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AND

BETWEEN:

AND

L.M. Farmah Esq., with E.E.Roberts Esq., and O. Kanu Esq, for Defendants.

WARNE J.S.C.: This is a claim by way of Originating Notice of Motion seeking the following reliefs:

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- (3) That in the light of the State Proceedings Act 2000 the provision in Section 5(4) of the Provinces Act 1960 Cap 60 of the Laws of Sierra Leone as amended is ultra vires the Constitution of Sierra Leone and therefore null and void.

Background

There was an election at the Sandor Chiefdom in the Kono District in the Eastern Province of the Republic of Sierra Leone. This election was to fill the vacancy created by the death of Paramount Chief Nyghaquee Fasuluku Sonsiama. Several Candidates vied for vacancy. Only one candidate was declared eligible to contest the election. He was duly elected. The Plaintiffs in this case were the other candidates. They were disqualified from contesting the election as being ineligible. Being disqualified, and the election having being held, and the sole candidate declared the winner, they sought the consent of the Attorney-General and Minister of Justice to commence proceedings in the High Court to challenge the validity of the said election. The Attorney-General refused to give his consent. The Plaintiffs have therefore invoked the jurisdiction of this court pursuant to Sections 124,171 (5) of the Constitution of Sierra Leone Act No. 6 of 1991 (hereinafter called the Constitution) and the Provinces Act Cap 60 of the Laws of Sierra Leone as amended by the Provinces Amendment Act No.4 of 1991 (hereinafter called the Provinces Amendment Act.)

Mr. Serry-Kamal Counsel for the Plaintiffs filed an affidavit sworn to by Tamba M. Mondeh Tengbessa one of the Plaintiffs on the 14th day of June 2005. This affidavit is in support of the Originating Notice of Motion. During the hearing, Counsel filed another affidavit sworn to again by Tamba M. Mondeh Tengbessa on his and on behalf of the other Plaintiffs herein on the 17th day of May 2006.

Mr. Serry-Kamal, in support of the various documents filed made the following submissions: that the grounds on which the Plaintiffs rely are those in Exhibits TMMT4 and TMMT5. He referred to the provisions in the Provinces Amendment Act No.4 and No.49 of 1961. That Sections (1)(2),4(2) and 7(1) of the State Proceedings Act No.14 of 2000 are inconsistent with the provisions of Section 133(1) of the Constitution.

That the case for the Plaintiffs is that set out in their cases dated 21st June 2005. That the only requirement that must be fulfilled to seek any of the reliefs as set out in Section 5(4) of the Provisions Act Cap.60 as amended are contained in Section 6. The application must be in writing addressed to the Permanent Secretary, Ministry of Internal Affairs and made within 30 days of the irregularity complained of, he added. Counsel went on to address the Court on the series of events prior to the refusal contained in Exhibit TMMT5 which are Election was held on the 13th May 2005, application the Attorney-General and Minister of Justice made on the 19th May 2005 and copies addressed to the Permanent Secretary, Ministry of Local Government and the Ministry of Internal Affairs. Counsel submits that the refusal of the Attorney-General is contrary to Section 133(1) and Section 171(15) of the Constitution. That having provided the requirements, Section 5(4) of the Provinces Act Cap.60 as amended is ultra vires the Constitution and consequently any Law which is inconsistent with the Constitution is null and void.

That Section 5 Subsections (4) to (7) are inconsistent with Section 133(1) of the Constitution and as such, null and void:

That Section 133(1) of the Constitution gives unlimited access to the Court and refers also to Section 171(15) of the Constitution. In support thereof Counsel refers to the State Proceedings Act No.14 of 2000 and more particularly to Section

2 and the case of A.P.C. vs. Namos SC No.4 of 1966 of 29th October 1999 (unreported).

That the Petition of Rights Act No.23 of the Laws of Sierra Leone is ultra vires the Constitution as a result of the foregoing submissions.

That the dicta of Wright JSC. In the Namos case states that Sections 3, 4 and 5 of the Petition of Rights Act Cap 23 are inconsistent with the Constitution. That the scheme in the Provinces Amendment Act is similar to the provisions in Sections 2,3,4 and 5 of Act No.23 of the Laws of Sierra Leone. In section 4 of Act No.23, there is the requirement of the Attorney- General's Fiat with this difference, that by the provision in Section 5(7), the jurisdiction of the court is ousted. In fact, Counsel has urged on the Court that Sections 5(3) 4(5) and (7) of Act No. 23 appear to oust the jurisdiction of the Court and this is in contravention of Section 171(15) of the Constitution. Counsel submits that he is challenging the validity of the election and this is a claim against the Government and a claim means a right to sue. The above submissions were made in support of ground (1) of the claim. Counsel submits that he was adopting his submissions on ground (1) for the reliefs sought on grounds (2) and (3).

In order to buttress his case further, Counsel submits that if his submission, on ground (1) are not tenable, then exhibit TMMT5 dated 7th June 2005 is inconsistent with Section 133(1) of the Constitution. He submits that the refusal contained in the letter is a violation of section 133(1) of the Constitution.

In a further argument on ground (3) Counsel submits that in the light of the provisions of Sections 5(4) (6) and (7) of the Provinces Act as amended, the refusal of the Attorney-General to grant his consent is ultra vires the Constitution. Finally

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Counsel sought leave to be granted that a declaration be made in ground (1) that section 5(4) of the Provinces Act as amended instead of an order.

The Court granted the leave accordingly.

Mr. L.M. Farmah Counsel on behalf of the defendant submits that he had filed Defendant's case on the 5th March 2006 and wishes to adopt his argument in his case. That would have sufficed, in view of the fact that he had mentioned the authorities he relied on. However, he went on to make some interesting submissions. That the Provisions Act Cap 60, more particularly Section 5(4) is not in conflict with section 133(1) of the Constitution. The reason being that the Statute and Section 133(1) deal with two subject matters and each provide a different regime, he added. Counsel further submits that section 133(1) deals with a claim against the Government. He submits that the claim against Government in Section 133 is for damages and compensation and not for actions of elections particularly Paramount Chiefs elections. That in order to enforce a claim under Section 133 (1) one should invoke the provisions which are contained in the State Proceedings Act Sections 5 and 6.

Counsel submits that any irregularities that may arise out of a Paramount Chief election the manner in which an action can be instituted is by the Provinces Act and the Provinces Act is an existing legislation.

Counsel further submits that Section 72 of the Constitution has nothing to do with Section 133(1) of the same Constitution and Section 72(3) upholds and preserves the Provinces Act Cap.60. Counsel submits that the repeal of Petition of Rights Act Cap 32 does not affect the existence of the consent requirement under section 5(4) of the Provinces Act Cap 60. Counsel finally submits that Chieftaincy election under the Constitution together with the Provinces Act provides the process by

which claims can be instituted and this is quite different from claims under Section 13(1). The latter of which is in Part 11 of the State Proceedings Act.

In the instant case the Plaintiffs claim that they have been restrained from instituting proceedings in the High Court to test the validity of the election of the Paramount Chief held on 13th May 2005. The law which gives the Attorney-General power to restrain them from instituting proceedings appears to be inconsistent with that provided by Section 133(1) of the Constitution. consequently the amended Section 5 of the Provinces Act may be inconsistent with the provisions of Section 133(1) of the Constitution and therefore null and void.

Section 133(1) of the Constitution provides:-

“Where a person has a claim against the Government, the claim may be enforced as of right by proceedings taken against the Government for that purpose, without the grant of a fiat or the use of the process known as Petition of Right”.

The Plaintiffs are persons within Section 133(1) who claim that their rights have been contravened. Mr. Farmah has argued strenuously that claim against Government in section 133(1) is one for damages or compensation for wrong against the individual. There is no qualification in section 133(1) as to the claim, which may be enforced as of right. Counsel urged on the Court to make a distinction which ought to be made or enforced as of right in relation to damages or compensation against the Government for wrongs against a person and a claim against Government vis a vis an election more particularly a Paramount Chieftaincy election.

As I have said, there is no qualification in Section 133(1) as to what right, which has been, contravened that may be enforced without the grant of a fiat or the process known as Petition of Right, with respect to Counsel for the defendant.

That Section 72 of the Constitution which deals with the institution of Chieftaincy, has no relation to Section 133(1) of the Constitution. Counsel urged on the court that Section 72 creates a separate regime. The submission again is contrary to the Constitution being one and an indivisible document. This is the basic law. No doubt the drafters of the Constitution were wise to ensure that the institution of Chieftaincy is preserved but to my mind they had no intention to isolate it from the rest of the Constitution or to put it above the supremacy of the Constitution, (vide Section 72(5):-)

5. "Subject to the provisions of this Constitution and in furtherance of this section; Parliament shall make laws for the qualifications, election, powers, functions, removal and other matters, connected with Chieftaincy".

This is clearly indicative of the intention of the drafters of the Constitution that Section 72 shall be part of the Constitution and subordinate thereto.

Let me now address the submission of Mr. Farmah that this claim is not sustainable against the Government. It is necessary to ascertain the definition of Government. In the Interpretation Act, No.8 of 1971, section 4(1) "Government means the Government of Sierra Leone (which shall be deemed to be person) and includes, where appropriate, any authority by which the executive power of the State is duly exercised in a particular case". Having said this, I hold that the Plaintiffs have a right to institute proceedings against the Government ; the Government being a person.

Does Section 72 of the Constitution create a separate regime irrespective of Section 133(1) of the same Constitution? I do not think so: I am fortified in my view by the provision in section 170(1) of the Constitution which state, the Laws of Sierra Leone. Shall comprise:-

- (a) This Constitution
 - (b) The Laws made by or under the authority of Parliament as established by this Constitution.
 - (c) any orders, regulations and other statutory instruments made by any Person or authority pursuant to a power conferred in that behalf by this Constitution or any other Law.
 - (d) the existing law; and
 - (e) the common law
2. The Common Law of Sierra Leone shall comprise the rules of law generally Known as the common law, the rules of law, generally known as the doctrines of equity, and rules of customary law including those determined by the Superior Court of Judicature.
 3. For the purpose of this Section the expression "Customary Law" means the Rules of law which by custom are applicable to particular communities in Sierra Leone."

I hold that Sections (2) and (3) are particularly applicable in the instant case since "Customary Law" is germane to the issue. I concede that we are

not here dealing with the merits regarding the validity of the election in the Sandor Chiefdom, yet we are bound to acknowledge that Section 72 of the Constitution is part of the Constitution and should be considered as such.

The documents that precipitated these proceedings are contained in the affidavit of Tamba M. Mondeh Tengbessa sworn to on the 17th day of May 2006 on his and on behalf of the other Plaintiffs. The exhibit TMMT4 which is a letter dated 19th May 2005 written by the Solicitor of the Plaintiffs to the Attorney-General and Minister of Justice seeking his consent to institute proceedings in the High Court to challenge the validity of the election of Sheku Amadu Fasuluku as Paramount Chief of Sandor and our disbarment from contesting the said election"; and exhibit TMMT5 which is a reply by the Attorney-General dated 7th June 2005 refusing his consent to institute such proceedings. Both exhibits are part of this Judgment. They are exhibit TMMT4 and exhibit TMMT5. I have included these two exhibits in this Judgment in the following pages.

M.J.Tucker (Miss)
A.B. Kalokoh
S.M. Sesay
Our Ref:-
Your Ref:-

19th May 2005.

THE ATTORNEY GENERAL AND MINISTER OF JUSTICE
GUMA BUILDING
LAMINA SANKOH STREET
FREETOWN.

Dear Sir,

**RE: CHIEFTAINCY ELECTIONS IN THE
SANDOR CHIEFDOM KONO DISTRICT**

We represent Mr. Gandhi Tamba Amadu Sukuyama and others aspirants who were disbarred from contesting elections held at Kayima Sandor Chiefdom on the 13th May 2005.

On behalf of our clients we intend to command CIVIL Proceedings in the High Court to challenge the validity of the election of Sheku Amadu Tejan Fasuluku as Paramount Chief of the Sandor Chiefdom and our disbarment from contesting the same elections.

Pursuant to Section 6(4) of Provinces Act Cap.60 as amended by Act No.4 and 49 of 1961 we write to seek your consent to commence those proceedings.

Yours faithfully

A.F. Serry-Kamal
For Serry-Kamal & Co.
8 Walpole Street
Freetown
Sierra Leone
Tel: 226263
Fax: 226652 Email

The letter was copied to all interested parties

-----M.T. States
Republic of Sierra Leone

Tel: - 229303/223497
Fax: - 229366
7th June 2005

Attorney-General & Minister of Justice
Attorney-General's Chambers
Ministry of Justice
Guma Building
Lamina Sankoh Street
Freetown, Sierra Leone.

Dear Sir,

RE: CHIEFTAINCY ELECTION IN THE SANDOR CHIEFDOM KONO DISTRICT

I refer to your letter dated 9th May 2005 seeking my consent to enable you Commence proceedings in Court in response of the above mentioned Paramount Chief Election conducted in Sandor Chiefdom Kono District.

Having considered the facts and circumstances leading to the elections and Recognition of Paramount Chief Sheku Ahmed Tajan Fasuluku of Sandor Chiefdom, I am unable to grant to you and your client my consent required by Section 5 Sub-section 4 of the Provinces Act Cap 60 of the Laws of Sierra Leone 1960 as amended.

Yours faithfully,

F.M.Carew
Attorney-General
& Minister of Justice.

This letter was copied to the Secretary to the President and the Minister of Local Government and Community Development.

For ease of reference the Provinces Amendment Act No.49 1961 is part of this Judgment in the following Pages.

A.410 **No.49 Protectorate Amendment (No.2) 1961**

- "(3) No proceedings shall be brought in any Court to retain or suspend or in any way to interrupt the election of a Paramount Chief
- (4) No proceedings shall be brought in any court without the consent in writing of the Attorney-General
 - (a) to assert the validity of the election of any person as a Paramount Chief or to declare any person to be the duly elected Paramount Chief of any Chiefdom; or
 - (b) to question in any way the validity of the election or, or to unseal or replace, any Paramount Chief or to retain him in any way in the exercise of any of the rights, duties, privileges or functions conferred upon, or enjoyed by him by virtue of his office; or
 - (c) to assert or question in any way the validity of any installation deposition or recognition of a Paramount Chief
- (5) For the purpose of this section the expression "proceedings" means any action or proceedings whatsoever and shall include without prejudice to the general of this definition any proceedings for the issue of prerogative writs or orders.
- (6) Application for the consent of the Attorney-General required by Subsection (4) shall be made in writing and notice of such application shall be served upon the Permanent Secretary of the Ministry responsible for Internal Affairs and the Attorney-General shall not give his consent unless the person seeking to bring proceedings has made his application within thirty days after the irregularity or breach of which the complains first occurred.
- (7) The decision of the Attorney-General in granting or refusing such Consent shall be final and shall not be enquired into in any Court.

J.W.E.DAVIES
for Clerk of the House of Representative

Mr. Serry-Kamal has applied to the Court for a hearing pursuant to provisions of Section 124 of the Constitution which states:

"The Supreme Court shall save as otherwise provided in Section 122 of this constitution, have original jurisdiction to the exclusion of all other courts ^{matters} (a) in all relating to the enforcement or interpretation of any provision of this Constitution".

In spite of the several submissions of Mr. Serry-Kamal I believe that what the Court is required to consider, is whether pursuant to Section 124(1) (a) of the constitution, in Section 5(4) of the provinces Act 1960 is in consistent with section 133(1) of the Constitution and therefore null and void? The Court can make such Declaration pursuant to Section 171(15) of the Constitution, which provides that -

"This constitution shall ^{be} supreme Law of Sierra Leone and any other Law found to be consistent with the provision of this Constitution shall to the inconsistency, be void and of no effect".

In the interest of clarity, the Section complained of is Section 5(4) of the Province^s Act, 1960 which provides that *"No proceedings shall be brought in any Court without the consent in writing of the Attorney-General"*. Section 133(1) of the Constitution is clear and unambiguous. At the expense of the repetition it states:-

"Where a person has a claim against the Government that Claim may be enforced as of right by proceedings taken against the Government for that purpose, without the grant of a fiat or the process known as petition of Right".

I therefore hold that Section 5(4) of the Provinces Act, 1960 is inconsistent with the Provisions of Section 133(1) of the Constitution and rendered void and of no effect to that extent pursuant to section 171(15) of the Constitution herein before mentioned.

In my view, the Plaintiff, had the right pursuant to Section 133(1) of the Constitution to enforce such right against the Government.

There was no need to seek the consent of the Attorney-General to institute proceedings against the Government. I have already found that the

Government is a person, according to law (vide Section 4 of the Interpretation Act, No. 8 of 1971).

I therefore declare that Section 5(4) of the Provinces Act, Cap. 60 of the Laws of Sierra Leone 1960 as amended is inconsistent with Section 133(1) of the Constitution Act No. 6 of 1991 and therefore null and void

There is no doubt that the election for the Paramount Chieftaincy of Sandor Chieftdom was conducted by Mr. Samura, the Provincial Secretary of the Northern Province of the Republic of Sierra Leone. He was a representative and acting as an agent of the government. (Vide Section 4 of the Interpretation Act, No. 8 of 1971).

Assuming that the action contemplated by the plaintiffs was against the said Provincial Secretary who conducted the election as an agent of the Government the contemplated action would have tantamounted to a claim against the Government. Such a claim, pursuance to Section 133(1) of the Constitution Act No. 6 of 1991, may be enforced as of right without the need for fiat or consent.

Consequently it was unnecessary for the plaintiffs to seek the consent of the Attorney-General: as such, it will be inappropriate for me to make a pronouncement on the second declaration sought.

Finally, I refuse to make any pronouncement regarding the third declaration sought because the issue of consent is irrelevant to the question of compliance with the State Proceedings Act, No. 14 of 2000.

No order as to costs

Samura JSC

Am... CJ

Sh.

Wt

A.B. S...

I agree

I agree

I agree

I agree

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Certified True Copy
DATE...
Registrar Supreme Court
SIERRA LEONE