

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 1991) TO SET UP AND
DID SET UP A TRIBUNAL CONSTITUTING 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 AND THE FINDINGS THEREOF. AND

B. RECOMMENDATION 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. CAESAR	-	MEMBER
4. JOSEPH GOMOI VANDI-KOBBA	-	MEMBER
5. ATTORNEY-GENERAL & MINISTER OF JUSTICE		

DEFENDANT

CORAM

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

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 DAY OF . . . , 2011.

HON. MR. JUSTICE P.O. HAMILTON JSC

The Plaintiff it must be noted commenced this action by way of an *Originating Notice of Motion* 8th day of April, 2011 invoking the *Originating Jurisdiction of the Supreme Court* for interpretation of certain *Sections* of the *Constitution of Sierra Leone 1991 (Act No.6 of 1991)*, Declarations thereof pursuant to *Sections 124(1) and 127(1-4) of the said Constitution*.

In support of the *Originating Notice of Motion* there is filed an affidavit of the Plaintiff herein sworn to on the 8th day of April, 2011 pursuant to *Rule 89 of the Supreme Court Rules Constituted by Instrument No.1 of 1982*, and a statement of the Plaintiffs case together with an affidavit in verification thereof. The Defendants too filed their statement of case and an affidavit in verification thereof.

For purposes of clarity I shall set out in *extenso Sections 124(1) and Section 127(1) and (2) which gave this Court original jurisdiction in this regard:*

Section 124(1): "The Supreme Court shall save as otherwise provided in Section 122 of the Constitution, have original jurisdiction to the exclusion of all other Courts –

(a) in all matters relating to the enforcement or interpretation of any provision of the Constitution; and

(b) where any question arises whether an enactment was made in excess of the powers conferred upon Parliament or any other authority or person by law or under the Constitution.

Section 127(1): "A person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment is inconsistent with, or is in contravention may at any time bring an action in the Supreme Court for a declaration to that effect".

Section 127(2): "The Supreme Court shall, for the purpose of the declaration under Sub-Section, make such orders and give such directions as it may consider appropriate for giving effect to, enabling effect to be given to the declaration so made".

It must be noted straight off that the Supreme Court has got original jurisdiction to make declaration the effect that any law found to be inconsistent with any provision of the Constitution renders the offending provision of that law *null and void*.

I shall now turn to consider the submissions in the Plaintiff's case and that of the Defendants case relation to the five (5) Reliefs/Declarations sought by the Plaintiff.

1. FIRST DECLARATION

Counsel for the Plaintiff in his statement of case submitted that the members of the Tribunal are not qualified to sit as members since they are well above the compulsory retiring age of sixty-five (65) years as *Section 135(3) of the Constitution* should be read together with *137(2b)* to give a purposeful meaning to the disqualification for appointment as a Judge of the Superior Court of Judicature contemplated by *Section 137 (5a) of the said Constitution* if there should be a proper appreciation of its intent. He further submitted that all three (3) members of the Tribunal have passed retiring age as in *Section 137(2)(b) of the Constitution* and neither has held office as a Justice of the Supreme Court as is required by *Section 137(5)(a)*. All three (3) Commissioners therefore have failed to meet the requirement set out in *Section 135(5)(a) of the Constitution*.

Counsel for the Defendants in his statement of case submitted that although the three members of the Tribunal are above the age laid down in *Section 137(2)(a) and (b)* they continue to be entitled to practice as Counsel in the Courts as there is no evidence that they have been removed from the roll of Counsel or Legal Practitioners. He further submitted that they have not held office as Justice of the Supreme Court which affects the first limb of *Section 137(5)(a)* but they are persons qualified to hold office as Justice of the Supreme Court which is the second limb thus making them eligible for appointment as Justices of the Supreme Court.

Section 137(5)(a) of the Constitution 1991 (Act No.6 of 1991) provides:

"If the Judicial and Legal Service Commission represents to the President that the question of removing a Judge of the Superior Court of Judicature, other than the Chief Justice, Subsection (4) ought to be investigated then –

(a) 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.

What is the qualification to hold office as a Justice of the Supreme Court? Section 135(3)(4) and (5) provides the answer. It provides:

"A person shall not be qualified for appointment as a Judge of the Superior Court of Judicature, unless he is entitled to practice 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:-

(c) the Supreme Court, for not less than twenty years;

(d) the Court of Appeal, for less than fifteen years;

(e) the High Court of Justice, for not less than ten years".

"for the purpose of Subsection (3) a person shall be regarded as entitled to practice 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 Practitioner".

"for purposes of this section, a person shall not be entitled to practice in a Court by virtue of his holding or acting in any office".

In my humble opinion Section 135(3)(4) and (5) of the Constitution makes it clear that there is a qualification laid down for the appointment as a Judge to the various Courts i.e. Supreme Court, Court of Appeal, High Court of Justice, and the Superior Court of Judicature.

of Appeal and High Court. There is no reference to age and age is not a qualification requirement. It is a clear fact that all three members of the Tribunal have fulfilled the condition laid down in *Section 135(4)(a)* since they are above twenty (20) years of age and are enrolled persons as Counsel or Practitioners and they remain so qualified until they are debarred or removed from the roll of Counsel or Legal Practitioners.

Does age disqualify a person from holding office as a Judge of the Superior Court of Judicature? I would bold to answer this question in the negative and my reason is to be found in *Section 136(2)* and *the Constitution* but I shall here reproduce Subsection (4) which is of concern to this matter.

Section 136(4) provides: "where the office of a Justice of the Supreme Court or Court of Appeal is vacant or for any reason a Justice thereof is unable to perform the functions of his office or if the Justice advises the President that the state of business in the Supreme Court or in the Court of Appeal as the case may be, so requires the President may, acting in accordance with the advice of the Judicial and Legal Service Commission, appoint a person who has held office as or a person qualified for appointment as a Judge of the Superior Court of the Judicature to act as a Justice of the Supreme Court or of the Court of Appeal, as the case may be, notwithstanding the fact that he has already attained the retiring age prescribed by Section 137". (Emphasis mine).

The phrase "notwithstanding the fact that he has already attained retiring age prescribed in Section 137" is where age is stated in relation to appointment.

In my humble opinion even though the retiring age prescribed by *Section 137* is considered in *Section 136(4)* the appointment therein is premised on "a person who has held office as or a person qualified for appointment as a judge of the Superior Court of Judicature to act as a Justice of the Supreme Court". Therefore though retiring age became a part of it, appointment was based on nothing but qualification and qualification depends on nothing but on *Section 135(4)*, and that is that the person must be entitled to practice as Counsel if he has been called, enrolled or otherwise admitted as Counsel and has not been debarred or removed from the roll of Counsel or Legal Practitioners.

I therefore declare that the appointment of Hon. Justice Edmond K. Cowan, Wordsworth Filo and Roland E. Caesar as members of the Tribunal does not contravene *Section 137(5)(a)*, *Constitution of Sierra Leone 1991 (Act No.6 of 1991)* and will therefore dismiss the said declaration sought by the Plaintiff.

2. SECOND DECLARATION

Counsel for the Plaintiff submitted in his statement of case that the appointment of four Commissioners as contained in *Government Gazette No.173 at Pages 1 Vol. CXL1 dated Thursday 17th June, 2010* contravenes *Section 137(5)(a)* and therefore calls in aid *Section 127(1) of the Constitution*.

Counsel for the defence in his statement of case submitted that merely appointing Joseph Gomoi Vandy Kobba does not contravene *Section 137(5)(a)* since at the time of appointment Joseph Gomoi Vandy Kobba was not qualified under *Section 137(5)(a)* and *135(3)(a)* although he was qualified to practice as Counsel and was not debarred but he had not practiced for twenty (20) years. Counsel further submitted that the appointment was a legal nullity and the person so appointed did not participate as a member of the Tribunal therefore it cannot be said that *Section 137(5)(a)* was contravened.

In my humble opinion it is clear that since the commencement of the Tribunal only three not four commissioners have served with Joseph Gomoi Vandy Kobba not being in the Tribunal panel. Therefore *Section 135(5)(a)* has not been contravened as such this declaration is hereby dismissed since if Joseph Gomoi Vandy Kobba had participated as a member I would have held otherwise.

3. THIRD DECLARATION

Counsel submitted that the Chairman named in the Supreme Court *Gazette Vol. CXL1 Thursday, June, 2010 No.44 at Page 840/1* is not the same person as Justice E.K. Cowan presently Chairing the Tribunal as contained in *Exh. ABH2* relying on *J.T. Chanrai & Co. (SL) Ltd. V. Palmer 1970-71 All S.L. 391 at 396*.

Counsel for the defendants submitted that the Chairman named in the said Gazette is the same as called and identified as Justice Edmond K. Cowan as the "C" is a typographical error which does not derogate from the fact that Justice Cowan is the person intended to be so appointed.

In my opinion the case of *Chanria v. Palmer* (1970-71) cited by learned Counsel for the Plaintiff is totally different from this present matter. I hold that whether it was Justice Edmond C. Cowan, Justice Edmond K. Cowan or Justice E.K. Cowan is of no moment as Justice Edmond K. Cowan is the person intended to be appointed as Chairman and therefore Justice Edmond C. Cowan, Justice Edmond K. Cowan or Justice E.K. Cowan is one and the same person. I would therefore dismiss the Plaintiff's declaration.

4. FOURTH DECLARATION

Counsel for the Plaintiff has submitted that there exists a conflict of interest since the Chairman of the Ombudsman must recuse himself as the Plaintiff herein if aggrieved may exercise his right of petition to the office of the Ombudsman which office is headed by the Tribunal's Chairman.

In my humble opinion the Tribunal will be carrying out a "Judicial function" as contained in Section 137(5)(b) of the Constitution. The removal of a Judge of the Superior Court is contained in Section 137 7(a) and (b) viz to a Tribunal, then recommendation to the President and followed by a two-thirds (2/3) majority in Parliament through a Parliamentary Resolution.

The *Ombudsman Act, 1997 (Act No.2 of 1997)* sets out the functions of the Ombudsman and Section 7(1) provides –

*"(a) To investigate any administrative act of a prescribed authority in respect of which –
complaint is made to him by any person who claims to have suffered injustice as a result of
administration in connection with such act or*

*(ii) Information is received by him from any person or source otherwise than by complaint
concerning the matter referred to in subparagraph (1) and,*

(b) *To take appropriate action to remedy, correct or reverse the act complained of in such means as are fair, proper and effective*".

The functions of the Ombudsman therefore is to investigate administrative complaints maladministration not Judicial complaints and this investigation concerns the removal of a Judge from the Superior Court of the Judicature.

Section 8(1) of the Ombudsman Act, 1992 precludes the Ombudsman from investigating "any matter pending before or already decided by a Court of competent jurisdiction. The Tribunal herein is a Judicial Tribunal which is equivalent to a Court of Law.

The entire exercise of the Tribunal can only be confirmed by Parliament through a two-thirds majority. Can a complaint lie from Parliament to the Ombudsman? Section 94(1) and (2) of the Constitution provide an answer.

Section 94(1): "Subject to the provision of this Constitution Parliament may regulate its procedure, and in particular make amend and revoke Standing Orders for the orderly conduct of its proceedings".

Section 94(2): "Notwithstanding anything to the contrary in this Constitution or in any other law contained, no decision, order or discretion of Parliament or any of its Committee, or the Speaker relating to the rules or procedure, of Parliament or to the application or interpretation of such rule or any other act done or purporting to have been or purporting to have been done by Parliament or by the Speaker under any rules of procedure shall be inquired into by any Court".

In my humble opinion if the Appellant is aggrieved he could not seek redress from the Ombudsman who has no authority to enquire into a judicial decision but rather from the Supreme Court.

I therefore hold that the Chairman need not reclude himself from the Tribunal and would dismiss the declaration.

5. FIFTH DECLARATION

Counsel for the Plaintiff argued that *Exh. ABH* states the commencement and conclusion date of the Tribunal as at 29th June, 2010 to six weeks thereafter but did commence on the 10th January, 2011 and is still on going. He submitted that *Section 170(7) of the Constitution* must be read with *Section 1(1) and 1(2) of the Constitutional and Statutory Instruments Act 1991 (Act No.6 of 1991)* and for the President to have legitimately invoke *Section 137(5)(a) of the Constitution* strict compliance is needed in following the mandatory provisions of *Section 170(7) and Sections 1(1), 1(2) and 3(1) of the Constitutional and Statutory Instrument Act 1991 (Act No.6 of 1999)*. Therefore since no enlargement of time has been Gazetted all what is being done now and in the future will be *null and void*.

The defendants in their statement of case submitted that there is nothing in *Section 137 of the Constitution* from which the President derives his power to set up the Tribunal does not empower him to set a time limit within which the Tribunal must present its report.

Section 137(5)(a) and (b) merely empowers the President to appoint a Tribunal in consultation with the Judicial and Legal Service Commission to enquire and report to the President and make a recommendation for the removal of the Judge from office and to be approved by two thirds majority of Parliament. There is nothing in this subsection that empowers the President to set a time for the Tribunal to present its report.

What then is the validity of the Gazette and the Government Notice contained in it? *Section 171 provides:*

"Any orders, rules or regulations made by any 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 so laid before Parliament

(c) shall come into force at the expiration of a period of twenty-one days of being so laid before Parliament unless Parliament, before the expiration of the said period of twenty-one days, annuls or modifies them.

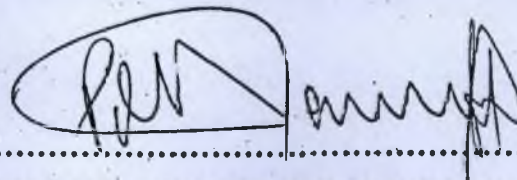
such orders, rules or regulations by the votes of not less than two-thirds of the Member Parliament".

It follows therefore that since the Gazette was not laid before Parliament it has no legislative effect is the case with *Constitutional Instrument or Statutory Instrument*. What then is a Gazette? *Interpretation Act 1971 (Act No.8 of 1971)* states – "Gazette means the gazette published by Government supplement thereto, *Gazette Extra Ordinary* so published and, in respect of publication before the 27th of April, 1961 the *Sierra Leone Royal Gazette*".

It is clear therefore that *Government Notice No.174* is neither *Legislative nor a Statute* and it carries no sanction; therefore the contents in it are merely directory not mandatory.

It is my humble opinion that since the orders contained in *Government Notice No.174* was merely directory and the Gazette of Thursday had no legislative effect, the failure to enlarge the time of Tribunal does not carry any legal effects which will render the result of the *Tribunal null and void*. This declaration is dismissed as it does not contravene *Section 170(7) of the Constitution of Sierra Leone 1991 (Act No.6 of 1991)*.

For all the foregoing reasons I shall dismiss this action and no order as to cost.



HON. MR. JUSTICE P.O. HAMILTON JSC



REF: POH/HJ