

S.C. 4/2011

IN THE SUPREME COURT OF SIERRA LEONE
IN THE MATTER OF THE CONSTITUTION OF SIERRA LEONE
ACT NO.6 OF 1991 SECTIONS 127(1-4); 124; 137(5A); 135(3-5);
136(2-6); 146(1) AND (2); 147(1) AND (2); 147(1-4); 148(1-3);
149(1-4) AND 146

AND

IN THE MATTER OF THE OMBUDSMAN ACT NO.2 OF 1997.
SECTIONS 4(A&B) AND 7-15 OF THE SAID ACT

IN THE MATTER OF THE SIERRA LEONE GAZETTE VOL
CXLI THURSDAY 17TH JUNE, 2010 NO.44 GOVERNMENT
NOTICE NO. 173 PAGES 840/1

AND

IN THE MATTER OF THE EXERCISE OF THE POWERS
CONFERRED ON THE PRESIDENT BY SECTION 137 OF THE
CONSTITUTION OF SIERRA LEONE 1991(ACT NO.6 OF 1919)
TO SET UP AND DID SET UP A TRIBUNAL CONSTITUTION
OF:-

- | | |
|------------------------------|------------|
| (1) JUSTICE EDMOND E. COWAN | - CHAIRMAN |
| (2) WARDSWORTH FILO JONES | - MEMBER |
| (3) ROLAND E. CAESAR | - MEMBER |
| (4) JOSEPH GOMOI-VANDI-KOBBA | - MEMBER |

2A. TO INQUIRE INTO THE QUESTION OF THE REMOVAL OF
JUSTICE ALUSINE SESAY AND JUSTICE ALLAN B.
HALLOWAY,

BOTH OF WHOM ARE JUDGES OF THE SUPERIOR COURT OF
JUDICATURE AND TO REPORT TO THE PRESIDENT THE
FACTS THEREON AND THE FINDINGS THEREOF, AND

(B) RECOMMEND TO THE PRESIDENT WHETHER JUSTICE
ALUSINE SESAY AND JUSTICE ALLAN B. HALLOWAY
ought to be removed from office

(3) THE TRIBUNAL SHALL COMMENCE ITS PROCEEDINGS ON THE 29TH DAY OF JUNE, 2010 AND SHALL SIT IN FREETOWN OR SUCH OTHER PLACE IN SIERRA LEONE AS THE TRIBUNAL MAY DETERMINE

(4) THE TRIBUNAL SHALL REGULATE THE PROCEDURE FOR THE PROCEEDINGS

(5) THE TRIBUNAL SHALL SUBMIT ITS REPORT WITHIN SIX WEEKS OF THE COMMENCEMENT OF THE PROCEEDINGS.

MADE AT FREETOWN THE 10TH DAY OF JUNE, 2010

BETWEEN:

JUSTICE ALLAN B. HALLOWAY	-	PLAINTIFF
AND		
1. JUSTICE EDMOND E. COWAN	-	CHAIRMAN
2. WORDSWORTH FILO JONES	-	MEMBER
3. ROLAND E. CEASAR	-	MEMBER
4. JOSEPH GOMOI VANDI-KOBBA	-	MEMBER
5. ATTORNEY-GENERAL & MINISTER OF JUSTICE		

CORAM

HON. MRS. JUSTICE BASH-TAQI	-	JSC
HON. MR. JUSTICE P. O. HAMILTON	-	JSC
HON. MRS JUSTICE V.A.D. WRIGHT	-	JSC
HON. MR. JUSTICE M.E.T. THOMPSON	-	JSC
HON. MRS. JUSTICE A. SHOWERS	-	JAC

F.M.MARGAI ESQ., S.B. TEJAN-SIE ESQ. AND R.B. KOWA ESQ.
FOR THE PLAINTIFF

JOSEPH G. KOBBA FOR DEFENDANTS

RULING DELIVERED ON THE 8th DAY OF July 2011

V.A.D. Wright JSC. I had the opportunity of reading the lead ruling of my brother. This is an application dated 8th day of April, 2011 following relief's pursuant to Section 127 (1-4) and 124(1) of the Constitution of Sierra Leone, 1991 (act No. 6 of 1991) namely:

1. A declaration that the appointment by the President of (1) Mr. Justice Edmond E. Cowan – Chairman, (2) Wordsworth Filo Jones, (3) Roland E. Ceasar as the Tribunal set up (a) to inquire into the question of the removal of Justice Alusine Sesay and Justice Allan B. Halloway both of whom are Judges of the Superior Court of Judicature and to report to the President the facts thereon and the findings thereof (b) recommend to the President whether Justice Alusine Sesay and Justice Allan B. Halloway ought to be removed from office contravene Section 137(5a) of the Constitution of Sierra Leone, Act No.6 of 1991 in that all three Commissioners do not meet by way of qualification the requirements envisaged by the said sub-section reading Section 135 of Act No.6 of 1991 in tandem with Sections 137 (2)(a) and (b) and 136(4) of the same Act.
2. A declaration that the appointment of Joseph Gomoï Vandi-Kobba to the said Tribunal as published in Sierra Leone Gazette Vol. CXLI Thursday 17th June, 2010 No. 44 Gov. Notice No.173 contravenes Section 137 of Act No.6 of 1991 as the Tribunal should consist of a Chairman and two other Members.
3. A declaration that Justice Edmond E. Cowan, named as a Chairman of the Tribunal in Gov. Notice No.173 at P.840 in the Sierra Leone Gazette Vol. CXLI, Thursday 17th June, 2010 No.44 is not

the same person who is Presiding over the Tribunal as evidence in a Ruling delivered by the

Tribunal dated 29th March, 2011 the Chairman being Justice E. K. Cowan and not Justice Edmond E. Cowan.

4. Alternatively, a declaration that the appointment of Justice Edmond E. Cowan as Chairman of the said Tribunal who is the substantive Ombudsman An office provided for in Section 146 of the Constitution of Sierra Leone Act No.6 of 1991 and actualized by the coming into force of Act No.2 of 1997 tantamount to as conflict of interest in that, the Plaintiff under Investigation is a public officer who if aggrieved by the process leading upTo the setting up of the said Tribunal should be amenable to the Ombudsman's office and or services and thereof breach the Rules of natural Justice by depriving him of such facilities that is access to the Ombudsman.
5. A declaration that the President, having set up the said Tribunal under Section 137 of Act No.6 of 1991 and caused same to be gazetted as Aforesaid with as time line for submission of its report to the President Within six weeks of the commencement date being 29th day of June, 2010; Not having extended the period on the expiry of the commencement date, and publishing same in the gazette, deprived the ongoing Tribunal of Legitimacy/efficacy as such omission contravenes Section 137 of Act No.6 Of 1991 from which authority is derived.
6. Such other or further Orders to made by this Hon. Court as the Justice of the of the case may demand.

The brief facts in this case are that a tribunal was set up by the President under Section 137 (5) (a) & (b) of the Constitution of Sierra Leone 1991 (Act No. 6 of 1991) hereinafter referred to as the Constitution appointing

three persons to enquire into the removal of Justice Allan Halloway and Justice Alusine Sesay Judges of the High Court. The President ordered the tribunal to commence sittings on the 29th June 2010 and to submit its report six weeks of the commencement of the proceedings as contained in the Gazette as Public Notice No174. Justice Edmond Cowan was appointed Chairman of the Tribunal with Wordsworth Filo Jones Esq., Roland E. Caesar Esq. and Joseph Gomoj Vandi Kobba.

Charles Margai Esq. Counsel for the plaintiff raised series of objections seeking several declarations, from the Supreme Court to hold that the declarations sought contravene certain provisions of the Constitution.

The application is supported by the affidavit of the plaintiff sworn to on the 5th April 2011 and filed herein. At the hearing leave was granted to the respondent to file their case out of time.

I shall now deal with the first declaration sought, which is that the Chairman Justice Edmond Cowan, Wordsworth Filo-Jones and Rowland Caesar appointed by the President to serve in the Tribunal be removed from office since it contravenes sections 137(5a) of the constitution since they do not have the required qualifications for the post to sit in the tribunal and that they have all passed retirement age.

Learned counsel for the plaintiff Charles Margai Esq. in his case submitted that the qualification of members to sit on the tribunal are found in Section 137(1) of the Constitution. He submitted that Section 135 deals with the appointment of Judges their retirement ages and Section 136(2)(3)(4)&(6) summarises the circumstances on which a Judge or Justice has reached retirement age can be appointed to act as a Judge of the High Court or Justice of the Court of Appeal or a Justice of the Supreme Court. He reiterated that all the three members of the tribunal have passed the compulsory retiring age of sixty five years, and that they have not held office as a Justice of the Supreme Court. He said

that it was imperative that section 135(3) should be read together with Section 137(2b) of the constitution to give effect to the correct meaning of the word "qualified" as used in the said sub-section.

Learned Counsel for the respondent J. G. Kobba Esq. in his case filed disagreed with those submissions and submitted that all the two scenarios envisaged by Section 135(4) are that one must be qualified to practise as counsel if you have been called and enrolled or otherwise admitted as such and have not subsequently been disbarred or removed from the Roll of Counsel or Legal Practitioners. He went on to say that from the foregoing it would appear that one would remain eligible to practice as Counsel until one is disbarred or removed from the Roll of Counsel or Legal Practitioners and submitted that any person entitled to practise for twenty years without sitting as a Supreme Court Justice will be qualified to be a member of the tribunal.

Let me say that Chapter VII of the Constitution deals with the Judiciary and part V deals with the appointment of judges and the relevant provisions are to be found in Sections 135(1) 135(2) 135(3) and 135(4) and 136(5) of the constitution:-

Section 135 (1) states "The President shall, acting on the advice of the Judicial and Legal Service Commission and subject to the approval of Parliament, appoint the Chief Justice by warrant under his hand from among persons qualified to hold office as Justice of the Supreme Court.

(2) The other Judges of the Superior Court of Judicature shall be appointed by the President by warrant under his hand acting on the advice of the Judicial and Legal Service Commission and subject to the approval of Parliament.

(3) A person shall not be qualified for appointment as a Judge of the Superior Court of Judicature, unless he is entitled to practise as Counsel

in a Court having unlimited jurisdiction in civil and criminal matters in Sierra Leone or any other Country having a system of law analogous to that of Sierra Leone and approved by the Judicial and Legal Service Commission, and has been entitled as such Counsel in the case of appointment to:-

- (a) the Supreme Court, for not less than twenty years;
- (b) the Court of Appeal, for not less than fifteen years;
- (c) the High Court of Justice, for less than ten years.

(4) For the purposes of subsection (3), a person shall be regarded as entitled to practise as Counsel if he has been called, enrolled or otherwise admitted as such and has not subsequently been disbarred or removed from the Roll of Counsel or Legal practitioners.

136(5) Any person appointed under the provisions of sub-section (4) of this section to act as Justice of the Supreme Court or of the Court of Appeal shall continue to act for the period of his appointment or if no such period is specified until his appointment is revoked by the President acting in accordance with the advice of the Judicial and Legal Service Commission. The above sections in my mind are clear and unambiguous. In *A. G. Ogun State (2002) 2 W.R.N. Bella JSC* said

"The fundamental principle is the interpretation that would serve the interest of the Constitution and would carry out its object and purpose should be preferred. To achieve this goal, its relevant provisions must be read together and not disjointly, where the words of any section are clear and unambiguous, they must be given their original meaning unless this would lead to absurdity or be in conflict with the provisions of the constitution and effect must be given to those provisions without any recourse to any other control"

The three commissioners have been called to the bar for more than 20 years thereby making them eligible for appointment as Justice of the Supreme Court as enumerated in Sections 135(3)(c) of the Constitution. Section 135(4) of the Constitution has two parts firstly that one must be entitled to practice as counsel if one is enrolled and secondly if one is admitted and not subsequently been disbarred or is removed from the Roll of Counsel or Legal Practitioners.

It could be seen from the above that to satisfy the conditions laid down in Section 135 (3) one is entitled to practice for twenty years without sitting as a Supreme Court Justice to serve as a member of the Tribunal.

Section 137 of the Constitution gives the tenure of office of the Judges and Justices of the Superior Court of Judicature Section 137(1) of the constitution states

"Subject to the provisions of this section a Judge of the Superior Court of Judicature shall hold office during good behaviour.

Section 137(2) states that a person holding office as a Judge of the Supreme Court of Judicature-

- (a) May retire as Judge at any time after attaining the age of sixty years;
- (b) Shall vacate that office on attaining the age of sixty - five years.

of course these are all part of the conditions of service of Judges but Section 136(4) shows that a Justice of the Appeal or Supreme Court can be appointed to act as a Justice of Appeal or Supreme Court after the retiring age of sixty-five years for any prescribed period.

From the above, it is abundantly clear that that one can be appointed to act as a Judge of the High Court or Justice of the Appeal Court or Justice of the Supreme Court after attaining 65 years under Section 136(2) and 136(4) of the constitution.

Formerly the approach to legislative interpretation was the literal rule but that has now moved towards the purposive rule. Lord Diplock in *Carter VS Bradbeer* (1975) ALL ER 158 holds that "If one looks back to actual decisions of this house over the last thirty years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions

In *Agyei Twum Vs A-G & Akwetey* (2005-2006) SCGLR Dr Date – Bah JSC said "The concept of the purpose of a constitutional provision reveals there are two kinds of purpose; Subjective and objective. The subjective purpose is what the framers of the constitution actually intended. The objective purpose, on the other hand, is what the provision should be seeking to achieve, given the general purposes of the constitution and the core values of legal system and of the constitution. In other words, it is the purpose that a reasonable person would have had if he or she were faced with formulating the provision in question.

Section 137(5) (a) can be divided into two parts those who have held office as a Supreme Court Justice and those who are qualified to hold office as a Supreme Court Justice.

To me the fact that the Commissioners are over 65 years is irrelevant since they are still entitled to practice as Barristers and Solicitors and their names have not been removed from the Roll of Legal Practitioners.

It was not necessary for the Commissioners to serve as a Justice of the Supreme Court.

Therefore since the Commissioners have fulfilled the qualification in Section 137(4) they were validly appointed as members of Tribunal.

In relation to the second declaration the plaintiff submitted in his case that in accordance with Section 137 (5a) the President appointed a Tribunal comprising as follows:-

1. Justice Edmond E. Cowan Chairman
2. Wordsworth Filo Jones
3. Roland E. Caesar
4. Joseph Gomoï-Vandi Kobba

Contrary to sub-section (5a) of Section 137 of Act No.6 of 1991.

In the defendant's case it was disclosed that Joseph Gomoï-Vandi Kobba advised himself at the time of his appointment that he was not qualified under Section 137(5a) and 135(3) since he had not qualified for twenty years and as such cannot be a member of the Tribunal. Since this is a nullity Joseph Gomoï-Vandi Kobba did not participate as a member of the Tribunal although he now represents the interest of government.

It is clear that Section 135 (5) of the Constitution was not contravened and the declaration sought therefore fails.

In relation to the third declaration that the Chairman named in Sierra Leone Gazette Vol. CXL I, Thursday 17th June 2010 No.44 at pp 84011 is not the same person as Justice E. K. Cowan presently chairing the Tribunal as evinced from Ex ABH 2 dated 29th March 2011 (see Exh ABH1 & ABH2) This is merely a typographical error wherein the initial "C" was substituted for "k" in the name of Justice Edmond K. Cowan. Therefore this declaration fails.

In relation to the fourth declaration sought that the Chairman must recuse himself, as the Chairman of the Tribunal C.F.Maargai Esq., in his case said that if the Plaintiff is aggrieved he may exercise his rights and petition the office of the Ombudsman which office has as its head the Chairman of this Tribunal.

In the plaintiff's case it was said that there is a conflict of interest in discharging his duty as Chairman of the Tribunal while remaining the Ombudsman. By the Ombudsman acting as Chairman or even an ordinary member of the said Tribunal it had shut the door to any recourse to him by the plaintiff in the event of a complaint arising from maladministration resulting in injustice emanating from his superiors amounting to a denial of natural justice. The defendant in his case disagreed with this in his case.

The Chairman was appointed by the President by Section 137(5) which states that the President acting in consultation with the Judicial and Legal Service Commission shall appoint a Tribunal which shall consist of a Chairman and two other members, all of whom shall be persons qualified to hold or have held office as a Justice of the Supreme Court.

This Tribunal was set up by the President as spelt out in Section 137(5)(b) The Tribunal appointed under paragraph (a) shall enquire into the matter and report on the facts thereof and the findings thereon to the President and recommend to the President whether the Judge ought to be removed from office under sub-section (7)

The functions of the Ombudsman was set up as laid in part III of the Ombudsman Act No.2 of 1997 whose functions include "to investigate any administrative act of prescribed authority in respect of which a complaint has been made to him by any person who claims to have suffered injustice as a result of any maladministration in connection with

such act or information as received by him from any person or source, otherwise than by complaint, referred to him. " He also had to take appropriate action to remedy, correct or reverse the act complained of through such means as are fair, proper and effective. As Chairman of the Tribunal he performs a judicial function and as an Ombudsman he investigates all cases of maladministration brought to him.

Section 8(1) (a) of the Ombudsman Act precludes the Ombudsman from investigating any matter "pending before or already decided by a court of competent jurisdiction".

The Constitution makes provisions for persons aggrieved to have redress to Supreme Court under its supervisory or original jurisdiction. Section 127 of the Constitution states "that a person who alleges that an **enactment** or anything contained in or done under the authority of that Act or any other enactment is inconsistent with, or is contravention of a provision of this constitution may at any time bring an action in the Supreme Court for a declaration to that effect".

It is pertinent to note that the Tribunal's recommendation to remove the Judges from office has to be confirmed by a two third majority in Parliament and by Section 94 (1) of the Constitution Parliament may regulate its own procedure, make an amend standing orders of Parliament.

Section 94(2) of the Constitution states clearly that the application or interpretation of rules, decision or order done by parliament or by the Speaker under the rules of procedure shall not be enquired into by the Court.

This brings to my mind the provision of Section 53(3) of the Constitution in relation to complaint from aggrieved persons which states that "Whereby this Constitution or under any other law the President is

required to act in accordance with the advice of any person or authority the question whether he has in any case received or acted in accordance with such advice shall not be enquired into by any court". From the foregoing I see no reason why the Chairman of the Tribunal being an Ombudsman should reclude himself from the Commission. Therefore this declaration fails

In relation to the fifth declaration sought in the plaintiffs case learned Counsel for the plaintiff he said that the publication in the Gazette stated the date of commencement and conclusion that is 29th June 2010 to six weeks thereafter, but the Tribunal commenced its proceedings on the 10th January 2011, of which the Tribunal is still sitting, He submitted that Section 170(7) of the constitution must be read together with the constitutional and statutory Instruments Act No6 of 1999 which was dealt with in the Hinga Norman case. He further said that the President having invoked the provisions of Section 137(5a) of the Constitution it was mandatory for Sections 170(7) to be strictly complied with.

The defendant's case stated that an executive command can attract the Rules of Statutory Interpretation when they are Legislative or statutory as the name applies. He relied on Section 53 of the Constitution supra; and that the orders contained in Government Notice No174 could not be mandatory, but directory and that the Gazette has no Legislative effect not seeking an enlargement of time in the circumstance does not entail any legal consequences which will render the present exercise Null and Void.

According to the Interpretation Act 1971 No. 8 of 1971 a Gazette means "the gazette published by order of the Government of Sierra Leone and

required to act in accordance with the advice of any person or authority the question whether he has in any case received or acted in accordance with such advice shall not be enquired into by any court". From the foregoing I see no reason why the Chairman of the Tribunal being an Ombudsman should recluse himself from the Commission. Therefore this declaration fails

In relation to the fifth declaration sought in the plaintiffs case learned Counsel for the plaintiff he said that the publication in the Gazette stated the date of commencement and conclusion that is 29th June 2010 to six weeks thereafter, but the Tribunal commenced its proceedings on the 10th January 2011, of which the Tribunal is still sitting. He submitted that Section 170(7) of the constitution must be read together with the constitutional and statutory Instruments Act No6 of 1999 which was dealt with in the Hinga Norman case. He further said that the President having invoked the provisions of Section 137(5a) of the Constitution it was mandatory for Sections 170(7) to be strictly complied with.

The defendant's case stated that an executive command can attract the Rules of Statutory Interpretation when they are Legislative or statutory as the name applies. He relied on Section 53 of the Constitution supra; and that the orders contained in Government Notice No174 could not be mandatory, but directory and that the Gazette has no Legislative effect not seeking an enlargement of time in the circumstance does not entail any legal consequences which will render the present exercise Null and Void.

According to the Interpretation Act 1971 No. 8 of 1971 a Gazette means "the gazette published by order of the Government of Sierra Leone and

includes any supplement thereto, Gazette Extra ordinary so published and, in respect of any publication before the 27th April 1961 of the Sierra Leone Gazette."

By Section 170 (7) of the Constitution any orders, rules or regulations made by any person or person or authority pursuant to a power conferred in that behalf, by this Constitution or any other law:-

- (a) Shall be laid before Parliament
- (b) Shall be published in the Gazette on or before the day they are Laid before Parliament.
- (c) Shall come into force at the expiration of a period of twenty-one days of being so laid, unless Parliament before the expiration of the said period of twenty-one days annuls any such orders, rules or regulations by the votes of not less two-thirds of the members of Parliament.

From the above it could be clearly seen that a Gazette is not a constitutional Instrument or Statutory Instrument, therefore the orders contained in Government Notice No. 174 could not be mandatory and that the Gazette has no legislative effect. I accordingly find no legal substance to enable me to grant this order especially in view of Section 170 (7) and section 53(3) of the Constitution.

From the foregoing all the declarations sought are refused and the motion is accordingly dismissed.

No order as to costs.

Wright

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HON. MRS JUSTICE V.A.D WRIGHT JSC

