IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: DOTSE JSC (PRESIDING)
PWAMANG JSC
AMEGATCHER JSC
PROF. KOTEY JSC
OWUSU (MS.) JSC
LOVELACE-JOHNSON (MS.) JSC
KULENDI JSC

WRIT NO. J1/06/2022

6TH APRIL, 2022

DANIEL AXIM ..... PLAINTIFF

VRS

THE ATTORNEY-GENERAL ..... DEFENDANT

JUDGMENT

LOVELACE-JOHNSON (MS) JSC:-

The Plaintiff by the present writ seeks to invoke the original jurisdiction of this court under article 2(1) and 130 (1) of the 1992 Constitution for the following five declarations and a subsequent order based on the interpretation of the clauses of article 187 stated therein:

1. *A declaration that upon a true and proper interpretation of Article 187 (3) of the Fourth Republican Constitution of the Republic of Ghana ("Constitution"),the*

Auditor-General of the Republic of Ghana ("Auditor-General") is the sole person to have access to all books records returns and other documents relating to public accounts for the purposes of auditing therefore any unauthorized auditing by any other person without reference to the Auditor-General is an infringement on the constitution and therefore null and void.

2. *A declaration that upon a true and proper interpretation of Article 187(7)(b)(i)(ii) and (iii) of the Constitution, there must have been a disallowance and a surcharge before the Attorney-General and prosecute a person whom the Auditor General has surcharged so that the amount may be recovered from the person by whom the amount should have been brought into account, therefore any prosecution in respect public account not based on surcharge is null and void as same is not in accordance with the provisions of the Constitution.*
3. *A declaration that upon a true and proper interpretation of Article 187 (9) of the Constitution, where a person aggrieved by a disallowance or surcharge made by the Auditor General may appeal to the high court, such a person cannot exercise this constitutional right of appeal where the Defendant is allowed to audit public accounts and prosecute PUBLIC SERVANTS without reference to the Auditor General.*
4. *A further declaration that upon a true and proper interpretation of Article 187 (8) of the Constitution, the Defendant can act in the name of the President and direct the Auditor-General to perform a particular audit for him and not act without reference to the Auditor.*
5. *A further declaration that the failure, refusal or neglect by the Auditor-General to issue any disallowances and surcharges in respect of (i) unlawful items of expenditure, (ii) amounts not brought into account, and (iii) losses and deficiencies incurred through negligence and misconduct can be rectified by enforcing the provisions of the constitution*
6. *An order directed at the Defendant to restrain its agencies not to engage any person or body of persons to audit any public accounts without reference to the Auditor General.*

The parties herein by a memorandum of agreed issues filed on 30th June 2021seek the resolution of the following:

1. Whether or not on a true or proper interpretation of Article 187 (3) of the 1992 Constitution of Ghana, Auditor-General has the sole preserve of auditing public accounts in all cases

2. Whether or not the Attorney General through its agents can appoint a private firm to conduct auditing into the Financial activities of a public Institution without reference to the Auditor-General

3. Whether or not the Attorney General can rely on the findings of a private auditing conducted into public financial activities without reference to the Auditor-General to prosecute a public servant

4. Whether or not the Attorney General can lawfully prosecute a public servant who has not been surcharged by the Auditor-General for any financial misconduct

5. Whether or not the prosecution of the Plaintiff at the High Court by the Attorney General for financial misconduct when the Auditor-General has not surcharged the plaintiff for any financial wrong doing is null and void

6.Whether or not the right of appeal under article 187 (9) is a bar to prosecution until same is exhausted by a person surcharged by the Auditor-General.

7. Whether or not the right of appeal under article 187 (9) of the constitution can be trampled upon by the Attorney General.

Article 2(1)one of the legs upon which the plaintiff stands to trigger this court's jurisdiction provides as follows

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 contradiction of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect

From the tenor of the plaintiff's writ and statement of case, it appears the plaintiff's complaint is founded on Article 2 (1) (b).

Article 130 (1)also provides as follows

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

The Plaintiff's reasons or the basis for the issuance of this writ can be found at pages 2 and 7 of the statement of the case filed on his behalf. It is stated at page 2 that

'It appears article 187 is ambiguous in the light of the powers granted the Defendant under article 88 to prosecute criminal cases in the country. This action therefore affects all public servants since the Defendant believes the power to prosecute means and includes power to look for any public servant in breach of any law'

At page 7, itis contended that clause (3) vests

"…the Auditor General with the SOLE right to audit public accounts or appoint a private auditing firm to do so on its behalf'.

The defendant disputes this alleged ambiguity and contends that the clauses for which interpretation is sought are clear, plain and unambiguous. That being so, this court's jurisdiction under Article 130(1) (a) has not been properly invoked.

This dispute as to whether or not the court's jurisdiction has been properly invoked has to be taken in the preliminary and discussed, which discussion would coincidentally deal with issue (1) of the memorandum of agreed issues upon which the whole case is premised. A background to the case and a summary of the cases of the parties will put the discussion of the preliminary objection into perspective

Background

The background facts relevant to this case are that during the criminal trial of the plaintiff at the High Court, among the documents filed by the Prosecution upon an order of that court, was a draft audit report from a private firm of auditors by name Baffour Awuah & Associates engaged by the Economic and Organised Crime Office, (EOCO) when it was investigating allegations of financial malfeasance against the Plaintiff who is an officer of MASLOC, (a public organization). The plaintiff raised an objection to this report on the grounds that the Defendant cannot through an investigative body like EOCO, appoint such a private firm to audit his office, a public one, without reference to the Auditor General in the face of the provisions of Article 187(3). The objection was dismissed. He then issued the present writ.

Summary of the Plaintiff's case

In a nutshell the plaintiff is of the opinion that it is the Auditor-General (and he alone) who has the power to conduct audits into public accounts and that it is only after he has performed the functions stated in Article 187(3) of the Constitution that he(ie the plaintiff) can take advantage of any of the several options stated in paragraph 22 of his affidavit of verification to wit (a) appeal to the High Court (b) refund a surcharged amount and (c) wait for Parliamentary committee on finance to discuss the issue. Further that the investigation by the private firm of auditors whose report founded his prosecution is unconstitutional since it did not follow the process set out under Article 187. It is contended that the failure to go through this process deprived the plaintiff of his 'sacred' right of appeal under Article 187(9) of the Constitution should he be aggrieved by a surcharge by the Auditor-General.

Summary of the case of the Defendant

In sum the Defendants position is that conducting forensic audits of public institutions is NOT exclusive to the Auditor-General and that this is clear from the provisions of Article 187. The defendant, it is contended, exercises his powers under Article 88 and in the process he may act upon investigations conducted by other law enforcement agencies. In exercising these powers to investigate and prosecute criminal acts, which powers could include the conduct of audits into public accounts, the issue of a surcharge or disallowance does not arise. Consequently a right to appeal against such a surcharge does not also arise. The Defendant's mandate to conduct prosecution is not subject to the powers of the Auditor-General so such prosecution cannot be rendered null and void simply because the plaintiff had been deprived of an opportunity of a surcharge he would have got had the audit been conducted by the Auditor-General.

Resolution of jurisdictional issue

In summarizing the case law on enforcement or interpretation, Anin JA in **Republic v Special Tribunal; Ex parte Akosah [1980] GLR 592**listed the circumstances under which it could be said that an issue for enforcement or interpretation arises as

(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 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 interpretation.

Do the circumstances of this case fall under any of these heads?

Article 187 with the heading"**The Auditor-General"** provides as follows

(1) There shall be an auditor-General of Ghana whose office shall be a public office

(2) The public accounts of Ghana and of all public offices, including the courts, the central and local government administrations, of the universities and public institutions of like nature, of any public corporation or other body or organization established by an Act of Parliament shall be audited and reported on by the Auditor-General

(3) For the purposes of clause (2) of this article, the Auditor-General or any person authorized or appointed for the purpose by the Auditor-General shall have access to all books, records, returns and other documents relating or relevant to those accounts.

No doubt clause (2) imposes a duty on the Auditor General to audit the accounts of all public offices which would include that of the plaintiff's employer MASLOC. To do this effectively, the Auditor General or anyone appointed by him is by clause (3) given access to the books, records and other documents of these public organizations.

Nothing in this clause bars access to these documents, books and records for other purposes except that commonsense dictates that not everyone can be given access to such documents. It would surely depend on who, their authority and for what purpose.

It is to be remembered that these documents do not belong to the Auditor-General (so he cannot put a fetter on who else has access to them) but to these public institutions hence the need to provide him or anyone he appoints in the course of his duties with authority to have access to them.

Undoubtedly the duties and powers of the Auditor –General have been clearly spelt out.

Article 88 of the Constitution states as follows

(1)There shall be an Attorney-General of Ghana who shall be a Minister of State and the principal legal adviser to the Government.

(2) The Attorney-General shall discharge such other duties of a legal nature as may be referred or assigned to him by the President, or imposed on him by this Constitution or any other law.

(3) The Attorney-General shall be responsible for the initiation and conduct of all prosecutions of criminal cases

(4) All offences prosecuted in the name of the Republic of Ghana shall be at the suit of the Attorney-General or any other person authorized by him in accordance with any law.

(5) The Attorney-General shall be responsible for the institution and conduct of all civil cases on behalf of the State; and all civil proceedings against the State shall be instituted against the Attorney-General as Defendant

(6) The Attorney-General shall have audience in all courts in Ghana.

As stated earlier, it is Plaintiff's position that "Article 187 is ambiguous in the light of the powers granted the defendant under article 88 to prosecute criminal cases in the country." and so he seeks an interpretation of certain clauses of Article 187.

The provisions on the powers of the Auditor-General and the Defendant under Articles 187 and 88 respectively are precise and clear so the plaintiff's call for interpretation cannot be triggered by the circumstances stated in (a) above.

It is not in dispute that the Plaintiff is facing certain charges in a criminal trial initiated by the Defendant by virtue of his powers under article 88.Indeed it appears the plaintiff raised no complaint about the right of the Defendant to initiate the said prosecution

which went through the calling of five witnesses until over a year later when it emerged that the Auditor from Baffour Awuah, (the private auditors) was to be called as the 6th prosecution witness. It was then that he raised a legal objection challenging the jurisdiction of the court.

What then is the Plaintiff's complaint against the Defendant? It would appear in essence to be that he has 'audited' MASLOC, a public entity through EOCO, an investigative body which is mandated by section 3 the Act creating it (Act 804) to

Investigate and on the authority of the Attorney-General prosecute serious offences that involve:

(1) Financial or economic loss to the Republic or any State entity or institution in which the State has financial interest

EOCO has power to engage the services of advisers such as auditors to facilitate investigationsupon the recommendation of its Board.

Clearly this office had power to investigate MASLOC and in the performance of this investigative function engage the services of certain outside bodies (advisers) to help with its investigations. Plaintiff, it appears takes the position that the forensic auditing aspect of the investigation,having been done by a firm, upon the authority of EOCO, and not by the Auditor-General is unconstitutional.

The mandate of the Defendant under Article 88 being soclear,it appears that the complaint by the Plaintiff of ambiguity in Article 187 is because he persists in seeing a relationship between that Article and Article 88 which empowers the defendant. There is no such relationship. He conveniently creates such a connection by reading into Article 187(3) an exclusive right of the Auditor-General to the documents of a public office needed to conduct an audit. No such exclusivity is evinced by the provision. The express **OMISSION** of the word SOLE, (which word has beenused in the first relief sought by the plaintiff) in the wording of the provision prevents this court from

grantingthe said relief because it would mean importing a restrictive meaning into those clear provisions.

This court has stated time without number that it will not embark on the interpretation of Constitutional provisions where the words are plain clear and unambiguous. See the case of

Tuffour v Attorney-General [1980] GLR 637@ 648 where in refusing to apply Article 2, it was stated that

*'We are precluded, **by express omission**, from dealing with article 2, whatever coherence or symmetry that may have with the Constitution as a whole. The words of section 3 admit of no ambiguity'*

The cases of

Ghana Bar Association v Attorney-General and Anor 1 SCGLR 250and

Tait v Ghana Airways Corporationunreported decision of this court dated 29th July 1970 cited in **Ex parte Akosah** (supra)

make the same point. The court held in the**Tait** case as follows

"If the words of the statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature…. Where the language of the Constitution is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise"

It was again stated in the case of

James Kwabena Bomfeh Jnr v Attorney-General, Writ No 31/14/17, unreported judgment of this court dated 23rd January 2019 as follows

"A Constitutional issue is not raised on account of a Plaintiff's absurd, strained and farfetched understanding of clear provisions in the Constitution. For a person to assert a

manifestly absurd meaning contrary to the very explicit meaning and effect of clear words in the Constitution does not mean that a genuine issue of interpretation of some relevant Constitutional provision has arisen"

It is also obvious that Plaintiff's writ does not fall under (b) and (c) because the matter of disallowances and surcharges dealt with by clauses 7 (b) (i) (ii) and (iii), (9), of Article 187 which he wants interpreted are of no relevance to the Defendant in the performance of his duties in the circumstances of this and so cannot be a source of dispute in relation to their meanings. There is also no conflict in the effect of the above clauses vis a vis the powers of the defendant under article 88. Both bodies exercise their powers without recourse to the other though they may both make use of documents from the same organizations. That does not amount to a conflict which can be resolved by an interpretation of the Articles of the Constitution creating them.

It appears that the plaintiff believes that the powers exercised by the Defendant under Article 88 intrude on those exercised by the Auditor-General, a power the Plaintiff wrongly assumes gives the latter sole access to books, records etc when he is auditing public organisations. In the light of the clear provisions of both articles it will be untenable to read from the said provisions an intention by the framers that the Defendant cannot *"act without reference to the Auditor-General"* when he sees the need to authorize the conduct of an auditusing the books of a public organisation to aid a successfulprosecution.

Having taken this position, we conclude that there is no conflict between the operations of the Auditor-General and the Defendant, whether or nota person such as the Plaintiff loses certain opportunities such as a surcharge and the right to appeal to the High court when it is the Defendant who initiates prosecution as has been done in his criminal trial. In any case, in the last mentioned circumstance he also has a right to appeal if dissatisfied with the verdict. The Plaintiff can again not trigger this court's exclusive jurisdiction of interpretation under (d).

From all the above, we are satisfied that this court's said jurisdiction has not been properly invoked.

The 5th declaration and 6th order sought are not tied to an interpretation of any provision of the Constitution but cannot be granted for the simple reason that in respect of the 6th relief, Article 187 does not put a fetter on the defendant in the exercise of its mandate under Article 88. He cannot therefore be restrained in any way in the lawful exercise of those functions byan enforcement order from this court.The act complained of, that is the use of an audited report prepared by a private firmunder the authority of the defendant, in the course of the prosecution of a criminal case, is not beyond the ambit of that mandate as seen from the constitutional provisions earlier reproduced.

Regarding relief (5), the plaintiff has not produced any evidence of such failure, refusal, or neglect on the part of the Auditor General, who in any case is not a party to this matter.

In conclusion, being satisfied that the provisions of the Constitution under discussion are clear and unambiguous and require no interpretation and following the practice of this court to consistently guard *"against the invitation to assume jurisdiction…. Whereas no issue of interpretation genuinely arises upon a careful scrutiny of same;* **(James Kwabena Bomfeh Jnr v Attorney General** (supra) and being further satisfied that the Defendant has not encroached on the powers of the Auditor General and so does not require an order compelling him to restrain its agents from auditing public accounts without reference to the Auditor General; the present action fails firstly on the ground that this court's interpretation jurisdiction has not been properly invoked and secondly that the order sought under relief (6), if granted will amount to an interference with the defendant's mandate under article 88 of the Constitution.

A. LOVELACE-JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)
V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER
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