

JABBI v COMA and Others

SUPREME COURT, BANJUL

(Civil Appeal No 4/2000)

28 July 2000

LARTEY CJ, JALLOW, WALI, OGWUEGBU AND AMUA-SEKYI
JJSC

Constitutional law-Constitution-Enforcement and interpretation-Reference of issue of interpretation to Supreme Court-Constitution 1997, s 58-Election to vacant position of district chief-All conditions for election fulfilled-Continued performance of functions of district chief by appointee in acting capacity after expiration of 120 days contravenes section 58(5) Constitution-President empowered to appoint a person to act as district chief in so far as exercise of power not contravening section 58(5) of Constitution-Constitution 1997, ss 58 (1)-(5), 88(1) and 150-Elections Decree, 1996 (Decree No 78), ss 3(1) and 42(2) (e)-Provinces Act, Cap 27,s7.

It is provided by section 58(1)-(5) of the Constitution that:

- “(1) Subject to the provisions of this Constitution and any Act of the National Assembly, the Independent Electoral Commission shall be responsible for the conduct and supervision of elections to the office of District Chief.
- (2) All persons who are ordinarily resident within the Chieftaincy district in which an election is to be held for the office of District Chief and who are registered as voters for National Assembly elections within the constituency in which such chieftaincy district or any part of it is situated shall be entitled to vote in an election of a District Chief.
- (3) The election of a District Chief shall be by secret ballot.
- (4) A candidate for election as District Chief shall be nominated by not less than one hundred and fifty registered voters.
- (5) An election to fill a vacancy in the office of District Chief shall be held within one hundred and twenty days of the date the vacancy occurred.”

Held, unanimously upholding the plaintiff's application for a declaration that: (1) since all the conditions for the holding of elections to the office of District Chief under sections 58 (1) – (5), 88 (1) and 150 of the 1997 Constitution and sections 3(1) and 42 (2) (e) of the Elections Decree, 1996 (Dcree No 78), do

exist, the continued holding and performance of the functions and duties of the District Chief of Sami District by the first defendant immediately after the expiration of 120 days from the date such position became vacant contravenes the provisions of section 58 (5) of the 1997 Constitution which are in full and effect; consequently the retention of the first defendant by the second defendant in an acting capacity as the District Chief of Sami District immediately after the expiry of 120 days from the date of such position became vacant, contravenes section 58 (5) of the Constitution.

(2) The power of the President to appoint a person to act in an acting capacity as provided in section 7 of the Provinces Act, Cap 27 still subsists in so far as the exercise of such power does not contravene section 58(5) of the 1997 Constitution.

REFERENCE by the High Court to the Supreme Court under section 127(2) of the 1997 Constitution for interpretation of section 58(5) of the Constitution. The facts are sufficiently stated in the ruling of the court delivered by Lartey CJ.

ANMO Darboe for the plaintiff.

J Wowo for first, second and third defendants.

LARTEY CJ delivered the ruling of the court. The plaintiff, Fa Saikou Jabbi, is a farmer. He lives at Lamin Koto in Sami District, Central River Division. He is a rate payer and a citizen of The Gambia. On 6 April 1999, he took out an originating summons in the High Court against the three defendants: Kebba Coma, the Secretary of State for Local Government and the Attorney-General asking for the following reliefs:

- (a) a declaration that the continued holding and performance of the functions and duties of the office District Chief of Sami District by the first defendant is in contravention of section 58 of the 1997 Constitution and therefore null and void;
- (b) a declaration that the act of the second defendant to retain the first defendant as Chief for the District of Sami without holding an election to fill the vacancy created by the removal/retirement of Musa Coma is unconstitutional null and void; and
- (c) an order or directive restraining the first defendant from parading or holding himself out as Chief of Sami District until he is properly elected as such in accordance with the provisions of the Constitution and the Elections Decree, 1996.

Upon being served with the summons, the defendants raised a preliminary objection to the suit on the ground that it is the Supreme Court, not the High Court, which has jurisdiction to interpret and enforce the provisions of section

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58 of the 1997 Constitution. The objection was upheld and the learned judge of the High Court has, in compliance with section 127(2) of the Constitution, referred the matter to us for determination. The said section 127(2) provides:

“Where any question referred to in paragraphs (a), (b) or (d) of subsection (1) arises in any proceedings in any other court, that court shall stay its proceedings and refer the matter to the Supreme Court for its determination, and such other courts shall give effect to any decision of the Supreme Court in the matter.”

Section 127(1) (a) gives this court an exclusive original jurisdiction for the interpretation and enforcement of any provision of the Constitution other than those relating to fundamental human rights and freedoms. And when the matter came before us, we ordered that the Independent Electoral Commission be made a party as the fourth defendants and that the commission be served with the relevant documents. This has been done.

The facts on which the plaintiff relies are that some time in April 1998, Musa Coma, the then District Chief of Sami, ceased to hold office as such. The first defendant Kebba Coma was appointed to act in his place. The complaint is that Kebba Coma is still at post in an acting capacity although more than 120 days have elapsed since the vacancy occurred. The plaintiff says that this is unlawful because section 58(5) of the Constitution requires that any vacancy in the Office of District Chief be filled by election within 120 days of the occurrence of the vacancy.

The above facts have not been denied, nor has the constitutional position been challenged. However, counsel who appeared for the three original defendants submits that an election to the office of District Chief cannot be held until the Independent Electoral Commission has, among other things, laid down the modalities for the nomination of candidates and delimited boundaries. He submits further that until such elections are held, acting appointments can be made under the Provinces Act, Cap 27.

The truth of the matter is that all the conditions for the holding of elections to the office of District Chief exist. Section 58(1) of the Constitution makes the Independent Electoral Commission responsible for the conduct and supervision of elections to the Office of District Chief; section 58(2) says all persons who are ordinarily resident within the chieftaincy district in which an election is to be held for the Office of District Chief and are registered as voters for National Assembly elections within the constituency in which such chieftaincy district or any part thereof is situated, shall be entitled to vote in an election of a district chief; section 58(3) states that the election of a district chief shall be by secret ballot; section 58(4) provides, that a candidate for election as district chief shall be nominated by not less than 150 registered voters; and section 58(5)

also states, that the election shall be held within 120 days of the occurrence of the vacancy. As to the boundaries of chieftaincy districts, section 88(1) of the Constitution makes them coterminous with the boundaries for elections to the National Assembly. Section 3(1) of the Elections Decree, 1996 declares that the provisions of the Decree shall apply to the election of candidates for the Office of District Chief. Section 42(2) (e) provides that a district chief shall be nominated by not less than 50 voters in the district; and section 43(1) (e) obliges a candidate to deposit with the returning officer the sum of D2000.

On the facts, it is clear, and we do so find, that the provisions of section 58 of the Constitution are in full force and effect and that the Independent Electoral Commission were obliged to hold an election to the Office of District Chief of Sami within 120 days of the occurrence of the vacancy. This provision has been breached. In the light of the preceding findings and conclusion by this court, we grant the reliefs claimed by the plaintiff as modified hereunder and order as follows:

- (1) that the continued holding and performance of the functions and duties of the District Chief of Sami District by the first defendant immediately after the expiration of 120 days from the date such position became vacant contravenes the provisions of section 58(5) of the Constitution of the Republic of The Gambia 1997;
- (2) that the retention of the first defendant by the second defendant in acting capacity as District Chief of Sami District immediately after the expiry of 120 days from the date such position became vacant contravenes section 58(5) of the Constitution of the Republic of The Gambia and to that extent null and void.
- (3) That within 120 days of his ruling the Independent Electoral Commission shall conduct and hold an election to fill the vacant Office of the District Chief of Sami in the Central River Division.

The power of the President to appoint a person to act in an acting capacity as provided in section 7 of the Provinces Act, Cap 27, still subsists in so far as the exercise of such power does not contravene section 58(5) of the 1997 Constitution.

Notwithstanding the foregoing order, the President can exercise the power conferred on him by section 7 of the Provinces Act, Cap 27 of appointing any person to act as the District Chief at Sami District within the period of 120 days during which the election is to be held.

There will be no order as to costs.

*Declaration granted.
Order accordingly
SYBB*