

IN THE SUPERIOR COURTS OF THE GAMBIA



IN THE HIGH COURT OF THE GAMBIA
MISC. APP. NO. HC/380/21/MF/122/F1

BETWEEN:

GAMBIA PARTICIPATES _____ 1ST APPLICANT
ABDOU AZIZ GAYE _____ 2ND APPLICANT
CENTRE FOR RESEARCH
AND POLICY DEVELOPMENT _____ 3RD APPLICANT

AND

THE MAYOR OF BANJUL _____ 1ST RESPONDENT
INDEPENDENT ELECTORAL COMMISSION _____ 2ND RESPONDENT
ATTORNEY GENERAL _____ 3RD RESPONDENT

IN THE MATTER OF AN APPLICATION FOR DECLARATION
UNDER SECTION 12 (20 (e) OF THE ELECTIONS ACT (ACT NO. 7 OF
2001) AND SECTION 13 (e) OF THE ELECTIONS ACT

Before Hon. Justice B. V. P. Mahoney JCA by request of the Hon. Chief
Justice to hear and determine this case by Fiat Ref. ZA/18/133/01/(84) and
pursuant to Section 131 (1) (c) of the Constitution of The Gambia.

Tuesday 13th July 2021

1st Applicant's representative - present
2nd Applicant present
3rd Applicant's representative - absent
1st Respondent and 3rd Respondent - absent
2nd Respondent's representative - present

Representation:

Mr A. Fatty for the Applicants

Ms S. Sillah for the 1st Respondent

Mr K. Sanyang with him Ms F. M. Jawo for the 2nd Respondent

Mr Binga D with him Mr M. B. Sowe for the 3rd Respondent

JUDGMENT

The Claim

By Originating Summons filed on 23rd June 2021, the Applicants apply to this Court for the following orders:

1. A declaration that the actions of the Mayor of Banjul in issuing attestations to constituents of the City of Banjul in the ongoing Independent Electoral Commission (IEC) general registration of voters process are in contravention section 12 (2) (e) of the Elections Act;
2. A declaration that the actions of the Independent Electoral Commission (IEC) in conferring the power to the Office of the Mayor of Banjul to administer attestation forms generated by the IEC for the purpose of claiming voter cards in the City of Banjul are a contravention of section 12 (2) (e) of the Elections Act;
3. An order quashing the decision of the IEC to bestow upon the Mayor of Banjul the powers and authority to issue attestations to the constituents of the City of Banjul;
4. An order setting aside all attestation forms endorse and or issued by the Mayor of Banjul for which voter cards were issued by the IEC;
5. Consequently, an order striking-out and or cancelling all voter cards issued by the IEC that were supported by attestation forms issued and or endorsed by the Mayor of Banjul;

6. Such further or other orders that this Honourable Court deems fit to make under the circumstances.

The Facts

The facts relied on by the parties in this case are on the whole not in conflict. Between the several affidavits filed in this application identified hereinafter, there are several documents exhibited including the 2nd Respondent's Public Notice on General Registration of Voters 2021, the 1st Applicant's letter to the 2nd Respondent on the issue of the Mayor of Banjul issuing attestations and the 2nd Respondent's reply thereto, copies of attestation forms certified by the Mayor, the 2nd Respondent's letter to the 1st Respondent requesting a meeting, and the minutes of the meeting held between the 2nd Respondent and the Council.

The Applicants rely on the affidavit in support of the summons sworn by the Executive Director of the 1st Applicant in which the basis of their claim is stated and can be summarised as follows: That during the ongoing general registration of voters conducted by the 2nd Respondent (the Independent Electoral Commission) between 29th May 2021 and 11th July 2021, it came to the attention of the Applicants that the Mayor of Banjul is issuing attestations to the constituents of the City of Banjul. The 1st and 3rd Applicants who are civil society organisations whose objectives are, among others, to promote good governance and the 2nd Applicant who is the Councillor for Box Bar ward in Banjul, are aggrieved by the actions of the 2nd Respondent in entrusting the Mayor of Banjul (the 1st Respondent herein), and conferring on her, the power to issue attestations to the constituents of Banjul for the purpose of registration of voters which, they allege, is in contravention of section 12 (2) (e) of the Elections Act.

The 1st Respondent filed an affidavit in opposition sworn by the Mayor herself in which it is averred that the 2nd Respondent convened a meeting to sensitise the Council on the general voter registration and

it was at that meeting that the officials of the 2nd Respondent informed her that attestations in the City of Banjul have always been issued by the Mayor of Banjul and that this has always been the practice. The 1st Respondent further states that she is also authorised to issue attestations for birth certificates and death certificates in her capacity as Mayor and that the manner in which her office issues attestations is transparent, fair and just and that since the commencement of the voter registration exercise, she has issued more than 2,000 attestation forms to the people of Banjul.

The 2nd Respondent also filed an affidavit in opposition deposed to by its Director of Administration. It is averred, as the 1st Respondent did, that a meeting was convened by the 1st Respondent on sensitisation of the voter registration and at that meeting, concerns were raised as to who would provide attestations in Banjul since there is no Alkalo or Seyfo there. That the Respondent's Chairman informed the meeting that the Mayor of Banjul has always provided attestations for undocumented adult Gambians living in the City and that the 2nd Respondent resolved that the 1st Respondent should do the attestations in Banjul for the current voter registration. The 2nd Respondent states that without the attestation of the Mayor, a lot of undocumented Gambians in Banjul will be disenfranchised.

The 3rd Respondent, according to the affidavit in opposition sworn on their behalf, admits that the Mayor of Banjul is issuing attestations to eligible Gambians resident in the City of Banjul who do not possess the requisite papers for voter registration which is ongoing.

Hearing

On the first day the application was mentioned, all counsel agreed to deliver their submissions within a limited time due to the urgency of the matter and hearing was adjourned to 5th July with the expectation that it would conclude that day. However, due to the 2nd and 3rd Respondents' late filing of their affidavits in opposition, counsel for the Applicants requested for time to file an affidavit in reply and consequently the hearing could not be completed on the same day and actually concluded on the next hearing date which was 8th July.

Applicant's arguments

Counsel for the Applicants' submits that the issue before the Court is whether the 1st Respondent has the legal authority to issue attestations as part of the voter registration process.

Counsel referred to section 12 (2) of the Elections Act concerning the qualifications for registration of voters which was also stated in the 2nd Respondent's public notice on the registration exercise. Counsel submits that the interpretation of the section 12 (2) (e) of the Elections Act, should be a literal one since the provision is clear and unambiguous.

Counsel argues that invoking section 127 of the Elections Act to authorise the 1st Respondent to issue attestations would be changing the ordinary meaning of section 12 (2) (e).

Counsel further submits that section 127 (2) which appears to oust the jurisdiction of the Court to question an issue addressed by the 2nd Respondent under section 127 (1) does not apply because the application is not on the merit of the decision of the 2nd Respondent but rather on whether the 2nd Respondent exercised its functions in accordance with the Statute regulating it.

Counsel submits that the High Court has supervisory jurisdiction of all judicial and public bodies and institutions of which the Respondents belong to the latter and must be subject to control if they act unlawfully.

Counsel concludes that that the 2nd Respondent cannot confer on themselves power that the law-makers have not given to them. That if Parliament had wanted to vest the Mayor with power to issue attestations, they would have included it in section 12. That where the language of the statute is clear, a literal construction of it should be adopted. And that if the Mayor has issued 2,000 attestations in Banjul, that is a significant number when the Mayor has no legal authority to

do so and thus has a significant impact on the integrity of the registration process.

1st Respondent's arguments

Counsel for the 1st Respondent argued against the application on the declarations sought and the consequential orders. On the declarations, counsel submitted that section 12 (2) of the Elections Act was amended in 2001 by removing paragraph (d) which allowed the attestation by five elders. Counsel submits that the 2nd Respondent conferred power on the 1st Respondent to issue attestations for the people of Banjul by exercising its power under section 127 (1) of the said Act because the intention of the legislators was that section 12 (2) (e) (now (d)) was not for general application over the whole country but only for places with a Seyfo or Alkalo of which Banjul has none so that the general provision in section 127 was invoked to give uniformity and avoid discrimination and unfairness. That although where there is a specific provision, the general provision will not apply, there are exceptions such as where the intention of Parliament was not for the specific provision to be generally applicable. That in this case, it is obvious that Parliament did not intend the general application of section 12 (2) (e), (now (d)), so that there is a lacuna which was filled by the 2nd Respondent allowing Banjul which has no Alkalo or Seyfo, to have attestations issued by the Mayor.

On the consequential orders, counsel argues that the people whose voters cards are sought to be cancelled are not parties to the suit so that it would be against the rules of natural justice and fair hearing to have their cards cancelled without them being heard.

Counsel concluded her submissions by submitting that the application is geared towards disenfranchising some of the people of Banjul who have a constitutional right to be registered and vote.

2nd Respondent's arguments

Counsel for the 2nd Respondent submits that section 12 (2) of the Elections Act provides for attestations in the absence of a birth

certificate, identity card or passport. That in Banjul, without attestations, over 2000 citizens would be disenfranchised. That the 2nd Respondent has always used the 1st respondent to issue attestations who would otherwise be disenfranchised.

Counsel also questions the legal capacity of the Applicants, that they have not shown that they have sufficient interest to bring this suit or that the 2nd Applicant is authorised by his constituents to bring this suit.

Counsel submits that the 2nd Respondent informed the 1st Applicant in their letter that they were acting pursuant to Section 127 of the Election Act in authorising the 1st respondent to issue attestations. That they so acted because section 12 (2) is silent on the issue of attestations for the people of Banjul. That section 12 (2) is supposed to apply throughout The Gambia and that by not applying to Banjul, it disenfranchises the City which violates the constitutional right to vote and discriminates against the people of Banjul.

Counsel further submits that the power given to the 2nd Respondent under section 127 cannot be questioned by a court. That the provision has ousted the jurisdiction of the court to inquire as to how the 2nd Respondent arrived at the decision to give the 1st Respondent the power to issue attestations.

3rd Respondent's arguments

Counsel for the 3rd Respondent had raised some preliminary issues on the mention date of this matter but he was asked to argue all issues at the hearing due to the urgency of this matter. In his arguments against the application, counsel for the 3rd Respondent submitted that certain paragraphs of the affidavit in support of the summons contain legal arguments and conclusions and violate the Evidence Act and ought to be struck out.

On section 12 (2) of the Elections Act, counsel submitted that with the repeal of the paragraph allowing attestations by 5 elders, the people of Banjul will be deprived unless somebody is authorised by an Act of

Parliament to provide attestations. That due to the lacuna or absence of anyone to provide attestations in Banjul, the 2nd Respondent relied on section 127 to authorise the 1st Respondent to issue attestations so that the residents of the City of Banjul will not be discriminated against.

Counsel submits that with rising increase in youth population, a high percentage of the constituents of Banjul would be deprived and discriminated against so that it was only fair to the electorate that the 2nd Respondent invoked section 127 to enable them be registered and vote.

Furthermore, counsel submits that section 127 has ousted the jurisdiction of the court to entertain matters regarding the 2nd Respondents operational activities to enable them have a free hand within the ambit of the law.

Reply on points of law

Counsel for the Applicants in his reply on points of law submitted that section 12 cannot be said to apply to only certain parts of The Gambia since it is made pursuant to sections 42 to 45 of the Constitution.

On the argument that the persons affected have not been made parties, counsel submits that his argument is that the power given to the 1st Respondent by the 2nd Respondent is void ab initio.

On the right to vote, counsel submits that the Constitution also contains eligibility requirements just as section of the 12 Elections Act so that the argument that the application discriminates against the people of Banjul is not supported.

On the locus standi of the Applicants, counsel submits that they are concerned persons and entities and have a right to challenge matters of public importance.

The Issues

From the claims in the originating summons and the other processes filed and the submissions of all counsel in this case, the main issue that this Court is required to determine is whether the 1st Respondent in issuing attestations to constituents of the City of Banjul contravenes section 12 (2) of the Elections Act and whether the 2nd Respondent in conferring power on the 1st Respondent to issue attestations also contravenes section 12 (2) of the said Act.

Other sub-issues that have arisen are the legal capacity of the Applicants, whether the affidavit in support contravenes the Evidence Act and whether, if the declarations are granted, the consequential orders sought can be made.

Jurisdiction

Before delving into the merits of the application, let me identify the jurisdiction of the Court to determine such an application. The High Court has original jurisdiction to hear and determine all civil and criminal proceedings and to interpret and enforce the fundamental rights in the Constitution under section 132 of the Constitution. It also has supervisory jurisdiction over all lower courts and adjudicatory authorities in The Gambia under section 133 of the Constitution. What of judicial control over public authorities; in which the 2nd Respondent, the Independent Electoral Commission falls, since it is part of the public service under section 42 of the Constitution and administers a public function? The Courts Act 1964 by section 3 vests the High Court with the following jurisdiction: "The High Court shall have the jurisdiction and powers provided by the Constitution and all the jurisdiction, powers and authorities which were vested in or capable of being exercised by Her Majesty's High Court of Justice in England immediately before the eighteenth day of February, 1965."

The High Court has judicial control over the acts of public bodies by judicial review. Acts of a public authority are lawful only so long as the authority does not exceed its powers and may be challenged in the courts on the ground that there is no such power, or the power has been exceeded or used for an improper purpose. See Constitutional

Law by E.C.S. Wade and A.W. Bradley, 8th Edition (1970), at pages 619 and 620.

Furthermore, at common law, the principal machinery of review was provided by the prerogative writs – mandamus, certiorari and prohibition and the remedy by declaration and injunction of which the latter two may be available when other remedies are spent. See Wade and Bradley supra at pages 657 to 671.

The Rules of the High Court also contain provisions on declaratory judgments. Order 5 Rule 2 of Schedule 1 of the Rules of the High Court provides

“2. Declaratory Judgments

An action or proceeding shall not be open to objection on the ground that a mere declaratory judgment or order is sought thereby and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.”

In effect, this Court has jurisdiction to hear and determine applications for judicial review and actions for declarations and consequential orders in public interest cases.

Preliminary issues

The first preliminary issue to be determined in this application is counsel for the 3rd Respondent’s contention that certain paragraphs of the affidavit in support of the application contravene the Evidence Act and ought to be struck out. Paragraphs 10 to 14 and paragraphs 16 and 17 are alleged to offend section 90 of the Evidence Act.

I will not reproduce the allegedly offending paragraphs but suffice to say that paragraphs 10, 12, 14, 16 and 17 of the affidavit in support are mainly legal arguments and conclusions which are prohibited by section 90 of the Evidence Act. They ought to be struck out and are hereby struck out. The remaining paragraphs still contain facts that give a sufficient meaning to support the Applicants’ claim so that this suit is still competent despite the striking out of the offending

paragraphs. See *Gamstar Insurance Co. Ltd. v Musa Joof* (2002-2008) 1 GLR 103 at pages 126 and 127.

The second preliminary issue arises from counsel for the 3rd Respondent's submission that the Respondents lack the legal capacity to bring this action. Counsel is questioning the locus standi of the Applicants.

In the affidavit in support of the summons, the Applicants stated as follows:

3. That the 1st Applicant is a civil society organisation registered under the Companies Act whose main objectives are to promote the rule of law, democratic values and good governance in the public life of this country. In essence, to act as watchdogs against abuse of power and functions.

4. That the 2nd Applicant is the Councillor of Box Bar ward in Banjul. As a local government official, he is interested in the affairs of his ward in particular and Banjul in general in ensuring transparency, fairness and legality in the general registration process in the city of Banjul.

5. That the 3rd Applicant is a civil society organisation registered under the laws of The Gambia with special focus and expertise in areas of good governance and citizenship participation in the socio-political life of this country.

In the 1st Respondent's affidavit in opposition, only paragraphs 7 to 20 of the affidavit in support were denied. The Applicant's paragraphs 3, 4 and 5 are therefore deemed admitted.

In the 2nd Respondent's affidavit in opposition, only paragraphs 13, 14, 16, 18, 19 and 21 were denied. In effect, the Applicant's paragraphs 3, 4 and 5 are deemed admitted.

In the 3rd Respondent's affidavit in opposition, paragraphs 3, 4 and 5 are expressly admitted.

Consequently, the facts deposed by the Applicant on the status of the Applicants and their interest in the subject matter of this suit, the registration of voters in Banjul by the 2nd Respondent public body are established.

Counsel for the Applicants submitted that the courts now permit any legal person to bring a public interest case to court. But this proposition is exclusively for the purposes of interpretation and enforcement of the Constitution. When it comes to judicial review concerning interpretation of statutes as opposed to the Constitution, the applicant is required to show an interest over and above that of the general public. See UDP (No. 1) v Attorney-General (No. 1) (1997-2001) GR 789.

In Constitutional Law by Wade and Bradley supra at page 666, the learned authors stated: "In administrative law it is necessary for a complainant to have a peculiar grievance which is not suffered in common with the rest of the public." Further on the same page, the authors however note that: "But membership of a special section of the community which has a grievance of its own may entitle an individual to seek relief."

From the interest shown by the Applicants in paragraphs 3, 4 and 5 of their affidavit in support which are uncontroverted and deemed established, I am satisfied that the applicants are members of a special section of the community who have a particular grievance and interest in the subject matter of this case to entitle them to seek declaratory reliefs and have locus standi to bring this action.

Main issue

Whether the Mayor issuing attestations contravenes section 12 (2) of the Elections Act.

This issue calls for the interpretation of section 12 (2) and section 127 (1) of the Election Act, the latter section which the Respondents claim to have invoked in giving the 2nd Respondent authority to empower the 1st Respondent to issue attestations and whether the jurisdiction of the court to question a decision made with respect to an issue under the aforementioned section is ousted by section 127 (2).

To better appreciate the subject matter of this suit, it would be prudent to identify the source of the law concerning voter registration. This can be traced to Chapter 5, Part 1 of the Constitution of The Gambia 1997 where at section 39 (1), it is provided that: “Every citizen of The Gambia being eighteen years or older and of sound mind shall have the right to vote for the purpose of elections of a President and members of the National Assembly, and shall be entitled to be registered as a voter in a National Assembly constituency for that purpose.”

It is further provided at section 41 of the Constitution that: “Subject to the provisions of this Constitution, an Act of the National Assembly may make provision for giving effect to the provisions of this Chapter and, without prejudice to the generality of the foregoing, may provide for-

- (a) the registration of voters for the purpose of public elections...”

The Elections Act 1996, the present statute in force on elections, provides the laws on registration of voters in Part 3 with Section 11 covering the Register of Voters, Section 12 the qualifications for registration, Section 13 the disqualifications for registration, Section 14 the period of general and supplementary registration etc.

Section 12 Elections Act - registration

The part of the law in controversy in the instant case is Section 12 which is reproduced from the 2009 Laws of The Gambia Volume 1 Cap. 3:01 for ease of reference as follows:

“Section 12. Qualifications for registration

- (1) Subject to section 13, a person shall be entitled to have his or her name entered on a register of voters in a constituency if he or she-
 - (a) is a citizen of The Gambia;
 - (b) has attained, or will on the date of the holding of the next election attain, the age of eighteen years; and
 - (c) is resident, or was born in that constituency.

- (2) Notwithstanding subsection (1), a person’s name shall not be entered on a register of voters in a constituency unless he or she produces any one of the following documents-
 - (a) a birth certificate;
 - (b) a Gambian passport;
 - (c) a National Identity Card;
 - (d) a document certified by five elders that the applicant is a citizen of The Gambia; or
 - (e) a document certified by the District Seyfo or an Alkalo of the village of birth of the applicant stating that the applicant was born in the district or village.

- (3) The Commission shall not reject a valid document produced under sub-section (2).”

It is relevant to note here that this Section was amended by deleting paragraph (d) on attestation by five elders. I shall come back to this matter later on.

Now, on the rules of interpretation of statutes, it is well established that provisions in statutes are to be given their ordinary plain meanings unless it would lead to absurdity. This principle has been consistently applied in this jurisdiction, to name a few cases, reference is made to *Gaye (No.1) v The State (No.1)* (1997-2001) GR 240 at page 253 where Justice Francois JA stated: "It is... well settled that in the interpretation of statutes, where the language is clear, one does not go beyond its plain meaning. Neither logic nor esoteric legal argument can displace the clear expression of a statute."

In *Kanifing Municipal Council v I.B.C. Ltd* (2002-2008) 2 GLR 173 at page 193 Justice Agim JCA as he then was, stated: "It is not within the interpretative jurisdiction of a court to read into a provision words that are not there. The Courts in interpreting and applying statutes have a duty to pay heed to the text of every provision and take account of the words as they stand. It should not add any words. As the Nigerian Supreme Court held in *Mabinuori v Ogunleye* (1970) All NLR 17 to do so will amount virtually to amending the provision. This will amount to legislation, an exercise that a Court cannot and has no power to do."

In *Thompson Holidays Ltd. v Banna Beach Hotel Ltd.* (2002-2008) 2 GLR 340, Justice Yamoah Ag. JCA as she then was, at page 349 stated: "The first cardinal rule of interpretation is that every word, unless used in a technical sense, ought to be given its ordinary or literal interpretation, as legislators are generally presumed to intend what they actually convey by the words they use. There is a glut of authority regarding this position. See *The Queen in Prosecution of J. F. Pemsel v Commissioners of Income Tax* (1888) 2 QBD 296 where it was held that "the underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expressions used therein rather than from any notions which may be entertained by the court as just and expedient." That is the position, except in certain circumstances and only when the words are such that interpreting them in the ordinary sense may give absurd results, or be otherwise inconsistent. Then the intendment of the law in relation to its *raison d'être* may become relevant in applying the

interpretation that will avoid absurdity.” And further at page 351 citing the observation of Scott L.J. in *Croxford Universal Insurance Co. Ltd v Gresham Fire and Insurance Society* (1936) 2 KB 253 at 280, her Ladyship stated: “Where the words of an Act of Parliament are clear, there is no room for applying any of those principles of interpretation which are merely presumptions in cases of ambiguity.”

Therefore, as a starting point, the Court is required to interpret the statute in question using its ordinary meaning unless an absurdity would result. If the literal interpretation leads to an absurdity, then the Court should give the provision an interpretation that would avoid the absurd result but consistent with the intention of the lawmakers. In the instant matter, a careful study of section 12 of the Elections Act appears plain and unambiguous. Subsection (1) gives the general qualifications for entry in the register of voters. It reflects the right to vote as provided in section 39 (1) of the Constitution. Then subsection (2) provides that notwithstanding the right to vote stated in subsection (1), a person’s name shall not be entered on the register unless he or she produces any one of four stated documents namely a birth certificate, a Gambian passport, a National Identity Card or a document certified by the District Seyfo or an Alkalo of the village of birth of the applicant stating that the applicant was born in the District or village.

Now, the controversy that appears to have arisen is that there is no provision for ‘attestation’ for the people of Banjul because it is said Banjul does not have a District Seyfo or a village Alkalo and so there is a lacuna in the law. This is where the 2nd Respondent intervened and appointed the Mayor to issue ‘attestations’ to the people of Banjul pursuant to the 2nd Respondent’s power in Section 127 to resolve the issue which I shall come back to shortly.

As stated in the various decisions cited above, the ordinary interpretation of the words of the statute must be applied in the first instance. What then is the interpretation of Section 12 in the ordinary sense of the words used?

The ordinary interpretation is that notwithstanding the right of a citizen of The Gambia above the age of eighteen who is not disqualified by reason of unsound mind among others, must produce one of four permitted documents in order to be entered on the register of voters. The four documents are: a birth certificate, a Gambian passport, a National Identity Card or a document certified by the District Seyfo or Alkalo of the village of birth of the applicant stating that the applicant was born in the District or village.

While the second and third documents are confirmatory of citizenship, the first and fourth are only confirmatory of place of birth. The ordinary meaning of the fourth document, that is one certified by the Seyfo or Alkalo of the District or village of birth of the applicant stating that the applicant was born in the District or village, is that it merely confirms the place of birth of the applicant which achieves the same functions as the birth certificate.

I am of the view that there is no ambiguity in Section 12.

Let me now consider whether the literal interpretation produces absurd results or unfairness as the Respondents have submitted in that people from Banjul will be deprived of attestations if the Mayor is not empowered to issue same which is the crux of this matter.

When interpreting a statute, it is also necessary to look at other provisions on the same subject matter in the same statute – as stated in *Attorney General v Pap C. O. Secka* (2002-2008) 2 GLR 73.

It is also necessary to make reference to other statutes for consistency as stated in *Edward Graham v Lucy Mensah* (2002-2008) 1 GLR 22, and the *raison d'être* of the statute as stated in *Thompson Holidays Ltd. v Banna Beach Hotel Ltd. supra*.

In an aid to interpreting section 22 (2) and whether it is unfair so as to trigger the 2nd Respondent to exercise its power under section 127 to authorise the 1st Respondent Mayor to issue attestations and effectively add words to, or expand the meaning of section 12 (2), one

ought to look at the original text of the Elections Act and the amendments to section 12 as was highlighted earlier.

Now, the original Elections Act was enacted as the Elections Decree 1996, Decree No. 78 of the Armed Forces Provisional Ruling Council and came into force on 2nd January 1996. It repealed and replaced the Elections Act 1964 Cap 3:01 Laws of The Gambia 1990.

Section 12 (2) provided that: “Notwithstanding subsection (1) [on the right to have name entered on register], a person’s name shall not be entered on a register of voters unless he produces any one of the following documents –

- (a) a birth certificate,
- (b) a Gambian passport,
- (c) a National Identity Card, or
- (d) a document certified by five elders residing in the place of birth of the applicant stating that the applicant was born in that place.”

By Act No. 7 of 2001, the Elections (Amendment) Act 2001 was enacted and published in the Gambia Gazette No. 7 of 9th July 2001. It amended, among other provisions, Section 12 (2) by substituting paragraph (d) for a new paragraph and introducing a new paragraph (e) so that it then had five paragraphs as follows:

- “(a) a birth certificate,
- (b) a Gambian passport,
- (c) a National Identity Card,
- (d) a document certified by five elders that the applicant is a citizen of The Gambia; or
- (e) a document certified by the District Seyfo or an Alkalo of the Village of birth of the applicant stating that the applicant was born in the District or Village.”

Thereafter, by Act No. 6 of 2015, the Elections (Amendment) Act 2015 was enacted and published in Gazette No. 17 of 27th July 2015. Again, it amended several provisions among which was Section 12 in which paragraph (d) of subsection (2) was deleted so that the five paragraphs became four as follows:

- “(a) a birth certificate,
- (b) a Gambian passport,
- (c) a National Identity Card, or
- (d) ...
- (e) a document certified by the District Seyfo or an Alkalo of the Village of birth of the applicant stating that the applicant was born in the District or Village.”

From the state of the law in section 12 (2), it appears the lawmakers in their wisdom decided to remove the option of a document certified by five elders that the applicant is a citizen of The Gambia as one of the documents that can be presented for a person to have his or her name entered on the register of voters. In making the amendment, the lawmakers did not substitute the provision but repealed it leaving only four documents than can be presented for registration to the exclusion of any document certified by one or more individuals that the applicant is a citizen of The Gambia.

Looking at the template of the document that the 2nd Respondent provided to the 1st Respondent Mayor to issue attestations (MN4, MN5 and MN6 exhibited to the Applicants’ affidavit), it is headed ‘ATTESTATION FORM’ and the Mayor is attesting that the applicant ‘is a Gambian citizen and is eligible to acquire a voter’s registration card for elections in The Gambia’.

This form is more akin to the repealed paragraph (d) on ‘a document certified by five elders that the applicant is a citizen of The Gambia’ than paragraph (e) which is supposed to be a document certifying that the applicant was born in the District or village.

I am not convinced by the Respondents' arguments that there is a lacuna in section 12 (2) because Banjul is a city and has no District Seyfo or village Alkalo to issue attestations so that those without any of the other three documents will be disenfranchised. As stated earlier, paragraph (e) is a document certifying birth in the District or village. This is similar to a birth certificate. In fact, the Birth, Deaths and Marriages Registration Act 1886 was originally only applicable to Banjul and Janjanbureh and made it a criminal offence for parents not to register the birth of a child within a specified time. This did not apply to the Regions until the 1950s but it has never been mandatory for parents to register the births of children outside Banjul and Janjanbureh.

I refer to the above Act on birth registration in interpreting section 12 of the Elections Act to see if there is a lacuna as suggested, as one is permitted to look at other statutes to see if they are consistent and also to identify the *raison d'être* of the provision in question as indicated hereinbefore.

From the literal and purposive interpretation of section 12 (2) of the Elections Act, I do not see any lacuna that would trigger the court or the 2nd Respondent to read into the section a wider interpretation by inserting words that are not there as the Respondents have done. If the lawmakers had intended to cater for certification of place of birth in Banjul other than by birth certificate, they would have provided for it in the Act.

Reference is made to the legal statement of Justice Agim CJ as he then was in *U.D.P., N.R.P. and K. Sanneh v The Attorney General* (2010-2012) GSCLR 216, Supreme Court decision at page 245 as follows: "The point need not be belaboured that where a constitutional or statutory provision expressly lists the things to which it applies, it is clear that the legislative intention is that it shall not apply to those not mentioned. This is a trite principle of law, often expressed in the Latin maxim *unius est exclusio alterius* (the express mention of a thing or things excludes those not mentioned). See *Black's Law Dictionary* (Centennial Edition (6th Edition) P. 581."

This statement speaks for itself.

Section 127 (1) Elections Act – Issue in Act not addressed to be resolved by Commission

This takes me to Section 127 (1) and (2) of the Elections Act relied on by the 2nd Respondent. It provides as follows:

- “127 (1) Where an issue arises relating to electoral matters which is not addressed by this Act or any other law, the Commission shall resolve the issue in keeping with the standards and rules of natural justice and fairness.
- (2) A decision of the Commission with respect to an issue arising under subsection (1) shall be final and shall not be called into question in any court of law.”

It is the argument of the Respondents that section 12 (2) is discriminatory and unfair in that one of the documents that may be produced for a person's name to be entered on the register of voters is not available to the people of Banjul who do not possess any of the other three documents. That this is a lacuna in section 12 (2) and is an issue not addressed by the Act so that the Commission may resolve the issue pursuant to section 127 by authorising the 1st Respondent (Mayor of Banjul) to issue attestations.

The interpretation of section 127 (1) in its ordinary language is that the Commission may resolve an issue relating to electoral matters that is not addressed by the Act or any other law. What was the issue identified by the 2nd Respondent to warrant invoking section 127? The Respondents submit that the issue was the document in paragraph (e) of section 12 (2) not being available to persons in Banjul because Banjul has no District Seyfo or village Alkalo while it is available to everyone outside Banjul thus making it unfair and discriminatory with the consequence of disenfranchising such persons.

But as I have indicated earlier, the document in paragraph (e) is not a certification of citizenship but rather a certification that a person was

born in Banjul which has the same effect as a birth certificate. Persons in Banjul are required by law to be registered in the register of births so that everyone born in Banjul should have a birth certificate. As the 1st Respondent stated in her affidavit in opposition, the Mayor of Banjul is authorised to issue attestations for birth certificates so that persons born in Banjul who do not possess a Gambian passport or National Identity Card ought to have a birth certificate and even if they do not possess one, are required to register if they have not been previously registered or request for a certified extract from the register of births if they have been previously registered. In effect, persons born in Banjul are not in a worse position than those born outside Banjul where the District Seyfo or village Alkalo is empowered by section 12 of the Elections Act to certify their place of birth in their respective Districts or villages.

Consequently, it cannot be said that there is a lacuna in section 12 (2) of the Elections Act and it also cannot be said that the issue of District Seyfo and village Alkalo certifications of birth otherwise called attestations not being available to the people of Banjul is an issue not addressed by the Act or any other law that needs to be resolved by the 2nd Respondent. Indeed, documents proving birth in Banjul are provided for by law and persons in Banjul are required to comply with it. The issue sought to be resolved is not an issue which has not been addressed by the Elections Act. The purported issue has in fact been addressed since persons in Banjul are required by law to register their births in Banjul to the extent that it is a criminal offence not to register a child born in Banjul. Consequently one can properly expect that everyone born in Banjul should have a birth certificate.

I am therefore of the firm belief that there is no lacuna in section 12 (2) of the Elections Act and the issue of documents proving birth in Banjul has been addressed in the Elections Act and the Births, Deaths and Marriages Registration Act. Again, if the lawmakers had intended to cater for certification of place of birth in Banjul other than by birth certificate, they would have expressly provided for it in the Act.

Section 127 (2) Elections Act ouster of jurisdiction clause

The Respondents also argue that the decision taken by the 2nd Respondent in authorising the 1st respondent to issue attestations was made pursuant to section 127 (1) and by section 127 (2) is final and is not to be questioned by a court of law.

However, as shown above, the decision to resolve the purported issue could never have been taken in the first place. Had it been an issue that could have been properly resolved in accordance with section 127, no court would have jurisdiction to question it. But as the decision was not made in accordance with section 127 (1), the court's jurisdiction is not ousted.

In interpreting ouster clauses, it is well established that courts jealously guard their jurisdiction so that any clause ousting the jurisdiction of the court will be construed narrowly. This principle was very well articulated in by Justice Galaga King JA in *Cham (No. 1) v Attorney-General (No. 1)* (1997-2001) GR 454 from which Holding 1 appropriately summarises the position: "it is the overriding duty of a court to guard its jurisdiction jealously. The court will, therefore, not allow its jurisdiction to be taken away except by plain, clear, unambiguous and positive words in the enabling Decree, statute or constitutional provisions. In performing that duty, the court will strictly construe any legislation which purports to oust the court's jurisdiction and also construe it strictly against those who claim the benefit of the ouster. Therefore, where the ouster provisions are capable of having more than one meaning, then the meaning which preserves the court's jurisdiction will be preferred, adopted and applied. Dicta of Scrutton J in *Re Boaler* (1915) 1 KB 21 at 36, CA; of Evershed MR in *Goldsack v Shore* (1950) 1 KB 708 at 712; of Romer LJ in *Lee v Showmen's Guild of Great Britain* (1952) 1 All ER 1175, CA; of Lord Reid in *Anisminic v Foreign Compensation Commission* (1962) 2 AC 147 at 170, HL; and of Obaseki Ag CJN in *Nwosu v Imo State Environmental Sanitation Authority* (1990) All NLR 379 at 417 cited."

In the case of Cham (No. 1) v A.G (No. 1) supra, the issue was an ouster clause of the Public Assets and Properties (Recovery) (Amendment) Decree (No. 2) 1994 and the Transitional and Consequential Provisions of Schedule II of the Constitution 1997 to the effect that Orders, Rulings and Findings of a commission established under a Decree shall not be questioned by any court. The court held that courts have no jurisdiction to sit on appeal over the decisions of the commission on the merits, but have jurisdiction to determine whether a commission of inquiry was established in accordance with a Decree or whether such a commission had exercised its functions in accordance with the statute establishing it.

His Lordship Justice Galaga King JA in the Cham case just referred to stated at page 463 that: "if a person aggrieved by the decision of a commission seeks to show that a decision or order is a nullity, he is not questioning the purported decision or order; he is merely maintaining that it does not exist as a decision." And at page 463: "the courts have no jurisdiction to sit on appeal over the decision or orders of a commission on the merits, but have jurisdiction to determine whether a commission was properly constituted or had exercised its functions in accordance with the statute establishing it."

Applying the interpretation given by Justice Galaga King JA just stated to the instant matter, it can be seen that the ouster clause in section 127 (2) of the Elections Act is similarly worded in that it states that a decision of the Commission with respect to an issue arising under subsection (1) ... shall not be called into question in any court of law. And subsection (1) gives the Commission the authority to resolve an issue relating to electoral matters which is not addressed by the Act or any other law.

So the interpretation is that in a situation where the Commission exercises its authority or power in making a decision to resolve an issue which is *not addressed by the Act*, the court will have no jurisdiction to question the decision. But where a decision is made by the Commission not in accordance with the Act, that is a purported decision which does not resolve an issue relating to electoral matters

which is not addressed by the Act, the purported decision will not have been made in accordance with the Act and will be a nullity and the court will have jurisdiction to entertain an aggrieved person seeking to show that the decision is a nullity.

This is the position in the instant matter. The 2nd Respondent purportedly made a decision to resolve an issue which was actually already addressed by the Act. The 2nd Respondent's purported decision was not in accordance with the Act and in excess of the powers conferred on it and used for an improper purpose. This Court has jurisdiction to entertain the application seeking a declaration over the 2nd Respondent's purported decision.

In Constitutional Law by Wade and Bradley supra at page 639 the learned authors state: "When a power is exceeded, any acts done in excess of the power are invalid as being ultra vires."

Consequential orders

Having determined that there is no lacuna in section 12 (2) to warrant reading into the section words that are not there and that section 127 was not invoked in accordance with the Act and in excess of the power conferred on the 2nd Respondent, it remains to be determined whether the consequential orders ought to be granted.

Counsel for the 1st Respondent submitted that the consequential orders should not be made without hearing from the persons affected. Counsel for the Applicants on the other hand argued that the 1st Respondents actions were null and void ab initio so that the consequential orders are a natural consequence. Both arguments are well founded but the Elections Act itself prohibits the questioning of lists of voters except through the Revising Courts. Section 30 provides as follows: "No list of voters, list of deletions and entry in such list shall be questioned in any proceedings (other than criminal proceedings) except in a revising court or an appeal from such revising court to the court in accordance with this Part."

The consequential orders especially cancelling the voters cards issued would offend section 30 of the Elections Act in that it would directly affect the entries of the persons on the register whose voters cards are sought to be cancelled.

Consequently, only a revising court established in accordance with section 24 of the Elections Act can deal with the individual entries in the register of voters.

Conclusion

I have been careful not to dwell on the merits of the exercise of the 2nd Respondent's power to resolve the purported issue not addressed in the Act including whether the Mayor of the City is an equivalent person to a District Seyfo or village Alkalo with the required knowledge to perform the task assigned, because as I have resolved in this matter, the Elections Act has provided for the alternative documents for registration so that the issue of documents to be presented for registration cannot fall into the category of an issue not addressed by the Act to enable the 2nd Respondent resolve it the way they purported to do. As stated herein, the list of documents to be presented for registration has been determined by the lawmakers and if a new document is sought to be introduced, it is for the lawmakers to so introduce, which they could easily have done during the several amendments on the very section 12 (2) of the Elections Act.

In the interpretation of section 12 (2) (e) of the Elections Act, there is no lacuna to warrant the 1st Respondent to issue certifications of birth or 'attestations' so that the 2nd Respondent issuing same contravenes the said section.

And in the interpretation and application of section 127 of the Elections Act, the issue purported to have been addressed by the 2nd Respondent was already addressed by section 12 (2) so that the 2nd Respondent authorising the 1st Respondent to issue certifications of birth or 'attestations' was not done in accordance with the law and in

excess of the powers conferred on it and used for an improper purpose thereby and contravening the said section.

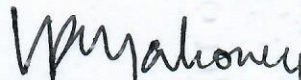
Let me conclude by emphasising that there is no carte blanche or free hand for public bodies and authorities to perform their functions. See Cham (No. 1) v (AG No. 1) supra at page 463. They are required to act within the law or intra vires and not outside the law or ultra vires. This accords with the doctrine of separation of powers and the rule of law.

Final Orders

In light of the above, the following declarations are hereby made:

1. It is declared that the actions of the Mayor of Banjul in issuing attestations to constituents of the City of Banjul in the Independent Electoral Commission (IEC) general registration of voters process are in contravention of section 12 (2) (e) of the Elections Act;
2. It is also declared that the actions of the Independent Electoral Commission (IEC) in conferring the power to the Office of the Mayor of Banjul to administer attestation forms generated by the IEC for the purpose of claiming voter cards in the City of Banjul are a contravention of section 12 (2) (e) of the Elections Act.

Costs of D20,000 awarded to the Appellants.



Hon. Justice B. V. P. Mahoney JCA
Judge