

ECW/CCJ/JUD/07/10 The Registered Trustees of the Socio-economic and Accountability Project (SERAP) v. Nigeria & UBEC

In the Community Court of Justice of the Economic Community of West African States (ECOWAS)

Holden at Abuja, Nigeria

This 30th day of November, 2010

Between

The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) - Plaintiff

vs

- 1. Federal Republic of Nigeria**
- 2. Universal Basic Education Commission (UBEC) - Defendants**

Before their Lordships

Hon. Justice Hansine N. Donli - Presiding

Hon. Justice Anthony A. Benin - Member

Hon. Justice Soumana D. Sidibe - Member

Assisted by Tony Anene-Maidoh Esq. - Chief Registrar

Representation

Plaintiff:

- 1. A. A. Mumuni Esq.**
- 2. Sola Egbetinka Esq.**

Defendants:

- 1. Yemi Pitan Esq.**
- 2. Tolu Odupe Esq.**
- 3. John Gaul Esq. (for the 2nd Defendant)**

Judgment of the Court

1. Parties and lawyers

The plaintiff is a human rights non-governmental organization registered under the laws of the Federal Republic of Nigeria. The first defendant is a member state of the Economic Community of West African States. The second defendant is body set up by the first defendant to ensure the success of basic education in the country. The applicant was represented by A. A. Mumuni and Sola Egbeyinka. The first defendant was represented by Yemi Pitan and Tolu Odupe, whilst the second defendant was represented by John Gaul.

2. Subject-matter of the proceedings

The initiating application complains of violation of the human right to quality education, the right to human dignity, the right of peoples to their wealth and natural resources, and the right of people to economic and social development, guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples Rights. (ACHPR)

Facts of the case

3. The genesis of this matter, according to the Applicant, is a report of investigations conducted into the activities of the second defendant. Indeed the investigation centred on the mismanagement of funds allocated for basic education in ten states of the Federation of Nigeria. This report was submitted to the Presidency on April 13, 2006. The exact amount though has not been disclosed.

4. Besides, in October 2007, the Independent Corrupt Practices Commission (ICPC) reported having more than 488 million naira of funds looted from state offices and headquarters of the second defendant and was still battling to recover another 3.1 billion naira looted by officials of the second defendant.

5. The Applicant contends that this is not an isolated case but an illustration of high level corruption and theft of funds meant for primary education in Nigeria. The result is that Nigeria is unable to attain the level of education that she deserves in that over five million Nigerian children have no access to primary education, among others. The Applicant catalogued a number of factors that have negatively affected the educational system of the county, including failure to train more teachers, non-availability of books and other teaching materials etc etc.

6. The charge against the first defendant is that she has "contributed to these problems by failing to seriously address all allegations of corruption at the highest levels of government and the levels of impunity that facilitate corruption in Nigeria."

7. The result is that this has "contributed to the denial of the right of the peoples to freely dispose of their natural wealth and resources, which is the backbone to the enjoyment of other economic and social rights such as the right to education

SERAP contends that the destruction of Nigeria's natural resources through large scale corruption is the sole cause of the problems denying the majority of the citizens access to quality education."

8. Pleas in law

The Applicant quoted the provisions of Article 4(g) of the 1993 Revised Treaty of ECOWAS, as well as Articles 1, 2, 17, 21 and 22 of the ACHPR and submitted that the first defendant has violated the right to education, the right of the people not to be dispossessed of their wealth and natural resources and the right of the people to economic and social development.

9. Reliefs and Orders sought.

i. A declaration that every Nigerian child is entitled to free and compulsory education by virtue of Article 17 of the African Child's Rights Act, Section 15 of the Child's Rights Act 2003 and Section 2 of the Compulsory Free and Universal Basic Education Act 2004.

ii. A declaration that the diversion of the sum of 3.5 billion naira from the UBE fund by certain public officers in 10 states of the Federation of Nigeria is illegal and unconstitutional as it violates Articles 21 and 22 of the ACHPR.

iii. An order directing the defendants to make adequate provisions for the compulsory and free education of every child forthwith.

iv. An order directing the defendants to arrest and prosecute the public officers who diverted the sum of 3.5 billion naira from the UBE fund forthwith.

v. An order compelling the government of Nigeria to fully recognize primary school teachers' trade union freedoms, and to solicit the views of teachers throughout the process of educational planning and policy making.

vi. An order compelling the government of Nigeria to assess progress in the realization of the right education with particular emphasis on the Universal Basic Education; appraise the obstacles, including, corruption, impeding access of Nigerian children to school; review the interpretation and application of human rights obligations throughout the education process.

The defence case

10. For their part, the defendants totally rejected the claims by the applicant. The defendants filed separate statements wherein they identified some issues as being material to a determination of this matter. The first defendant formulated three issues relating to the following: 1. The court's jurisdiction over this matter. 2. Failure on the part of the applicant to exhaust local remedies before coming to this court. 3. Failure by the applicant to establish their claims.

11. The second defendant set out a number of issues, namely; 1. Whether the second defendant is the competent body to answer the allegations made by the applicant. 2. Whether the proper parties are before the court. 3. Whether the applicant has established their case. 4. Whether the applicant has satisfied the condition precedent to bringing an action before this court that is exhaustion of local remedies.

12. Preliminary issues

On 27th October 2009, the court issued a ruling in an application for preliminary objection raised by the defence. These issues about the court's jurisdiction in this matter as well as the exhaustion of local remedies were decided in that ruling. It is thus inappropriate for Counsel to raise the same issues again. The principle of law is clear that when a court has decided on some issues in the case, the decision creates issue estoppel as between the parties and/or their privies in the present and any subsequent proceedings in which same issue/s is/are raised. Besides, the decision of this court is final and can only be altered through a revision if the correct procedure is followed. In view of the foregoing, the court cannot re-open these two issues about its jurisdiction and exhaustion of local remedies.

Analysis of the main issues

13. The key issue is whether, having regard to the record before the court, the applicant has established a case against the defendants or any of them. The other issue about whether the second defendant is answerable for the education units of the states who they regard as the proper parties to this case will be addressed first. This is because if the second defendant is a wrong party sued, there will be no point discussing the main issue with reference to them.

14. Among other duties they are mandated by law to perform, the second defendant stated that they 'receive block grant from the Federal Government and allocate to the States and Local Governments and other relevant agencies implementing the Universal Basic Education.....provided that the Commission shall not disburse such grant until it is satisfied that the earlier disbursements have been applied in accordance with the provisions of the Act'.

15. It is clear from even a cursory reading of this provision in the Act which the second defendant themselves relied upon that they have a responsibility to ensure that the funds they disburse to the States, *inter alia*, are utilised for the purposes for which they were disbursed. Thus the second defendant cannot be heard to say that if funds given to the States are not properly accounted for they are not responsible, albeit vicariously. It is clear from the use of the mandatory expression 'shall not disburse' that the Act has placed the onus on them to be satisfied that the funds are properly utilised, hence the power given to them to refuse further disbursements. The language of the statute is so clear and unambiguous requiring no interpretation. Thus the second defendant is a proper party in this action, despite the fact that the ten States mentioned in the Report might also have been joined to this action.

16. Turning next to the main issue, the applicant relies largely on the ICPC Report which they annexed to their papers filed in this case. The ICPC report uncovered corrupt practices in the management of funds allocated for education. The applicant further contends that the "allegations of high level corruption have contributed to series of serious and massive violations of the right to education, including lack of access to quality primary education in Nigeria".

17. The defendants are alleged to have contributed to the denial of education to a lot of Nigerians by failure to seriously address all allegations of corruption at the highest levels of government and the levels of impunity that facilitate corruption in Nigeria. This situation has contributed to the denial of the right of the peoples to freely dispose of their natural wealth and resources, which is the backbone to the enjoyment of the right to education and other economic and social rights.

18. To begin with, the ICPC report is the product of investigations into the affairs of the basic education sector. And in law such investigative report is not conclusive of the facts stated therein, nonetheless they provide *prima facie* evidence of the facts investigated. If the report finds that there is evidence of corruption, it behoves the appropriate authority to act further on it, and secure a judicial verdict. It is only then that a person investigated can be said to be guilty of the allegations or findings of corruption contained in the report. And the fact that the report is not conclusive of the facts stated therein explains the use of such words and expressions as "allegedly", "reportedly", "according to reports", in the initiating application.

19. And coming to the crux of the matter, granting that the ICPC report has made conclusive findings of corruption that per se will not amount to a denial of the right of education. Admittedly, embezzling, stealing or even mismanagement of funds meant for the education sector will have a negative impact on education since it reduces the amount of money made available to provide education to the people. Yet it does not amount to a denial of the right to education, without more. The reason is not far to seek. The Federal Government of Nigeria has established institutions, including the 2nd defendant to take care of the basic education needs of the people of Nigeria. It has allocated funds to these institutions to carry out their mandate. We believe these are all geared towards fulfilling the right ID education. Some officers charged with the duty of implementing the education mandate, are said to have misused, misapplied, embezzled or even stolen part of the funds. The Federal Government and the 2nd defendant are said to have failed to act against such persons and for that reason, they are said to have denied the right of the peoples of Nigeria to education. There must be a clear linkage between the acts of corruption and a denial of the right to education. In a vast country like Nigeria, with her massive resources, one can hardly say that an isolated act of corruption contained in a report will have such devastating consequence as a denial of the right to education, even though as earlier pointed out it has a negative impact on education.

20. The applicant appreciated this last point and so went on to argue that "this is not an isolated case but an illustration of high level corruption and theft of funds meant for primary education in Nigeria." This Court cannot accept such sweeping conclusion. It is a serious indictment on authorities of the Federal Republic of Nigeria which calls for strict proof, being a criminal matter. In the absence of such proof, the Court will reject any suggestion of high level corruption in the educational sector which has resulted in a denial of the right to education.

21. The Court takes note that in the course of implementing policies, especially financial policies, if funds are stolen or embezzled or misapplied, it behoves the matter to be dealt with internally, that is at the domestic level. This Court will only hold a State accountable if it denies the right to education to its people. Funds stolen by officers charged with the responsibility of providing basic education to the people should be treated as crime, pure and simple or the culprits may be dealt with in accordance with the applicable civil laws of the country to recover the funds. Unless this is done, every case of theft or embezzlement of public funds will be treated as a denial of human rights of the people in respect of the project for which the funds were allocated. That is not the object of human rights violation in this Court where every breach or violation must be specifically alleged and proved by evidence.

22. Indeed the ICPC report itself did not recommend prosecution in the first place. Paragraph (viii) of its recommendations is pertinent and germane to the ongoing discussion, and it reads: "All illegal and unauthorized payments including transfers, diversion, misapplied funds or fictitious claims discovered during the course of investigation should be refunded to the government, failure to accede to this request will lead to criminal prosecution of those involved or the Agency".

23. The Court notes that there is no time frame set in the report for the funds to be recovered. The applicant has jumped the first step in the implementation of the report and is calling for prosecution which is the last resort.

24. Be that as it may, even if the report had recommended prosecution, this Court will not have the power to order the defendants to arrest and prosecute anybody to recover state money. It is the duty of the Attorney-General to decide on what matter or who to prosecute, and that power is entirely his to exercise. And the Attorney-General is not a community official, within the meaning of Article 10(e)
x Access to the Court. e) Staff of any Community institution, after the Staff Member has exhausted all appeal processes available to the officer under the ECOWAS Staff Rules and Regulations;

[sic] of the Supplementary Protocol on the court, no. A/SP./1/01/05 that could be ordered for having failed to perform official act.

25. Another order sought by the Applicant was that the government of Nigeria should recognize school teachers' trade union freedoms, and to solicit the views of teachers throughout the process of educational planning and policy-making. There is no evidence in support of this. Besides, this is not a human rights issue, whether the government will include another organization in the planning and execution of its programmes. Be that as it may, the Act which established the second defendant, which they annexed to their document, shows that the teachers are not ignored as the applicant wants to imply from the order sought. The Nigeria Union of Teachers, as well as the National Parents/Teachers Association of Nigeria, and the National Teachers Institute are all represented on the board of the second defendant.

Decision

26. In the light of the foregoing analysis of the facts, the Court is able to decide as follows:

Relief 1. The defendants do not contest the fact that every Nigerian child is entitled to free and compulsory basic education. What they earlier on said was that the right to education was not justiciable in Nigeria, but the court in its earlier ruling of 27th October 2009 in this case, decided it was justiciable under the ACHPR.

27. Relief 2. As stated already, the report provides only *prima facie* and not conclusive evidence of the facts stated therein, and there is no judicial pronouncement on these findings. Also the alleged suspects are not parties before us in this action, so this court is unable to make any declaration of illegality or unconstitutionality in this matter.

28. Relief 3. The applicant is saying that following the diversion of funds, there is insufficient money available to the basic education sector. We have earlier referred to the fact that embezzlement or theft of part of the funds allocated to the basic education sector will have a negative impact; this is normal since shortage of funds will disable the sector from performing as envisaged by those who approved the budget. Thus, whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that the first defendant should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education.

29. Relief 4. The court cannot grant this order for the arrest and prosecution of the alleged suspects for reasons already explained.

30. Reliefs 5 and 6. For lack of evidence these orders are refused.

31. In conclusion, subject to reliefs 1 and 3 which the court grants in terms as stated above, the court rejects all the other reliefs and orders sought.

32. Costs.

Since the matter succeeds in part the parties shall bear their own costs.

This decision has been read in open court in Abuja this 30th day of November 2010 in the presence of

Hon. Justice Hansine N. Donli.....Presiding

Hon. Justice Anthony A. Benin.....Member

Hon. Justice Soumana D. Sidibe.....Member

Assisted by Mr. Tony Anene-Maidoh.....Chief Registrar