Is the ECOWAS Court of Justice a Toothless Bulldog that Only Barks? Issues Arising from the Decision of the High Court of Accra in Mr. Chude Mba v The Republic of Ghana

March 4, 2016

International/Regional Law

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Introduction

The High Court of Accra, Ghana² on 2nd February 2016, delivered a ruling on an application filed by Mr. Chude Mba, seeking an enforcement of the judgment of the Economic Community of West African States (ECOWAS) Community Court of Justice ("ECOWAS Court") entered in his favour against the Republic of Ghana. In its ruling, the court held that the decisions of the ECOWAS Court cannot be enforced by the courts in Ghana because the Republic of Ghana has not domesticated the Protocols of the ECOWAS Court. If allowed to stand, this decision, in our view, will set a dangerous precedent and succeed in jeopardizing the continued existence of ECOWAS as a sub-regional body. The implication of this decision is that pronouncements of the ECOWAS Court of Justice, are worthless pieces of paper, lacking any force of law, in total disregard of the provisions contained in Article 5(3) of the ECOWAS Revised Treaty³ whereby Member States of the ECOWAS had undertaken to honour their obligations under the Treaty and to abide by the decisions and regulations of the Community.

This decision of the High Court of Accra and many other unenforced decisions of the ECOWAS Court, despite the binding nature of the Revised Treaty and the Supplementary

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² In Suit No. HRCM/376/15 – In the Matter of Mr. Chude Mba vs. The Republic of Ghana.
³ The Revised Treaty of the Economic Community of West African States (ECOWAS) was signed in Cotonou, Benin, on 24 July 1993 and entered into force on 23rd August 1995. It amended the ECOWAS Treaty of 1975.
Protocol⁴, is cause for grave concern and requires urgent resolution if the mandate of the Court is to be actualized.

Summary of the Case

The Applicant, Mr. Chude Mba, a Nigerian citizen, brought an application⁵ before the ECOWAS Court in January 2013 for the enforcement of his fundamental rights which he alleged were violated by the Republic of Ghana and sought some declaratory, injunctive and monetary orders. On 6th November 2013, the ECOWAS Court found that the Republic of Ghana had indeed violated the fundamental rights of the Applicant and consequently made an order that it discontinues the violations of the Applicant's fundamental rights, awarded the sum of US$800,000.00 as damages for the violation of the Applicant's fundamental rights and costs of the action assessed at ₦500, 000.00.

It was apparent from the outset that the Republic of Ghana was set to ridicule the continued existence and efficacy of the Court. This is because, despite the service of the originating court processes on it, the Republic of Ghana neglected to file its defence to the Applicant’s claims. Even when the Applicant filed an application for judgment in default and the Court granted an extension of time to the Republic of Ghana (upon its application) within which to file its defence, it still neglected to file the defence. Thus, after several months without filing any papers in response to the Applicant's action, the Court heard the Applicant’s application for judgment in default as well as the substantive application on the merits.

Dissatisfied with the judgment, the Republic of Ghana filed an application seeking to set aside the judgment of the Court. However, the Court dismissed this application on the ground that the application was unmeritorious as the Republic of Ghana did not establish any grounds to warrant the Court to set aside the judgment. Thereafter, the Registrar of the Court, in line with the provisions of Article 24(2) of the Supplementary Protocol, issued and served on the Republic of Ghana, a Writ of Execution of the judgment of the Court. Also, the Applicant, through his lawyers, S. P. A. Ajibade & Co., wrote to the Republic of Ghana demanding payment of the judgment sums and compliance with the orders of the Court, but the Republic of Ghana failed, refused and/or neglected to obey the orders of the Court.

Following the failure of the Republic of Ghana to voluntarily comply with the judgment of the Court, the Applicant filed an application before the High Court of Accra, seeking the order of that Court to enforce the decision and orders of the Court against the Republic of Ghana. The Applicant embarked on this enforcement route since Ghana had failed to designate the

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⁴ (A/SP.1/01/05) Amending the Protocol (A/P1/7/91) Relating to the Community Court of Justice ("the Supplementary Protocol).
⁵ In Suit No. ECW/CCJ/APP/01/13 – Mr. Chude Mba vs. The Republic of Ghana.
appropriate authority for purposes of enforcement as prescribed in the Supplementary Protocol. The Republic of Ghana opposed the application and the High Court of Accra, per Justice G. S. SuurBaareh (J. A) (sitting as an additional High Court Judge), dismissed the application in his ruling delivered on 2nd February 2016 on the sole ground that the decisions of the ECOWAS Court cannot be enforced by the courts in Ghana because the Republic of Ghana has not domesticated the Protocols of the ECOWAS Court of Justice.

**Commentary:**

**Issues Arising from the Decision of the High Court of Accra**

The Republic of Ghana is a Member State of the ECOWAS together with 14 other Member States including the Federal Republic of Nigeria. The ECOWAS Court was established as a sub-regional international court in 2001 pursuant to Article 15 of the ECOWAS Revised Treaty. By the combined provisions of Article 15(4) of the ECOWAS Revised Treaty and Article 24(1) of the Supplementary Protocol, the judgments of the Court are binding on all the Member States, the institutions of the Community, individuals and corporate bodies. Further, by virtue of Article 19(2) of the Protocol (A/P1/7/91) on the Community Court of Justice (“the Protocol”), the decisions of the Court are final and immediately enforceable.

Article 22(3) of the Protocol and Article 5(2) of the ECOWAS Revised Treaty mandate Member States, (in accordance with their constitutional provisions) to immediately take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of the Treaty including the execution of the decisions of the Court. By virtue of these provisions, Member States of the ECOWAS are mandated to ratify and domesticate the ECOWAS Treaty, Protocols and other legal instruments for the effective and unimpeded implementation of the provisions of the Treaty including the enforcement of the judgments of the Court. Thus, any refusal, failure and/or neglect by any Member State to implement the above provisions shall not render the judgments of the Court unenforceable, thereby depriving a successful party of the enjoyment of the fruits of his judgment.

This anti-ECOWAS decision rendered by the learned Justice Suurbaareh of the High Court of Ghana offends the principles of private and public international law, and if allowed to stand, will spell doom to the continued existence of ECOWAS as a sub-regional body and put a question mark on the efficacy of the ECOWAS Court in protecting the fundamental rights of its citizens. It is pertinent to point out that in the exercise of its human rights jurisdiction; the ECOWAS Court is not constrained by the fact that the ECOWAS Protocols have not been domesticated by any given Member State. This was indeed the decision of the ECOWAS Court in Moukhtar Ibrahim Aminu vs. Government of Jigawa...
State & 3 Ors.\(^6\), where the 1\(^{st}\) and 2\(^{nd}\) Defendants, in their preliminary objection, had contended that the Court did not have the jurisdiction to entertain the action on the ground, *inter alia*, that the Protocol of the Court of Justice which gave it the power to hear and determine issues of violation of human rights by individuals has not been domesticated in Nigeria as provided for under Section 12 of the Constitution of the Federal Republic of Nigeria. The Court rejected this argument and held (rightly in our view) as follows:

> It is trite that the question of domestication is entirely a local duty of the State to comply with its domestic laws including its constitution. However, where the action of the State is indicative of the fact that it intends to abide by the contents of the Treaty and proceeded to enact into law the provision of the African Charter on Human and Peoples’ Rights contained in Article 4(g) of the Revised Treaty makes the objection of the 1\(^{st}\) and 2\(^{nd}\) Defendants a non-issue and immaterial. As always, a State cannot approbate and reprobate in respect of domestication of Treaties, that it derives benefits from its application. It is common knowledge that the Revised Treaty was ratified by the Federal Republic of Nigeria, on 1\(^{st}\) July, 1994. With such ratification, the Revised Treaty as far as the Community Law is concerned, becomes applicable in the institutions of the community – ECOWAS including this Court. The Protocols of the Court which are annexed to the Revised Treaty form an integral part thereof.

The ECOWAS Court is not constrained by the domestic laws of its Member States including national constitutions that are inconsistent with their Treaty obligations. When a sovereign State freely assumes international obligations and is being held accountable in respect of those obligations, that State cannot renounce those obligations under the pretext that the matter in question is one that falls essentially within its domestic jurisdiction. Being a Member State of the ECOWAS, the Republic of Ghana is bound by the obligations that it has assumed under the Revised Treaty, the Protocols and other legal instruments of the ECOWAS. When it undertook to honour its obligation under the Treaty through the process of ratification and to abide by the decisions and regulations of the Community by virtue of the provisions of Article 5(3) of the ECOWAS Revised Treaty, its undertaking is indicative of the fact that it intends to abide, and is thereby bound, by the contents of the Treaty and Protocols. Having therefore voluntarily undertaken to honour its obligations under

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\(^6\) Suit No. ECW/CCJ/APP/02/11.
the Treaty, the Republic of Ghana shall suffer the burdens as it also enjoys the benefits of its membership of the sub-regional body. It will not be seen to be approbating and reprobating.

Professor M. T. Ladan, a Professor of Law at the Ahmadu Bello University, Kaduna State, Nigeria, in his paper⁷ has correctly observed that “the Court has maintained the supra-nationality of ECOWAS and the ECOWAS Court of Justice in its jurisprudence. It has also insisted on holding Member States accountable for their Treaty Obligations under international instruments. It is not constrained by the domestic laws of Member States, including national constitutions that are inconsistent with their Treaty Obligations”.

The ECOWAS Court expounded on this same issue in Musa Saidykhan vs. The Republic of The Gambia⁸ where it held as follows:

ECOWAS is a supra national authority created by the Member States wherein they expressly ceded some of their sovereign powers to ECOWAS to act in their common interest. Therefore, in respect of those areas where the Member States have ceded part of their sovereign powers to ECOWAS, the rules made by ECOWAS supersede rules made by individual Member States if they are inconsistent. The Revised Treaty of ECOWAS was ratified by all the Member States of ECOWAS, including the Defendant/Applicant herein. This Court is the offspring of the Revised Treaty; and this Court is empowered by the Supplementary Protocol on the Court of Justice, which is part of the instruments of implementation of the Treaty and has the same legal force as the Treaty, to adjudicate on issues of human rights arising out of the Member States of ECOWAS.

Therefore, it is untenable for a Member State of ECOWAS to claim that a matter is essentially within its domestic jurisdiction when it had expressly or by necessary implication granted ECOWAS powers to act solely or concurrently with national jurisdiction in respect of that matter.

The above decision of the Court is clear and therefore renders the ruling of the Honourable Justice Suurbaareth (J. A) erroneous and unacceptable. This is because, by voluntarily ratifying the ECOWAS Treaty, the Republic of Ghana had expressly ceded some of its sovereign powers to ECOWAS to act in its common interest. Therefore, in respect of those areas where it has ceded part of its sovereign powers to

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⁷ The Prospect of Public Rights Litigation before the ECOWAS Court of Justice, being a published Presentation made at the Nigerian Bar Association Conference held at Owerri, Imo State between 24th and 29th August 2014.

⁸ In Suit No. ECW/CCJ/APP/11/07.
ECOWAS, the rules made by ECOWAS now supersede the rules made by the Republic of Ghana if they are inconsistent (as in the case under review). Therefore, it is indefensible for the Republic of Ghana (and indeed any other Member State of ECOWAS) to claim that a matter is essentially within its domestic jurisdiction when it had expressly or by necessary implication granted ECOWAS powers to act solely or concurrently with national jurisdiction in respect of that matter.

The Republic of Ghana has freely assumed international obligations and must be held accountable to the obligations it has freely assumed. It cannot therefore renounce those obligations under the pretext that Ghana has not domesticated the ECOWAS Court Protocols. The Republic of Ghana is mandated and is therefore under an obligation, in accordance with Article 5(2) of the ECOWAS Revised Treaty and Article 22(3) of the ECOWAS Protocol, to domesticate the Protocols and to put all necessary apparatus in place to ensure compliance with the Revised Treaty and the Supplementary Protocol.

Apart from the Republic of Ghana, there is still a great percentage of the decisions of the Court which has remained unenforced till date. This is primarily because, as posited in an earlier published article,9 neither the ECOWAS Revised Treaty, Protocols nor other legal instruments make provisions regarding the means of enforcing the issued writ of execution where Member States fail to voluntarily comply with the terms of the judgments of the Court. Although Article 77 of the ECOWAS Revised Treaty empowers the Authority of Heads of State and Government of ECOWAS to impose certain sanctions on any Member State who fails to fulfill its obligations to the Community through suspension of new Community loans or assistance, suspension of disbursement on on-going Community projects or assistance programmes, exclusion from presenting candidates for statutory and professional posts and suspension from participating in the activities of the Community, this power is yet to be exercised by the apex organ of ECOWAS. Thus, unless Member States are compelled to comply with the judgments of the ECOWAS Court, the confidence reposed in the Court will completely be eroded so much so that the Court may be unable to entertain any applications from any person in respect of the violations of the fundamental rights of the citizens of ECOWAS.

Conclusion:

The Authority of Heads of State and Government of the ECOWAS should save the ECOWAS and the ECOWAS Court from the danger of being rendered inefficacious through

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the attitudes of its Member States in not complying with the decisions of the Court given against them. The judges of the ECOWAS Court should consistently rise to the defence of the Court and the Community by compelling, through their decisions and orders, Members States to comply with the decisions of the Court. In situations where a Member State (as in the case under review) blatantly and with impunity refuses to comply with any decisions given against it, the Court should empower the beneficiary of that judgment to enforce the judgment against such a Member State by directing enforcement against the assets of the Member State found within the territories of any of the Member States of ECOWAS. Further, the Court should mandate the Authority of Heads of State and Government of ECOWAS to invoke its powers against any Member State by imposing the sanctions provided under Article 77 of the ECOWAS Revised Treaty including other severe sanctions. The judges of the Court can also embark on an enlightenment tour of all member states (as they have done in the past) to press for the unqualified recognition and enforcement of its decisions, if the regional integration goals of the Community are to be attained.

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