

Plaintiff's Counsel

IN THE SUPREME COURT OF THE GAMBIA

SUPREME COURT NO: 001/2019

**IN THE MATTER OF SECTIONS 5 AND 127(1)(C) OF THE CONSTITUTION
OF THE REPUBLIC OF THE GAMBIA, SECTION 5(A) OF THE SUPREME
COURT ACT**

**IN THE MATTER OF SECTION 88, 90 AND 91 OF THE CONSTITUTION OF
THE REPUBLIC OF THE GAMBIA**

BETWEEN:

YA KUMBA JAITEH

PLAINTIFF

AND

CLERK OF THE NATIONAL ASSEMBLY

1ST DEFENDANT

SPEAKER OF THE NATIONAL ASSEMBLY

2ND DEFENDANT

FODAY GASSAMA

3RD DEFENDANT

ATTORNEY GENERAL

4TH DEFENDANT

STATEMENT OF CASE FOR 1st, 2nd, and 4th DEFENDANTS

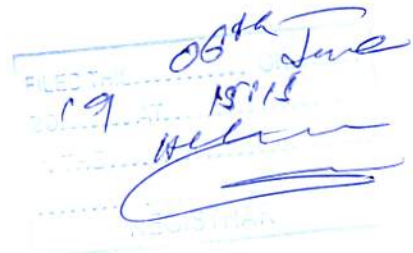


ABUBACARR M. TAMBADOU

ATTORNEY GENERAL & MINISTER OF JUSTICE

MARINA PARADE

BANJUL



A. Overview

1. By a writ filed on 5 March 2019, the Plaintiff sought to invoke the original jurisdiction of the Supreme Court contending, *inter alia*, that: “*the purported termination of the Plaintiff’s membership of the National Assembly through an executive decision is null and void and of no effect*”; and that “*the seat of a member of the National Assembly may only be vacated pursuant to Section 91(1) and not in any other circumstance*”.
2. The Plaintiff was nominated by the President of the Republic (“the President”) as a member of the National Assembly of The Gambia pursuant to Section 88(1)(b) of the 1997 Constitution of The Gambia (“the Constitution”). She was sworn in as one of five nominated members of the National Assembly on 11 April 2017.
3. By letter dated 25 February 2019, and conveyed through the Office of Secretary General, the President revoked the Plaintiff’s nomination as a member of the National Assembly of The Gambia.
4. The Plaintiff in arguing her case raised 3 issues for determination:
 - i. Whether the seat of a nominated member of the National Assembly may be vacated in any manner not provided for in Section 91(1) of the Constitution?
 - ii. Whether the President of the Republic has the power to cause to be vacated, the seat of a nominated member of the National Assembly?

iii. Whether any body or entity apart from the Supreme Court can determine the question of whether or not the seat of a nominated member has been vacated?¹

5. The 1st, 2nd and 4th Defendants (‘the Defendants’) submit that, contrary to the Plaintiff’s contentions above, the only issue for determination by this Honourable Court is whether or not the President contravened any provision of the Constitution when he revoked the nomination of the Plaintiff as a member of the National Assembly.
6. As demonstrated below, the President is vested with the power to revoke the Plaintiff’s nomination as a member of the National Assembly and the Plaintiff’s contentions in this regard lack merit and should be dismissed in their entirety.

B. Defendants’ Arguments

(i) *Burden of Proof*

7. On the basis of applicable legal principles including that he who asserts must prove,² and the principle in favour of the presumption of regularity of all official acts,³ the burden of proof is on the Plaintiff to demonstrate, on a balance of probabilities, that the revocation of the Plaintiff’s nomination as a member of the National Assembly by the President contravened a provision

¹ This 3rd issue should be juxtaposed with the Plaintiff’s assertion that the National Assembly purportedly passed a Resolution to declare the actions of the Executive as null and void, Plaintiff’s Statement of Case, para. 21. While the issue has not been canvassed by the Plaintiff, the Defendants submit that the National Assembly does not have the legal authority to declare an Executive act as null and void. The purported Resolution is of no effect therefore.

² Evidence Act 1994, Sections 141, 142, 143 & 145; *Topp vs Savage*, CIV. APP. No.15/98; *Sanna Manneh vs Attorney General*, GCA, CR. APP. NO.5/1992

³ *Ya Kumba Jaiteh vs Clerk of the National Assembly & Ors*, SC Civil Suit NO: 001/2019, Ruling on Interim Orders, 15 March 2019.

of the Constitution. Accordingly, the Plaintiff must demonstrate that she is entitled to the reliefs sought.

8. The Defendants submit that the Plaintiff has failed to discharge this burden. The President did not contravene any provision of the Constitution when he revoked the Plaintiff's nomination as a member of the National Assembly of The Gambia. The President is vested with the power to do so, and the Plaintiff has failed to identify with specificity the constitutional or legal provision prohibiting the President from doing so, or the constitutional provision that the President allegedly contravened by revoking her nomination. She has not advanced any rule of law or of practice to support her contention.

9. In fact, the Plaintiff's entire submissions in this regard are premised on an unreasonably restrictive interpretation and application of the relevant provisions of the Constitution which, as the Defendants will demonstrate further below, are misconceived. The Plaintiff failed to demonstrate that her contentions are supported by any law, and has consequently failed to discharge the burden of proof placed upon her.

(ii) Admissions by the Plaintiff

10. The Plaintiff contends that "after the prescribed oath is taken [by a nominated member], neither the IEC, the electorate, a political party or the President has the power to cause a National Assembly member's seat to be vacated".⁴ (emphasis added). The Plaintiff further re-iterated this argument by submitting that "*the Presidential power to nominate the Plaintiff did not include the power to revoke that nomination after*

⁴ Plaintiff's Statement of Case, para. 36.

the Plaintiff took the prescribed oath and became a member of the National Assembly".⁵ (emphasis added)

11. The Defendants argue that by submitting that the President can only revoke a 'nomination' before a candidate takes the prescribed oath and not after, the Plaintiff is admitting, notwithstanding the absence of an express provision in the Constitution to this effect, that the President is vested with the power to revoke a nomination, except that this power, according to the Plaintiff, is only exercisable by the President before and not after a candidate takes the prescribed oath. The Plaintiff's challenge therefore, appears to relate only to the timing of the exercise of the presidential power of revocation, and not the actual power to do so. The Plaintiff's contention in this regard is misconceived as demonstrated below.

12. When properly construed, nominations for membership to the National Assembly under Section 88 of the Constitution, envisages a three step process. First, there is the *identification* stage which requires the President to identify a candidate for nomination, ie, the potential nominee. Second, there is the *qualification* stage where the candidate so identified, is presumed to have met all the requirements for qualification for membership to the National Assembly in accordance with Section 89 of the Constitution. The third and final stage involves the taking of the prescribed oath by the candidate. Only thereafter can the candidate be said to be a member nominated by the President in the context of Section 88.

13. This reading of Section 88 is further buttressed by Section 88(2) which states:

⁵ Ibid, para. 42.

“Before taking his or her seat in the National Assembly, a member shall take the prescribed oaths before the Speaker: Provided that a member may take part in the election of a Speaker and Deputy Speaker before taking such oaths”.

In simple terms, Section 88(2) stipulates that a member cannot participate in any activities or proceedings of the National Assembly before taking the prescribed oaths save in two exceptional processes, ie, election of Speaker and Deputy Speaker. Therefore, unless and until they take the prescribed oaths, their membership of the National Assembly is not yet completed hence their proscription from taking their seats, ie, participating in any activities or proceedings of the National Assembly including voting on motions which is expressly prohibited under Section 107 of the Constitution.

14. Accordingly, if an identified candidate has not yet taken the prescribed oath, he/she cannot be said to be a member nominated by the President under Section 88. Consequently, it is illogical to argue, as the Plaintiff does, that a nomination under Section 88 can only be revoked before the candidate takes the prescribed oath simply because the candidate, before taking the prescribed oath, has not yet assumed the status of a member nominated by the President. Accordingly, to argue that the President can only revoke a nomination before a member takes the prescribed oath is to say that the President can only revoke a nomination that has not yet matured into one.

15. The Defendants submit further that, as a consequence, if a candidate has not yet taken the prescribed oath, then nomination under Section 88 has not yet occurred, and one can only talk about revocation of a nomination after the nomination and not before. Therefore, given her own admission that the President apparently has the power to revoke her nomination, the only plausible revocation exercisable by the President is revocation after the Plaintiff became a member nominated by the President as envisaged under

Section 88, ie, after the Plaintiff takes the prescribed oath. In other words, the President cannot revoke a nomination that has not yet existed.

(iii) Applicability of Section 231

16. Contrary to the Plaintiff's claims,⁶ Section 231(1) of the Constitution gives the President the power to revoke the Plaintiff's nomination. For ease of reference, Section 231(1) is reproduced hereunder:

Where any power is conferred by this Constitution to make any proclamation, order, regulation, rule or pass any resolution or give any direction or make any declaration or designation, it shall be deemed to include the power, exercisable in like manner and subject to like conditions, if any, to amend or revoke the same.

17. First, it is clear that the power to make a *designation* under Section 231(1) also includes the power to revoke same.

18. Second, the use of the word '*designation*' is, in the context of Section 231(1), synonymous with the words '*nomination*' or '*appointment*'. Black's law dictionary⁷ defines nomination as follows: "*The act of naming or designating a person for an office, membership, award, or like title or status*". Black's law dictionary also explains the phrase "*to nominate*" as meaning "*to name or designate a person for a position*". The English Oxford dictionary⁸ defines *designation* as "*appoint someone to a particular job*". The Law Dictionary online website⁹ defines nomination as "*An appointment or designation of a person to fill an office or discharge a duty*". It goes further to describe the

⁶ Plaintiff's Statement of Case, para. 40.

⁷ 8th Edition.

⁸ 10th Edition

⁹ Thelawdictionary.org

phrase “to nominate” as meaning “*To propose for an appointment; to designate for an office, a privilege, a living etc*”.

19. The Oxford Living Dictionaries¹⁰ list the synonyms of nomination to include **designation** and **appointment**. And of course, synonyms are words or phrases that mean exactly or nearly the same as another word or phrase in the same language.

20. Therefore, the word ‘designation’ under Section 231(1) is interchangeable with the words ‘appointment’ or ‘nomination’ since in this context, they are all words that convey ways in which third parties are conferred with roles, responsibilities, authority, or positions. They have the same effect.

21. Furthermore, it should be noted that the power to make an appointment under Section 231(5) of the Constitution also includes the power to revoke same. This is also consistent with Section 20 of the Interpretation Act¹¹.

22. Therefore, in order to ensure legal certainty, consistency and predictability in the interpretation and application of Gambian law, especially in the absence of any express provision to the contrary, the power to make a nomination under Section 88 of the 1997 Constitution must also include the power to revoke same in the way that designations under Section 231(1) of the Constitution, and appointments under Section 231(5) of the Constitution and Section 20 of the Interpretation Act do, since they all carry nearly the same meaning in the context that they are used therein.¹²

¹⁰ Oxforddictionaries.com

¹¹ Laws of The Gambia, Cap. 4:01.

¹² See para. 16 above.

23. Finally, the Plaintiff's contention that Section 231(1) is in conflict with Section 91 of the Constitution is misconceived and without merit.¹³ There is no conflict between the two said provisions of the Constitution. First, both provisions govern fundamentally different issues. Section 91 addresses tenure of seats of members of the National Assembly, while Section 231 construes powers given to different entities by the Constitution. Second, the rule that specific provisions override general provisions in the event of conflict is not an absolute one. Reference is made to the legal authority cited by the Plaintiff in the case of **Commercial Tax Officer, Rajasthan v. M/S Binani Cement Ltd & Anor**,¹⁴ in which it is stated thus:

"the provisions must be examined to find out whether it is possible to construe harmoniously the two provisions-Once it is held that the intention of the legislation is to exclude the general provision then the rule 'general provision should yield to specific provision' is squarely attracted-The rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction".
(emphasis added).

24. In any event, and as demonstrated further below, the principle of *generalia specialibus non derogant* is inapplicable in the instant case because the provisions of Section 91(1) and Section 231(1) are not in conflict. In fact, they are complementary. Consequently, the Defendants submit that the President's power to revoke a nomination in general or pursuant to Section 231(1) is not inconsistent with the provisions of Section 91(1).

¹³ Plaintiff's Statement of Case, para. 40.

¹⁴ *Ibid*, para. 40.

(iv) *Scope of Section 91(1)*

25. The Plaintiff's contention that "*the seat of a member of the National Assembly may only be vacated pursuant to Section 91(1) and not in any other circumstance*"¹⁵ is misconceived and wrong. The consequences of the Plaintiff's contentions are indeed far reaching and if this Honourable Court were to uphold her arguments, the result will give rise to an inconsistency that cannot be reconciled or justified under the Constitution or indeed in any true democratic society.

26. First, the Constitution is a wholesome document and its provisions must be read together as a whole,¹⁶ and not piece meal or in compartments. This is to ensure consistency in its interpretation and application. Reading one part of the Constitution in isolation from the other parts, as the Plaintiff did, will lead to a misguided and erroneous conclusion. Therefore, Section 91(1) must not be read in isolation from the other provisions of the Constitution.

27. In this regard, the Defendants submit that all the circumstances for vacation of the seat of a member enumerated under Section 91(1) are applicable in like manner to all members of the National Assembly save for Section 91(1)(f) which provides for the possibility of the recall of an elected member of the National Assembly by an electorate. The option of recall is therefore only available in the case of an elected member because it is only registered voters in a constituency that can trigger the recall process pursuant to Sections 91 and 92 of the Constitution. It is clearly inapplicable in the case of a nominated member.

¹⁵ Plaintiff's Statement of Case, para. 1.

¹⁶ Attorney General vs Pap CO Secka, GLR, Vol. 2 (2002-2008), p. 75, para. 11; Federal Ministry of Health vs COMET Ltd, 39 NSCQR, p. 72, para. 4.

28. Hence, if the option of recall is available to an electorate in the case of an elected member, it stands to reason that a similar corrective avenue must also be made available in the case of a nominated member so that if circumstances were to arise in the case of a nominated member which would have given rise to the recall of an elected member, a nominated member may also vacate his/her seat in the National Assembly.

29. Therefore, if a nominated member of the National Assembly cannot be subjected to the recall process under Section 91(1), and if this Honourable Court were to uphold the Plaintiff's argument that the President does not have the power to revoke the nomination of a member under Section 231(1), then a situation arises in which there will be an imbalance in favour of nominated members in the National Assembly. This will simply mean that nominated members of the National Assembly, in so far as tenure of seats is concerned, will have an undue or unfair advantage over their elected colleagues. And contrary to the Plaintiff's propositions,¹⁷ this will lead to an unjustified distinction between nominated members and elected members.

30. Furthermore, such a scenario will make a mockery of true democratic practice. It will be an anomaly that cannot be said to have been intended or contemplated by the drafters of the Constitution. In fact, if accepted, it will mean that nominated members of the National Assembly stand on firmer footing than members who were elected directly by the people through universal adult suffrage. It will be incompatible with the cardinal principle in our constitutional democracy that sovereignty resides in the people of The Gambia¹⁸. This is why the President holds a corresponding power under

¹⁷ Plaintiff's Statement of Case, para. 28.

¹⁸ Section 1 of the Constitution of The Gambia 1997

Section 231(1) to revoke a nomination in the same spirit as an elected member may be recalled by an electorate under Section 91(1).

31. Section 231(1) therefore complements Section 91(1) in ensuring consistency and parity among all members of the National Assembly whether elected or nominated. There is simply no conflict between the two provisions of the Constitution, and when read together as a whole, as they must, the Constitution becomes more meaningful and wholesome in this regard.

32. It must therefore be that the President has the power to revoke a nomination under Section 231(1), especially when there is no constitutional or other provision prohibiting it. Contrary to the Plaintiff's claims,¹⁹ all the indications point to the conclusion that the President has the power to do so.

33. Moreover, there is an underlying assumption that the power to make a nomination also includes a corresponding power to revoke same. This must have been so obvious and apparent to the drafters of the Constitution that there was no need to reiterate it in express terms not only because it was consistent with other parts of the Constitution, but also because there was no provision in the Constitution stating otherwise.

(v) Purposive Construction

34. Assuming even that Section 231(1) is inapplicable under the circumstances, and that there is no express provision in the Constitution that allows the President to revoke the nomination of the Plaintiff, the Defendants submit that a holistic reading of the Constitution supports the proposition that the President had the power to revoke the Plaintiff's nomination. The Defendants

¹⁹ Plaintiff's Statement of Case, paras. 3, 36, 38, 39, 40, 41, and 42.

submit further that a resolution of this constitutional issue, in the absence of an express provision either way, cannot be confined to abstract legal or constitutional theories alone. A resolution must necessarily involve adopting a pragmatic approach to a complex legal problem. As Professor Aharon Barak, former President of the Supreme Court of Israel said:

“a constitution sits at the top of the normative pyramid. It shapes the character of society and its aspirations throughout history. It establishes a nation’s basic political points of view. It lays the foundation for social values, setting goals, obligations and trends. It is designed to guide human behavior over an extended period of time, establishing the framework for enacting legislation and managing the national government. It reflects the events of the past, lays a foundation for the present, and shapes the future. It is at once philosophy, politics, sociology, and law. The unique characteristics of a constitution warrant a special approach to its interpretation, because it is a constitution we are expounding”²⁰.

35. First, there is no dispute that the power to nominate a member of the National Assembly of The Gambia is exclusively vested in the President without any preconditions save for those enumerated under Section 89 of the Constitution in respect of qualifications for membership.

36. Second, the power to nominate is clearly discretionary and intended to serve a purpose. It is not merely to fill up empty spaces at the National Assembly. While the Constitution is silent on the purpose for the exercise of this discretion by the President, we can take a cue from other Commonwealth jurisdictions where similar practice exists. In Malaysia²¹ and Singapore,²² for instance, the practice is meant to allow the nominating authority to take into account unique or special circumstances, in the nomination of candidates to

²⁰Aharon Barak, *Purposive Interpretation in Law*, Princeton University Press, 2005, p. 370.

²¹Federal Constitution of Malaysia, 2010, Section 45.

²²Constitution of Singapore, Section 39.

the legislature, so as to accommodate certain minority or marginalized groups in the political decision-making process.

37. Hence, the President's power to nominate a member of the National Assembly is intended to serve a purpose. For this reason, and where the purpose or the circumstances for the nomination of a particular member of the national assembly no longer exists, the President must have the ability to exercise a residual power to replace that nominated member with another member whose nomination will continue to serve that purpose. This provides the President with flexibility to adapt to changing circumstances during the life of a particular National Assembly. And naturally, replacing one nominated member with another nominated member will inevitably necessitate the revocation of a nomination. Any contrary view will defeat the purpose for which this important constitutional and governance objective is intended to serve.

38. Third, there is no timeline for the President to make a nomination. This means that a nomination may be done at any time during the life of a National Assembly and subject only to the limitations placed on the number to be nominated, ie, five at any given time. Consequently, the power to nominate must include a corresponding power to revoke that nomination consistent with the President's power to nominate at any time during the life of a National Assembly. There is no law, constitutional or otherwise, stating that he cannot do so. To hold otherwise is to take away a responsibility that the Constitution has entrusted to the wisdom of the President.

39. It is of course plausible to argue, as the Plaintiff does, that once sworn in, a nominated member acquires all the rights and privileges of a member of the

National Assembly including protection from arbitrary removal.²³ However, arbitrariness must be distinguished from the lawful exercise of unfettered discretion. A nominated member is a member of the National Assembly serving at the pleasure of the President. That is an entitlement exclusively bestowed on the President by the Constitution.²⁴ He alone chooses his candidates for nomination and he does so as he deems fit in his wisdom. It is not only his constitutional right, but also his constitutional responsibility.

40. This Honourable Court must, therefore, only interfere with the President's lawful exercise of discretion if the Plaintiff can demonstrate that the President has clearly abused this discretion. In this regard, the Plaintiff must show, and this Honourable Court must have a firm conviction, that the President's action in revoking the Plaintiff's nomination was clearly unreasonable, erroneous or arbitrary. Given the President's large margin of appreciation in the exercise of this constitutional responsibility, the Plaintiff has failed to demonstrate an abuse of this discretion.

41. Finally, there is a presumption of good faith attached to the President and to all members of the National Assembly, whether elected or nominated, by virtue of their oaths of office. The Defendants invite this Honourable Court to take judicial notice of these oaths. Therefore, to assume, without basis, that nominated members of the National Assembly may find themselves in a situation of "irreconcilable conflict"²⁵ in the fulfillment of their constitutional mandate as legislators; or to assert, without proof, that the President will

²³ Plaintiff's Statement of Case, para. 38.

²⁴ Section 88(1)

²⁵ Plaintiff's Statement of Case, para. 38.

abuse his constitutional powers for personal political motives,²⁶ is at best speculative.

C. Conclusion

42. Based on the foregoing, the Defendants respectfully submit that the Plaintiff has failed to demonstrate that the President contravened a provision of the Constitution when he revoked the Plaintiff's nomination as a member of the National Assembly. Based on the arguments of the Defendants above, the President is vested with the power to revoke the Plaintiff's nomination as a member of the National Assembly, and accordingly, the Plaintiff's contentions should be dismissed in their entirety for lack of merit. She has failed to demonstrate her entitlement to the reliefs sought.

Dated this 6th Day of June 2019.



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Attorney General & Minister of Justice

²⁶ Plaintiff's Statement of Case, paras. 9-17.