRESSIVE PEOPLES PARTY (PPP) PLAINTIFF

VRS.

THE ATTORNEY GENERAL DEFENDANT

JUDGMENT

AKAMBA, JSC:

On 14th May 2015 this Court unanimously dismissed the above writ, but we reserved our reasons. We now proceed to indicate the reasons for the said decision.

The Plaintiff is a duly established political party in Ghana. The Defendant is the nominal representative of the Republic. Plaintiff issued a writ in this Court on 31st March 2014 seeking seven reliefs.

RELIEFS SOUGHT

The reliefs were fashioned as follows:

"(a) A declaration that on the true and proper interpretation of articles 25 (1) (a) and 38 (2) of the 1992 Constitution, Government of Ghana had only twelve years commencing from January 7, 1993 to January 6, 2005 to have delivered to the Ghanaian Children of School going age free, compulsory and universal basic education and that the Government has failed in discharging the said constitutional duty imposed on her by the people of Ghana.

(b) A declaration that on the true and proper interpretation of articles 14 (1) (e), 25 (1) (a) and 38 (2) of the 1992 Constitution, the Government of Ghana has a constitutional duty to compel children of school going age within the Republic who refuse and or fail so to do to be at school without fail and that Ghana Government failure to so act thereto constitutes an omission that is inconsistent with the Constitution.

(c) A declaration that section 2 of Education Act, 2008, (Act 778) as amended, to the extent that it fails to provide for compulsion on the children of school going age who refuse and or fail to attend basic education instructions, to so attend, and also to provide for the law and procedure within which to exercise that compulsion, is an omission, that is inconsistent with and in contravention to articles 14 (1) (e), 25 (1) (a) and 38 (2) of the 1992 Constitution and that consequently, to the extent of such inconsistency, the said section 2 of the Education Act, 2008 (Act 778) is void and of no effect.

(d) A declaration that section 2 (6) of Education Act, 2008, (Act 778) as amended, to the extent that it derogates from 25 (1) (a) and 38 (2) of the 1992 Constitution, is inconsistent and in contravention of the Constitution and that consequently, to the extent of such inconsistency, the said section 2 (6) of Education Act, 2008 (Act 778) as amended is void and of no effect.

(e) An order directed at Government of Ghana to take steps forthwith to compel children of school going age within the Republic who refuse and or fail to attend a course of instructions at the basic school, to attend basic school instructions, including legislating to lay bare the laws and procedure thereto within which such compulsion is to be exercised.

(f) An order directed at Government of Ghana to take steps forthwith leading to the amendment of section 2 (6) of the Education Act making same imperative and mandatory instead of permissive and empowering.

(g) Any other order the Court so desires to make and or directions for giving effect or enabling effect to be given to the declarations so made."

The parties subsequently filed their respective statements of case in accordance with the rules of this court.

PLAINTIFF'S SUBMISSIONS

The plaintiffs' submissions are embodied in their supporting statement of case filed on 31st March 2014. Among others, the plaintiffs submitted that the people of Ghana envisioned in the 1992 Constitution to build a free democratic state in which basic education would be free, compulsory and universal to all persons. Consequently, when the Constitution came into force on 1st January 1993, the Government of Ghana was tasked to draw up a program within two years after their Parliamentarians first met to ensure implementation of these aspirations and will of the people. This was to have commenced on 7th January 1993 when Parliament first met. The deadline for drawing up this program was January 1995. However, when the deadline was not met, the implementation was extended to March 1996 at which time the Government of Ghana drew up the program entitled "Republic of Ghana The Programme for Free Compulsory Universal Basic Education (fCUBE) by the year 2005."

It was obvious from page 1 of the 'fCUBE' that the constitutional injunction to implement the drawn program within ten years was not lost on Government or at all. This is evidenced in the statement to the effect that, "The Government is committed to making schooling from Basic stage1 through 9 free and compulsory for all school age children by the year 2005."

The Government of Ghana was also tasked to implement this drawn up program within ten years immediately upon the two years from January 1995 to January 2005. Twenty one years down the line, the Government of Ghana has failed in living within the Constitutional injunction imposed on her.

The Government's own reports and laws show that basic education is not free nor is it compulsory. Counsel for the Plaintiff further submitted that as at year 2006, as many as 500,000 children of school going age were outside school. Presently almost 300,000 children are still outside school yet the Government of Ghana has no intention of compelling them to be in school as intended by the Constitution 1992. The result of the failure on the part of Government has been the street children, head porters (kayayei), children in fishing, children in begging children in cocoa farms and children in the high seas, inter alia. These lapses on the part of government derail efforts at achieving the objectives of ensuring a safe and sound future for our children. The Plaintiffs gave a breakdown of facts from the Ministry of Education Sector Report for July 2013 in support of the number of out- of-school children.

The Plaintiffs' next issue was with the Education Act of 2008, Act 778 which, according to counsel, was legislated to give meaning to the program for ensuring a free, compulsory and universal basic education. Counsel submits that the Government of Ghana failed to adhere to the constitutional deadlines for drawing up the necessary programs for attaining the objectives for a free, compulsory basic education. For instance Government took three years instead of two to draw up the policy i.e. fCUBE. Then after, Government took sixteen years to back up the policy with legislation, the same being the Education Act 2008, Act 778. The entire fCUBE program fails to explain what compulsory basic education means. It simply fails to meet the constitutional intendment within the meaning of articles 14 (1) (e), 25 (1a) and 38 (2) of the 1992 Constitution. This is particularly so because there is no provision within section 2 of the Education Act (2009) which makes Government the ultimate person to compel children who refuse and or fail to attend a course of instruction at the basic education level. By the present liberal provisions of the Education Act the Government has reneged from employing force and or coercion to compel children of school going age who refuse or fail to so attend instructions at the basic education level. This is contrary to the intendment of Constitution for ensuring a free, compulsory universal basic education.

DEFENDANT'S SUBMISSIONS

The Defendant's case is stated in the written submissions filed on 15th July 2014. In it they contend primarily that the plaintiffs have wrongfully invoked the exclusive original jurisdiction of this court as their plaint does not raise any genuine or real issue of interpretation or enforcement of any provision of the 1992 Constitution. They further contend that there is no constitutional duty on the Government of Ghana to forcefully compel children of school going age to attend school.

ISSUES AGREED FOR DETERMINATION

Before us in this application, six issues were agreed upon by both parties as filed in their joint memorandum of agreed issues of 14th November 2014 for trial, namely:

1. "Whether or not the Plaintiff's action raises any real or genuine issue of interpretation or enforcement of any provision of the 1992 Constitution.
2. Whether or not articles 14 (1) (e), 25 (1) (a), and 38 (2) of the 1992 Constitution impose any duty on Government of Ghana to compel children of school going age who fail or refuse to be in school to attend school.
3. If the answer to Issue No. 2 above is in the affirmative, then the question for determination by this court is whether the Government of Ghana has failed to discharge the duty imposed on it by Articles 14 (1) (e), 25 (1) (a) and 38 (2) of the 1992 Constitution.
4. Whether or not Government of Ghana has failed to discharge the duty imposed on her by articles 14 (1) (e), 25 (1) (a), and 38 (2) of the 1992 Constitution.
5. Whether or not section 2 of the Education Act, 2008 (Act 778), is inconsistent with and in contravention of articles 14 (1) (e), 25 (1) (a), and 38 (2) of the 1992 Constitution.
6. Whether or not Government of Ghana failed to deliver to Ghanaian children of school going age Free, Compulsory Universal Basic Education within the constitutional timeframe of January 7, 1993 to January 6, 2005."

JURISDICTION

The Plaintiffs' by their writ are invoking this court's original jurisdiction, as it were, under articles 2 (1) and 130 of the Constitution 1992 for the enforcement of the reliefs endorsed therein. The Defendant however holds the view that the invocation of our jurisdiction in this context is wrongful. This being the situation we are obliged to ascertain whether or not our jurisdiction under the said articles 2 (1) and 130 (1) (a) has been properly invoked. Does the Plaintiffs' writ properly raise any real issues of interpretation or enforcement of the Constitution that can only be resolved by this court exercising our original jurisdiction? An issue on jurisdiction is a fundamental issue to be resolved before tackling any other questions posed for our determination. Articles 2 (1) and 130 (1) (a) respectively, provide as follows:

"2 (1) A person who alleges that –

(a) An enactment or anything contained in or done, under the authority of that or any other enactment;
Or
(b) Any act or omission of any person;

is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect."

130 (1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in-

(a) All matters relating to the enforcement or interpretation of this Constitution; and
(b) all matters arising as to whether an amendment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution."

CONSIDERATION BY COURT

What indeed is the exact scope of this court's original jurisdiction under article 2 and 130 (1) of the 1992 Constitution? This question has been ably answered by this court per my respected sister Sophia Akuffo in the case of **Bimpong Buta vs General Legal Council (2003-2004) SCGLR, 1200**. At page 1216 this court summed up the numerous outcomes of opportunities availed this court to define the scope of this jurisdiction. In order not to reinvent the wheel, I quote the summary thereof as follows:

> *" (1) A person bringing an action under article 2 need not demonstrate that he has any personal interest in the outcome of the of the suit; that he is a citizen of Ghana suffices to entitle him to bring the action. (Tuffuor v Attorney General (1980) GLR 637, SC and Sam (No 2) vs Attorney-General (2000) SCGLR 305.*
> *(2) The 'person' referred to in the context of article 2 includes both natural persons and corporate bodies (cf New Patriotic Party v Attorney-General (CIBA Case) (1996-97) SCGLR 729.*
> *(3) The Supreme Court's power of enforcement under article 2, by exercise of original jurisdiction, does not cover the enforcement of the individual's human rights provisions; that power, by the terms of articles 33 (1) and 130 (1), is vested exclusively in the High Court (**cf Edusei v Attorney General (1996-97) SCGLR 1; Edusei (No 2) v Attorney-General (1998-99) SCGLR 753 and Adjei-Ampofo v Attorney-General, Supreme Court, Writ No3/2003. 25 November 2003; reported in (2003-2004) SCGLR 411***
> *(4) Regardless of the manner in which they are clothed, where the real issues arising from a writ brought under article 2 or 130 (1) are not, in actuality of such character as to be determinable exclusively by the Supreme Court, but rather fall within a cause of action cognizable by any other court or tribunal of competent jurisdiction, this court will decline jurisdiction (cf **Yiadom I v Amaniampong (1981) GLR 3, SC; Ghana Bar Association v Attorney-General (Abban Case), Supreme Court, Writ No 8/ 95, 5***

December 1995; reported in 2003-2004) SCGLR 250; Edusei (No 2) v Attorney-General (supra); and Aduamoa II v Twum II (2000) SCGLR 165."

The 1992 Constitution has conferred on this court the special exclusive jurisdiction to interpret the constitution. Article 130 (1) captures it as follows:

"130 (1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in-

(a) all matters relating to the enforcement or interpretation of this Constitution; and

(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or persons by law or under this Constitution."

Article 2 (1) of the Constitution also provides as follows:

"2. (1) A person who alleges that-

(a) an enactment or anything contained in or done, under the authority of that or any other enactment; or

(b) any act or omission of any person;

is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect

….."

In the instant application, what case of interpretation or enforcement, if any, is raised by the plaintiff for determination by this court? The plaintiff has listed articles 14 (1) (e); 25 (1) (a) and 38 (2) of the Constitution and stated that on a true and proper interpretation of the Constitution, the Government of Ghana has failed to discharge its constitutional obligation of providing free, universal basic education.

This submission does not call for an interpretation as would be obvious here below, since it relates to a proper application of the provisions of the Constitution to the facts which have been strenuously listed and this of course is a clear matter for a trial court to deal with and no case of interpretation arises. The plaintiff made no effort to demonstrate any ambiguity, absence of clarity or imprecision in respect of the articles relied upon which calls for our interpretive or enforcement intervention. This is a necessary precondition to the invocation of our interpretive and enforcement jurisdiction. In our recent majority (6-3) decision in **Osei Boateng v National Media Commission [2012] SCGLR 1038 at 1041** this point was brought to the fore in holding 2 as follows:

"the requirement of an ambiguity or imprecision or lack of clarity in a constitutional provision was as much a precondition for the exercise of the exclusive original enforcement jurisdiction of the Supreme Court as it was for its exclusive interpretation jurisdiction under articles 2 (1) and 130 of the 1992 Constitution; that was clearly right in principle since to hold otherwise would imply opening the flood gates for enforcement actions to overwhelm the Supreme Court. Accordingly, where a constitutional provision was clear and unambiguous any court in the hierarchy of court might enforce it and the Supreme Court's exclusive original jurisdiction would not apply to it."

In **Republic v Special Tribunal; Ex Parte Akosah (1980) GLR 592 at 605** quoted with approval in the **Osei Boateng** case (supra), the Court of Appeal summarized the case law on the enforcement or interpretation of a provision of the Constitution. It arises in any of the following eventualities listed at page 605 of the decision:

"(a) Where the words of the provision are imprecise or unclear or ambiguous. Put in another way, it arises if one party invites the court to declare that the words of the article have a double-meaning or are obscure or else mean something different from or more than what they say;

(b) Where rival meanings have been placed by the litigants on the words of any provision of the Constitution;

(c) Where there is a conflict in the meaning and effect of two or more articles of the Constitution, and the question is raised as to which provision shall prevail;

(d) Where on the face of the provisions, there is a conflict between the operation of particular institutions set up under the Constitution, and thereby raising problems of enforcement and of interpretation.

On the other hand, there is no case of 'enforcement or interpretation' where the language of the article of the Constitution is clear, precise and unambiguous."

It does appear that the plaintiff is either unaware or feigned ignorance of the fact that articles 25 (1) (a) and 38 of the Constitution 1992 have already received judicial interpretation by this court in the case of **Federation of Youth Associations of Ghana (FEDYAG) (No 2) v Public Universities of Ghana & Ors [2011] 2 SCGLR 1081.** Owing to the relevance and importance of the decision to the present application I will quote the holdings (1) and (2) of the decision as follows:

"(1) in construing article 25 of the 1992 Constitution, guided by article 38 of The Directive Principles of State Policy and as required by article 34, the court would hold that there was a difference between article 26 (1) of the United Nations Universal Declaration of Human Rights, 1948 stating that "Everyone has a right to education" and article 25 (1) of the 1992 Ghana Constitution, providing that: "All persons shall have the right to equal educational opportunities and facilities.." The difference was mainly due to the experiences, challenges and weaknesses in Ghana's educational system and economic imbalances, which needed to be addressed to prevent the erosion of the gains that had so far been made. There was the need to address the imbalances in the infrastructural development of educational facilities in the country and the urgency to improve the quality of education, particularly in the field of science and technology for effective national development. Thus each word used in article 25 was intended to have some

effect or be of some use. And whilst the word “opportunities” in article 25 (1) might be defined as a favourable or advantageous circumstance or combination of circumstances or a good chance for advancement or progress, or simply an advantage, the phrase ‘equal educational opportunities’ might be defined as a situation in which people had the same chance or advantage in life as other people without being treated in an unfair way because of their race, colour, ethnic origin, religion, creed or social or economic status. **Edusei (No 2) v Attorney General [1998-99] SCGLR 753 (per Charles Hayfron-Benjamin JSC at 756)** cited

(2) The court would therefore hold that the effect of article 25 (1) of the 1992 Constitution, was to confer on every Ghanaian the right to have the same or equivalent chance and opportunities for educational advancement; and also the right to the same educational facilities in which to achieve that purpose regardless of his/her social or economic status, place of origin, sex or religion. However, there were inherent limitations, regulating and controlling the enjoyment of the right to equal educational opportunities and facilities. That right was subject to the capacity on the part of the student and the availability of educational facilities to be provided by the State. In the same article 25 (1), the right was qualified by clauses (a), (b) and (c) by the controlling words: “with a view to achieving the full realization of that right.” Thus under the following clauses: (a) basic education should be free and compulsory and available to all; (b) generally available and accessible at secondary, technical and vocational level; and (c) in respect to university or higher education, equally accessible to all on the basis of merit of the students and capacity of the institution; and, in particular by progressive introduction of free education at all levels. The ultimate objective of article 25 (1) was to make education free by a gradual and progressive introduction to free education at all levels. And since the right to education was for every person, article 25 (1) (d) required that functional literacy be encouraged and intensified for those who for one reason or other would be unable to pursue formal education. And under article 25 (2), persons had the right to run private schools at all levels but at their own expense. It was therefore the duty of the State to formulate and execute policies to achieve that purpose. However, under

article 38 of the Constitution those educational objectives could only be implemented by the availability of resource."

In the light of the above cited decision in which articles 25 (1) and 38 of the Constitution 1992 have received judicial interpretation by this court, what further ambiguity or imprecision or lack of clarity about those articles arises for another interpretation of the self same articles to warrant the plaintiff asking this court for "a declaration that on a true and proper interpretation of articles 25 (1) (a) and 38 (2) of the 1992 Constitution, Government of Ghana had only twelve years commencing from January 7, 1993 to January 6, 2005 to have delivered to the Ghanaian Children of School going age free, compulsory and universal basic education and that the Government has failed in discharging the said constitutional duty imposed on her by the people of Ghana." What is left for a party in these circumstances is to seek to enforce the outcome of the court's interpretation, in the FEDYAG (No 2) (supra) decision or for stated good reasons to call for a departure from our earlier decision and not to call for another interpretation simpliciter, as the plaintiff sought to do by the present writ. Reliefs (b) and (c) are no different as to what they ask for. They obviously do not raise any issues of interpretation as with enforcement which is the domain of another forum.

There is equally no relief in the conjoint issue which seeks the enforcement and interpretation of section 2 of the Education Act 2008 (Act 778), a statute. The reason for this can be discerned from the respectful view of Edward Wiredu, Acting CJ when he stated in **Amidu v President Kufuor (2001-2002) SCGLR 86** thus:

"I am of the respectful view therefore that the alleged violation of the provision of a statute such as Act 463 falls outside the provisions of Article 2 of the Constitution. For an action to lie in this court under article 2 (1) (b), a specific provision of the Constitution itself must be the subject for the consideration. The enforcement and interpretation of Act 463 of 1993 in this regard lies elsewhere and not in this court. Act 463 is not an extension of any provision of the

Constitution but a statute….In my judgment therefore this court lacks jurisdiction to entertain the plaintiff's action."

The overall submissions made by the plaintiffs relate to no more than a proper application of the relevant provisions of the Constitution to the facts in issue. This obviously is a matter for an appropriate trial court to deal with.

It is the duty of this court to decide on the true nature of a claim, however camouflaged or disguised in another form, in order to decide whether or not it is clothed with the requisite jurisdiction to entertain a case under article 130 and other provisions of the Constitution. (See **Ghana Bar Association v Attorney General & Anor (Abban Case) [2003-2004] SCGLR 250).** No matter the nature of the fancy dressing a party gives to his reliefs, it has to pass the scrutiny of this court as to whether it is an appropriate matter that invokes our jurisdiction.

We venture to make one observation. The Plaintiffs' by their plaint are seeking to enforce a human rights provision of the Constitution dressed up in the garb of interpretation and enforcement. In our thinking the real question arising from the invocation of this court's jurisdiction is whether on the facts of the case as presented, real or genuine interpretative issues arise for determination. The answer would depend, among others, upon the nature of the action, reliefs sought, the pleadings and whether or not the action is one which is camouflaged or dressed up to look like one in which the original jurisdiction of this court is required. See **per Wood, CJ, in Republic v High Court (Fast Track) Division, Accra; Ex Parte Electoral Commission (Mettle-Nunoo & Ors Interested Parties) (2005-2006) SCGLR 514.**

From the nature of the action, the reliefs sought and the pleadings filed in contention it is obvious to us that the present action has the characteristics of a camouflage to invoke our original jurisdiction. We would decline such an invitation since there is a more appropriate forum to deal with such matters as raised herein.

For the foregoing reasons the application is accordingly dismissed.

(SGD) J. B. AKAMBA
JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

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