THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- AD 2019

CORAM: YEBOAH JSC (PRESIDING)

BAFFOE- BONNIE JSC

BENIN JSC

PWAMANG JSC

MARFUL-SAU JSC

DORDZIE (MRS) JSC

KOTEY JSC

WRIT
NO J1/ 9/ 2018

19TH DECEMBER, 2019

FRED KWASI AWUAH .... PLAINTIFFS

VRS

1. THE HONORABLE CHIEF JUSTICE
2. THE HONORABLE ATTORNEY GENERAL

.... DEFENDANTS

JUDGMENT

BENIN, JSC:-

Introduction: Plaintiff's case

The plaintiff filed a writ before this Court claiming that the Chief Justice, the 1st Defendant herein, has committed infringement of the 1992 Constitution

by writing to suspend him from office as a High Court judge, pending impeachment proceedings against him for his removal from office. He claims that it is only the President of the Republic who is empowered to suspend a Judge under article 146(10)(b) of the Constitution. In the affidavit in support of the writ, the Plaintiff recounted the facts leading to the setting up of an impeachment committee to investigate bribery allegation against him. He claims the Chief Justice has no role to play in suspending a judge who is undergoing impeachment. He therefore sought the following reliefs from this court:

1. A declaration that by the true and proper interpretation of Articles 2(1), 130, 146(10) of the 1992 Constitution, it is only the President of the Republic who can suspend a Justice of the superior court who is facing an impeachment committee for removal from office.

2. A declaration that by the true and proper interpretation of the said Article 146(10)(b) of the 1992 Constitution, the power of the President of the Republic to suspend a Justice of the superior court during impeachment proceedings cannot be delegated to the Chief Justice.

3. A declaration that the Chief Justice cannot suspend a Justice of the superior court who appears before an impeachment committee set up under Article 146 for the purpose of removal from office.

4. A declaration that the suspension of the Plaintiff from office contained in the 1st Defendant's letter dated 24th March 2016 is in breach of the Constitution and null and void.

5. An order of the court directed to the 1st Defendant to allow the Plaintiff to perform his duties as a Justice of the High Court.

Defendants' case

The defendants argued simply that the Chief Justice has the implied authority of the President to suspend a judge who has committed infractions of the criminal law, upon a purposive construction of some named provisions of the Constitution. They maintain the position that the Chief Justice acted to suspend the Plaintiff on the written authorization of the President and this accords with the provisions of Article 146(10)(b) of the Constitution.

Agreed issues

The parties agreed on the following issues:

1. Whether the President indeed directed the Chief Justice to suspend the plaintiff.

2. If the President indeed directed the Chief Justice to suspend the plaintiff, is such a suspension in accordance with article 146 of the Constitution, 1992?

3. Whether or not the Chief Justice can suspend a Justice of the superior court as in the case of the plaintiff.

4. Whether in the circumstances of this case the Chief Justice has not breached article 284 of the Constitution.

Issue 1

The parties appeared to be disputing over the core facts in the case. The point of factual disagreement between the parties relates to whether in fact and indeed the President of the Republic did write to the Chief Justice to suspend the Plaintiff. The Plaintiff claims there was no such written authorization, but the defendants maintain that there was. After a protracted discourse, the defendants filed a copy of the authorization letter in these proceedings. The Plaintiff has mounted a serious challenge to this letter, claiming, in a nutshell, that it is fake and a forgery. He catalogued a number of reasons for this claim and urged the court to reject it. The defendants opposed this, saying the letter must be accepted as an official deed.

In a case of constitutional interpretation, it behoves the plaintiff to restrict the facts to only the material ones which are incontrovertible, as the court does not embark upon making findings of fact before interpreting the constitutional provision/s in issue. Where the facts are disputed, it would not be a fit case to invoke the court's original jurisdiction to interpret the Constitution under Article 130, in so far as a case of constitutional interpretation is not a safe battleground to resolve disputed facts. In short, the court does not sit as a trial court when its interpretative jurisdiction is invoked.

Where the court is enjoined to sit as a court of first instance to resolve disputes, clear provision is made in the Constitution, like in matters of presidential election disputes. The court may also decide to take evidence in exercising its other jurisdiction, like in appeals, which gives it opportunity to re-hear the matter, or in enforcement of its decisions. But in matters of constitutional interpretation, it deals with purely questions of law, upon the assumption that the underlying facts are correct and undisputed.

Elsewhere, the courts frown on what is termed constitutional fact-finding. In the USA, the Supreme Court describes it as interpreting the facts, and not as finding the facts. It is another way of saying the Supreme Court is not a trial court to make findings of fact, when its jurisdiction to interpret the constitution is invoked. That court has used the best guess or factual assumption approach as it fits a given case. See for instance Gibbons v. Ogden, 22 U. S. (9 Wheat) 1 (1824). Other approaches have been adopted, short of making direct findings of fact.

In an article published in the January 1991 issue of the University of Pennsylvania Law Review by David L. Faigman titled “Normative Constitutional fact-finding: Exploring the empirical component of constitutional interpretation”, the author posited that facts are important as they supply the fulcrum for discerning the clear understanding of the constitutional provision, and also provide the foundation that supports the soundness and legitimacy of the judgment. That “the facts guide and restrain constitutional interpretation” , he wrote. We share these views, as long as the court does not have to make findings of disputed facts.

In the matter before us, we will assume the correctness of the facts, as evidenced by the documents exhibited, as we have them on the record as the foundation for the constitutional interpretation. We do so upon realization that the court should just invoke the presumption of regularity under section 37(1) of the Evidence Act, 1975, NRCD 323, popularly known by its Latin expression 'omnia praesumuntur rite esse acta', and proceed to dismiss the challenge 'in limine'. Also, if the plaintiff had cause to doubt the authenticity of the President’s letter, he should have proceeded to the trial court to test the factual foundation of his suspension by leading evidence to rebut the

presumption of regularity. Having failed to do that he cannot be permitted to use this court as a trial court when the business before the court is one for constitutional interpretation. Thirdly, by the very reliefs placed before this court, the Plaintiff has accepted the fact that the Chief Justice acted on the written authorization by the President, and the entire reliefs are based on the truthfulness of these facts. Thus, the challenge to the written authorization undermines the entire case and is contradictory in terms. We reject the challenge to the President's letter accordingly.

We proceed to resolve Issue 1. This is purely a question of fact and construction of documents, not one for constitutional interpretation. We reiterate what we have already stated, that the letter from the office of the President is presumed to be regular, the presumption not having been rebutted in proceedings before a trial court. The letter from the office of the President, dated 24 March 2016 reads:

“RE: SUSPENSION OF HIS LORDSHIP JUSTICE FRED KWASI AWUAH IN ACCORDANCE WITH ARTICLE 146(10)(b)

Thank you for your letter No. SCR/23Vol.14 of 10th March 2016 on the above subject.

In accordance with Article 146(10)(b) of the 1992 Constitution of the Republic of Ghana, I hereby uphold the recommendation to suspend Justice Fred Kwasi Awuah from office as a Justice of the High Court.

Kindly proceed with action on the matter through further due process.”

The President was reacting to a recommendation by the Judicial Council to suspend the Plaintiff from office. The said recommendation was contained in a letter dated 10th March 2016, signed by the Chief Justice.

On the strength of the President's letter, the Chief Justice wrote a letter to the plaintiff dated 24 March 2016 and it reads: “I write to inform you that His Excellency the President in accordance with Article 146(10)(b) of the 1992 Constitution.....has directed that you should be suspended from office as a Justice of the High Court. You are therefore suspended from office with immediate effect.”

It is this communication from the Chief Justice which has sparked this action. The two letters are clear enough and warrant no construction. The President accepted the recommendation of the Judicial Council to suspend the plaintiff and he directed the Chief Justice to carry out the decision. The first issue is thus answered in the affirmative.

Issue 2

The Plaintiff's case is very simple and straightforward. It is that by the scheme of things as set out in Article 146(10)(b), the Chief Justice has no role to play in the suspension of a judge who is before an impeachment committee. That a recommendation to suspend such a judge has to be made by the Judicial Council to the President who acts on the recommendation to suspend the judge concerned. In his words, “the power to suspend excludes the Chief Justice from the process.” There is a fundamental fallacy in this argument, because the Chief Justice is the Chairperson of the Judicial Council which makes a recommendation to suspend a judge, consequently he/ she has a role to play in the suspension of any such judge.

It should be noted from the onset that there is a difference between decision-making and execution and/or communication of a decision already taken.

The former may not be delegated, but the latter may. For, executing the decision is an administrative act. It is merely carrying out what the editors of Black's Law Dictionary, 9th Edition, at page 526 describe as "an instruction on how to proceed". And as explained in the case of Benson v. Benson (1941) P 90 at 97, per Lord Merriman P, direction is given only after judgment; thus it does not entail decision-making.

Under Article 146(10)(b) it is the Judicial Council that makes a recommendation to the President to suspend a judge who is facing an impeachment committee. The President has the discretion whether or not to accept the recommendation; in other words, the decision to suspend or not is entirely his to take. The question that is agitating the plaintiff is that the President should take the decision and sign the suspension letter himself. Consequently, the direction or authorization given to the Chief Justice is not in accord with the constitutional provision, Article 146(10)(b), to be precise.

It is pertinent to cite the entire provisions of Article 146(10) at this point. They read thus:

146(10) Where a petition has been referred to a committee under this article, the President may-

(a) in the case of the Chief Justice, acting in accordance with the advice of the Council of State, by warrant signed by him, suspend the Chief Justice,

(b) in the case of any other Justice of a superior court or of a chairman of a Regional Tribunal, acting in accordance with the advice of the Judicial Council, suspend that Justice or that Chairman of a Regional Tribunal.

It is clear, as earlier mentioned, that the Constitution gives the President power to suspend a judge who is facing an impeachment committee. That

decision-making cannot be delegated for two reasons. To begin with, the provisions have been crafted in a manner as to involve both the Executive and Judiciary in the process of impeaching a judge. It ensures broad-based supervision of, and transparency in, the entire process. The purpose of the provision would thus be defeated if the Executive cedes its role to the Judiciary in this process. Next, there will be a conflict of interest situation contrary to Article 284 of the Constitution because the Chief Justice, as Chairperson of the Judicial Council, cannot act as advisor and decision-maker at the same time. It amounts to taking a decision on his own recommendation. Conflict of interest arises in this context because of the incompatibility of the two acts of advisor and decision-maker.

Then there is the vexed question whether the President can direct the Chief Justice, and for that matter and other person, to carry out the decision taken by him under article 146(10)(b). This is the climacteric moment as far as issue 2 goes. The President's letter, quoted supra, states clearly that he had accepted the recommendation of the Judicial Council to suspend the plaintiff from office. This means he has taken a decision to suspend the plaintiff, in accordance with the recommendation. And that fully complies with article 146(10)(b).

The letter asked the Chief Justice to carry out the decision. That is also perfectly within the provision. To decide otherwise would mean importing words similar to those used in Article 146(10)(a). Under paragraph (a) of article 146(10), the President is enjoined to personally execute the warrant to suspend the Chief Justice. That requirement is significantly left out in paragraph (b) in matters involving any other judge. This was not a mere omission, but was done on purpose, to enable the President to direct another

person to carry out his decision. It does not entail taking any constitutionally-mandated decision on behalf of the President, hence it can readily be delegated under the President's broad power of delegation under article 58(3) of the Constitution. The court is not entitled to import other words into the constitutional provision, especially so when the provision, as it stands, is clear, purposeful and meaningful. Issue 2 thus fails.

Issue 3

The Plaintiff's case is that the Chief Justice has no power to suspend a judge under Article 146(10)(b) of the Constitution. He can only interdict a judge who is not facing an impeachment committee. For their part, the Defendants cited and relied on the case of Justice Edward Boateng, infra, and concluded that the Chief Justice has the "presumed authority of the President" to suspend a judge.

A judge can be suspended by the Chief Justice, employing his/her administrative power over all staff, including judges, who are alleged to have committed infractions of the criminal law or committed misconduct that warrants their impeachment. The power is assumed as an incidence to the office as administrative head to ensure good governance over the organization. A combined reading of Articles 125(4) and 297(c) supports this view. These constitutional provisions read:

125(4) The Chief Justice shall, subject to this Constitution, be the Head of the Judiciary and shall be responsible for the administration and supervision of the Judiciary.

297(c) Where a power is given to a person or authority to do or enforce the doing of an act or a thing, all such such powers shall be deemed to be also given as are necessary to enable that person or authority to do or enforce the doing of the act or thing.

As earlier mentioned, the power to discipline a judge is a necessary tool in exercising the supervisory responsibility entrusted to the Chief Justice under Article 125(4).

The situation on hand is distinguishable from that in the case of Justice Edward Boateng v. The Judicial Secretary & 2 Others, Suit no. J6/3/2017, dated 28 February 2018, unreported, which the parties referred to. That case affirms the position that the Chief Justice has the implied power of the President, who appoints the judges, to discipline erring judges.

But it must be noted that in the Justice Edward Boateng case, the judge was not placed before an impeachment committee, hence the President's power to suspend such judge had not arisen in the matter. The decision must be understood in that context, and the facts must be distinguished from the instant case. The power the Chief Justice exercises in an administrative capacity is independent of that exercised by the President under article 146. It must be emphasized that, where a judge is facing an impeachment committee, the provisions under article 146(10)(b) in respect of suspension of such judge, must prevail; the implied power exercised by the Chief Justice does not arise.

In the instant case, the Plaintiff is facing an impeachment committee hence the power to suspend him is vested in the President upon the recommendation of the Judicial Council. The decision to suspend the Plaintiff

was rightfully taken by the President upon the recommendation of the Judicial Council. The Chief Justice carried out the decision upon direction from the President, as fully explained under Issue 2. Hence there was no infraction of the provisions under article 146(10)(b) as the Chief Justice did not purport to act on her own.

Issue 4

Whether or not the Chief Justice is in breach of article 284 of the Constitution. The said article provides:

A public officer shall not put himself in a position where his personal interest conflicts or is likely to conflict with the performance of the functions of his office.

The operative expression in this provision is “personal interest”. What constitutes personal interest cannot be defined generally, but contextually. Thus, in a given case, the court will have to determine in the context and circumstances, whether the public office holder can be said to have a personal interest in the matter, and if so, whether it conflicts, or is likely to conflict, with the performance of the functions of his office. Factors constituting personal interest are varied and diverse and cannot be foreclosed; what passes for personal interest in one case, may not qualify as personal interest in another. Hence, the difficulty and inadvisability in defining the expression.

The Plaintiff's case is that it was the Chief Justice who submitted the petition to the President; she it was who set up an impeachment committee to investigate the plaintiff and she it was who also wrote a letter suspending

him from office. In the plaintiff's view, as per his statement of case, the Chief Justice's "conduct in the prosecution of this case should be a restraining factor for her to suspend the Plaintiff."

The decision to petition the President against the plaintiff was taken by the Judicial Council. The Chief Justice is the Chairperson of the Judicial Council, by virtue of article 153(a) of the Constitution. Thus the petition submitted by the Chief Justice on behalf of the Judicial Council was in her capacity as Chairperson of the Council, it was not a personal act. Then the setting up of the impeachment committee is also mandated by article 146(4) of the Constitution. It was also not a personal act. The decision to suspend the plaintiff was taken by the President under article 146(10)(b); the Chief Justice carried out the decision as directed by the President. In none of these actions could the Chief Justice be said to have done anything that suggests personal interest. She was not the plaintiff's accuser, and was not said to have any interest in the accusation beyond following due process in investigating it. There is thus no merit in this issue.

Conclusion

We find no merit in any of the issues set down. Consequently, none of the reliefs sought can be granted by the court. In the result the action entirely fails.

SGD. A.A. BENIN

JUSTICE OF THE SUPREME COURT

SGD. ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

SGD. P. BAFFOE- BONNIE

JUSTICE OF THE SUPREME COURT

SGD. G. PWAMANG

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