

THE KYEREMA

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SNIPPETS OF CASES FROM THE SUPREME COURT



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In this mid-year edition of *The Okyerema*, we bring you a summary of the case CDD Ghana and 8 other civil society organizations filed at the Supreme Court to challenge the President's directive to Mr. Daniel Domelovo, the former Auditor-General, to proceed on leave in June, 2020. The Supreme Court gave judgment in the case on 31st May, 2023. It was held that the President's directive was wrong as the office of the Auditor-General is an independent constitutional body and as such, it cannot be controlled by anybody, including the President. It is sad to observe that the case spent 3 years in court and by the time judgment was given, Mr. Domelovo had gone on retirement. The good news is that, the case serves as a guide for future actions by Presidents of the Republic.

CDD GHANA & OTHERS V ATTORNEY-GENERAL¹ (DOMELOVO'S CASE)

(a) Background facts: Sometime in June, 2020, the President directed the then Auditor-General, Domelovo, to take his accumulated leave of 123 working days. Domelovo was also directed to hand over his official duties to another person, described as "Acting Auditor-General." Domelovo wrote to the President, urging him to reconsider his decision as it had dire consequences for the independence of the office of the Auditor-General. In response, the President stuck to his earlier directive and rather increased Domelovo's accumulated leave to 167 working days. The International Association of Auditors (INTOSAI) and the African Association of Auditors (AFROSAI-E) interceded on Domelovo's behalf but those efforts bore no positive results. Therefore, CDD Ghana and eight other civil society organizations sued the Government through the Attorney-General.

(b) What CDD Ghana and the 8 others (plaintiffs) claimed against the Government: The plaintiffs' claim was that, the President's directive to Domelovo to proceed on his accumulated leave was against the Constitution, 1992 as it interfered with the independence and functions of the Auditor-General. They also claimed that the appointment of another person as "Acting Auditor-General" was null and void as it was contrary to provisions in the Constitution. Furthermore, the plaintiffs stated that the Auditor-General could not be compelled by the President to take his leave since, like his salary, his right to go on leave did not impose any duty on him to do so.

Continue on next page

Footnote:

1. Writ No. J1/01/2021 judgment dated 31st May, 2023, SC

They also asked the Supreme Court to stop the President from enforcing the directive for Domelovo to go on leave and also appointing an “Acting Auditor-General.”

(c) The Attorney-General’s case: The Attorney-General responded that, the Auditor-General does not enjoy complete independence under the Constitution. He only enjoys functional independence and not institutional, administrative and managerial autonomy. Secondly, the Attorney-General stated that the Constitution² and the Labour Act³ make it obligatory for an employee to enjoy his right to go on leave and for his employer to enforce the leave. The President as head of government had power to enforce the law by asking Domelovo to proceed on leave.

Preliminary legal objection by the Attorney-General: Before the case was heard, the Attorney-General raised a preliminary point that the suit was moot.⁴ The reason was that, while the case was pending, Domelovo reached the compulsory retiring age of 60 years. Therefore, there was no live issue for the court to determine. The Supreme Court dismissed the preliminary objection and held that, in cases such as this case where the President’s alleged unconstitutional behaviour had the potential to establish a precedent for future executive actions, the Supreme Court had to deal with it. Thus, the case

could not be dismissed for mootness.

(d) The Supreme Court’s judgment: It was held that the plaintiffs’ case was a proper one to invoke the exclusive original jurisdiction of the Supreme Court. The Supreme Court gave judgment in favour of the plaintiffs as follows:

- *Constitutionality of the President’s directive to Domelovo to proceed on leave:* It was held that the President’s directive to Domelovo to proceed on leave was unconstitutional. The Auditor-General has independence in carrying out his functions as stated in the Constitution. He is not an ordinary public officer. As an independent constitutional office holder, the Auditor-General could not be compelled to go on leave by any person. This was so especially where the effect of the directive was to interfere with the performance of his work.

Footnotes:

2. Article 24

3. Section 20(1) of Act 651

4. “As defined in Black’s Law Dictionary (6th ed.), an action is generally considered moot when it no longer presents a justiciable controversy because issues involved have become academic or dead. This may happen when the matter in dispute has either been resolved already and hence there is no need for judicial intervention, or events happening thereafter have rendered the issue no longer live. In either situation, unless the issue is a recurring one and likely to be raised again between the parties, the courts would not entertain such a dead issue” – see: *Amidu v President Kufuor* [2001-2002] SCGLR 86 at 106 by Acquah, JSC (as he then was). See also: *Dafeamekpor v Attorney-General* Writ No. J1/19/2023 judgment dated 3rd May, 2023, SC; *Commission on Human Rights & Administrative Justice v Attorney-General & Baba Kamara* [2011] 2 SCGLR 746; *Republic v High Court, Accra; ex parte Addae Atchewerebuo III (Asare-Baah III & Others Interested Parties)* [2010] SCGLR 359; *Bilson v Attorney-General* [1993-1994] 1 GLR 104, SC

- *The “proceed on leave” mantra by Presidents:* It was held that, though it was argued that the late President Atta Mills also directed an Auditor-General to proceed on leave in 2009, that culture of Presidents directing heads of independent constitutional bodies to “proceed on leave” is unconstitutional.⁵ In the instant case concerning Domelovo, the ‘proceed on leave’ conflicted with the functional independence of the Auditor-General.
- *Constitutionality of the appointment of an Acting Auditor-General:* It was held that, the concept of an “Acting Auditor-General” appointed by the President (and not the Auditor-General) to assume and exercise the powers of the Auditor-General in his temporary absence is unconstitutional.

(e) Matters arising from the trial

Delay in the trial: The Supreme Court lamented how the parties had failed to comply with the timelines set in the Rules, thereby delaying the case. The Court shared the blame equally on the plaintiffs and the defendant, Attorney-General. The Court recounted the time limits set in the Rules⁶, but which had been flouted by both parties. The Court itself did not bear any part of the blame. It is submitted that, since the Court failed to exercise its powers under the Rules⁷ to dismiss the case when both parties disregarded the time limits set in the

Rules, the Court cannot absolve itself from blame for the embarrassing delay the way it sought to do. As Sophia Akuffo, JSC (as she then was) noted in the case of *Doku v Presbyterian Church of Ghana*⁸, “[i]t is not for nothing that rules of court procedure stipulate time limits. Because it is in the public interest that there shall be an end to litigation, the rules of the Supreme Court have set time limits to guide litigants with a view to achieving certainty and procedural integrity.”

(f) Conclusion: In conclusion, the Supreme Court has held that, the President’s directive to Mr. Domelovo’s to proceed on leave and the President’s appointment of an “Acting Auditor-General” were both unconstitutional actions taken by the President. But since the case took so long (almost 3 years) to complete, Mr. Domelovo went on compulsory retirement before the case was heard. Therefore, he did not get any real benefit from it. It remains a pyrrhic victory, at best. The jury is still out regarding how the judgment will guide Presidents in their actions in future.

Footnotes:

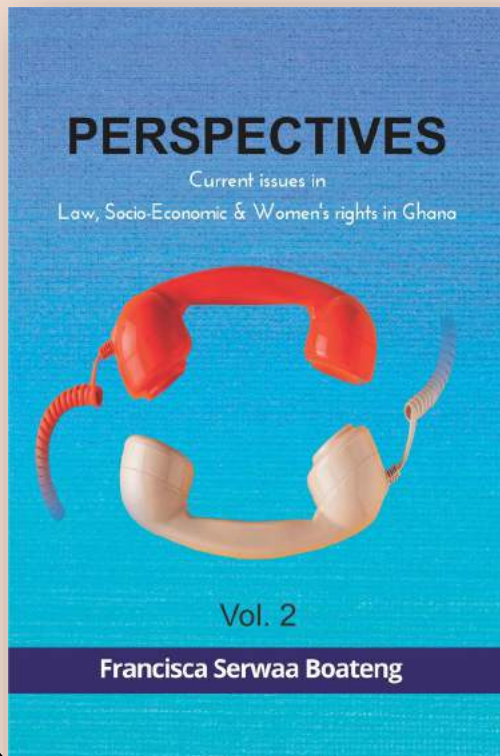
5. See: Article 146 and 187(7)(a) of the Constitution, 1992

6. The Supreme Court Rules, 1996 (C.I. 16) (as amended)

7. Rule 79 of C.I. 16 (as amended) on non-compliance with the rules of procedure

8. [2005-2006] SCGLR 200 (holding 2)

FSB News: Launch of Perspectives Vol. 2



On Monday, 12th June, 2023, our Managing Counsel, Francisca Serwaa Boateng, Esq. launched her second book, “PERSPECTIVES” Vol. 2 via social media. The book is available in e-copy and can be bought on Amazon.com by clicking on the link <https://a.co/d/b4lRIAx>. Hard copies can also be bought from the following places:

- Baatsona Total
- Legalities bookshop, Court Complex, Accra.
- fsboateng.com
- UG, Legon Bookshop
- Vidya Bookstore, Osu
- FSB Law Consult - 0507980400

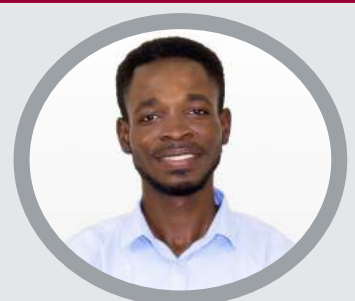
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