IN THE SUPERIOUR COURT OF JUSTICE
IN THE SUPREME COURT OF JUSTICE
ACCRA

CORAM: ATUGUBA, JSC (PRESIDING)
ANSAH, JSC
OWUSU (MS), JSC
DOTSE, JSC
BAFFOE-BONNIE, JSC

REFERENCE
NO. J6/1/2009
19TH MAY, 2010

NII KPOBI TETTEY TSURU III
(LA MANTSE AND PRESIDENT OF
LA TRADITIONAL COUNCIL) ... PLAINTIFF
LA MANTSE'S PALACE
LUMOSHISHI, KOWE, LA

VRS

THE ATTORNEY-GENERAL ... DEFENDANT

J U D G M E N T

ATUGUBA, J.S.C:-

This case came before us upon a reference from the High Court, Fast Track/Automated Division, Accra, presided over by Victor Ofoe, J.A. The facts as stated by him are as follows:

> "The property in dispute, popularly known as "La Wireless Station is the property of the plaintiff. It is not in dispute that the land of 92.490 acres was acquired pursuant to the Public Lands (Leasehold) Ordinance of 1950 by the Government of Ghana for a term of 99 years commencing from the 1st day of January, 1948. *It is also not in dispute that by virtue of the Certificate of Title that was issued under the Ordinance the said land was acquired for the purposes of a "Wireless*

Station". Further it is a fact that recently the Government of Ghana has entered unto the land which had hitherto been lying fallow for years and had commenced extensive developments of substantial buildings not meant for use by the Wireless Station. These said developments the government is executing through a body known as "Ghana @ 50". It is plaintiff's case that the act of the government is in violation of the 1992 Constitution, specifically Article 20(5) and (6).

X X X

It is the contention of the plaintiff that the land in issue was compulsory (sic) acquired not in the public interest at large, but for a specific public purpose i.e. for the establishment of a Wireless Station for which purpose it is no longer required. Consequently the La Stool is entitled to be given the first option for acquiring the property and the government can not put the land to any other use than use of the Wireless Station, the only purpose for which the land was acquired.

The plaintiff has a further complaint. It is that succeeding governments have compulsorily acquired large tracts of "La lands for next to nothing in financial terms and are being allocated by the Government of Ghana to private developers at astronomical sums of money while the people of La "languish in poverty, squalor, hunger and state of utter deprivation of roads, sanitary facilities and other modern amenities of life".

It is the same manner the present government is treating La land. The plaintiff contends that in so taking over the lands, which presently is their only valuable asset, resulting in "emasculating the development of La to discriminatory, unfair and unjust treatment to the total disadvantage of the people of La to the advantage of some other sections of the Ghana population contrary to the preamble and the Directive Principle of State Policy of the Constitution of Ghana 1992".

The foregoing forms the grounds for what the plaintiff is claiming per its writ of summons i.e.:-

"1. A *declaration that under clauses (5) and (6) of article 20 of the Constitution of the Republic of Ghana, 1992 the land popularly referred to as "Wireless Station Land" situate at a part of La which falls under the description "Cantonments" and compulsorily acquired under a certificate*

of Title dated 9th August, 1957 registered as number 2488/1957 more particularly described in a cadastral plan numbered Z.2399D attached to the said Certificate of Title incorporated by reference herein *has ceased to be used as a wireless station for which it was acquired and consequently that the plaintiff is entitled to be given the first option for reacquiring the said land*.

2. A declaration that any development of the said land other than for the purpose for which it was compulsorily acquired is *unconstitutional or otherwise unlawful.*
3. An order restraining the Government of Ghana and or all its agencies and privies *from dealing with the said land other than for the purpose for which it was compulsorily acquired and in particular, from carrying on with the developments which they have now embarked upon on the said land.*"

Continuing at p.10 of the Reference the learned trial judge states thus:

"I will find that by the Certificate of Title the land was acquired for a Wireless Station. The evidence before me is clear that the developments on the land by the various developers and on the authority of Ghana @ 50 Secretariat are not in conformity with the purpose for which the land was acquired. There is sufficient evidence that the buildings which were put with the intention of housing the Heads of State during Ghana's 50th Anniversary were never used for that purpose. *They have now been put up for sale by a private company, Top Kings Enterprises Limited. This to me is a clear change of user, a violation of Cap 138 and cannot be development in conformity with a Wireless Station.*

I will find that in the Cantonments area *also compulsorily acquired land have now private buildings on them as testified to by the plaintiff*. But then from the pleadings and evidence before me certain issues arise which call for interpretation of Article 20(5) & (6) of the 1992 Constitution for a final determination of this case.

The change of user of the land as I have found in the matter, on interpretation of the Constitution can it be a change of use for public interest or for the purpose for which it was acquired on interpretation of Article 20(5) of the 1992 Constitution?

(2) If the user is not for public interest or for the purpose for which it was acquired *whether Article 20 is applicable as to give the La Stool the option to reacquire the land*.

(3) Whether *granting the La Stool the option to reacquire the land will be retrospective application of the said Article 20(6) and whether the said Article can be applied retrospectively*.

I will refer these for the Supreme Court interpretation – Article 130(2) of the 1992 Constitution applied."

Article 20(5) and (6) provides thus:

> "(5) *Any property* compulsorily taken possession of or acquired in the public interest or for a public purpose shall be used only in the public interest *or for the public purpose for which it was acquired.*
>
> (6) Where the property is not used in the public interest *or for the purpose for which it was acquired*, the owner of the property immediately before the compulsory acquisition, shall be given the first option for acquiring the property and shall, or such re-acquisition refund the whole or part of the compensation paid to him as provided for by law or such other amount as is commensurate with the value of the property at the time of the re-acquisition."

The purview of the 1992 Constitution

From the facts stated the land in question was acquired as long ago as 9th August 1957. The question is whether article 20(5) and (6) covers or relates to such an acquisition.

It is trite learning that the 1992 Constitution is in ***pari materia*** with the preceding 1979 and 1969 Constitutions of Ghana. It is also trite law that statutes in ***pari materia*** are to be taken and construed together whether they are expired or not.

In *Gbedemah v Awoonor-Williams* (1969)2 G&G 442, Apaloo J.A, for the majority, said:

> "*As we read the Constitution, it has no retrospective effect .....* We illustrate our appreciation of the effect of the Constitution on this aspect of the case by a simple example. Before the Constitution came into force, the Court of final resort in Ghana was the Court of Appeal. *Judgments delivered by that court on or before 22 August 1969 were final for all purpose*. When the Constitution came into force on 22 August, one further appellate court – the Supreme Court – was created which replaced the Court of Appeal as the court of final resort. *Judgments delivered by the Court of Appeal on or after 22 August 1969, are appealable in certain specified cases to the Supreme Court but any findings or conclusions reached by the Court of Appeal before 22 August remain wholly untouched by the provisions of the Constitution*. Thus a man whose conviction

for fraud was affirmed by the Court of Appeal on 21 August 1969, will suffer the disqualification imposed by article 72(2) (c) of the Constitution, whereas if his appeal had been disposed of on 23 August he will be entitled, if his original conviction had been in the High Court, to appeal to the Supreme Court.

Accordingly, if the report of the Jiagge Commission had been published after the Constitution came into force, then the validity of NLCD 129 and NLCD 354 would have been of more than academic consequence to the defendant. Being part of the existing law within the meaning of article 126 (1) (d), their validity would have to be considered against the provisions of article 102. Our view of the matter is, that on the facts of this case, the validity or invalidity of NLCD 129 and NLCD 354 is irrelevant to the success or failure of the plaintiff's case."(e.s)

The principle that the Constitution is prospective and not retroactive is a general one. But as is well known virtually every general rule has its exceptions. Some judges have therefore, even if subsequently, stated this principle of prospectivity with caution. Certain provisions of the Constitution are clearly retrospective. See for examples sections 1, 2(1) 3, 4 and 17 of the Transitional Provisions.

This question of retroactivity however need not detain us in this case. The lands, the subject-matter of this Reference were acquired long ago. With the lands popularly known as La Wireless lands, they were originally acquired on the 31st day of December 1947 but the acquisition was varied by a certificate of title dated 9th July 1957. There can be no doubt that this land was compulsorily acquired under sections 3(1) and (3), 5, 8 and 10 of the Public Lands (Leasehold) Ordinance, 1950, Cap. 138. They are as follows:

"3 (1) Notwithstanding the provisions of any other Ordinance relating to the acquisition of land, the Minister may acquire any land *required for any public purposes* for *such term of years as* he may think proper, paying *such compensation as may be agreed* upon or *determined* as hereinafter in this Ordinance provided.

x x x

(3) *All land so acquired* shall be leased to or become vested in and be held by the Governor of the Gold Coast for the time being and his successors in office in trust for her Majesty *for public purposes*.

x x x

5. Whenever the Minister shall direct that *land shall be acquired for public*

purposes under the provisions of this Ordinance, and by reason of disputes or doubts as to the ownership of the land required *or inability of the parties to agree the terms of a lease* or for any other cause *the acquisition is hindered*, the Commissioner of Lands shall *cause a notice that the land is required for public purposes* for a stated term of years to be published in the *Gazette* and delivered to the traditional authority with a request that the notice of intention shall be made known in such manner as is customary in the area of the traditional authority. Such notice shall be in the Form A in the Schedule or to the like effect.

x x x

8. *The Commissioner of Lands on behalf of the Governor may*, at any time after the expiry of four months from the publication of notice of intention to acquire in accordance with the provisions of section 5, *apply ex parte* by motion *to the Supreme Court for a certificate of title to the land described in the notice,* and upon such application and upon proof of such publication and service *the Court shall grant a certificate of title in Form B in the Schedule.*

x x x

10. A certificate of title granted under this Ordinance shall-

(1) not be questioned or defeasible by reason of any irregularity or error or defect in the notice of intention to acquire or the publication or service and posting thereof or the want of notice or of any other irregularity, error or defect in the proceedings previous to the obtaining of such certificate;

(2) *confer on the Governor* to whom such certificate shall be given and on every succeeding Governor *for the time being in trust for Her Majesty for public purposes, an absolute and indefeasible right to the land described therein for the estate therein specified free from all adverse or conflicting rights, titles, interests, trusts, claims and demands whatsoever;*

(3) when produced in any Court be held to be an absolute bar and estoppels to any action or proceeding by or in which the right of the Governor to the estate therein specified in the land therein described is sought to be impugned or questioned."

From these provisions it is clear that the property affected is compulsorily acquired for the period specified even though it is a leasehold estate. Thus in their sterling work, Ghana Land Law and Conveyancing (second edition), the distinguished authors, BJ da Rocha and CH K Lodoh state at p. 21 as follows:

> "*The State has statutory power to acquire land compulsorily* from any proprietor of land whether a community, an individual or a corporate body *and whether the title is allodial, a free-hold or whatever.*"(e.s)

Public Land

Article 257(1) and (2) of the Constitution provides as follows:

> "(1) *All public lands* in Ghana shall be vested in the President *on behalf of* and in trust for, *the people of Ghana*.
>
> (2) For the purposes of this article, and subject to clause (3) of this article, "public lands" includes any land which immediately *before the coming into force of this Constitution*, was *vested in the Government* of Ghana on behalf of, and in trust for, the people of Ghana and any other *land acquired in the public interest, for the purposes of the Government of Ghana before, on or after that date."*

It is quite clear that the La Wireless Lands are "Pubic Lands" within the definition of that expression in article 257(2). Once acquired under Cap. 138 they have statutorily devolved on the President since then. This position is captured in holding (2) of *Omaboe III v Attorney-General & Lands Commission* (2005-2006) SCGLR 579 thus:

> "Portions of stool lands, like other private lands, may be compulsorily acquired by the Government of Ghana or the State under the State Lands Act, 1962 (Act 125) (as amended) and become part of public lands under article 257 of the constitution even after the coming into effect of that Constitution. But in that case, their management falls to the Lands Commission under article 258(1), and not the Office of the Administrator of Stool Lands. The regulatory regimes for stool lands and compulsorily acquired lands are simply different."

Since the lands in question in this Reference have been brought within the purview of the 1992 Constitution ***cadit quaestio***. The Constitution thus expressly applies to them and the question of retroactivity simply does not arise, since the intention that it should apply to them is thus quite plain- see *The Republic v. Judicial Secretary, Ex parte Torto*

(1979) GLR 444 C.A. Once within the purview of the constitution all relevant articles will apply to the lands in question, for example article 258 1(a) on the power of the Lands Commission to manage public lands. There is no conceivable reason therefore why article 20 (5) and (6) should not likewise apply to them. It is true that article 20(1) to (6) can be regarded as a self governing code on the question of compulsory acquisition of property and that it's opening provisions point to prospectivity. However where these provisions are meant to be limited to situations arising only after the coming into force of the constitution, that is made quite clear. Hence article 20(3) provides thus:

> "20.(3) Where a compulsory acquisition or possession of land *effected* by the state *in accordance with clause (1) of this article* involves displacement of any inhabitants, the State shall resettle the displaced inhabitants on suitable alternative land with due regard for their economic well-being and social and cultural values."

By contrast article 20(5) and (6) is not so limited to the provisions of clause (1) and is therefore of general and wider scope. *Article 20 thus clearly has, like article 257(1) provisions relating to matters both before and after the coming into force of the 1992 Constitution.*

This construction is reinforced by the cases of *Yovuyibor v Attorney-General* (1993-94) 2 GLR 343 S.C, *Yakubu v Attorney-General* (1993-94)1 GLR 307 S.C and *Abakah v Attorney-General* (1993-94) 1 GLR 307 S.C etc, in which offices pre-existing the 1992 Constitution have been **brought within the purview of the 1992 Constitution and regulated thereunder. In the *Yovuyibor* case the constitutional ramifications which altered the pre-existing service conditions of police officers, are stated per Amua-Sekyi JSC (his other brethren concurring) at 346 thus:**

> "*Article 190(1) of the Constitution, 1992 restored the Police Service to its place within the public services. It is this fact that has brought the present plaintiffs to court*. The plaintiff, Yovuyibor, is a superintendent of police, as is the plaintiff Bonuedi. *They say that as the compulsory retiring age for public officers under article 199(1) of the constitution, 1992 is 60 years, the compulsory retiring age for members of the Police Service is no longer 55 years but 60 years, and that their premature retirement at the age of 55 years is wrongful and a breach of the Constitution, 1992.* The answer of the defendants is that under section 8 of the transitional provisions of the Constitution, 1992 the Police Service continues

to be governed by the Police Service Act, 1970 (Act 350), the Police Service (Amendment) Decree, 1974 (NRCD 303) and the Police Service Regulations, 1974 (LI 880) which, they contend, require all police officers to retire at the age of 55 years.

Section 8(1) *A person who immediately before the coming into force of this Constitution held or was acting in an office in existence immediately before the coming into force of this Constitution, shall be deemed to have been appointed* as far as is consistent with the provisions of this Constitution, *to hold or act in the equivalent office under this Constitution.*

(2) A person who before the coming into force of this Constitution would have been required under the law in force to vacate his office at the expiration of a period of service shall, notwithstanding the provisions of subsection (1) of this section, vacate his office at the expiration of that period.

(3) This section shall be without prejudice to any powers conferred by or under this Constitution or any other law not being inconsistent with any provision of this Constitution, upon any person or authority to make provision for the abolition of office, for the removal from office of persons holding or acting in any office and for requiring those persons to retire from office."

Upon these facts this court held as stated in the headnote thereof thus:

"*Held*: *on a proper construction, section 8(1) of the transitional provisions to the Constitution, 1992 catered for* public officers holding appointments for a fixed period, such as those on contracts for a number of years as well as *pensionable officers whose appointments were not limited in terms of years*, and provided that a person who before the coming into force of the Constitution , 1992 held or was acting in an office shall be deemed to have been appointed to hold or act in the equivalent office under the Constitution. On the other hand, section 8(2) of the transitional provisions of the Constitution, 1992 *catered only for public officers holding appointments for fixed periods* and required that such public officers vacate their offices in accordance with the terms of their engagement. *Hence, the view that section 8(2) of the transitional provisions to the Constitution, 1992 also affected pensionable officers was erroneous and ought to be rejected*. Accordingly, *as public officers holding pensionable appointments, the compulsory retiring age of the plaintiffs was 60 years so that their purported*

retirement from the Police Service at the age of 55 years was a breach of article 199(1) of the constitution, 1992 and a nullity."

Cap. 138 under which the La Wireless land was acquired was repealed by the State Property and Contracts Act 1960 (C.A 6). Except that lands acquired under Cap. 138 at one time vested in the President under s.1 of C.A.6, I do not see the relevance of C.A.6 to this case. The effect of a repeal is succinctly stated by Dr. S.Y Bimpong-Buta in his classic work, The Law of Interpretation in Ghana, at p.171 as follows: "The general common Law rule is: *when an Act is repealed or expires, lapses or otherwise ceases to have effect, it is regarded, in the absence of a contrary provision, as having never existed except as to past and closed matters or transactions*. This common law position has been *codified in Ghana by the Interpretation Act, 1960, ss 8 and 9…"*

It has not been shown what past and closed matters or transactions, that is to say vested rights or obligations, existed under Cap 138 and are now sought to be overreached. What constitutes a vested right or obligation has been analysed luminously by Dr. Bimpong-Buta in his said book at pp.177-185. In any case in the face of articles 1,2 and 11(4)-(6) on the supremacy of the Constitution it is idle to think of anything being done as from the 7th day of January 1993 in a manner inconsistent with its provisions – see *British Airways v Attorney-General* (1996-97) SCGLR 547. In short all acts and laws must as from the 7th day of January 1993 conform with the provisions of the Constitution.

It is quite clear that under article 257(2) the, expression, "public lands" embraces lands compulsorily acquired **in the public interest** ***both before and after the coming into force of the 1992 Constitution and they are all to be commonly administered by the new Lands Commission under article 258(1)***.

One would therefore wonder why the constitution when specifically dealing with compulsorily acquired lands in article 20(5) and (6) should not embrace both types of compulsorily acquired land. ***If that is not so it would mean that with lands compulsorily after the coming into force of the constitution if there is a departure in use from its acquired purpose, the original owner can enjoy the option in article 20(6) whereas if such departure occurs even after the coming into force of the 1992 Constitution in respect of those lands compulsorily acquired before it came into force the original owner is left in the cold, even though both types of land have been brought under the same umbrella as public lands under articles 257(1) and (2) and 258(1) (a)***. A

constitution which abhors discrimination and which requires that all acts and laws must, as laid down in articles 1(1) and (2) and 2(1), conform with it upon its coming into force, could hardly contemplate such a scenario. Indeed in an analogous situation in the *Yovuyibor* case Edward Wiredu JSC (as he then was), was constrained to state forcefully as captured by the headnote thus:

> "*Per Edward Wiredu JSC. To construe section 8(1) of the transitional provisions of the Constitution, 1992 in the way the defendants are urging*, *would mean that no employee in any of the services listed under article 190(1) of the Constitution, 1992 with the exception of members of the legal class* some of whom enjoy up to 65 years under the existing law, i.e the Legal Service Law, 1993 (PNDCL 320) *can benefit from the provisions of section 8(1)*. The benefit created by its provision cannot enure to the benefit of any public office holder who "held or was acting in an office in existence" within the language of that section. *It would also mean that within the same service there will be two types of personnel. Those to be appointed under the Constitution, 1992 and those continuing under the Constitution, 1992. The former retiring at 60 years and the later retiring at 55 years*. *This would bring disparity between the personnel in their conditions of service. Such a construction would lead to an absurdity*."

Similarly in *British Airways v Attorney-General* (1996-97) SCGLR 547 the plaintiffs' prosecution though begun before the coming into force of the 1992 Constitution was continued thereafter despite the repeal of the law in question. This court therefore had to pronounce on s.8(1) of the Interpretation Act, 1960 (C.A.4) and article 19(11) of the Constitution. They are as follows:

> "8(1) The repeal or revocation of an enactment shall not –
>
> (e) *affect any investigation, legal proceeding or remedy in respect of any* such rights, privilege, obligation, *liability, penalty*, forfeiture or *punishment*, and such *investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed or revoked.*
>
> 9 (11) No person *shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law.'*(e.s)

Upon these facts this court forcefully, stated as captured in holding (2) of the headnote thus:

> "(2) *The criminal trial of the plaintiffs after the repeal of PNDCL 150 should be discontinued; it could not be justified (as contended by the defendant) under section 8(1) (e) of the Interpretation Act, 1960 (CA4)* which was inapplicable *because under article 19(11) of the 1992 Constitution, no person could be convicted or punished unless a written law has defined the offence or provided sanctions for same. The provision in section 8(1) (e) was now inconsistent with article 19(11) in respect of criminal offences contained in a repealed law such as PNDCL 150.* The position would have been different if the plaintiffs had been convicted before the repeal of PNDCL 150 by the Statute Law Revision Act, 1996 (Act 516) or if Act 516 had saved offences committed before the repeal of PNDCL 150. Consequently, the provision in article 19(11) became applicable in respect of the criminal case pending against the plaintiffs.
>
> *Per Acquah JSC concurring. Note that the verb used in article 19(11), is "is" and not "was". If it had been "was" the formulation could have referred to the past and not the present. The use of "is, clearly shows that the formulation looks beyond the time of the commission of the offence to ensure the legality of what happens thereafter.* If at any stage before conviction, the law creating the offence and the punishment is totally repealed without any saving, the investigation and proceedings cannot be continued."(e.s)

This decision clearly upheld the new constitutional order as against s.8 1(e) of C.A.4. As stated eternally in *Tuffuor v Attorney-General* (1980) GLR 637 C.A, the constitution being a political document meant to achieve certain objectives of governance in the interest of the people, that consideration and not puristic principles of construction of statutes should be the overriding factor in applying or interpreting the constitution. This principle has been forcefully revisited by Francois JSC in *Kuenyehia v Archer* (1993-1994)2 GLR 525 at 562 thus:

> *"Any attempt to construe the various provisions of the Constitution, 1992 relevant to the present inquiry must perforce start with an awareness that a constitutional instrument is a document sui generis to be interpreted according to principles suitable to its peculiar character and not necessarily according to the ordinary rules and presumptions of statutory interpretation. Though basic*

rules of statutory construction may provide the first steps, they should strictly be kept at the first rung as servants and never elevated in flight as maters.

This essential prerequisite is illustrated in a number of cases. In *Minister of Home Affairs v Fisher* [1979] 3 All ER 21 at 26, PC, Lord Wilberforce delivered himself at the Privy Council 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. It is quite consistent with this, and with the recognition that rules of interpretation may apply, *to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument.*"

It appeals that the overwhelming imperatives are the spirit and objectives of the Constitution itself, keeping an eye always on the aspirations of the future and not overlooking the receding footsteps of the past. It allows for a liberal and generous interpretation rather than a narrow legalistic one. *It gives room for a broader attempt to achieve enlightened objectives and tears apart the stifling straight jacket of legalistic constraints that grammar, punctuation and the like may impose.* Moreover it ensures that what has been termed "the austerity of tabulated legalism", is avoided, as also the dry interpretation of a section with its attendant difficulties: see per Lord Summer in Brooks' case [1915] AC 493."

Applying these principles to the present case it is quite clear that the 1992 Constitution, ***inter alia,*** set out to straighten certain injustices in the land tenure of Ghana. See articles 266-267. This policy is reflected therefore also in article 20(5) and (6) and should be upheld for the welfare of the people of Ghana as laid down in article (1).

In any event a statute can be prospective in some respects but retrospective in some respects. See *Fenuku v. John Teye* (2001-2002) SCGLR 985. A vivid example is given by Dr. Bimpong-Buta in his said book at as follows:

> "*A striking example of a legislation which is both prospective in some respects and retrospective in others, is to be found in* the now repealed Provisional National Defence Council (Establishment) Proclamation (Supplementary and Consequential Provisions) Law, 1982 (PNDCL 42), *s 67*. *The section stated that the provisions of the Law made on (sic) December 1982 were to be deemed to*

have come into force on 31 December 1981 unless the PNDC decided in a specific instance or the context so provided that the provisions were to take effect from the date of the making of the law; or unless there was *a specific provision (like section 60 thereof) indicating that it was to take effect from a specified date, ie 4 September 1979."*(e.s)

Operative Law of the case

At the risk of repetition but since there are varying views on this issue I wish to emphasise that the applicable law to this case is in the main the 1992 Constitution.

(a) Alternative Law

In the United States their Supreme Court has adopted a policy to the effect that, for the avoidance of constitutional tension and conflict owing to the sensitive nature of constitutional litigation, if a case can go off on some other ground than constitutionality the former course should be preferred. See *Ennin v. The Republic* (1976) 1GLR 326 C.A. I have myself sometimes followed this principle, see for example *Tsatsu Tsikata v. The Republic* [2003-2004] 2 SCGLR 1068. Upon reflection however I think the better course for Ghana, except in grave circumstances, is for the Judiciary to uphold and entrench the supremacy of the constitution as clearly contemplated by articles 1, 2, 3(4), 35, 37(1) and 41(b) of the constitution

This will produce, hopefully, a national culture of constitutionalism.

(b) Vested Rights

There is much complexity about the introduction of new legislation. In *C.F.A.O v. THOME* (1966) GLR 107 S.C the facts of the case as stated in the headnote are as follows:

"By a home-made agreement dated 1 April 1949, the plaintiff let a store and flats in his building to the defendants at an agreed rent. The agreement provided that the defendants were to surrender possession of the premises in good and tenantable condition at the expiration of the lease. The agreement expired on 31 March 1959 but the defendants renewed their tenancy of the store only. They could not surrender the flats apparently because they could not conformably with the agreement, deliver them to the plaintiff in a good and tenantable condition. They sought to renegotiate the rent for the flats with the plaintiff but negotiations eventually failed. By agreement, the parties obtained

the advice of an expert who assessed the cost of repairs to be done on the flats of £G2,337 10s. The defendants having failed to effect the repairs, the plaintiff caused a writ of summons to issue against the defendants claiming (a) an order for possession of the flats in a state of repair and (b) mesne profits from 1 April 1959 to the date possession was given. The trial judge gave judgment for the plaintiff and ordered the defendants to surrender t he flats to the plaintiff in a state of repair and also pay mesne profits at the rate of £G60 per month until such possession was delivered."

Upon these facts, Apaloo JSC delivering the judgment of the Supreme Court held at 115-116 thus:

"I agree therefore with the contention of counsel for the company that the evidence being that the premises were let in 1949 at the agreed rent of £45 and there being no evidence of any previous letting, the sum became, by force of the statute, the standard rent of the premises and that the position is in no way affected by the fact that the company undertook to make initial repairs to the tune of £500 to put the premises into a habitable condition. If therefore the rights of the parties fell to be determined by the Rent Control Ordinance, 1952, I should accede to the contention of the company that the plaintiff was precluded by the mandatory provisions of section 12 of that Ordinance from demanding £G60 for a part of the premises. *But are the rights of the parties governed by the 1952 Ordinance? In my judgment, they are not. The contract from which the parties acquired rights and incurred obligations was entered into in 1949 and it seems to me that those rights and obligations must be judged by the rent legislation then in force, namely, the Rent Control Ordinance, 1947*. This Ordinance was repealed with effect from 1 March 1952.

It seems to me the question which falls to be answered is: Did the 1947 Ordinance turn the contractual rent of £45 into a standard rent? To answer this question, it is necessary to consider the statutory definition of standard rent in 1947. That legislation says, a standard rent means, in so far as material,

(a) the rent fixed for any particular premises or any class of premises by the appropriate committee;

(b) where no rent has been fixed-

(i) in the case of premises which were let on 3 September 1939, the rent at which the premises were then let; or

(ii) in the case of premises which were vacant on 3 September 1939, the rent at which the premises were last let before that date.

There is no evidence that any committee fixed the rent for the premises in question nor is there any evidence that they were let before 3 September 1939, or on that date. It follows therefore that *if this dispute fell to be adjudged either in 1950 or 1951, the plaintiff could successfully contend that there was no standard rent of the premises. It cannot, in my judgement, be argued that his rights were adversely affected by legislation passed three years after the contract.* I think therefore that the learned trial judge was right in holding that there was no standard rent of the premises...."

Again in *Ansah-Addo v Addo* And *Ansah-Addo v Asante (Consolidated)* (1972)2 GLR 400 C.A the facts as stated in the headnote are as follows:

"*In 1928 six buying syndicates bought land from the stool of Akwatia.* Notwithstanding the sale, the stool granted mining leases of the same land to C.A.S.T. *In 1933, the stool and the syndicates agreed to share the mining revenues in the proportions of two-thirds and one-third*. At this time the syndicates acted through two agents, Asante and Addo. In 1951 by the Local Government Ordinance, Cap. 64 (1951 Rev.), all mining revenues became payable to the Akwatia Local council. Thus when in 1956 the syndicates sued for their share of the revenue, they sued that council. The stool joined the action as co-defendant, arguing that the full extent of the land transferred to the syndicates had not been mutually determined. At this time the mouthpieces of the syndicates were Oppong Addo, the son of Addo (deceased) and Asamoah. The syndicates lost the action in 1959 on the ground that they had failed to establish with certainty the area they had bought. They appealed to the Court of Appeal but *whilst the appeal was pending the parties submitted to a mutually satisfactory arbitration which confirmed the area sold to the syndicates and reduced their portion of the revenues to one-third. The syndicates*, now acting by Sekyi and Oppong Addo, *requested the Administrator of Stool Lands to pay them their revenue*, and this was ultimately paid to "E.K. Sekyi and Oppong Addo and others." Neither Sekyi nor Oppong shared the revenue with the other members of the syndicates.

In suit No. 461/69 the plaintiff, a paternal half-brother of Oppong Addo, claimed against him a share of moneys which were allegedly received on account of the estate of their father, Oppong. The plaintiff was joined by other members of the syndicates and E.K. Sekyi joined as co-defendant. In suit No. 189/71 the plaintiff and co-plaintiffs in the first suit jointly sued E,K. Sekyi claiming their share of the mining revenues. The main defence in both actions was that the plaintiffs were estopped by the 1959 judgment from alleging that they had any interest in the land in dispute. The trial judge thinking that the issue of estoppels might conclude the matter one way or the other ordered the suits to be consolidated and the issue of estoppels to be set down as a preliminary matter. He subsequently gave his ruling that in both suits the plaintiffs were estopped and *that the arbitration was void as it contravened the Akim Abuakwa (Stool Revenue) Act, 1958 (No. 8 of 1958), the Local Government Ordinance, Cap. 64 (1951 Rev.), and the Administration of Lands Act, 1962 (Act 123).* The plaintiffs appealed from this ruling."

Upon these facts, it was held, inter alia, as per holding (2) of the headnote thus:

"*The arbitral award in this case merely confirmed a sale that took place in 1928 and a contract that was entered into in 1933, the pith of sections 14 and 75 of the Akim Abuakwa (Stool Revenue) Act, 1958, and the Local Government Ordinance, Cap. 64, is that section 14 transferred management of Abuakwa stool lands to the receiver of stool revenue and section 75 denied legal validity to any disposal of stool land in any council area without the concurrence of the council. In any case these statutes were passed in 1958 and 1951 respectively and they have no retrospective effect. The arbitral award was therefore unaffected by those statutes*."

Similarly in *R v. Secretary of State for Trade and Industry and others, ex parte R* (1989) 1 All ER 647 it is succinctly stated in the headnote thus:

"The Secretary of State for Trade and Industry's *power under s 105 of the Financial Services Act 1986 to investigate the affairs of an investment business*' does not entitle him *to investigate business transactions which took place before the date on which the material provisions of that Act setting out his investigative powers and characterising the different types of investment business activity that could be investigated came into effect, ie 18 December 1986, since the*

investigative scheme created by the Act is not retrospective and transactions which took place prior to that date are not "investment business' within the meaning of the Act."

I do not understand these decisions to be contrary to what Dr. Bimpong-Buta has stated in his said book at 183-184 thus:

"The decision of the majority in CFAO v Zacca in construing the right to apply for a review – a remedy to be granted in the discretion of the full bench as an accrued right and not a mere right existing on the coming into force of the 1969 Constitution is clearly contrary to the decision of the Privy Council relied upon namely: *Abbot v Minster for Lands and Director of Public Works v Ho Po Sang, In Abott v Minister for Lands* the appellant had purchased a portion of Crown Land in New South Wales. *He was thus entitled under the 1861 Crown Lands Alienation Act to make further purchases of Crown Lands Alienation Act to make further purchases of Crown Land adjoining the original holding. The 1861 Act* was, however, *repealed by the 1884 Crown Lands Act* which provided in a saving clause that *notwithstanding the repeal, "all rights accrued under the repealed enactment should remain unaffected."* It was held that *the mere right existing at the date of the repealing legislation to make additional purchases of the adjoining land did not constitute an accrued right.* In the words of the Privy Council per the Lord Chancellor:

> It has been very common in the case of *repealing statutes to save all rights accrued. If it were held that the effect of this was to leave it open to any one who could have taken advantage of any of the repealed enactment still to take advantage of them, the result would be far-reaching.*
>
> It may be...that the power to take advantage of an enactment may without impropriety be termed 'a right.' But the question is whether it is a 'right accrued' within the meaning of the enactment which has to be construed.
>
> Their Lordships think not,... *They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued'* within the meaning of the enactment.

In Director of Public Works v Ho Po Sang (supra) *it was held that the mere hope or expectation of a lessee of landed property of obtaining a rebuilding certificate from the Director of Public Works under the Hong Kong Landlord and Tenant Ordinance (which was later repealed in 1957) did not constitute an accrued right even though the director had given notice to issue the certificate before the repeal.* As was pointed out by the Privy Council, the lessee did not know at the time of the repeal, whether or not he would be given a rebuilding certificate – the issue of which was dependent upon a further decision of the Government of Hong Kong." (e.s)

I understand all the foregoing to come to this: if a statute creates rights and obligations and such rights and obligations have actually materialised as per the provisions of the said statute, they remain good and enforceable even after the repeal of the statute in question. It certainly cannot mean that the repealed statute still governs matters to which its provisions would have been relevant had it not been repealed, but which had not yet crystallised before its repeal. If that were so, as pointed out in some of the authorities quoted by Dr. Bimpong-Buta supra, no repeal of a statute would be effective. In *Ellis v Attorney-General* [2000] SCGLR 24, it was sought to invalidate a compulsory acquisition which had fully taken place before the 1992 Constitution on the grounds that it violated that constitution. That certainly is not the matter in this case. In this case the question is whether the vested purpose of the compulsory acquisition can be enforced on the provisions of article 20(5) and (6) in respect of acts committed not before but after the 1992 Constitution came into force.

In my opinion had the alleged acts of misapplication of the compulsorily acquired lands in this case accrued before the repeal of Cap. 138 they could still today, barring any statute of limitation, have been questioned under s.21 of Cap. 138, they being vested rights. It provides as follows:

"21.(1) *The person entitled to the reversion* to any land expectant on a term of years acquired by the Governor under the provisions of this Ordinance may, *if he claim that the land or any part thereof is being used otherwise than for public purposes*, *proceed by petition to the* Governor in Council *to seek the surrender of the term of years in respect of the whole or any part of the land*.

(2) If the Governor in Council on receipt of a petition under the provisions of subsection (1) of this section, and *after such investigation as he may deem*

necessary, shall so direct, the Commissioner of Lands shall apply under the provisions of section 11 of this Ordinance for the variation of the certificate of title to the land so far as may be necessary to effect the surrender of the term of years in respect of such part of the land as the Governor in council is satisfied is being used otherwise than for public purposes, or, if the Governor in Council is satisfied that the whole of the land is being so used, for the rescission of the certificate of title." (e.s)

Even there the procedure by way of petition would not still hold under article 293 of the constitution. But if the constitution has plainly altered or substituted a new right in the circumstances of the matter it is the new order that ought to prevail. I would therefore conclude that the rights of the parties in this case are governed by articles 20(5) and (6) and 257(1) of the 1992 Constitution.

The trial court's findings as to misuser of the lands

It is clear from Ofoe J.A's findings that the La Wireless lands were acquired solely for the purpose of a Wireless Station under Cap.138. With respect he erred. As stated earlier the La Wireless lands were not originally acquired by Exhibit A which Ofoe J.A relied on. As exhibit A did not appear entirely clear, we by order dated 5/5/2010 called for the original thereof. This resort to the Public Records and Archives Administration department reveals that that land was first acquired on the 31st day of December 1947. In the Gold Coast Gazette Extraordinary Gazette Notice No. 2086 dated Thursday, 18th December 1947, undoubtedly issued pursuant to s.5 of Cap 138 the notice for the acquisition of the land is headed:

"GAZETTE NOTICE NO. 2086.
NOTICE OF LAND REQUIRED FOR THE SERVICEOF THE COLONY AND ASHANTI SITUATE AT CANTONMENTS, ACCRA AND REQUIRED FOR
WIRELESS STATION AND EXTENSION TO RESIDENTIAL AREA"

Although pursuant to application the said certificate of title was on the 9th day of August 1957 varied by the substitution of the original plan No. Y605 by Plan No. Z2399D there was no order as to the alteration of the purpose for which the said land was acquired. Indeed the very application for the said variation described the Land in question in the same terms as contained in the said Gazette Notice. Consequently the description of the purpose of the land in the pursuant varied certificate of title as "LAND AT ACCRA

CANTONMENTS FOR A WIRELESS STATION" without more does not seem to be an exhaustive description thereof.

Since the houses for the visiting heads of state to the "Ghana at 50" celebrations are a use as part of a residential area, if the second purpose for the acquisition of the said land, proves true, that user of the land is not improper.

Authority to disagree with findings of trial judge

Certainly this court cannot be constrained by any erroneous statement of the facts of the case in a referral to give judgment contrary to the fundamental law of the land, for it takes precedence over all other laws. It is trite law that when a court is called upon to make an order contrary to a statute, it is open to the court to take the point ***suo motu.***

In any case in analogous situations such as committal for sentence it has been held that the court to which the matter has been committed is not constrained to pass sentence upon an unsupportable conviction, see Amissah Criminal Procedure in Ghana p. 160. Although there is some contrary authority, the preferable view on this question is as just stated. See also *Regina v. Chapman* (1960)1 WLR 147 CCA and *Ghana Commercial Bank Ltd. v. Commission on Human Rights and Administrative Justice* [2003-2004] SCGLR 91 holding (3) of the headnote.

Conclusion

It is true that when the State Property and Contracts Act 1960 (C.A6) repealed Cap. 138 it provided in s.1 thereof as follows:

> "**1. Vesting of property**
>
> (1) *Property vested in the Crown as trustee for the Public Service of the Republic* and whether situated in or outside the Republic shall, on the coming into force of this Act, *vest* without further authority than this section *in the President in trust for and on behalf of the people of Ghana for the Public Services of the Republic."*

However article 257(1) of the Constitution provides as follows:

> "257. (1) *All public lands in Ghana* shall be *vested in the President* on behalf of, and *in trust for, the people of Ghana.*"

There is a difference between the two provisions. Under s.32 of the Interpretation Act 1960 (CA4) the definition relating to "*public officer*" shows clearly that the expression Public Services refers to certain governmental institutions. On the other hand article

257(1) refers to the "*people of Ghana*" not the Public Services of Ghana. Hence article 257(1) is the prevailing provision of law relating to "public lands." It is true that the definition of "public lands" in article 257(1) could have been better drafted to reflect the history of public lands in Ghana but we must interpret it ***ut res magis valeat quam pereat***.

I do not think that article 257(1) can be read free from the fact that some of the lands it comprehends were originally acquired compulsorily and thus within the contemplation of article 20(5) and (6). Article 20(5) is quite comprehensive. It embraces "*Any property compulsorily taken* possession of *or acquired* in the public interest or for a public purpose "

As article 20(5) applies to compulsory acquisitions generally and since also article 257(1) embraces such acquisitions, the ascertainment of the purpose for which the lands in question were acquired must harp back to the time of their acquisition. Since as shown supra, it cannot be categorically said with regard to the La Wireless lands that they were acquired for a wireless station only but not as well as for extension to a residential area and since under ss.2 and 3(3) of Cap 138 "public purposes" is defined only in an inclusive but not exhaustive sense and inter alia, includes "*the use of the general public*" it cannot be said that the present user of the land, despite the sales of the houses in question, is not for residential purposes unless the contrary be proved. If some of them are used other than for residential purposes, bearing in mind what is merely incidental or ***de minimis*** then articles 20(5) and (6) can be invoked. So much for the La Wireless Lands.

As to the other general finding of the trial judge, namely *"I will find that in the Cantonments area also compulsorily acquired land have now private buildings on them as testified by the plaintiff"* there is not enough evidence on that issue to enable me come to a conclusion as to impropriety of such user. The ambit, circumstances and conditions of such compulsory acquisition are not clear before me.

I am therefore unable to answer the 1st question in view of the evidence. 2nd question affirmative. 3rd question, article 20 (6) is applicable and whether it is so applicable retrospectively or otherwise is immaterial, but its applicability is indeed not retrospective.

W. A ATUGUBA
JUSTICE OF THE SUPREME COURT

ANSAH, JSC:-

I had the privilege of reading beforehand the opinion of my learned brother Dotse JSC about to be read. I agree with the conclusion and reasoning reached by him. I have nothing useful to add.

J. ANSAH
JUSTICE OF THE SUPREME COURT

OWUSU (MS), JSC:-

I have read before hand the Judgments of my respected brothers, the president and Dotse JJSC and I wholly agree with the conclusion arrived at by Dotse JSC that Article 20 (5) and (6) of the constitution are not applicable in the instant case pending before the High Court in respect of which a referral was made to this court.

I associate myself with the reasons which informed his decision. I would however want to add a few words of mine own.

The facts and issues have sufficiently been set down in the Judgment just read and I do not deem it necessary to repeat them.

I share the view of my brother that Article 20 of the constitution must be read as a whole to discern from it whether the framers of the constitution intended that the Article should cover acquisitions made before the coming into force of the constitution.

Article 20(1) reads as follows:

> **"No property of any description, or interest in or right over any property shall be compulsorily taken possession of or acquired by**

the state unless the following conditions <u>are satisfied</u>" – [emphasis mine]

This provision reads into the future and the conditions set out in 20 (1) to 20 (6) are to be met in the future.

20 (5) under which the plaintiff bases his claim states thus

"Any property compulsorily taken possession of or acquired in the public interest or for a public purpose shall be used only in the public interest or for the public purpose for which it was acquired!

The land the subject matter of the plaintiff's claim was acquired under a certificate of title dated 9th August, 1957 under the Public Lands (Leasehold) Ordinance (CAP. 138) of 1950.

This Ordinance, even though repealed by the State property and contracts Act (C. A. 6) it (the Act) did not change the character of the land otherwise known as La Wireless Land indicating the purpose for which the land was acquired. If the whole of Article 20 reads into the future, then 20 (5) and (6) cannot have any reference to the acquisition made in 1957.

The 1992 Constitution frowns upon retroactive legislation. Article 107 forbids even parliament from passing any law –

"which operates retrospectively to impose any limitations on, or to adversely affect the personal rights and liberties of any person or to impose a burden, obligation or liability on any person except in the case of a law enacted under articles 178 to 182 of this constitution."

if Article 20(5) and (6)are meant to operate retrospectively, I am sure it would expressly have stated so.

Under Article 266 of the constitution which deals with ownership of land by Non-Ghanaians, where the law operates retrospectively, it is so expressly stated.

Art. 266 (1) states that –

"No interest in, or right over, any land in Ghana shall be created which vests in a person who is not a citizen of Ghana a freehold interest in any land in Ghana."

266 (3) goes on to state that –

> **"Where, on the twenty-second day of August 1969, any person not being a citizen of Ghana had a freehold interest in or right over any land in Ghana, that interest or right shall be deemed to be a leasehold interest for a period of fifty years at a peppercorn rent commencing fro the twenty-second day of August 1969, and the freehold reversionary interest in any such land shall vest in the president on behalf of, and in trust for, the people of Ghana."**

In the case of a leasehold Art. 266 (4) stated that –

> **"No interest in, or right over, any land in Ghana shall be created which vests in a person who is not a citizen of Ghana a lease hold for a term of more than fifty years at any one time."**

266(5) continues that –

> **"where on the twenty-second day of August 1969 any person not being a citizen of Ghana had a leasehold interest in, or right over, any land in Ghana for an unexpired period of more than fifty years, that interest in, or right over, any such land shall be deemed to be an interest or right subsisting for a period of fifty years commencing from the twenty-second day of August 1969."**

Counsel for the plaintiff quoting from the definition of "Retrospective legislation" submits that from the definition, the application of the provisions of Article 20 (5) and (6) of the constitution cannot amount to retrospective application to the acquisition of the La Wireless Land.

The definition covers a whole range of situations and is as follows:
"A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or created a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past - - -".

Clearly, if Article 20 (5) and (6) are made applicable to the plaintiff's case, the law will be looking backwards to affect acts or facts occurring before it came into force.

Simply, in dictionary of Law by L. B. Curzon, retrospective Legislation is defined as "Laws which, expressly or by implication, operate so as to affect acts done prior to their having been passed."

Counsel's submission therefore that application of those provisions to his claim before the High Court cannot amount to retrospective application is untenable.

I have had a look at the case of ELLIS VRS ATTORNEY-GENERAL [2000] SCGLR 24 which my brother has digested in his Judgment and I am convinced the more that since the law had been passed and the plaintiff's land had been vested in the Republic under the law before the coming into force of the constitution, which could only be applied prospectively and not retrospectively. Articles 20 (5) and (6) have no application in the instant case.

Having come to the conclusion that Article 20 (5) of the constitution is not applicable, issues 2, and 3 require no further consideration.

R. C. OWUSU (MS)
JUSTICE OF THE SUPREME COURT

DOTSE, JSC:-

I have been privy to the ruling just delivered by my respected brother and President of this Court, Atuguba JSC and it is no longer worthwhile to re-state the facts which he has chronicled in detail.

Except as may be necessary to elucidate the point being made, I will not repeat the facts of this case.

Suffice it that, the facts of this case admit of no controversy whatsoever. This is a referral case from the High Court, Accra presided over by Ofoe JA sitting as an additional Judge of the High Court.

The Plaintiff in this case, who is the La Mantse, and President of the La Traditional Council, on the 3rd November, 2006, issued a writ against the defendants in respect of a piece of land known as La Wireless which was granted to the Government of the Gold Coast, now Ghana by way of a leasehold under the Public Lands (Leasehold) Ordinance (CAP 138) of 1950 for a term of 99 years and under a certificate of title dated 9th August, 1957.

In that writ, the Plaintiff sought a declaration that under clauses 5 and 6 of article 20 of the Constitution 1992

> ***"the land compulsorily acquired under certificate of title dated 9th August, 1957 had ceased to be used as a wireless station for which it was acquired"***

and that the Plaintiff as the original owners of the land is entitled to be given the first option to reacquire the land.

The plaintiff sought a further declaration that any development of the land other than for the purpose for which it was acquired is unconstitutional and therefore the Defendant ought to be restrained from using the land other than for the purpose for which it was acquired.

From the records before this court, reference the statement of case filed by the parties, as well as the judgment of the trial court, which is attached and is

dated, 11th day of July, 2008, the firm impression is given that the trial High Court had given judgment in the matter before making the reference.

PROOF OF DELIVERY OF JUDGMENT

1. The judgment of the trial High Court itself, dated 11/7/2008 is entitled judgment, and this also contains the referral.
2. In the detailed statement of case filed by learned counsel for the plaintiff Mr. William Addo, pursuant to a court order dated 17th day of June, 2009 it is stated in paragraph 1 (one) thereof as follows:

   "On the 11th day of July, 2008 the High Court, Accra presided over by Justice Ofoe JA *gave judgment on the facts in favour of the plaintiff herein and referred to this honourable court* for interpretation, the scope and applicability of article 20 (5) & (6) of 1992 Constitution of Ghana to the land popularly known as the *"wireless Station land" acquired under a certificate of Title dated 9th August, 1957 pursuant to the Public lands (leasehold) Ordinance, 1950 chapter 138 of the Laws of the Cold Coast.*

3. In the statement of case filed on behalf of the defendant pursuant to the order of this court dated 17/6/2009 on the 12th of January, 2010 this is what is contained in the second paragraph on page 2 of the said statement.

   *"The case was tried by the High Court presided over by Mr. Justice Victor Ofoe who **delivered judgment on 11th July 2008.** The learned Judge found that by the certificate of Title, the land was acquired for a wireless station and he stated further that the evidence is clear that the developments on the land by the various developers on the authority of Ghana at 50 Secretariat are not in conformity with the purpose for which the land was acquired. He also*

found that compensation had not been paid in respect of the acquisition."

I have decided to refer to these quotations in order to establish beyond any shadow of doubt that, the learned trial Judge actually delivered judgment in the case and therefore clearly overstepped his jurisdiction as is stated in article 130 (2) of the Constitution 1992.

That being the situation, it is important to examine what the duty of a trial Judge is whenever a referral is made under article 130 (2) of the Constitution 1992. This examination no doubt will also consider the relevant rules of court made in the Supreme Court Rules, 1996 C. I. 16 to regulate and control referrals by Courts lower to this court to the Supreme Court.

On the 11th day of July 2008, whilst delivering judgment in Suit No. AL 18/2007 intituled *Nii Kpobi Tettey Tsuru II – Plaintiff vrs The Attorney General - Defendant* the learned trial Judge, Ofoe JA, referred the following issues to the Supreme Court for determination. He stated thus:

"The change of user of the land as I have found in the matter on interpretation of the Constitution can it be a change of use for public interest or for the purpose for which it was acquired on interpretation of article 20(5) of the 1992 Constitution?

2. If the user is not for public interest or for the purpose for which it was acquired whether article 20 is applicable as to give the La Stool the option to reacquire the land.

3. Whether granting the La Stool the option to reacquire the land will be retrospective application of the said article 20(6) and whether the said article can be applied retrospectively.

I will refer these for the Supreme Court interpretation – article 130 (2) of the 1992 Constitution applied".

These were the issues that the learned trial Judge referred to this court for interpretation.

It is provided in article 130 (2) of the Constitution 1992 as follows:

"Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, ***that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination,*** *and the court in which the question arose* ***shall dispose of the case in accordance with the decision of the Supreme Court".***

This therefore means that, as soon as the issue of Constitutional interpretation arises, in any Court other than the Supreme Court, that Court shall stay further proceedings in the case and refer the question of interpretation to the Supreme Court.

The trial Court, or the other Court as the case may be shall finally dispose of the case in terms of the interpretation that the Supreme Court will give in the matter.

In the instant case, the learned trial Judge proceeded with the hearing of the case until judgment when he decided to refer the Constitutional matter for interpretation whilst reserving to himself the determination of issues which he found not to be constitutional matters.

In my mind, what the learned trial Judge should have done was to have simply made a referral in terms of the Supreme Court Rules, 1996, C. I. 16 rule 67 which sets out in detail, the modalities for referral of cases by courts below the Supreme Court to this Court.

Out of abundance of caution, let me refer in extenso to the provisions of this rule:

"67 (1) A reference to the Court for the determination of a question, a cause or matter pursuant to a provision of the Constitution or of any other law shall be made by way of a case stated **by the Court below, or by the person or authority making the reference.**

2. A case stated under sub-rule (1) shall contain

a. a summary of the action or matter before the court below or the person or the authority from which or from whom the reference is made.

b. the issue involved in the matter before the court below or that person or authority from which or from whom the reference is made.

c. the matter or question referred for determination by the court.

d. the findings of fact relevant to the matter or question referred to the court.

e. the arguments of Counsel

f. the ruling or decision of the court below or of that person or authority; and

g. **a statement by the court below that the determination of** the Constitutional matter or question is necessary to the determination of the action, where the reference is made under clause (2) of article 130 of the Constitution.

3. Each party may, **with the consent of the Court below or that person or authority and shall, when so ordered by the court**, state a case or jointly state a case containing arguments of law and a list of the decided cases and the Statute law in support of the case.

4. The Court may call for the record of the proceedings before the **Court below** or before the **person or authority making** the reference.

5. Rule 53 shall, with the necessary modifications, apply to a reference before the Court.

The above provisions therefore set out the detailed guidelines which should regulate courts below the Supreme Court in what they are supposed to be

doing whenever they refer constitutional matters to the Supreme Court for interpretation.

In the instant case for example, where the learned trial Judge himself stated that he was making the referral pursuant to article 130 (2) of the Constitution 1992, it was incumbent upon the learned trial Judge to have stayed all further proceedings in the matter to await the interpretation that the Supreme Court will give in the matter. Besides, it is also important to note that the Supreme Court Rules 1996 C.I. 16 Rule 67 sub rule 2 (g) specifically mandates the referral court to specifically make it clear that the determination of the constitutional matter or question is necessary to the determination of the action before the court.

Where therefore, as in the instant case, the learned trial Judge proceeded to deliver what he termed a judgment in which he made pronouncements and determinations which are clearly prejudicial to the outcome of the case before him, such a conduct is inconsistent with the provisions of Rule 67 (2) (g) of C.I. 16, the Supreme Court Rules. **It is therefore to be noted by all courts below the Supreme Court, that whenever it appears to them that a case or matter before them depends upon a constitutional interpretation or requires constitutional interpretation to determine the issues raised in the case, and a referral is made pursuant to article 130 (2) of the Constitution 1992, such a referral must be consistent with Rule 67 of the Supreme Court Rules C. I. 16 already referred to supra.**

Similar circumstances and facts arose in the case of ***Republic vrs High Court (Fast Track Division) Accra, Ex-parte Electoral Commission (Mettle-Nunoo & others, Interested Parties) [2005 – 2006] SCGLR 514.***

In this case, the plaintiff in the High Court therein, Interested Parties herein in the Supreme Court, sued the Electoral Commission in the High Court, (Fast Track Division) Accra seeking three declarations, which were all declarations in respect of Presidential Elections that were held in Ghana on 7th December, 2004.

At the hearing of the application for directions in the trial court, the defendant (Electoral Commission) specifically prayed the Court to refer to the Supreme Court for its interpretative opinion under article 130 (2) of the Constitution 1992 the issues which had been set down by the court for trial. But the trial Judge, Ofoe J, as he then was, declined the application for referral until he was certain in his mind "what facts there are to the case" to enable him "formulate the referral accordingly. The learned trial Judge also explained that "where there would be need for a referral, it would be determined during the course of the trial"

The Electoral Commission, the defendants therein therefore brought an application in the Supreme court, in the exercise of its supervisory jurisdiction under article 132 of the Constitution for an:

(i) an order staying further proceedings of the suit involving the parties pending before Ofoe J, and

(ii) a referral to the Supreme Court for the determination of the issues set down in the said pending action.

After arguments in the Supreme Court, Counsel for the Interested Parties then made an oral application to decouple the statutory provisions from the constitutional provisions, such that the suit would no longer be cognizable before the Supreme Court for any constitutional interpretation.

In a majority decision, the Supreme Court laid down basic guidelines which should serve as a roadmap for Judges or courts below the Supreme Court to follow when making referrals to the Supreme Court pursuant to article 130 (2) of the constitution. The Supreme Court held as follows:-

i. *(3) "The trial Judge, in the exercise of his discretion, was not bound to comply with the request to refer a constitutional issue to the Supreme Court for determination under article 130 (2) of the Constitution.* ***However, the discretion was not limitless, boundless, or was it to be exercised in a petulant fashion. The discretion must be exercised within reasonable bounds, i.e. it must be exercised judicially, not***

capriciously or arbitrarily and also in a timely manner, having regard to the nature of the case and the reliefs sought, the issues arising for referral, even more crucially, its expected outcome on the pending action, bearing in mind that all courts had a duty to ensure the efficacious and expeditious disposal of all cases. If at the stage of the referral application, it was plain that, the taking of evidence was not at all necessary, and that the determination of the issues might dispose of the case one way or the other, i.e. bring the entire hearing or proceedings to an end, then, the taking of evidence for whatever purposes would amount to an improper exercise of discretion*. Consequently, whenever there were no disputed facts to be resolved, for either a determination of whether or not a genuine question for interpretation had arisen, or for a formulation of the issues for referral, the referral ought to be made promptly and without any delay. In the instant case, the action pending in the High Court, did not raise any genuine or serious disputed facts. In the circumstances, the trial Judge had erred in refusing the request for a referral to the Supreme Court. The reasons given by the trial Judge, namely, that he was not ready to make a referral until he had taken more evidence and made more findings of facts, were improper".*

ii. ***(4) "The question as to whether on the facts of any given case a real or genuine interpretative issue for referral had arisen for the Supreme Court's opinion, would depend on, inter alia, the nature of the pending action, the reliefs sought and the pleadings.*** *A further criterion was whether or not the action was one which had been neatly clothed as a case involving the exercise of the original jurisdiction of the Supreme Court. In the instant case, at the centre of the whole controversy, lay the disputed interpretation of important constitutional provisions, namely articles 45, 63 (9) and 64 (1) of the 1992 Constitution; section 2 of the Electoral Commission Act, 1993 (Act*

451); and the Public Elections Regulations, 1996 (CI 15). The case was not in substance, an election petition as contended by Counsel for the applicant. Consequently, the applicant had made a genuine case which called for the interpretative opinion of the Supreme Court under article 130 (2) of the 1992 Constitution. ***Republic vrs Special Tribunal; Ex parte Akosah [1980] GLR 592 at 604-605****, CA;* ***Edusei vrs Attorney-General [1996-97] SCGLR 1; Aduamoa II vrs Adu Twum [200] SCGLR 165 at 171; and Bimpong-Buta vrs General Legal Council [2003-2004]2 SCGLR 1200 at 1253*** *cited.*

See also the case of ***Republic vrs High Court, Fast Track Division Accra, Ex-parte (CHRAJ) Dr. Richard Anane, Interested Party, [2007-2008] SCGLR 213, holding 1***

From the above expositions of the law on the issue of referral, it is clear that just as in other cases where courts have discretion, that discretion in the instant case was not limitless, boundless and most important of all it must be exercised in a timely manner, having regard to the nature of the case and the reliefs that have been sought.

For example, if as in the instant case, from an ordinary reading and appreciation of the plaintiffs claims, it was clear that the taking of evidence was not at all necessary, and the determination of the issues might dispose of the suit one way or the other, the taking of evidence for whatever reason would amount to an improper exercise of discretion and usurpation of the jurisdiction of the Supreme Court in a reckless manner.

This is because, a cursory glance at the core relief claimed by the plaintiff herein, to wit,

"a declaration that under clauses ***5 and 6 of article 20 of the Constitution 1992,*** *the land compulsorily acquired under a certificate of title dated 9th August, 1957 had ceased to be used as a wireless station for which it was acquired"*

should have been apparent to the learned trial judge that this was a case which called for constitutional interpretation, pure and simple. In that regard therefore, the High Court did not have jurisdiction and the court ought to have promptly stayed proceedings and made the referral to the Supreme Court to enable the trial court get guidance from the Supreme Court for the determination of the case before it in line with the decision of the Supreme Court, referred to supra in the Ex-parte Electoral Commission case.

In line with article 130 (2) of the Constitution 1992 and Rule 67 of the Supreme Court Rules, 1996 C.I.16, the following are the prescribed and recommended road map that a court making a referral to the Supreme Court should follow:-

i. Summary of the matter or action before the Court.
ii. The issues involved before the court.
iii. The matter or question referred to the Supreme Court for determination.
iv. Findings of fact if any relevant to the matter or question referred to the Supreme Court. It should be noted that, since it is the lower court that has the pleadings of the case, and other documentary evidence if any had been tendered the summary and findings of fact will be prepared from the said pleadings and evidence led so far.
v. Arguments of Counsel in the matter before the referral court.
vi. Statement or narrative by the court below on how the determination of the constitutional question by the Supreme Court will determine the decision before the court below pursuant to clause (2) of article 130 of the Constitution.

If the procedure set out above is followed, the temptation of the court below to make determinations of some of the issues raised before them or pretend to be the Supreme Court itself will be prevented.

The duty cast on the courts below in referrals pursuant to article 130 (2) of the Constitution 1992 admits of some discretion on their part.

Aside that limited discretion, referral courts must do the following:

1. In the first place, they must stop all further proceedings and refer the case to the Supreme Court and await the determination from the Supreme Court to guide them in their final decision. This they must carry out once they are satisfied at first instance that a constitutional interpretation arises. The referral must be contemporaneous with the realization that a constitutional interpretation has arisen.
2. Secondly, the referral must comply with rule 67 of the Supreme Court Rules, 1996 C.I. 16.

CONSTITUTIONAL AND LEGISLATIVE PROVISIONS ON REFERRALS TO SUPREME COURT

I have observed that, whilst article 130 (2) of the Constitution 1992 provides that only courts can make referrals to the Supreme Court for interpretation of constitutional issues that arise before them for guidance, Rule 67 of the Supreme Court Rules, 1996, C. I. 16 in addition to courts, mentions the following as also capable of making referrals of constitutional issues for interpretation to the Supreme Court for guidance when they arise before them. These are:

i. a person, or
ii. authority

This would seem to connote the fact that an individual person or authority of whatever description can on his or their own make referrals to the Supreme Court for interpretation.

However, article 11 of the Constitution 1992, states that the Constitution shall be the basic law of the land and this is what is known in jurisprudence as the GRUNDNORM. The Supreme Court Rules C. I. 16 which is what is known generally as subsidiary legislation is the third tier on the sources of law in Ghana and is captured in article 11 (c) of the Constitution 1992.

Subsidiary legislations are therefore subordinate to constitutional provisions and substantive Acts of Parliament. It must at this stage be noted that the

Constitution 1992 actually entrenches the principle of supremacy of the Constitution.

In that respect, article 1 (2) of the Constitution 1992 provides as follows:-

> *"This Constitution shall be the Supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall to the extent of the inconsistency be void"*

This therefore means that whenever there is an inconsistency between article 130 (2) of the Constitution and a subsidiary legislation like Rule 67 (1) of C. I. 16, the constitutional provision shall prevail.

And for the avoidance of doubts, it is hereby stated that court as stated in article 130 (2) of the constitution shall take the meaning ascribed to the definition of a court in article 295 of the Constitution which provides as follows:

> *"Court means a court of competent jurisdiction established by or under the authority of this Constitution and includes a tribunal".*

The following are the courts that have been established under the Constitution 1992 and the Court Acts. These are:

1.	Supreme Court	-	Article 126 (1) (a) (i)
2.	Court of Appeal	-	Article 126 (1) (a) (ii)
3.	High Court	-	Article 126 (1) (a) (iii)
4.	Regional Tribunal	-	Article 126 (1) (a) (iii)
5.	Lower Courts such as Circuit Courts and other adjudicating Tribunals	-	Article 126 (2) (i) and the Courts Act 1993, Act 459 and the Courts Amendment Act 2002, Act 620

It is therefore to be noted that, only courts properly so called and duly established under the Constitution 1992 or an Act of Parliament can qualify to make referrals to the Supreme Court.

Since the referral in this case was made by a duly recognised court, i.e. the High Court, the issue raised above really does not arise in the instant case.

DETERMINATION OF REFERRAL ISSUES

This now brings me to the determination of the core issues that have been raised in this referral already referred to supra.

In order to make the referral really meaningful and also relevant, to the circumstances of this case, the issues for determination will be re-formulated as follows"

1. Whether the land acquired under a certificate of title dated 9th August, 1957 (known as La Wireless Land) under the Public Lands (Leasehold) Ordinance (CAP 138) of 1950 is affected by article 20 (5) & (6) of the Constitution 1992.
2. Whether or not if the State is unable to use the La Wireless land for the purpose for which it was acquired the plaintiff herein has to be given the 1st option to re-acquire it by virtue of article 20 (5) and (6) of the Constitution 1992.
3. Whether or not the said constitutional provisions can have retrospective effect.

For purposes of clarity, I will like to argue issueS 1 and 3 first. I have persued the erudite and well reasoned statement of case of the plaintiff in this case just as I have done that of the statement of case filed by the defendants.

In paragraph 64 of the statement of case of the plaintiff, learned counsel for the plaintiff brilliantly captured the undisputed facts in this case.

This is that, the land in dispute was acquired as a leasehold by the then colonial Government for use as a wireless station. That at the time of the institution of the action the land was no longer being used as a wireless station.

It was also contended that none of the buildings developed on the land was used either to accommodate the heads of state and their delegations attending Ghana's 50th anniversary of attainment of independence or the African Union

conference in July of 2007. Finally it was not denied that the buildings on the land have been offered for sale to the general public.

This being a leasehold, it meant that the rights of the lessor in the said land, which in this case is the plaintiff (stool) are not extinguished completely upon the grant of the lease. The legal regime that governs leases therefore have to apply in this case.

It is therefore the resolution of these constitutional issues that is paramount.

1. **Whether the land acquired under a certificate of title dated 9th August, 1957 (known as La Wireless Land) under the Public Lands (Leasehold) ordinance (CAP 138) of 1950 is affected by article 20 (5) & (6) of the Constitution 1992**

In order to properly assess and evaluate the constitutional significance of the above issues, it is necessary to put into context, the entire provisions of article 20 of the Constitution 1992. For it is by such an exercise that the significance of the clauses (5) and (6) of article 20 thereof of the Constitution can be understood and put in proper context since I believe the entire article must be read together. This is necessary because the philosophical underpinnings of the entire provisions of article 20 of the Constitution have to be read together such that the meaning can be ascertained holistically without isolating certain clauses. Any attempt to isolate some provisions from the rest will make those clauses lose their actual meaning.

20 (1) "No property of any description, or interest in or right over any property shall be compulsorily taken possession of or acquired by the State unless the following conditions are satisfied:-

a. the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit; and

b. the necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property.

(2) Compulsory acquisition of property by the State shall only be made under a law which makes provision for-

a. the prompt payment of fair and adequate compensation; and

b. a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from any other authority for the determination of his interest or right and the amount of compensation to which he is entitled.

(3) Where a compulsory acquisition or possession of land effected by the State in accordance with clause (1) of this article involves displacement of any inhabitants, the State shall resettle the displaced inhabitants on suitable alternative land with due regard for their economic well-being and social and cultural values.

(4) Nothing in this article shall be construed as affecting the operation of any general law so far as it provides for the taking of possession or acquisition of property –

a. by way of vesting or administration of trust property, enemy property or the property of persons adjudged or otherwise declared bankrupt or insolvent, persons of unsound mind, deceased persons or bodies corporate or unincorporated in the course of being wound up; or

b. in the execution of a judgment or order of a court; or

c. “by reason of its being in a dangerous state or injurious to the health of human beings, animals or plants; or

d. in consequence of any law with respect to the limitation of actions; or

e. for so long only as may be necessary for the purpose of any examination, investigation, trial or inquiry; or

f. for so long as may be necessary for the carrying out of work on any land for the purpose of the provision of public facilities or utilities, except that where any damage results from any such work there shall be paid appropriate compensation.

(5) Any property compulsorily taken possession of or acquired in the pubic interest or for a public purpose shall be used only in the public interest or the public purpose for which it was acquired.

(6) Where the property is not used in the public interest or for the purpose for which it was acquired, the owner of the property immediately before the compulsory acquisition, shall be given the first option for acquiring the property and shall, on such re-acquisition refund the whole or part of the compensation paid to him as provided for by law or such other amount as is commensurate with the value of the property at the time of the re-acquisition".

Considered as a whole, it becomes very clear that the said article 20 (1) has a clear futuristic intention and not concerned with things of the past.

For example, if as is the case, article 20 (1) of the Constitution provides that no property of any description, or interest over any type of property shall be compulsorily taken possession of by the state unless the conditions stated therein in sub-clauses (a) and (b) are complied with. This is a clear indication of the fact that the commencement provisions of the said article 20 refer to a state of things yet to happen after the coming into force of the Constitution. The simple but plain meaning then is that, if the State of Ghana, represented

by the Government of the day, is desirous of acquiring or taking compulsory possession of any property of whatever description, then the State can do so only if the conditions stated therein are satisfied.

These conditions have been carefully spelt out in sub clause (1) (a) as follows:

i. in the interest of defence
ii. public safety
iii. public order
iv. public morality
v. public health
vi. for town and country planning
vii. for utilization of property in such a manner as to promote public benefit.

The rationale for the said provisions are quite clear. This is because, in the ensuing provisions of article 20 (1) up to article 20 (4) of the Constitution 1992, very elaborate conditions had been stated to justify why only properties needed for acquisition in the areas mentioned could be compulsorily taken possession of, but before you do that, certain conditions or pre-conditions must be fulfilled to minimize the negative effect on the people whose interest in the land will be affected by such a compulsory acquisition of the property.

For example, the provisions recognise the prompt, fair and adequate payment of compensation to any person, whose property shall be compulsorily acquired and the right of such a person to go to the High Court for the vindication of his or her rights if he or she feels that the conditions precedent to a compulsory acquisition have not been met. Furthermore, if pieces of land had been acquired or taken possession of compulsorily in the past as in the instant case under a different statutory regime, and for certain reasons prompt or adequate compensation had not been paid, it will be wrongful, illegal, illogical and unconstitutional to expect provisions in article 20 (1) to regulate the transaction.

Article 20 (3) of the Constitution referred to supra also mentions the need for the State to re-settle any displaced inhabitants on the acquired property having regard to their economic, social and cultural values.

What this means is that, if a frontage of a beach land for example has been compulsorily acquired, and the people there are fishermen and fishmongers, in re-settling the original owners of the property the State shall consider their economic, social and cultural values.

In this respect, it will not be out of place for the State to ensure that the said displaced people are resettled on alternative beach land to ensure that their economic, social and cultural lives are not adversely affected as fishermen etc.

In similar circumstances, where the original settlers of a land that has been compulsorily taken possession of, or has been slated for compulsory possession has communities who are dominantly farmers, traders or artisans of whatever description, steps must be taken to ensure that in resettling them on alternative plots of land, their economic activities are taken into consideration to ensure that they are not worse of than they were previously before the acquisition.

As a matter of fact, if the entire provisions of article 20 of the Constitution 1992 are not construed with this philosophical understanding in mind, serious dislocations will result in the land use policy in Ghana. This is because over the years, various Governments of the State of Ghana have come out with different land use polices which might deviate slightly or substantially from the original purpose for which the land was acquired and put to use e.g. demolition of Makola market and it present use as a car park. This need for variation is always necessary because of the changing roles that Governments play in the socio, economic and cultural affairs and activities of its citizens.

Thus, even though a land might have been acquired solely as a residential facility, the need might have arisen for the same facility to be used for the pubic either as an office for a state institution or still as a facility for public purpose. In such situations it is incumbent upon the court to determine

whether the said use is ancillary to the original purpose for which the property was acquired. See case of ***Nii Nikoi Olai Amontia (substituted by Nii Tafo Amon II) vrs Managing Director Ghana Telecom Civil Appeal H/33/04 dated 11/2/2005 Court of Appeal, reported in [2006] vol. 2. G.M.L.R. 69.***

In the instant case, it is my considered opinion that, the La Wireless Land, being property already covered by a valid and subsisting Leasehold Agreement is not the type of properties whose compulsory acquisition has been envisaged under the entire provisions of article 20 of the Constitution 1992.

As already, explained supra, this is because it is very apparent that the said provisions are intended to be applicable in respect of compulsory possession or acquisitions of properties done after the coming into force of the Constitution 1992. It is under such circumstances that the elaborate procedures outlined in article 20 with particular reference to clauses (5) and (6) thereof come into operation in reference to post 7th January, 1993 compulsory acquisitions of property.

Under these circumstances, I am of the opinion that the land acquired under a certificate of title dated 9th August, 1957 and known as La Wireless Lands under the Public Lands (Leasehold) Ordinance CAP 138 of 1950 is not affected by article 20 sub-clauses (5) and (6) of the Constitution 1992.

I have been emboldened in the decision I have taken by the Ruling of the Supreme Court in the case of ***Ellis vrs Attorney General [2000] SCGLR 24***.

This was a case where the plaintiff's invoked the original jurisdiction of the Supreme Court for a declaration under article 2 of the Constitution, 1992 that the Hemang Lands (Acquisition and Compensation) Law 1992 (PNDCL 294) was inconsistent with and in contravention of articles 20 and 107 of the Constitution and therefore a nullity. It was held upholding the preliminary objection as follows:

1. "The Court could not declare the Hemang Lands (Acquisition and Compensation) Law, 1992 (PNDCL 294) null and void under the 1992

Constitution, because the law had been passed and the plaintiffs' land had been acquired and vested in the Republic under the law before the coming into force on 7th January, 1993 of the Constitution, ***which could only be applied prospectively and not retrospectively. Fattal vrs Minister for Internal Affairs [1981] GLR 104 SC*** applied"

My respected brother Atuguba JSC, who is the President of this panel in his opinion in the *Ellis vrs Attorney-General* case referred to supra put the matter beyond doubt in these forceful terms:-

"PNDCL 294 relates to matters concluded by it both in terms of the vesting of the plaintiffs' lands in the PNDC on behalf of the Republic and as to the quantum of compensation for the same.

As these matters do not fall to be done on or after the coming into force of the 1992 Constitution, that Law, even if it be regarded as an operative existing law within the meaning of article 11 (5) is incapable of infringing the 1992 Constitution."

Continuing further, Atuguba JSC ended the matter as follows:-

"***The pertinent question therefore is whether PNDCL 294, which expropriated the plaintiffs' property requires anything to be done which can affect the period commencing from 7 January 1993, when the 1992 Constitution came into force, in a certain manner, whereas a provision of the Constitution requires that very thing to be done as from 7 January 1993 in a different manner. The answer is clearly No."***

The principle of retrospectivity of past and completed acts during past regimes and their relationship to the Constitution 1992 which was stated in *Ellis vrs Attorney General* referred to supra, has been applied in the following cases:-

1. Baiden vrs Graphic [2005-2006] SCGLR 154, per Atuguba JSC at 160, holding 4

2. Ghana Commercial Bank vrs CHRAJ [2003-2004] SCGLR 91 at 119 per Atuguba JSC where he stated that:

> *"It has constantly been held by the courts in respect of the Constitutions of Ghana, from 1979 up to the present one, that they not are retrospective, relying on cases like Awoonor-Williams vrs Gbedemah 1969 2 G & G, 403, Benneh vrs Republic [1974] 2 GLR 47 CA (full bench), Sam vrs Attorney General [2000] SCGLR and Ellis vrs Attorney General already referred to supra"*

The above then is the evidence which should embolden this court to reject the retrospective application of article 20 to acquisitions made prior to the coming into force of the Constitution.

Since no good reason has been urged on this Court why it should depart from its previous decision on the matter, I am in line with the provisions in article 129 (3) not departing from the previous decision of the Supreme Court. Acquisitions of interest in land done prior to 7/1/1993 are not affected by article 20 of the Constitution.

In coming to the above conclusion, I have been guided by the locus classicus decision of Sowah JA, as he then was in the celebrated case of ***Tufuor vrs Attorney General [1980]GLR 637*** Court of Appeal**,** sitting as the Supreme Court, which case was followed by the Supreme Court in the case of ***Asare vrs Attorney General [2003 – 2004] 2 SCGLR 823, at 825-826*** where it is stated as follows:

> *"modern judicial technique had tended away from simple liberalism towards a purposive approach to interpretation which was more likely to achieve the ends of justice. It was a flexible approach which would enable the Judge to determine the meaning of a provision,* ***taking into account the actual text of the provision and the broader legislative underpinnings and purpose of the text.*** *In applying the purposive approach, a court might give an ordinary or artificial meaning of words in a statute or Constitution, depending upon its perception of the*

legislative purpose of the provision. Consequently, the court would give purposive interpretation to article 60 (1)…"

Again in the ***CEPS vrs N. L. C (Public Services Workers Union of TUC Interested Party) [2009] SCGLR 531, at 568-569***, I stated the following in the majority decision:-

> *"What should be noted is that national Constitutions are made by people to control, regulate and guide the community to achieve goals and objectives. The modern view to constitutional interpretation seems to dwell on purposive approach."*

It is the above constitutional principles of interpretation which guided me to arrive at the conclusion that article 20 (5) and (6) of the Constitution 1992 are inapplicable to interprete acquisitions of land or of property under legal and or constitutional regimes prior to the coming into force of the Constitution 1992 on 7th January, 1993, such as the La Wireless Land.

This now brings me to a determination of issue 3 supra.

3. Whether or not the said constitutional provisions can have retrospective effect.

Retroactivity of article 20 (5) and (6)

Article 107 (b) of the Constitution 1992 provides as follows:-

> "Parliament shall have no power to pass any law
>
> (b) Which operates retrospectively to impose any limitations on or to adversely affect the personal rights and liberties of any person **or to impose a burden obligation or liability on any person except in the case of a law under articles 178 to 182 of this Constitution."**

The meaning of the above is that, the Constitution 1992 as a basic law of the state, frowns upon retroactive legislation. In that respect therefore it is to be noted that, the constitutional provisions themselves, such as those contained in article 20, sub-clauses (5) and (6) cannot by any rule of interpretation be deemed to operate retrospectively.

This is because, the state and possibly individuals and institutions might have acquired vested interests in the parcels of land that had been compulsorily taken possession of under different legislative regimes before the coming into force of the Constitution and its provisions as contained in article 20 (5) and (6).

It is also a fact that the Public Lands (Leasehold) Ordinance (CAP 138) of 1950 has since long been repealed. What should be noted is that, despite its repeal by the State Property and Contracts Act, 1960 (C.A.6) and to some extent, Conveyancing Act, 1973, NRCD 173 the rights, interests, etc. that have accrued to persons or has been vested in the State and those individuals and entities who have had the use of the land or have been on the land for all these years have gotten rights which cannot be extinguished save by operation of the leasehold agreement as is legally enforceable under the constitutional dispensation provided in the instant case, what should be noted is that, since the La Wireless Land had been taken possession of as a Leasehold it, means the La Stool has the reversionary interest, and it is in the interest of the Lessee, the defendant herein to ensure that they do not commit acts which will make it difficult for the Lessor to renew the lease when it expires.

In this respect therefore, I am unable to accept the interpretation learned Counsel for the plaintiff sought to give Retrospective Legislation as defined in the 6th edition of Blacks Law Dictionary.

For example, in this case, it is not denied that the Leasehold on the La Wireless land was executed first in 1948 and varied on 9th August 1957 for 99 years. Thus, if rights that have accrued, since the lease was entered into, the various public entities like PWD, Ghana Civil Aviation Authority, etc. who have acquired rights and vested interests should now be faced with the application of article 20 (5) and (6) supra then no doubt, such an event connotes retroactivity and is to be frowned upon.

In view of the decision that I have already given on the applicability of article 20 (5) and (6) of the Constitution, 1992, it follows then that, once the said

articles do not even apply to the La Wireless Land Acquisition/Leasehold, the issue of the said provisions having retrospective effect has therefore been effectively decided. See the Supreme Court case of ***Sasu vrs Amua Sakyi [2003-2004] SCGLR 742 at 778 - 779***

This issue with which I am faced with here had been adequately addressed by the court of Appeal speaking with one voice in the case of ***Nii Nikoi Olai Amontia vrs Managing Director, Ghana Telecom, [2006] 2 GMLR*** at page 102 to 104 where the court held as follows:-

> "However, this court will have to determine whether Articles 20 (5) and (6) of the Constitution, 1992 have unrestricted and unlimited operations without due regard to any time frame.
>
> In determining this matter, sight must not be lost of the fact that the Constitution is the basic and supreme law of the country and any law found to be inconsistent with any provision of this Constitution shall to the extent of the inconsistency be void, Article 1 (2) of the Constitution, 1992.
>
> A detailed perusal of article 20 (1) and the many clauses therein of the Constitution, 1992 would leave no one in doubt as to the scope and time frame envisaged by the framers of the Constitution.
>
> This is because, article 20(1) for example provides as follows:
>
> Our understanding of the above provision and the conditions stated therein show clearly that the Constitutional provisions cannot be said to have retrospective effect to all lands that had been acquired under the different regimes of land acquisition that we have had in this country.
>
> We are certain in our views that Article 20 of the Constitution, 1992 only deals with land acquisitions that are effected after the 1992 Constitution came into effect, and this by operation of law is January 7th , 1993.
>
> Our conviction and resolve is further buttressed by the provisions in Article 20(2) of the Constitution which provide that compulsory

acquisition of property by the State can only take place under a legal regime which provides for prompt payment of fair and adequate compensation and a right of access to the High Court by any affected person of such an acquisition.

It must be noted that there have been several instances of a lot of acquisition of lands by the State in the past, for which compensation has not yet been paid.

We think we can take Judicial notice of a seminar that was recently conducted by the LAND ADMINISTRATION PROJECT (LAP) of the Ministry of Lands and Forestry for the Judiciary. From this seminar, it became clear that there are many instances where there has been no payment of compensation whatsoever to the owners of the land. In some of these cases, the lands have been acquired for more than twenty or thirty years and completely utilized by the State.

If the Constitutional provisions should have retrospective effect then all such acquisitions of land by the State under the past legal regimes would be unconstitutional. This state of affairs would not only create chaos and confusion in the land administration sector of the country but would lead to anarchy.

Thirdly, it must be noted that since the Constitution 1992 itself frowns upon and actually prohibits retrospective legislation, it is doubtful if the Constitution itself would be interpreted to have retrospective effect. Such an interpretation will not only be reactionary but counter productive and will not be in the interest of the good and orderly development and administration of the country.

This court will therefore hold and rule that Articles 20 (5) and (6) of the Constitution, 1992 have no retrospective effect on acquisitions of land done under CAP 134 the Public Lands Ordinance which is the subject matter of this appeal.

This court is not alone in this line of thinking. Abada J in the case of ***Nii Kpobi Tettey Tsuru II – Plaintiff vrs Ghana Civil Aviation Authority and 2 others – Defendants*** unreported ruling of the High Court, Accra dated 7/5/2003 held as follows:

> *"A careful reading of article 20 of the 1992 Constitution shows that it is to be a future guide as to how the state should proceed in acquiring land and the conditions that are specified to be fulfilled before the state could compulsorily acquire land."*

We prefer the logic and rationale behind Abada J's ruling in the above case to the other cases decided by Nana Gyamera Tawiah especially the case of ***Nii Tetteh Opremreh II Chief of Shiashie – Plaintiff vrs Attorney General and Another, High Court, Accra dated 20/4/1999."***

The combined effect of the above is that, article 20 sub-clauses (5) and (6) definitely then cannot have any retrospective application to the coming into force of the Constitution 1992 on 7th January 1993".

Learned Counsel for the plaintiff in his well thoughout and reasoned statement of case referred this court to the opinion of Prof. Ocran Jsc of blessed memory in the case of ***Memuna Moudy & Others vrs Antwi [2003-2004] SCGLR 967***.

With the greatest respect, the said opinion of Prof. Ocran JSc is not the ratio of the case. This is because the issues involved in the above case were:

1. Whether after the State has compulsorily acquired land under relevant legislation, any person or entity may nevertheless acquire title subsequently in that same piece of land through what is in effect a prescription namely, by adverse possession for twelve years or more, pursuant to the Limitation Decree 1972 NRCD 54.
2. Whether on the facts of the said case, the plaintiffs have succeeded in establishing such adverse possession, and
3. Whether a person who enters on land, as a result of and, on the basis of an agreement with a person, in effect, asserts title through the

purported prescription rights referred to above, is to be held to have forfeited his or her rights, if he or she challenges the title of his or her grantor".

If Prof. Justice Orcan's opinion are viewed against the above issues which called for determination in the ***Memuna Moudy vrs Antwi case***, then clearly that opinion which is an obiter dicta did not address the issues of the case and is therefore not the opinion of the court. This court is therefore not bound by it, as the case is clearly distinguishable from the instant case.

This is because, it is trite law that it is only the ratio decidendi of a court that forms the binding decision of a court and has binding effect and not the obiter dicta.

Under the circumstances, I hold that article 20 (5) and (6) are not capable of having a retrospective effect.

This now brings me to a discussion of the last issue which is

Whether or not if the state is unable to use the La Wireless Land for the public (interest) purpose for which it was acquired, the plaintiff herein has to be given the 1st option to re-acquire it by virtue of article 20 (5) (6) of the Constitution 1992.

Quite clearly, the resolution of the above issue poses no complexity whatsoever. This is because, the Constitution 1992 contains provisions on the definition of what is a public interest.

Article 257 (2) of the Constitution describes what is meant by public lands mentioned in article 257 (1) as"-

"For the purposes of this article, and subject to clause (3) of this article "Public lands" includes any land which immediately before the coming into force of this Constitution was vested in the Government of Ghana on behalf of and in trust, for the People of Ghana, for the public service of Ghana, and any other land acquired in the public interest, for the purposes of the Government of Ghana before, on or after that date."

Article 295 of the Constitution, 1992, which is the definition section defines public interest in the following words:-

> "Public interest" includes any right or advantage **which enure or is intended to enure to the benefit generally of the whole of the people of Ghana."**

Under, section 2 of the then applicable Law, the Public Lands Leasehold (CAP 138) under which the La Wireless Lands were taken possession of as a leasehold, public purpose is defined to include:

(a) " the exclusive use of the Government of the Gold Coast or the use of the general public.

(b) the provisions, extension or improvement of any public utility service

(c) the effectuation of any scheme undertaken by a statutory body, the effectuation of which will in the opinion of the Governor in Council, be of public benefit or importance and with respect to which the Governor in Council is satisfied that by reason of disputes, as to the ownership of the land required, or inability of the parties to agree to the terms of a lease, or for any other cause, the effectuation of such scheme is being hindered to the detriment of the public interest

"Public works" is defined in the same law as:

> "include any works done or being done or contemplated by the Government of Gold Coast or any Town Council, Native Authority or other statutory body, and any public scheme of development, redevelopment or reconstruction (including schemes of preservation for development) and any work done or to be done and any change of user under any such scheme."

The above definitions clearly admit of a wide, broad and liberal interpretation of what is public interest, or public purpose or public works. Thus , even if the view is taken that the constitutional provisions in the Constitution 1992

prevail the same expansive, broad and liberal view shall prevail, since the two definitions are similar in context.

However, as is to be noted, the La Wireless Land had been acquired in the colonial era but the definitions therein contained in CAP 138 admit of no restrictive use such as has been urged on this Court by the plaintiff.

My opinion is that, the President of the Republic of Ghana will just be substituted for the Governor in Council mentioned in CAP 138, and Ghana also for Gold Coast.

With such an interpretation and understanding, will it be said to be contrary to public interest or the public purpose if the state as is exemplified in the authority of the President decided to use portions of the La Wireless Land to build Executive Mansions for visiting Heads of State who will attend Ghana @50 Independence Anniversary and the African Union Conference also slated for Ghana some few months away from Ghana @ 50?

My answer is a big No. This is because, as a country, there have been numerous examples where land that had been acquired for use in the public interest for specific purposes have had the use changed without any question or blemish. That is however not to say the people of La should sit down and raise their hands in despair without exercising their constitutional rights.

For example, part of the Accra Race Course land has had to be taken away for another public interest , purpose or use, and this was the construction of the multi purpose Accra International Conference Centre.

The second is the conversion of one of the Makola markets to a modern public car park.

My view of the matter therefore is that, once the use to which the land is to be put, is not restricted to any personal or individual interest, but one to which the general public will have a benefit, or the benefits of the project will enure to the entire country either directly or indirectly, the public interest purpose will be deemed to have been adequately catered for.

In the instant case, I agree entirely with the plaintiff that the intended sale or actual sale of the Houses built specifically for the Ghana @50 anniversary and African Union Conference to private individuals is a use that seems to be inconsistent with the use envisaged under both CAP 138 and the Constitution.

Even though the La Wireless Land is a leasehold to which the people of La have the reversionary interest, and therefore the argument might be made that the plaintiff has the reversionary interest in the long run, it is still considered by me as a reckless exercise of discretion by the Executive in the sale of the Houses built for a public purpose and interest to private individuals.

The only saving issue is the fact that the actual sale of the Houses was opened to all members of the general public based on the ability to pay. In that respect therefore, it could be stated that such a use is not inconsistent with the user clause

In view of the above decisions, it is my view that, the complaint of the plaintiff is not a constitutional dispute.

Quite clearly, the plaintiff is not without a remedy. This is because, even though in totality I have come to the conclusion that all the relevant constitutional issues referred to this court by the learned trial judge do not avail the plaintiff in the material nature which would have positively enhanced their claims, they are definitely not without a remedy. There are adequate provisions under the State Property and Contracts Act, 1960 C. A. 6 which the plaintiff's can make use of to address their concerns if they are so minded.

GENERAL COMMENTS

I have noted with much concern the reliance by learned Counsel for the plaintiff on a host of foreign decided cases. I am however of the view that, whenever the words in the Constitution or the Statute such as CAP 138 or C.A.6 are simple and straightforward, it is not necessary to refer to foreign cases for guidance. Instead, the court should adopt the principles of

constitutional and statutory interpretation espoused in cases like the ***Tufuor vrs Attorney-General*** line of cases already referred to supra.

In situations like this, the ordinary and plain meanings of the words must be used.

In this context, public purpose or public interest must be taken to mean any use of property to which members of the public have access to or are entitled to have beneficial enjoyment or use whenever desired or circumstances permit, in contra distinction to restrictive use.

CONCLUSION

I will conclude this matter by stating finally that, all the constitutional issues referred to this court are inapplicable to the circumstances of this case.

In the first place, it is my opinion that article 20 (5) & (6) of the Constitution 1992 is inapplicable to acquisitions of property before the coming into force of the Constitution 1992. The entire article 20 of the Constitution looks to the future, not past.

Secondly, the said articles 20 (5) & (6) of the Constitution do not have retrospective effect or application.

Thirdly, public purpose or public interest should be given a wide, broad and expanded interpretation such as would admit of any use of property that will have a beneficial effect on the entire community or is open to members of the public.

In the result, I would dismiss the constitutional referral as wholly inapplicable under the circumstances of this case.

The case is therefore remitted to the trial High Court to be determined in terms of article 130 (2) of the Constitution.

J. V.M. DOTSE
JUSTICE OF THE SUPREME COURT

BAFFOE-BONNIE, JSC:-

I had the privilege of reading beforehand the opinion of my learned brother Dotse JSC. I agree with the reasoning and conclusion reached by him.

P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

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