THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- AD

CORAM: ANIN YEBOAH JSC(PRESIDING)

BENIN JSC

APPAU JSC

PWAMANG JSC

MARFUL-SAU JSC

DORDZIE JSC

KOTEY(PROF) JSC

WRIT
NO J1/ 12/ 2018

19TH DECEMBER, 2019

MR. JUSTICE KWAME ANSU-GYEABOUR (RTD) ……PLAINTIFF

VRS

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

JUDGMENT

The plaintiff herein was a Superior Court Judge and a retired justice of the High Court. He retired from office on the 1st day of May, 2015 as per article 145 (2)(b) of the Constitution, 1992. The said article reads: "***(2) A Justice of the Superior Court or a Chairman of a Regional Tribunal shall vacate his office, (b) in the case of a Justice of the High Court or a Chairman of a Regional Tribunal, on attaining the age of sixty-five years".*** This means plaintiff had reached the compulsory retirement age of sixty-five (65) years as at 1st May 2015, so by operation of law as obligated

by the Constitution, 1992, he had immediately ceased to be a Justice of the High Court subject only to extension as permitted under article 145 (4) of the Constitution, 1992. This clause (4) of article 145 provides:
"Notwithstanding that he has attained the age at which he is required by this article to vacate his office, a person holding office as a Justice of the Superior Court or a Chairman of a Regional Tribunal may continue in office for a period not exceeding six months after attaining that age, as may be necessary to enable him to deliver judgment or do any other thing in relation to proceedings that were commenced before him previous to his attaining that age".

The grant of extension for six more months and not more under the above provision, normatively, is not automatic but permissible, subject to approval by the Chief Justice (1st defendant herein) who is the head of the Judiciary. Plaintiff's retirement, which obligated him to vacate office, commenced immediately on 1st May, 2015 when the 1st defendant had earlier on turned down his request dated 10th April 2015, praying her to invoke article 145 (4) in his favour, to enable him deliver some judgments then pending before him.

The quintessence of the matter before the Court

The gravamen of plaintiff's writ is that he has constitutionally retired under article 145 (2)(b) of the Constitution, 1992 after working continuously for about twelve (12) years as a superior court judge and therefore qualifies for pension under article 155 of the Constitution, 1992. However, the 1st defendant has wrongfully and unconstitutionally withheld his gratuity and end of service benefits since his retirement on 1st May, 2015. The ground upon which the 1st defendant purported to do that was that there was a pending impeachment proceeding against him before his compulsory retirement became due and until his fate under that process was determined, he would not be paid his retirement benefits. This unconstitutional conduct of the 1st defendant, as plaintiff termed it, has deprived him of his legitimate livelihood. His writ, invoking the original jurisdiction of this Court, was therefore to seek redress on the following reliefs:

1. *A declaration that plaintiff, having worked as a High Court Judge and retired compulsorily, he could not be a subject of any constitutional*

procedures set out for the removal of a Justice of the Superior Court under article 146 of the Constitution, 1992;

2. *A declaration that the withholding of plaintiff's gratuity and retirement benefits on the orders of the 1st defendant since 1st May 2015, is unconstitutional;*
3. *An order compelling the 1st defendant to cause to be issued to the plaintiff a retirement letter in line with official judicial service practice and for a further order for the payment of plaintiff's retirement benefits to him;*
4. *General damages for emotional and financial stress caused to the plaintiff due to the unconstitutional conduct of the 1st defendant;*
5. *Any further orders(s) the Court deems fit.*

The 1st and 2nd defendants filed a joint statement of defence. Their main defence was that plaintiff was facing impeachment proceedings prior to his retirement to determine whether or not he could be removed from office without any retirement benefits under article 145 (2)(c), but plaintiff used delay tactics or what they termed 'judicial gymnastics', to frustrate the completion of the process till he retired. According to defendants, plaintiff stalled the impeachment proceedings by; "*deliberately failing to prosecute his appeal before the Court of Appeal against the judgment of the High Court which dismissed his complaint against his impeachment"*. It was therefore plaintiff's diabolical ploys that delayed the completion of the impeachment proceedings commenced by the Justice Adinyira Committee that was established by the 1st defendant on the authority of article 146 (4) of the Constitution, 1992. The 1st defendant therefore acted fairly and constitutionally in ordering for the withholding of plaintiff's retirement benefits until the impeachment process was brought to its logical conclusion, to determine plaintiff's fate instead of allowing him to benefit from his own wrongs with the use of unnecessary court processes to forestall his impeachment process. Defendants accordingly prayed that plaintiff must be ordered to appear before the Justice Adinyira Committee for the continuation of his impeachment proceedings before he could qualify for the payment of his retirement benefits upon exoneration, notwithstanding the fact that he has statutorily retired from office as a High Court Judge.

The nature of plaintiff's reliefs

Plaintiff's prayer involves both the interpretation and/or enforcement of provisions of the Constitution, 1992. His reliefs are therefore being sought under articles **2 (1)(b)** and **130 (1)(a)** of the Constitution, 1992. These articles provide:

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

Issues

The parties agreed on three issues for determination by this Court in their joint memorandum of issues filed on 15/02/2019. This Court, however, narrowed the issues to two; i.e.

1. *Whether or not the plaintiff, in spite of attaining the compulsory retirement age of 65 years, in the circumstances of this case, is still subject to proceedings under article 146 of the 1992 Constitution; and*
2. *Whether or not in terms of article 155 (1) (a) and (2) of the 1992 Constitution, the 1st defendant could write the letter dated 7th April, 2015, withholding the plaintiff's gratuity and retirement benefits.*

Plaintiff's case

Plaintiff's case in brief was that when he made his first appearance before the Impeachment Committee (i.e. the Adinyira Committee), he got to know

that it was the 1st defendant who addressed a petition against him to the President to be impeached on the basis of the two findings made by the two committees she and the Judicial Council had earlier on set up. He therefore protested before the Justice Adinyira Committee against the way he had been treated as he had not been given copies of the reports that allegedly indicted him for misconduct, leading to the establishment of the Justice Adinyira Committee, notwithstanding his demand for them. He therefore exercised his constitutional right and issued a writ of summons against the defendants in the Human Rights Division of the High Court, challenging the propriety of his impeachment. Plaintiff named the other members of the Justice Adinyira Committee as; Justice R. K. Apaloo of the Court of Appeal, Justice Charles Quist of the High Court, Reverend Samuel Otu Pimpong and Madam Yvonne Sowah. According to plaintiff, he successfully applied for an interlocutory injunction to restrain the Justice Adinyira Committee from continuing with his impeachment pending the final determination of his suit before the High Court. The High Court, in the course of the proceedings before it, referred aspects of the matter to the Supreme Court, per article 130 (2) (f) of the Constitution, as in its view, the issues raised by plaintiff's action called for the interpretation of some provisions of the Constitution, 1992. This Court, on the 31st day of January, 2013, per R. C. Owusu, JSC, gave its opinion on the issues referred to it by the trial High Court and remitted the matter back to the trial court for continuation.

Plaintiff alleged that after the remittance of the suit to the High Court by the Supreme Court for continuation, the High Court did not follow procedure and proceeded to dismiss his action without offering him any hearing on the 14th day of May 2013. He therefore appealed against the decision of the trial court to the Court of Appeal on 12th June 2013, as in his opinion, he was neither treated fairly nor heard by the trial High Court. He cited the cases of; **IN RE-EFFIDUASE STOOL AFFAIRS (NO.2) ODURO NUMAPAU, PRESIDENT OF THE NATIONAL HOUSE OF CHIEFS, EX-PARTE AMEYAW II (NO. 2) [1998-99] SCGLR 639,** and **IN THE MATTER OF REFERENCE, THE REPUBLIC v EUGENE BAFFOE–BONNIE & 4 OTHERS, SUIT NO. J6/1/2018, DATED JUNE 7, 2018**, to support his arguments.

Plaintiff contended further that though he did not seek any order to stay the execution of the judgment of the High Court pending his appeal against same to the Court of Appeal, the Justice Adinyira Committee never invited him for the commencement of his impeachment proceedings after the dismissal of his case by the High Court on the 14th day of May 2013. According to him, the Justice Adinyira Committee did not invite him for the continuation of his impeachment not because he employed delay tactics or judicial gymnastics or maneuvers to frustrate its proceedings, as contended by the defendants, but because there was no such committee called **'Justice Adinyira Committee'** in place at the time, as the Committee had lost two of its members through retirement and suspension more than three (3) years before his retirement on 1st May 2015. Justice R. K. Apaloo voluntarily retired from office as a Court of Appeal Judge on 1st April 2011 (just about three months after the establishment of the Justice Adinyira Committee) and therefore ceased to be a member of the Committee since then; (i.e. more than four years before plaintiff statutorily retired under article 145 (2)(b). Justice Charles Quist was also implicated in the Anas/Tiger 'I' PI expose' and was on suspension a couple of years before plaintiff's compulsory retirement on 1st May, 2015. Both members of the Committee were never replaced by the 1st defendant. To his knowledge therefore, the Justice Adinyira Committee was non-existent as it was never reconstituted by the Chief Justice (1st defendant) to commence his impeachment after the dismissal of his case by the High Court on 14th May 2013, neither was any new Committee put in place by the 1st defendant to do so, until he statutorily retired two years afterwards on 1st May 2015, whilst in active service as a justice of the High Court. He concluded his statement by saying that some few weeks to his retirement, the 1st defendant wrote Exhibit **'KAG1'** to him withholding his retirement benefits till the completion of the impeachment process, which was non-existent for almost two years due to the inaction of the 1st defendant to reconstitute it. The exhibit in question, which was dated 7th April 2015 and signed by the First Deputy Judicial Secretary Mrs. Justice Juliana Amonoo-Neizer reads: -

"RETIREMENT OF A SUPERIOR COURT JUDGE

ON THE ATTAINMENT OF SIXTY-FIVE (65) YEARS

Records available in this office indicate that you will attain the compulsory retiring age of Sixty-five (65) years on 1st May, 2015.

I have instructions of the Honourable Lady Chief Justice therefore to inform you that you will retire as a Justice of the High Court on 1st May, 2015 in accordance with Article 145(2) (a) (sic) of the 1992 Constitution.

You are to take note that, in view of the Impeachment proceedings against you, the processing of your retirement benefits will be withheld until the determination of the matter".

*{It must be emphasized that the article of the Constitution, 1992 that the above letter was making reference to was **145 (2)(b)** but not **145 (2)(a)** as mentioned in the letter since plaintiff was a High Court Judge but neither a Supreme Court nor a Court of Appeal Judge}*

Determination of the issues before the Court

It is interesting to note that the issues raised in this matter have been dealt with comprehensively by this Court in the case of **FRANK KWADWO AMOAH v ATTORNEY-GENERAL [2013-2015] 2 GLR 246**. Both parties have copiously referred to this case in their various statements of case. Though the facts in the *Amoah case* are a little bit different from the instant one before us, the main issues raised in the two cases are the same. The only difference between the two cases is that whilst in the Amoah case, the plaintiff did not go to court to challenge his impeachment; the plaintiff in this case went to court to challenge his impeachment after his first appearance before the Justice Adinyira Committee. His action was however dismissed by the High Court to pave way for his impeachment. Notwithstanding this slight difference in the two cases, the paramount issues considered by this Court in the *Amoah case* (supra), which this Court unanimously settled on, are the very issues to be determined by us in this matter. These are:

i. ***Whether or not a Superior Court judge upon attaining the compulsory retiring age is amenable to impeachment proceedings; and***

ii. Whether or not inordinate delay in pending impeachment proceedings should deny a retired judge his entitlements and benefits upon attaining the compulsory retirement age.

In the Amoah case (supra), this Court, per Anin-Yeboah, JSC, after analyzing the relevant articles of the Constitution, 1992 on the retirement and impeachment of Justices of the Superior Courts; particularly articles 145, 146 and 155, held at page 257 as follows: - ***"We have carefully given thought and consideration to the various articles of the constitution to which reference has been made in the course of this judgment and have come to the opinion that article 146 of the constitution deals with persons who are in the employment of the Judiciary as judges and does not apply to judges who have retired by operation of law compulsorily. We are of the view that as impeachment proceedings are for the purpose of removing a serving judge from employment on clearly stated constitutional grounds, it is unreasonable to impute to the law-maker that the provision was intended to apply to retired judges as well. A judge who has compulsorily retired is clearly outside the scope of article 146. The operative words which describe the consequence of impeachment as provided in article 146, "shall be removed from office", render any other interpretation of the consequences of retirement on the impeachment process not only unreasonable but an abuse of language…"*** The Court continued further to hold as follows: ***"We are of the view that if the impeachment proceedings were ongoing before the retirement of the plaintiff, his retirement cannot bring them to an end as the matters giving rise to the proceedings would have given rise during his tenure.."*** {Emphasis added}.

The etymological meaning or definition of the word "**ongoing**" has been given as: - "**A.** noun - **1**. The action of going on; process, continued movement or action. **2**. In *pl*. Goings-on; proceedings, doings. **B**. adjective – Going on, in progress, continuous, current."… *{See the Shorter Oxford Dictionary (Deluxe Edition), Sixth Edition, Vol. 2, p. 2003}.* From the above definition, before something could be said to be ongoing, it must be in progress; it must be continuous and it must be current. Plaintiff has argued, as recounted above that he was not the cause of the inability of the Justice Adinyira Committee to bring to finality the impeachment proceedings

against him. He denied ever using any court processes to stifle his impeachment process as the defendants have alleged. According to him, any delay on the part of the Justice Adinyira Committee to bring to finality his impeachment before he compulsorily vacated office as a Justice of the High Court per the Constitution, 1992, was not his making, but that of the 1st defendant. According to him, for almost two years after the dismissal of his action by the High Court on 14th May 2013 and before his retirement on 1st May 2015, the 1st defendant had ample time and opportunity to reconstitute a new impeachment committee to impeach him after the exit of Messrs Justices R. K. Apaloo and Charles Quist from the Committee. Nothing, according to plaintiff, restrained the 1st defendant from doing so as there was no form of a restraining order inhibiting the 1st defendant from performing her constitutional duty. However, the 1st defendant did not reconstitute the Committee throughout this whole period up to the time of his retirement two years afterwards. Meanwhile, throughout this period, he was still performing his functions as a sitting High Court Judge without any suspension order whatsoever from the President as provided under article 146 (10)(b) of the Constitution, 1992. He added further that if his intention was to evade impeachment through retirement, he would not have requested for an extension of six (6) months as provided under article 145 (4) of the Constitution, to continue in office to enable him deliver some judgments pending before him.

From the submissions of plaintiff, there were no ongoing impeachment proceedings against him as at the time his retirement became due, so the conclusion of this Court in the *Amoah case* (supra) as to how proceedings under article 146 could follow a superior court judge into retirement does not apply to him. This conclusion was that: ***(i)*** *where the impeachment process commenced before an Impeachment Committee while the judge was in office and continued uninterrupted or was ongoing up to the date of retirement;* ***(ii)*** *where the impeachment process commenced whilst the judge was in office but could not be completed by the said Committee at the time the judge retired, due to deliberate acts employed by the judge to frustrate the work of the committee until he/she retired.*

Judging from the circumstances of this case, as disclosed by the facts and arguments advanced by both parties in their various statements of case and legal arguments, can it be said that plaintiff deliberately employed legal

processes to delay his impeachment so that he could retire to enjoy his gratuity and retirement benefits without facing a possible removal from office? We do not think the defendants have been able to establish this fact. They could not give any legitimate answers to the concerns raised by the plaintiff as recounted above. Defendants have not disputed the fact that plaintiff has constitutionally retired from office as a Justice of the High Court, having reached the compulsory retirement age of sixty-five (65) years as specified under article 145 (2)(b) of the Constitution, 1992, as at 1st May 2015. Defendants again, have not disputed the fact that plaintiff, having worked continuously for about twelve (12) years as a Justice of a Superior Court, is entitled to retire on conditions provided under article 155 of the Constitution, 1992. Defendant's argument simply, as recounted above, is that though plaintiff has statutorily retired and is not amenable to article 146 of the Constitution, this Court should extend the boundaries of article 146 to cover him, the reason being that, it was plaintiff who delayed the early completion of his impeachment which commenced when he was in active service.

We agree with the defendants that if the facts had disclosed that plaintiff knew his compulsory retirement was in the offing and for that matter deliberately frustrated the proceedings of the Justice Adinyira Committee to make it impossible for the committee to complete its work before his retirement became due, this Court could order for the continuation of the process to finality, though the Constitution is silent on such a process. The application of the modern purposive approach to interpretation which this Court has adopted lends support to such a conclusion. The defendants, however, did not provide any facts to support this allegation.

We are firm in our conviction that the defendants could not make such a case. The facts before us do not disclose any conduct of the plaintiff that put unnecessary impediments in the way of the 1st defendant in the discharge of her responsibilities under article 146 (4) of the Constitution. Defendants could not show in any way that plaintiff was ever served with any notice to appear before the Justice Adinyira Committee for the continuation of the impeachment process after the dismissal of his suit by the High Court on 14th May 2013, but refused to do so. This was the case because, with the voluntary retirement of Justice R. K. Apaloo as far back as 1st April 2011 and the suspension of Justice Quist somewhere in 2013,

there was no functioning impeachment committee called the Justice Adinyira Committee as at the date the High Court dismissed plaintiff's suit up to the date of his retirement almost two years afterwards.

Article 146 (4) of the Constitution, 1992, enjoins the Chief Justice (in this case the 1st defendant), to establish an Impeachment Committee to investigate a Justice of either the High Court, Regional Tribunal or the Court of Appeal against whom a prima facie case has been made in respect of a petition referred to her by the President. In this case, seven days after the High Court had dismissed plaintiff's case on 14th May, 2013, the injunction the High Court had placed on the Adinyira Committee established by the 1st defendant in January 2011 lapsed. **Rule 27 (3)** of the Court of Appeal rules, **C.I. 19** provides:

"There shall be a stay of execution of the judgment or decision, or of proceedings under the judgment or decision appealed

(a) *For a period of seven days immediately following the giving of the judgment or decision; and*

(b) *For a period of seven days immediately following the determination by the Court below of an application under subrule (1)(a) where the application is refused by the Court below".*

In this case, plaintiff did not apply for stay of execution when he appealed to the Court of Appeal against the dismissal of his suit. Subrule (3)(a) of Rule 27 is therefore applicable in his case. Therefore, seven days after the High Court had delivered its judgment dismissing plaintiff's case on 14th May 2013, the 1st defendant was enjoined by law to reconstitute the Justice Adinyira Committee or establish a new Impeachment Committee altogether, to investigate the allegations against the plaintiff but the 1st defendant either reneged in the discharge of this duty or defaulted in doing so for almost two years until plaintiff retired on 1st May, 2015. The defendants have not said anything in explanation to the 1st defendant's failure to reconstitute the Justice Adinyira Committee seven days after the dismissal of plaintiff's suit by the High Court on 14th May 2013, up to the date of plaintiff's retirement almost two years afterwards. We think two years is too long a time within which the 1st defendant could have discharged her constitutional duty. The plaintiff cannot therefore be faulted for the failure of the 1st defendant to live up to her constitutional duty when

the same constitution also obligates the plaintiff to retire within a specified period. We therefore hold that the inability of the Adinyira Committee to undertake to completion the impeachment process of plaintiff was due to the inaction of the 1st defendant but not any legal tactics employed by plaintiff to frustrate the process.

Conclusion

To resolve the first issue therefore, we would say that in the circumstances of this case, plaintiff cannot be subject to proceedings under article 146 of the Constitution since at the time of his retirement, there was no existing impeachment committee in place that was investigating him but for his statutory retirement. In other words, there were no ongoing impeachment proceedings against the plaintiff at the time he reached his compulsory retiring age. Any attempt to interpret article 146 to rope in retired justices of the Superior Courts who were not hitherto undergoing continuous impeachment proceedings prior to their retirement would be tantamount to re-writing the Constitution. Our jurisdiction to refine legislation or constitutional provisions through judicial review does not permit us to rewrite the Constitution itself. That is not the trademark of purposive interpretation. We conclude in the words of Prof. Kludze, JSC in the case of **REPUBLIC v FAST TRACK HIGH COURT, ACCRA; EX-PARTE DANIEL [2003-2004] SCGLR 364 at p. 370** as follows: ***"We cannot, under the cloak of constitutional interpretation, rewrite the Constitution of Ghana. Even in the area of statutory interpretation, we cannot amend a piece of legislation because we dislike its terms or because we suppose that the law-giver was mistaken or unwise. Our responsibility is greater when we interpret the Constitution. We cannot and must not substitute our wisdom for the collective wisdom of the framers of the Constitution".***

On the second issue, our view is that the 1st defendant is constitutionally clothed to write to a retired Justice of the Superior Court to withhold his/her retirement benefits pending the completion of impeachment proceedings. But this can only happen where the impeachment process was ongoing as at the statutory date of retirement and the Committee established for that purpose was well composed and intact. However, peculiar to this case, since there was no impeachment committee in place investigating plaintiff

as at the time he retired on 1st May 2015, the 1st defendant erred in withholding his retirement benefits by authoring Exhibit **'KAG1'**. We shall therefore grant plaintiff's reliefs 1, 2 and 3 by ordering that his gratuity and other retirement benefits due him under article 155 (1) & (2) of the Constitution from the date of his retirement on 1st May 2015 be paid to him forthwith. It would be unconstitutional for the 1st defendant to establish a new Impeachment Committee to impeach plaintiff four (4) years after his constitutional retirement, as he is no more in office for any steps to be taken to remove him from such office. With regard to the reliefs for damages and interest, we shall refuse them for the sound reasons given by this Court in the last two paragraphs at page 15 of its judgment in the *Amoah case* (supra). We order accordingly.

Y. APPAU

JUSTICE OF THE SUPREME COURT

ANIN- YEBOAH

JUSTICE OF THE SUPREME COURT

A.A. BENIN
JUSTICE OF THE SUPREME COURT

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