



IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC
COMMUNITY OF WEST AFRICAN STATES (ECOWAS) HOLDEN AT
ABUJA, NIGERIA

SUIT N°: ECW/CCJ/APP/33/16

JUDGMENT N°: ECW/CCJ/JUD/06/17

BETWEEN:

1. Omar Jallow
2. Amadou Scattred

} Plaintiffs

Vs.

Republic of The Gambia

} Defendant

1. COMPOSITION OF THE COURT:

Hon. Justice Hameye Foune Mahalmdane – Presiding

Hon. Justice Yaya Boiro – Member

Hon. Justice Friday Chijioke Nwoke – Member

Assisted by:

Athanase Atannon

-Deputy Chief Registrar

2. REPRESENTATION OF THE PARTIES;

The Plaintiff

- i. Chinonye Obiagwu Esq.
- ii. Alero Eyetsemitan (Mrs).
- iii. Amarachi Nwabia.

LEDAP 4 Manzini Street, Wuse Zone 4 Abuja, Nigeria

The Defendant

M.B Abubakar

Deputy Director of Public Prosecution.

Attorney- General's Office

Marina Parade

Banjul, The Gambia.

2. SUBJECT MATTER OF THE PROCEEDINGS.

- i. Violation of Article 2 and 13 (1) of the African Charter on Human and People's Rights.
- ii. Violation of Article 1(1) of the ECOWAS Protocol on Democracy and Good Governance.

4. SUMMARY OF FACTS

The 1st Plaintiff is a Gambian Citizen and therefore a Community Citizen of the ECOWAS. The 1st Plaintiff resides at No. 7, Ninth Street East Pipeline, Serrekunda. He is the President of the People's Progressive Party (PPP), a Political Party in the Gambia formed in 1959.

The 2nd Plaintiff is also a Gambian Citizen and a Former Minister of Information and Communication in the Gambia. The 2nd Plaintiff resides at 613 Red Oak Lane, Hinesville, GA 31313, USA.

The Defendant is a Member State of the Economic Community of West African States (ECOWAS) and signatory to the Revised Treaty of the ECOWAS.

The Plaintiffs have filed this Application on grounds of alleged violation of their rights as provided in Articles 2 and 13 (1) & (2) of the African Charter by the Defendants.

The Plaintiffs state that on the 7th of July 2015, the National Assembly of the Gambia passed the Election Amendment Act 2015 wherein, it made certain amendments which pose a threat to the Plaintiffs right to participate in the Government of their Country, as implementing the said amendment will lead to a shutdown and de-registration of opposition Political Parties.

That the amendments greatly increased the amount to be paid for Party registration from 5000 to 1,000,000 Dalasis, and the deposits for various positions, i.e.

Presidential from 10,000 to 500,000 Dalasis, Parliamentary from 5000 to 50,000 Dalasis, Councilor from 2,500 to 50,000 Dalasis, and the post of District Chief from 2000 to 50,000 Dalasis.

The number of signatures needed to register a political Party was increased from 500 to 10,000 registered voters. Also, the registration of membership of a Political Party was increased from D500, to D10, 000 with at least 1000 candidates coming from each administrative area. The number of constituencies were increased from 48- 53 without due legal process.

That the said amendment was not subjected to public debate or popular scrutiny at Constituency, Party or District Levels and was made without consultation with any of the seven opposition Political Parties. That the explanatory notes delivered to the National Assembly did not give reasons for increasing the deposits of the Candidates, neither did it highlight the defects of the current deposits, nor explain the necessity for increasing them.

That the statistical data captured for eligible Voters registering from 14th January to 12th March 2016 were: Banjul- 649, KMC- 5,001, Brikama- 13,039, Kerewan – 6,245, Mansakonko – 2,732, Janjanbureh – 9,639 and Basse – 7,242. These figures makes the requirement of having at least 1000 Members from each Administrative Zone clearly unrealistic.

The Plaintiffs further allege that there is no subvention for Political Parties in the Gambia. That while opposition Political Parties will be subjected to this monumental

hike, the Ruling Party, the Alliance for Patriotic Reorientation and Construction will not as they continue to make use of resources funded by tax payer's money. That while the ruling party use government administrative buildings as Party Headquarters, and State Vehicles for campaign, no such resources or facilities are made available to the Opposition Parties including that of the Plaintiffs.

Finally, the Plaintiffs aver that the Independent Electoral Commission (IEC) through a media release dated the 9th of February 2016, has threatened Political Parties with deregistration if they fail to comply with the Elections Amendment Act 2015.

Whereupon the Plaintiffs filed this Application seeking for the following orders:

1. **A DECLARATION** that the Election Amendment Act 2015 of the Republic of the Gambia is a violation of Article 13 (1) & (2) of the African Charter on Human and People's Rights.
2. **A DECLARATION** that the Defendant has failed to recognize, promote and protect the rights of the Plaintiffs and to take measures to give effect to their rights as provided under Article 2 & 13 (1) & (2) of the African Charter on Human and People's Rights.
3. **A DECLARATION** that the Defendant has failed to recognize and promote principles of democracy and good governance as envisaged by the ECOWAS Protocol on Democracy and Good Governance.
4. **AN ORDER** directing the Government of the Gambia to amend or repeal the Elections Amendment Act 2015.

5. The Defendant on the other hand filed its defense via an Application for extension of time on the 2nd of November 2016, which was granted.

The Defendant denied each and every material allegation of fact set out in the Plaintiffs Application and states that the Elections Amendment Act applies generally to all Political Parties without discrimination.

The Defendant in denying the Plaintiffs allegation on failure to subject the proposed amendment to public debate or scrutiny, states that the amendment was initiated based on a proposal made by the Independent Electoral Commission of the Gambia. That the Electoral Amendment Bill was published in the Gazette on 1st June 2015, and then introduced in the National Assembly on the 7th of July 2015 in accordance with the requirements of section 101 (3) of the Constitution of the Gambia. That the Electoral Amendment Act 2015 has been operational for more than one year unchallenged by the Plaintiffs.

The Defendant states that the explanatory memorandum delivered to the National Assembly complied with the requirements of section 101(2) of the Constitution of the Gambia.

The Defendant denies the allegation of using government administrative buildings and resources to fund the ruling party and further states that the activities, facilities and logistics needs of all the Political Parties in the Gambia, including the APRC are funded from the resources of the Political Parties and not from State Resources.

On the statistics provided by the Plaintiffs on eligible Voters, the Defendant states that it only represents the provisional figures of the Supplementary Voter Registration for 2016 and further states that the total number of registered voters stand at: Banjul – 22,731, KMC – 199,957, Kerewan – 101,717, Mansakonko – 49,198, Janjahbureh – 116,675, Basse – 115,185.

The Defendant states that the increase in Constituencies are in compliance with the Constituency re-demarcation Order 2015.

On the issue of press release, the Defendant state that it was designed to remind and sensitize Political Parties on the need to comply with the Electoral Amendment Act 2015.

That Eight out of nine Political Parties have complied with the requirements of the Election Amendment Act and also collected nomination forms in readiness for the December 2016 election.

Finally, the Defendant assert that the Election Amendment Act 2015, is enacted for the legitimate aim of guaranteeing the rights to streamlined and effective representation. That the Plaintiffs action lacks merit and therefore not entitled to the reliefs sought.

From the issues raised by the Plaintiffs and the Defendant, the following matters calls for determination;

**WHETHER THE ACTION COMPLAINED OF FALLS WITHIN THE AMBIT
OF THIS COURT’S JURISDICTION.**

The Plaintiffs herein have filed this Application against the Defendant on alleged violation of their rights as enshrined in the African Charter on Human and Peoples rights.

It is pertinent therefore to ascertain the extent of this court’s competence as it relates to the substance of the Plaintiff’s Initiating Application.

Article 9(4) of the Supplementary Protocol provides:

“The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.”

Article 10 (d):

Access to Court is open to the following:

(d) Individuals on application for relief for violation of their human rights; the submission of application shall: i) not be anonymous; nor

ii) be instituted whilst the same matter has been instituted before another International Court for adjudication.”

The crux of the Plaintiffs application is the violation of their rights by the Defendant wherein the Defendant in amending its Electoral Act made it impracticable for the Plaintiffs to exercise their rights as enshrined in Article 13 of the African Charter.

The Defendant, in refuting the Plaintiffs allegations state that the Elections Amendment Act applies generally to all political parties without discrimination as eight out of the nine political parties have complied with the said amendment and collected nomination forms in readiness for the upcoming election. Further, that the said amendment was done in accordance with due process of the Laws of the Gambia and has been operational for more than one year unchallenged by the Plaintiffs.

The Defendant denies using government resources to fund the ruling party APRC and further states that the activities of each political party are funded from the party's resources and not from state resources. That the main aim of the amendment is to streamline and guarantee effective representation.

This Court has held that for its jurisdiction to arise, the alleged violation must be founded on an international or community obligation of the state.

In **HISSEIN HABRE V. REPUBLIC OF SENEGAL (2010) CCJELR**, the Court held that it shall examine:

- If the issues submitted before it deals with a right which has been enshrined for the benefit of the human person;
- Whether it arises from International or Community obligations of the state complained of, as human rights to be promoted, observed, protected, and enjoyed;
- Whether it is the violation of that right which is being alleged.

In **BAKARY SARRE & 28 ORS V. MALI (2011) (Unreported) Pg 11, Para 25**, the Court held that its competence to adjudicate in a given case depends not only on its texts, but also on the substance of the initiating application. The Court accords every attention to the claims made by the Applicants, the pleas in law invoked, and in an instance where human right violation is alleged, the Court equally carefully considers how the parties present such allegations.

Article 13 (1) of the African Charter on human and Peoples Rights guarantees the right of every citizen to participate freely in the Government of his Country, either directly or through freely chosen representatives in accordance with the provisions of the law.

The African Charter on Human and Peoples' Rights is the main source of the community's fundamental human rights and has enjoyed universal acceptance as the African Regional Human Rights framework. Other key international treaties which are *pari material* to the African Charter also guarantee voting rights.

Article 13 (1) protects individual rights to participate in the governance of their Country either directly or through a freely chosen representative. This right is direct and grants free access to vote and be voted for in accordance with the provisions of the law. In any case, any act which restricts citizens from freely participating in the governance of their Country will amount to a violation. Such restriction may be in the form of denial of voting rights, campaigning for candidates, contesting for

elections etc. Government can also interfere with this right by establishing an uneven playing ground. This is a form of discrimination and the allegation of the Plaintiffs.

Concerning this allegation, the Defendant submits that the amendment is an internal affair of the State and same was conducted across borders without any form of discrimination.

The right to elections depends to a large extent on compliance with positive obligations of States. The State reserves the right to amend its laws without interference which forms part of its internal affairs. Such amendments should however not be discriminatory or targeted at a particular group.

The Blacks' Law dictionary 9th edition defined discrimination as:

“The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or disability”.

Discrimination is said to be unjust or prejudicial where no reasonable distinction can be found between those favored and those not favored.

Article 7 of the Universal Declaration of Human Rights (UDHR) provides that:

“all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

In **BADINI SALFO V THE REPUBLIC OF BURKINA FASO (2012) PARA 54 (Unreported)**, the court held that *“equality before the law presupposes that equal treatment*

be accorded people finding themselves in similar situations". Thus, examining the allegation of the violation of the principle of equality requires that, at least two similar legal situations be put side by side, so as to compare, and find out whether the treatment was concretely meted out to either one or both of them. See also **NATIONAL COORDINATING GROUP OF DEPARTMENTAL REPRESENTATIVES OF THE COCOA- COFFEE SECTOR (CNDD) V. COTE D' Ivoire (2004-2009) CCJELR PG 328 PARA 58.**

The question as to whether the amendment is proportional can be answered by weighing the impact, nature and extent of the limitation. Such limitations and or amendments must be proportionate with and absolutely necessary for the advantages sought to be obtained.

It is an elementary principle of law that he who asserts must prove.

In **Falana & anor V. Republic of Benin & 2 Ors JUDGMENT NO: ECW/CCJ/JUD/02/12 (unreported)**, this Court held that "as always, the onus of proof is on a party who asserts a fact and who will fail if that fact fails to attain that standard of proof that will persuade the Court to believe the statement of the claim".

Having examined the Plaintiffs application, the Court is of the view that the substance of the Plaintiffs allegation borders on the internal affairs of the Defendant and does not raise any issue of human right violation. The Plaintiffs in this case have not proved that the amendment was unreasonable, discriminatory and unjust or

targeted at any Political Party. Therefore, assuming jurisdiction amounts to examining the internal laws of the Defendant.

In **CDD V. MAMADOU TANDJA & ANOR, (2011) CCJELR**, the Court declared that it had no jurisdiction to examine the constitutionality or legality of acts which come under the domestic norm and laws of authorities of member States (vis-à-vis) violation of the provisions of the African Charter on Human and Peoples Rights as raised by the Plaintiffs.

Furthermore, this Court has held that there is no provision whether general or specific, that gives it powers to adjudicate on electoral issues which ordinarily is subject to the jurisdiction of National Courts. **See HON. DR JERRY UGOKWE V. THE FEDERAL REPUBLIC OF NIGERIA AND 1 OR (2004-2009) CCJELR.**

In the instant case, the Plaintiffs have not shown that the alleged amendment was discriminatory in nature, or targeted at their party, neither have they led evidence to establish that the amendment directly prevents them from choosing a representative of their choice in line with the provisions of Article 13 (1) of the African Charter. Furthermore, the Plaintiffs have failed to substantiate their allegation that the Defendant diverted government funds to the Ruling Party. The facts presented by the Plaintiffs have not indicated any human right violation within the context of the African Charter and other International Human Right Treaties. The Plaintiffs' Application anchors on the amendment of the Electoral Act which they allege violates their rights to participate in the upcoming elections.

From the forgoing, and in the absence of any substance invoking human rights jurisdiction, the Court holds fast that it lacks the competence to adjudicate on this matter.

DECISION:

The Court adjudicating in a public sitting after hearing the Parties in the last resort after deliberating according to law;

DECLARES:

That it is incompetent to entertain the suit.

AS TO COSTS:

Parties should bear its own costs.

Dated at Abuja this 10th day of October, 2017.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES;

1. Hon. Justice Hameye Foune Mahalmdane ----- Presiding
2. Hon. Justice Yaya Boiro ----- Member
3. Hon Justice Friday Chijioke Nwoke -----Member

Assisted by:

Athanase Attanon ----- Deputy Chief Registrar