IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: ATUGUBA, JSC (PRESIDING)
AKUFFO (MS), JSC
BROBBEY, JSC
ANSAH, JSC
ADINYIRA (MRS), JSC
OWUSU (MS), JSC
ANIN YEBOAH, JSC
GBADEGBE, JSC
AKOTO-BAMFO (MRS), J.S.C.

WRIT
NO. J1/5/2009
27/07/ 2010

FEDERATION OF YOUTH ASSOCIATION OF GHANA (FEDYAG) - - - PLAINTIFF

VRS

PUBLIC UNIVERSITIES OF GHANA & ORS - - - DEFENDANTS

J U D G M E N T

ADINYIRA (MRS.) JSC:

The case before this Court demands an interpretation of the extent of the citizen's right to education as enshrined in article 25 of the 1992 Constitution. The right to education has been a cause for civil rights activists in the history of many nations. It is a common saying that education is the key to development. Education is also the key to

breaking the cycle of poverty. Therefore in the quest to attain political and socio-economic development after independence, education was one of the core areas that Ghana and other African countries paid much attention. Education therefore offers an effective platform for national development and also "promotes understanding, tolerance, and friendship among all nations, racial or religious groups." See Article 26 (2) of the Universal Declaration of Human Rights.

The plaintiff, Federation of Youth Association of Ghana (FEDYAG) commenced an action, by a writ filed on 22 April 2009, invoking the original jurisdiction of this court against the Public Universities of Ghana as the first defendants, and against the Ministry of education, the National Council for Tertiary Education, and the Attorney-General as the second, third and fourth defendants respectively, for the following reliefs:

1. A declaration that the fee paying policy being implemented by the public universities of Ghana is inconsistent with, or in contravention of the letter and spirit of the 1992 Constitution and more particularly articles 17 (2) (3) (4) (a), 23, 25 (1) (c), 34 (1), 38 (1) (3) (a) (c) and 41(b) and (d) thereof.
2. An order prohibiting any further implementation of the fee paying policy by the first defendants herein and quashing same.

Facts and Plaintiff's Case

Apart from the bare assertions of facts made by the plaintiff in its Statements of Case, as verified by the accompanying affidavit, it offered no further proof of the facts alleged in them. For clarity I set

out in full paragraphs 1 to 7 of the statement of case which are as follows:

1. The Public Universities of Ghana, the 1st Defendants herein, for many years into the 4th Republic, have been implementing a policy called "Full Fee Paying Policy". The beneficiaries under the said policy are christened "The Fee paying Students."
2. How did this come about? As a country, like many states, within the comity of nations, we have an obligation of welcoming citizens of the world into our universities to pursue knowledge. It means that space must be reserved by the institutions concerned for these foreign students as we call them. It has almost always been the case that the space so reserved has never been fully occupied by the targets. The Universities instead of returning the unoccupied space to the next most qualified prospective students then sell the space to Ghanaian citizens at the same price as the foreign students.
3. As if that is not enough, the universities realizing that a lot of money could be made out of this have decided to reserve more space than can ever be reasonably occupied by these foreign students.
4. Now this act of public universities has become an annual ritual. For e.g. they tell the world that we can only take 70% prospective students whiles in reality they can take up to 95%. They then cut the intake at say aggregate 12 instead of aggregate 15 and turn around and say, "Whoever can pay this much; come, we have a place for you".

5. This means that whilst some citizens of the country pay tuition fees others do not pay tuitions fees to access higher education in the country.
6. By acting in this manner, many qualified prospective students who could have had a place in their own capacity but for that much to pay are relegated to the background while those who have the means have their way.
7. It is our humble contention that this act in the name of full fee paying of public universities in Ghana betrays the letter and spirit of the supreme law of the land viz the 1992 Constitution.

Though the plaintiff avers generally that the defendants' fee paying policy "betrays the letter and spirit of the supreme law of the land viz the 1992 Constitution", it specifically and more particularly relies on articles 17(2)(3)(4)(a), 23, 25(1)(c), 34 (1), 38(1)(3)(a)(c) and 41(b)(d) thereof.

Common Submission by all of the Defendants

It was commonly submitted by all the defendants that the fee-paying policy is in no way discriminatory because the quota available to the students admitted on merit is not in any way diminished by the admission of fee-paying students. They further submitted that by the provision of article 25 (1) (c) of the constitution, the introduction of free education at the tertiary level should be by a gradual process.

1st Defendants' Response

The 1st defendants further submit that the plaintiff does not show in which way the defendants have violated the articles mentioned in the writ. They submit that university education in Ghana has been funded by

the government through annual bursaries. The number of non-paying students is tied to the size of the government bursaries made available each year. That by the ever diminishing size of government bursary the public universities cannot admit all qualified candidates. They claim that the quota given to fee-paying students does not affect the quota for non-fee paying students. They submit that the fee-paying policy enables qualified students who would otherwise not gain admission on account of not obtaining government bursaries, to pay and obtain education from the public universities. The 1st defendants submit further that the revenues from fees paid by the fee-paying students are added to the government subvention to increase the number of non-fee-paying students admitted each year. In the case of the Kwame Nkrumah University of Science and Technology, such funds make it possible for the University to give scholarship to brilliant students from less endowed schools.

The 2nd, 3rd and 4th Defendants' Response

The 2nd, 3rd and 4th defendants on their part submit that, the government is unable to fully meet the financial requirements of the 1st defendants. As a result these subvented institutions have to supplement government efforts by resorting to the fee-paying policy. They also stated that the quota reserved for the intake of foreign students is a time honored practice by universities around the world. This practice enriches the academic community and provides for global socio-cultural interaction, which by itself is education.

Central issues to be determined in the case

There is no doubt that in essence the plaintiff's contentions are based on provisions of the constitution falling under or relating to the

Fundamental Human Rights as set out in chapter 5 of the Constitution. The only articles which do not physically fall within the said chapter 5 are articles 34, 38 and 41. These fall (under chapter 6), the Directive Principles of State Policy, of which article 34 requires that in applying or interpreting the constitution, their guidance cannot be discounted and therefore article 38 relating to education cannot be discounted in considering educational rights under chapter 5. We however do not see the relevance of article 23, and 41 of the Constitution to the case.

The parties did not agree on the issues to be tried and each filed separate memorandum of issues which added up to 13. From the myriad of issues filed by the parties we see the following issues emerging from the pleadings:

i. Whether or not the full fee paying policy of the 1st defendant universities are in contravention of the letter and spirit of articles 25, (1) (c), 38 (1) (3) (a) (c) of the 1992 Constitution of Ghana.
ii. Whether or not the 1st Defendant's offer of admission spaces not taken up by foreign students to students who qualify but not admitted for lack of government subvention, amounts to discrimination, in contravention of article 17(2) (3) (4) (a) of the 1992 Constitution.

Before we determine the above issues we must interpret article 25 to discover the extent of educational rights guaranteed by the 1992 Constitution. The correct approach to the construction of constitutional provision has been amply expounded on in the case of *Ahumah Ocansey v. Electoral Commission; Centre for Human Rights & Civil Liberties (CHURCIL) v Attorney-General & Electoral Commission*

(Consolidated); 2010 [SCGLR] 575 by our eminent lady Chief Justice Georgina Wood. She said at page 597 of the report as follows:

> "The correct approach to interpreting Constitutions generally and fundamental human rights provisions in particular, is clearly so well settled: it does not admit of any controversy. The jurisprudence of this court does show that these must be broadly, liberally, generously or expansively construed, in line with the spirit of the constitution, history, our aspirations, core values, principles, and with a view to promoting and enhancing human rights rather than derogating from it.
>
> This court has clearly moved away from the doctrinaire approach adopted years ago in the case of *In re Akoto* [1961]2GLR 523 SC. The famed words of Sowah JSC as he then was in the celebrated case of *Tuffuor v Attorney General* [1980] GLR 637 at 647-648, are very much still relevant for our purposes; not to mention the tall list of case law that was cited in one of the most recent decisions of this court given on 3 February 2010- to be reported as *Brown v Attorney –General (Audit Service case) [2010] SCGLR 183*. Two of the older decisions of this court are *Mensima v Attorney- General [1996-7] SCGLR 676 at p. 714,* and *New Patriotic Party v Inspector –General of Police [1993-94] 459 at 482*. In the latter case, Bamford –Addo JSC as she then was observed that:
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> > "…fundamental human rights are inalienable and can neither be derogated from or taken away by anyone or authority whatsoever. …This court is therefore not permitted to give an interpretation which seeks to tamper in any way with the

fundamental human rights but rather to see that they are respected and enforced."

The learned Chief Justice Georgina Wood observed further that:

> "In *Minister of Home Affairs v Fisher* [1980] A C 319, Lord Wilberforce in delivering the judgment of the Privy Council stated at page 329 as follows:
>
> > "A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language…and to be guided by the principle of giving full effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

Based upon these principles of constitutional interpretation, we have to interpret Article 25 guided by Article 38 of the Directive Principles of State Policy as required by Article 34.

Article 25 provides:

1. All persons shall have the right to equal educational opportunities and facilities and with a view to achieving the full realisation of that right -

(a) basic education shall be free, compulsory and available to all;

(b) secondary education in its different forms, including technical and vocational education, shall be made generally available and accessible to

all by every appropriate means, and in particular, by the progressive introduction of free education;

(c) higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular, by progressive introduction of free education;

(d) functional literacy shall be encouraged or intensified as far as possible

(e) the development of a system of schools with adequate facilities at all levels shall be actively pursued.

(2) Every person shall have the right, at his own expense, to establish and maintain a private school or schools at all levels and of such categories and in accordance with such conditions as may be provided by law.

Article 25 is based on Article 26 (1) of the Universal Declaration of Human Rights which states as follows:

Article 26 "(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. [Emphasis mine]

It is noted that whereas Article 26 of the Universal Declaration of Human Rights simply states everyone has a right to education, our constitutional provision on the right to education states that: "All persons shall have the *right to equal educational opportunities and facilities"*. Why the difference? The difference is mainly due to our

national experiences, challenges and weaknesses in our educational system and economic imbalances, which needed to be addressed to prevent the erosion of the gains that have 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. All these are reflected in Article 25.

Hayfron-Benjamin JSC in *Edusei (No.2) v. Attorney General (1998-99) SCGLR 753 at 756* expressed a similar view as follows:

> "In the area of fundamental human rights, it must be said that the matters enumerated in the Constitution and in chapter 5 thereof are based firmly on the sum total of our national experiences and our nation's subscription to international conventions and protocols on fundamental human rights."

From the outset it is supposed that each word used in Article 25 is intended to have some effect, or be of some use. In terms of our constitutional provisions the word *equal* usually reflects the human right provision of Article 17 which stipulates that:

(1) All persons shall be equal before the law.

(2) A person shall not be discriminated against on grounds of gender, race, color, ethnic origin, religion, creed or social or economic status.

The word *opportunity* may 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 opportunities* may thus be defined as a situation in which people have the same chance or advantage in life as other people without being treated in an unfair way because of their race, color, ethnic origin, religion, creed or social *or economic status*. [Emphasis mine]

Following the basic principles of constitutional interpretation set out above we can conclude that the words in article 25 (1) 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 are inherent limitations that regulate and control the enjoyment of the right to equal educational opportunities and facilities. This right is 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 Art 25 the right is qualified by clauses (a), (b), and (c) by the controlling words: 'with a view to achieving the full realisation of that right, a)basic education shall 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 the capacity of the institution; and in particular by progressive introduction of free education at all levels. The ultimate objective of article 25 is to make education free by a gradual and progressive introduction to free education at all levels.

Since the right to education is for every person, the article 25 (d) requires that functional literacy be encouraged and intensified for those who for one reason or other are unable to pursue formal education. Also private

persons have the right to run schools at all levels but at their own expense.

It is therefore the duty of the state to formulate and execute policies to achieve this purpose. However by article 38 of the Constitution these educational objectives can only be implemented by the availability of resources.

This article 38 provides:

(1) The State shall provide educational facilities at all levels and in all the Regions of Ghana, and shall, **to the greatest extent** feasible, make those facilities available to all citizens.

(3) The State shall, **subject to the availability of resources,** provide-

(a) equal and balanced access to secondary and other appropriate pre-university education, equal access to university or equivalent education, with emphasis on science and technology;

(b) a free adult literacy programme, and a free vocational training, rehabilitation and resettlement of disabled persons; and

(c) life-long education. [Emphasis mine]

However, the reality is that since education comes with cost in terms of infrastructure, such as classrooms and lecture halls, well resourced library and research centres, teachers/lecturers, Ghana like other African countries cannot provide free education within the shortest possible

time. Even the free universal basic education has not been fully achieved 19 years after the promulgation of the Constitution since educational opportunities and facilities in rural areas are not the same as those in the urban areas.

Barely four decades ago, university education was virtually free, in terms of tuition fees, boarding and lodging, and there were well equipped libraries and laboratories and adequate lecture halls and enough lecturers. The failure of government allocations in the face of economic decline and structural economic adjustment programs has led to reduction in support for public universities. Increasing student enrolment without the corresponding expansion in facilities has created huge complex problems that called for an improvement in resources and administration which will greatly improve university education and as a matter of course enhance development efforts.

The public universities are obliged under the statutes establishing them to augment their resources. The Ghana Education Trust Fund (The GET Fund) was established in 2000 under the Ghana Education Trust Fund Act, 2000, Act 581, to assist nationwide financing of education. Yet we face the problem of limited access to university education because not all qualified applicants get access into the public universities.

The inadequate funding from government and the resultant deterioration in the educational system, led to the introduction of cost sharing and cost recovery principles into the education sector. These are the full fee-paying and user fee policies. User fees are charged for accommodation and academic facility use such as the use of laboratories and libraries and other educational facilities, and are paid by all

categories of students except perhaps by those on full scholarship awarded by the university.

However, it seems that the plaintiff is not basing his claim on the right to free university education but rather on the right to equal access to the limited opportunities available to Ghanaians to public universities as required by article 25 (1) of the Constitution. The plaintiff complains that a significant part of the more qualified persons are not able to enter the institution because they are unable to raise and pay the fees charged by the 1st defendants and that the less qualified who are able to raise such fees charged get access into the university by their ability to pay. It seems to us that the plaintiff does not understand how the full fee-paying policy is implemented by the 1st defendants.

The 1st defendants in their statement of case explained how the fee paying policy is implemented. They stated that:

> "By 2002 the government approved intake quota was 5 percent for the foreign students and 5 percent for non-resident Ghanaians. It must be stated that these percentages were not in diminution of but in addition to the traditional spaces for local non-fee paying students …It is spaces that are not filled with respect to the above quota that are offered to other Ghanaian students who have qualified for entry into the universities but could not be admitted on account of they not having qualified for the government bursary."

In 2006 the quota for non-resident Ghanaians was raised to 10 percent. According to the 1st defendants:

> "Whereas the intake for the non-fee paying students is solely determined by the quantum of the bursary received from the government, the intake for the fee-paying students is determined as a percentage of, yet over and above, the already determined non-fee paying intake"

The defendants explained further that:

> "[T]he places available for fee-paying students would not in any event be available for non-paying students as the 1st defendants would not be able to recover the cost of training the extra students."

The 1st defendants stressed that the source of income from the fee-paying students has on the average over the past 8 years constituted 28 percent of the total revenue of the 1st defendant. They argued that:

> "In effect the fee-paying students the subject matter of this suit, are subsidizing the non-fee paying students, and are thereby making university education 'progressively free, 'equally accessible' and to the greatest extent feasible ...available to all citizens' towards the realization of the form and spirit of articles 25 (1) (c), 38 (1), (3) (a) of the Constitution."

The 1st defendant gave some statistics that showed that the quota for the non-fee paying students has not been reduced to the benefit of the fee-paying students as claimed by the plaintiff in paragraph 3 of their statement of case. We reproduce the statistics for purposes of clarity.

Table 1: Kwame Nkrumah University of Science & Technology, Kumasi Admission Statistics for 2004-2009

Year	Qualified	Admitted	Foreign students	Ghanaian Fee Paying Students

			No.	%	No.	%
2004/05	11723	6451	200	3.10	495	7.57
2005/06	16473	8771	275	3.14	761	8.68
2006/07	17100	7988	203	2.54	566	7.09
2007/08	11614	6952	152	2.19	490	7.05
2008/09	10630	6800	132	1.94	339	4.98

Table 2: University of Cape Coast - Admission Statistics for 2005-2009

Year	Qualified	Admitted	Foreign students		Ghanaian Fee Paying Students	
			No.	%	No.	%
2005/06	12166	5340	56	1.05	535	10.02
2006/07	13133	4270	47	1.10	182	4.26
2007/08	11046	4146	51	1.32	142	3.42
2008/09	9676	4319	83	1.92	128	2.96

Table 3: University for Development Studies- Admission Statistics 2004-2009

Year	Qualified	Admitted	Foreign students		Ghanaian Fee Paying Students	
			No.	%	No.	%
2004/05	3575	1738	0	0	23	1.32
2005/06	4103	1850	2	0.1	4	0.47
2006/07	4808	2432	0	0	0	0
2007/08	6935	3720	0	0	0	0
2008/09	6128	4123	1	0.24	0	0

Table 4: University of Education, Winneba- Admission Statistics 2005-2009

Year	Qualified	Admitted	Foreign students		Ghanaian Fee Paying Students	
			No.	%	No.	%
2005/06	4825	3795	-	-	-	-
2006/07	5793	4511	-	-	-	-
2007/08	7159	3979	-	-	-	-
2008/09	7964	4040	1	0.024	-	-

Table 5: University of Ghana, Legon- Admission Statistics 2005-2009

Year	Qualified	Admitted	Foreign students		Ghanaian Fee Paying Students	
			No.	%	No.	%
2005/06	19421	10873	380	3.49	590	5.43
2006/07	18215	10284	284	2.76	389	3.78
2007/08	20057	11749	359	3.06	680	5.79
2008/09	26118	15175	544	3.58	768	5.06

Table 6: University of Mines and Technology, Tarkwa- Admission Statistics 2004-2009

Year	Qualified	Admitted	Foreign students		Ghanaian Fee Paying Students	
			No.	%	No.	%
2005/06	734	266	9	2-53	4	1.5
2006/07	743	315	6	1.9	7	2.22
2007/08	1067	361	15	4.16	8	2.21
2008/09	1145	390	24	6.15	13	3.33

The 1st defendants also showed a statistics of admission of less endowed undergraduate students on scholarships funded from revenue accrued from the fee-paying policy by the Kwame Nkrumah University of Science and Technology, Kumasi.

Table 7: Kwame Nkrumah University of Science &Technology, Kumasi- Less Endowed Admissions (Undergraduates)

Year	Registered	
	No.	%
2004/05	256	3.97
2005/06	534	6.09
2006/07	335	4.14
2007/08	168	2.42
2008/09	149	2.19

The above statistics clearly defeats the plaintiff's argument that the admission for regular students into public universities in Ghana has been reduced over the years in favour of the fee paying students. Although the quota for non-resident Ghanaians was raised to 10% in 2006; the statistics shows that, that quota has never been fully used. For example in the Kwame Nkrumah University of Science and Technology, only 8.6% of the quota for full paying Ghanaian students was filled in the 2005/06 academic year. The percentage admitted dropped to 7.09% in 2006/07 academic year. The number has declined to 4.98 as at 2008/09 academic year. See Table 1. The unused quota cannot be allocated to non-bursary students as there are no funds to cover their fees.

We recall that Article 25(c) specifically provides that: "higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular, by progressive introduction of free education". So the real issue here is whether the full fee paying policy as being implemented by the public universities infringes the letter and spirit of Article 25 (1) (c). The proper test for determining an infringement to a fundamental right is to examine its effect and not merely its object.

By the provision of Article 38 (3) (a) of The Directive Principles of State Policy, equal access to university education is subject to the availability of resources to the state. The defendants who are charged by the Constitution to provide university education in Ghana are obliged to find and commit available resources to provide education to qualified students. The 1st defendants have demonstrated that the fee-paying policy was one of the means by which they have been able to offer

educational opportunities to more Ghanaian students; who otherwise would not have had access to public universities due to insufficient funding from the government.

It follows from the foregoing that the fee-paying policy achieves a constitutionally valid purpose and that the chosen means are reasonably and demonstrably justified. We therefore hold on issue (i) that the fee-paying policy does not contravene the letter and spirit articles 25 1 (c) and 38 (1) (3) (a) (c) of the Constitution.

That takes us next to a consideration of the last issue. It appears that the plaintiff makes a legitimate point that the full fee-paying policy is to the disadvantage of persons with low economic status as they may not have the ability to opt for the fee-paying policy. On the other hand we do not think the fee-paying policy is discriminatory, considering firstly, the fact that it does not affect the quota for non-fee-paying students and secondly, the fact that it creates more opportunity for qualified students to get university education. As the government cannot provide bursary for all qualified students to enter the university, the 1st defendants' offer of admissions spaces not taken up by foreign students to students who qualify but are not admitted for lack of government subvention, do not amount to discrimination.

The plaintiff did not substantiate his statement in paragraph 13 of his affidavit in the verification of fact that:

> 13…"[T]his policy of fee paying by the defendants is as discriminatory as it amounts to granting advantage to some prospective students based on their economic status rather than their intellectual capacity."

The system has a level of transparency; as prospective students have to opt for the full fee-paying policy at the time of applying for admission. In that respect it is expected that the admission of these full fee-paying students should be on merit rather than the ability to pay. There should however be decent and adequate facilities to support student intake into the public universities.

Accordingly I hold on issue (ii) that the full fee-paying policy is not discriminatory and as such does not infringe Article 17 of the Constitution.

Conclusion

The full fee paying policy is not unprecedented in Africa. It is implemented worldwide. What is required is that the defendants, students, parents and all stakeholders should develop adequate support mechanism such as, scholarships, grants, insurance schemes and adequate student loan schemes to lessen the harsh effect of cost sharing. Until the resources are available to the state to provide free education in Ghana, the full fee-paying option would have to continue to enable more qualified Ghanaians to access public universities.

From the foregoing, we hold that the fee-paying system as implemented by the 1st defendants does not infringe Articles 17, 25 (1) (c) and 38 (1) (3) (a) and (c) of the Constitution.

The plaintiff's action fails and is hereby dismissed.

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JUSTICE OF THE SUPREME COURT

(SGD) W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

(SGD) S. O. B. AKUFFO (MS.)
JUSTICE OF THE SUPREME COURT

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