COMMUNITY COURT OF JUSTICE,
ECOWAS
COUR DE JUSTICE DE LA COMMUNATE,
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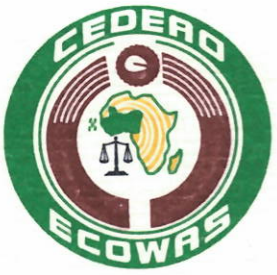

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THE COMMUNITY COURT OF JUSTICE OF THE

ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

In the Matter of

TRANSPARENCY INTERNATIONAL & 2 ORS. V REPUBLIC OF GHANA

Application No: ECW/CCJ/APP/ 29/20 Judgment NO. ECW/CCJ/JUD/32/23

JUDGMENT

ABUJA

DATE: 10th July, 2023

JUDGMENT NO. ECW/CCJ/JUD/32/23

1. TRANSPARENCY INTERNATIONAL **... APPLICANTS**

2. GHANA INTEGRITY INITIATIVE

3. GHANA ANTI-CORRUPTION COALITION

V.

REPUBLIC OF GHANA **...RESPONDENT**

COMPOSITION OF THE COURT

Hon. Justice Dupe **ATOKI** - Presiding

Hon. Justice Sengu Mohamed **KOROMA** - Member/Rapporteur

Hon. Justice Ricardo Claudio Monteiro **GONCALVES** - Member

ASSISTED BY:

Dr.Yaouza **OURO-SAMA** - Chief Registrar

REPRESENTATION OF PARTIES:

Olumide **BABALOLA**, Esq.	COUNSEL FOR APPLICANTS
Helen **AKPENE**, Esq.	COUNSEL FOR RESPONDENT
Dorothy **AFRIYIE-ANSAH** (Mrs.)	
Leona Serwah **JOHNSON**, Esq.	

I. JUDGMENT:

1. This is the judgment of the Community Court of Justice, ECOWAS (hereinafter referred to as the Court) delivered virtually in open Court pursuant to Article 8(1) of the Practice Direction on Electronic Case Management and Virtual Court Session, 2020.

II. DESCRIPTION OF THE PARTIES:

2. The First Applicant is Transparency International, a corporate body registered in Berlin, Germany with its address at Atl-Moadit 96, 10559, Berlin.

3. The Second Applicant is Ghana Integrity Initiative (GII), non-profit civil empowerment organization registered in Accra, Ghana with its address at 21 Abelenpe Road, Accra, Ghana.

4. The Third Applicant is Ghana Anti-Corruption Coalition (GACC), a civil society organization registered in Ghana with its address at 3 Kotobabai Road, Accra, Ghana.

5. The Respondent is the Republic of Ghana, a Member State of ECOWAS.

III. INTRODUCTION

6. The subject matter of the application borders on the Applicants' allegations of interference by the Respondent with the right of the people of Ghana to permanent sovereignty over their natural resources in contravention of several provisions of African Human Rights treaties.

IV. PROCEDURE BEFORE THE COURT

7. The Applicants filed an Initiating Application in the Registry of the Court on 30th December, 2020 which included an Application for Expedited Procedures, Application for Interim Measures.

8. On 30th April, 2021, the Respondent filed an Application for the Extension of Time to file its defense pursuant to Article 35 (2) of the Rules of Procedure of the Court. It also filed the Statement of Defense on the same date in the Registry of the Court.

9. The Applicant filed its Reply to the Respondent's Statement of Defense on 19th July, 2021 in the Registry of the Court.

10. On 23rd March, 2022, the Court had a virtual session in which both parties where represented. The Court duly struck out the Applicant's Documents 2 and 3 upon application and proceeded to grant an adjournment on costs to enable the Respondent file a rejoinder.

11. The Respondent filed its Rejoinder on 28th March, 2022 in the Registry of the Court.

12. The Court held a virtual session on 30th March, 2022.

13. The Respondent filed an Affidavit of Laws on 10th May, 2022 in the Registry of the Court.

14. On 2nd May, 2023 the Court had a virtual session in which both parties were represented. The Court notified the parties of the change of Panel and sought their consent to proceed. Upon the consent of the parties, the Court proceeded to hear the matter on the merits and adjourned for judgment.

V. APPLICANT'S CASE

a) Summary of facts

15. The Applicants are three entities namely:

- The First Applicant is Transparency International which is described as a global movement working in 100 countries to end the injustice of corruption, promote transparency, accountability and integrity globally;
- The Second Applicant is Ghana Integrity Initiative which is described as a non-profit civil empowerment organization; and
- The Third Applicant is Ghana Anti-Corruption Coalition described as a civil society organization with a focus on promoting good governance and fighting corruption.

16. The claim of the Applicants is that the Respondent is establishing a special purpose vehicle (SPV) which is domiciled out its jurisdiction, that is in the British Crown Dependency Jersey, called Agyapa Royalties Limited (Agyapa Royalties). The Applicants allege that the aim of the Respondent in establishing this SPV is for it to act as a sovereign wealth fund even though it was not set up as such. They claim that the company will receive the perpetual rights to 75.6% of Ghana's royalties from 48 gold mining leases compromising the vast majority of Ghana's gold production. More

particularly, the Applicants claim that the Respondent will own 51% of the shares of the SPV through its Mineral Income investment Fund (MIIF) and the remaining shares will be listed on the London Stock Exchange which will raise $500 million (USD) in capital from the said listing. In exchange for the gold royalty rights, the Respondent has argued that Ghana will be able to raise around USD 500 Million in capital from the listing of 49% of the shares in Agyapa Royalties valuing the rights at around USD $1billion which vastly under values the assets according to IMANI Centre for Policy and Education, a policy think-thank in Ghana, which argues that for this IPO to be profitable, it must generate at least $2.5 billion (USD). The Applicants claim further that the Respondent will establish a local SPV, ARG Royalties Ghana Limited (ARG Royalties) that will act as a subsidiary vehicle through which rights to the royalties from MIIF will pass unto the Jersey SPV.

17. The Applicants allege that the creation of both SPVs have been questioned by the Civil Society, the Parliament and Ghana's Anti-Corruption Special Prosecutor. In particular, the Applicants claim to be aware, inter alia, of the Special Prosecutor's Report by Ghana's Anti-corruption Special Prosecutor dated 16th October, 2020 which raised serious concerns surrounding the creation of Agyapa Royalties, the means by which the said royalties would be monetized and the process by which the Government of Ghana intend to achieve the proposed listing.

18. It is the submission of the Applicants that these concerns about the probity of the Agyapa Royalties risks being connected to conduct which is illegal or unlawful under the Laws of the Respondent state.

19. The Applicants have mapped out the timeline of the creation of both the local and international SPVs from 2018 to 2020 and this alleged factual map includes the following:

- The establishment of MIIF in December 2018 and the inauguration of its Board of Directors
- The incorporation of Asaase Royalties (which later became Agyapa Royalties) through MIFF on 5th November 2019 in Jersey
- The notice on the 15th November, 2019 by the Respondent's Minister of Finance of the intention to list Asaase Royalties on the London Stock Exchange in January 2020 to raise $750 million (USD) but on 23rd January 2020 it announced suspension of its intention to allow it amend the rules that will govern the operation of Asaase Royalties.
- Following this, on 15th July 2020 the Respondent laid a bill before Parliament seeking to amend the MIIF law to give any SPV created unfettered powers to operate and not required to comply with the Public Finance Management Act and the State Interest Governance Authority Act.
- These events led to the Attorney General expressing concern on the 22nd July 2020 that the Ayapa (formerly Asaase) Minerals Royalties Investment Agreement goes against the interest of the Respondent state and would allow for a breach of Ghana's Banking Act.
- This culminated in Parliamentary approval of the amendment on 3rd August 2020 of the MIIF Act and on the 10th August

the name was changed from Asaase Royalties Limited to Agyapa Royalties Limited. The Attorney-General on the 12th August, 2020 wrote to the Minister of finance approving the agreement subject to 7 outstanding amendments.

- When the agreement got to Parliament on 13th August 2020, a concern was raised that 49% ownership of the Respondent State's mineral royalties will be in the hands of private individuals. This concern snowballed into a Civil Society media briefing on the 25th August 2020 in which the suspension of the agreement was demanded but the Minister of Finance in another briefing defended the agreement and announced a new listing date of December 2020 on the London Stock Exchange.
- On 2nd September 2020 the Minister of Finance met with CSOs for further consultations and on 10th September, 2020 an investigation was launched into the project by the Special Prosecutor on the grounds that there may be a risk of corruption.
- The IPO was suspended on 5th October 2020 by the Ministry of Finance pending the completion of the investigation. On 16 October 2020, the Special Prosecutor submitted his report to the President and made a public announcement of this. Following this the President instructed the Minister of Finance to consider the implications and re-submit the agreement to Parliament for approval.
- This was followed by the Minister of Finance making a press release on the 3rd November 2020 and the Special Prosecutor

resigning on grounds of threats which made it impossible to perform his mandate without interference.

- The Agyapa Royalties need to be listed on the London Stock Exchange by 31 December 2020 or the agreement will lapse.

20. The Applicants have submitted several names of persons who are in charge of the SPVS and on the Board of Directors of MIFF who have close ties with politically exposed persons which they claim constitutes red flags.

b) Pleas in law

21. The Applicants have relied on the following pleas:

- Article 21 of the African Charter on Human and People's Rights
- Articles 2 (1) and (2), 3(1), 16 (1) and 17 (3) of the Revised African Convention on the Conservation of Nature and Natural Resources

c) Reliefs sought

22. The Applicants are seeking the following reliefs:

1. A declaration that the Defendant's actions towards entering into a relationship agreement with Minerals Income Investment Fund and Agyapa Royalties Limited in respect of transactions surrendering the sovereignty of Ghana over its gold mineral resources in perpetuity constitutes an interference with the right guaranteed under Article 21(1) of the African Charter on Human and Peoples Rights as well as violation of Articles 2(1) And (2), 3(1), 16(1) And 17(3) of The Revised African Convention On The Conservation Of Nature And Natural Resources (revised Maputo Convention).

2. An order restraining the Defendant from implementing the Agyapa deal, and cancelling/terminating the already existing contracts.

3. An order mandating the Defendant, where it desires to raise immediate funds from gold royalties, to restart the planning, impact assessment, consultations and other preparations in line with its international human rights law obligations.

4. An order mandating the Defendant to undertake a thorough and impartial investigation into the alleged corruption offences and ensure that any alleged perpetrators are brought to justice and held accountable for any violations.

5. An order mandating the Defendant to immediately review its existing relevant national laws and policies to:

    a. Provide for adequate and effective safeguards against violation of the Right to Free Disposal of Wealth and Natural Resources by public officials and public bodies.

    b. Follow Revised ECOWAS Treaty's fundamental principles enshrined in Article 4 paragraphs (g) and (h) and ensure compliance with its Article 31.

    c. Ensure that any entity with the function of sovereign wealth fund complies with the best international standards, such as the Santiago Principles.

6. **OTHER CONSEQUENTIAL ORDER(S)** as this Honourable Court may deem fit to grant in the circumstance.

VI. RESPONDENT'S CASE

a) Summary of facts

23. The Respondent in its defense has restated the Applicants pleas in law and narrated set of facts.

24. The Respondent submits that the Parliament of the Respondent State approved five agreements comprising of the Mineral Royalties Investment Agreement (Investment Agreement) and four other related agreements. It submits that the MIIF was established by the MIIF Act 2018 (Act 978) as amended by the MIIF Act 2020 (Act 1024). It narrates that the mandate of the MIIF is to manage the equity interests of the Respondent in mining companies and receive royalties on behalf of the Respondent. The Respondent further narrates that the MIIF is mandated to create SPVs in any jurisdiction and to procure listing of the same on a reputable Stock Exchange.

25. The Respondent states that the investment agreement provides the terms under which Agyapa Royalties Limited is to be incorporated as an SPV and that MIIF is to hold 51% of the shares in Agyapa on behalf of the Respondent and the people of Ghana and the remainder (49%) is to be listed on the London Stock Exchange and Ghana Stock Exchange simultaneously.

26. The Respondent refutes the allegation of the Applicant that the purported monetization of the royalties with respect to gold mining activities or extraction accruing to the citizens constitutes an interference with their rights.

27. The Respondent raises two contentions; firstly, that the First Applicant lacks the requisite capacity, and secondly, they contend that the Applicants are not properly before the Court.

b) Pleas in law

28. The Respondent has relied on the same pleas in law that he Applicants have put forward including Article 10 of the Supplementary Protocol (A/SP.1/01/05).

c) Reliefs sought

29. The Respondent has not prayed the Court for any relief/s.

VII. APPLICANTS' REPLY

30. The Applicant's reply to the Respondent's statement of defense turns on the two contentions raised.

31. The Applicants rebuts the contention that the First Applicant lacks the capacity to lodge the claim by stating inter alia that NGOs are allowed worldwide to institute enforce the rights of anyone whose mandate they have. It is submitted that the mandate of the First Applicant is globally known as a movement working to end the injustice of corruption, promote transparency, accountability and integrity at all levels and across of the global society. The

Applicants submit further that the first Applicant is by the very nature of its work, which has gained global recognition in over 100 countries including Ghana, is competent to bring this application before the Honourable Court.

32. The Applicant refers the Court to Abah, Danladi and Adihikon in their Article titled: *"Civil Society and Democratic Government in Nigeria's Fourth Republic*"- A Historical Reflection at page 2. The Applicant also relies on the decision of the Court in AMNESTY INTERNATIONAL & ORS V TOGO JUDMENT NO: ECW/CCJ/JUD/09/20 (Unreported).

33. The Applicant rebuts the Respondent's second contention by stating that they are properly before the Court as the guarantee pursuant to Article 21 (1) of the ACHPR has been breached.

VIII. RESPONDENT'S REJOINDER

34. The Respondent continues to challenge the capacity of the First Applicant and submits that the Court's jurisprudence only admits NGOs who are duly constituted under a Member State of ECOWAS therefore, the First Applicant being registered in Germany lacks capacity. Furthermore, the Respondent claims that the Second and Third Applicants do not enjoy observer status before an ECOWAS institution and therefore, lacks capacity.

35. The Respondent avers that the Applicants have misunderstood its application of extant laws in its defense, and states that Article 257 (6) of the Constitution of Ghana is in fact a domestication of Article 21 (1) of the ACHPR. It submits that it has not surrendered its sovereignty over natural resources as canvassed

by the Applicants. The Respondent avers that the mineral resources are collected and applied for the benefit of all the people of Ghana.

36. The Respondent claims that it has not breached Article 21 (1) of the ACHPR as claimed by the Applicants

IX. JURISDICTION

37. The Court, before addressing any issue will consider whether it has jurisdiction to hear and determine the claims before it. Recalling that part of the claims of the Applicants were premised on Article 21 (1) of the ACHPR, the Court is inclined to consider them pursuant to Article 9 (4) of the Supplementary Protocol (supra) to wit *"The Court has jurisdiction to determine case of violation of human rights that occur in any Member State."*

38. However, before proceeding to determine jurisdiction under Article 9 (4) of the Supplementary Protocol, the Court notes the first part of the Applicants' claims which includes a breach of Articles 2 (1) & (2), 3 (1), 16 (1) and 17 (3) of the Revised African Convention on the Conservation of Nature and Natural Resources. Whilst this treaty speaks to the protection of the rights of peoples to a sustainable environment favorable to their development, it is not classed as one of the fundamental human rights treaties. Rather, it is a framework for delivering on Africa's goal for inclusive and sustainable development. When a claim is brought before the Court for a violation of human rights, it is considered pursuant to its jurisdiction in Article 9 (4) of the Supplementary Protocol (supra). The claims considered under this jurisdiction are those pertaining to the fundamental international human rights treaties and regional

human rights treaties. Therefore, the Court cannot consider those claims of the Applicants brought under Article 2 (1) & (2), 3 (1), 16 (1) and 17 (3) of the Revised African Convention on the Conservation of Nature and Natural Resources within its competence pursuant to Article 9 (4) of the Supplementary Protocol (supra).

39. The Court therefore dismisses those claims under Article 2 (1) & (2), 3 (1), 16 (1) and 17 (3) of the Revised African Convention on the Conservation of Nature and Natural Resources.

40. In considering the second part of the claims of the Applicants brought under Article 21 of the ACHPR vis a vis the jurisdiction of the Court, it was held in HIS EXCELLENCY, VICE-PRESIDENT ALHAJI SAMUEL SAM-SUMANA V. REPUBLIC OF SIERRA LEONE (2017) CCJELR at page 281 that *"The African Charter on Human and Peoples' Rights and other international instruments invoked by the Applicant are indeed legal instruments the Court refers to when considering cases of human rights violations that occur in any Member State. Once the Plaintiff has raised an element of Human Rights Violation, which falls within any human right protection instruments in any ECOWAS Member State, it suffices for the Court to establish its jurisdiction which shall not be tied to whether the allegations are true or otherwise."*

41. Aligning itself with its jurisprudence in the above-mentioned case, the Court declares that it has the requisite jurisdiction to hear and determine the claims herein.

X. ADMISSIBILITY

42. In considering whether the application is admissible the Court is inclined to do so pursuant to Article 10 (d) of the Supplementary Protocol (supra) which provides that:

> *"Access to the Court is open to... d) Individuals on application for relief for violation of their human rights; the submission of application for which shall: i. Not be anonymous; nor ii. Be made whilst the same matter has been instituted before another International Court for adjudication;*

43. This provision requires that an Applicant must show capacity to bring an action as a victim, the application must not be anonymous nor must it be pending before another international Court.

44. In this instance, the Court recalls the Respondent's contention on the capacity of the Applicants as follows:

- That the First Applicant lacks capacity as it is not constituted in a Member State of ECOWAS;
- And that the Second and Third Applicants lack capacity as they do not enjoy observer status before any ECOWAS institution.

On the lack of capacity of the First Applicant

Respondent's case

45. The Respondent contends that the First Applicant does not have the capacity to lodge the action as its legal personality is German and not a Member of the Community. Furthermore that that Exhibit 1 submitted in support of this is in

German which is not a language of the Community and was not translated into any of the languages of the Court.

46. It is further contended by the Respondent that the First Applicant lacks the status of a victim as required pursuant to Article 10 (d) of the Supplementary Protocol. Furthermore, that the First Applicant cannot purport to bring a claim on behalf of the people of Ghana, as the latter is not a community but a Sovereign State. In this regard the Respondent relies on SERAP V FEDERAL REPUBIC OF NIGERIA (2014) CCJELR at page 33, paragraph 20-22 but recognizes that the Court reviewed its decision in this case in CENTER FOR DEMOCRACY AND DEVELOPMENT (C.D.D.) & ANOR. V MAMADOU TANDJA & ANOR. (2011) CCJELR.

47. For these reasons the Respondent submits that the First Applicant should be expunged as it is not qualified to initiate the suit.

Applicant's Case

48. The Applicant rebuts the contention of the Respondent by stating that it can sufficiently describe the mandate of the First Applicant and that it has gained global recognition in 100 countries including the Respondent State therefore, this makes it competent to initiate the suit. Furthermore, that it is acceptable practice for civil societies and NGOs to be allowed to lodge claims for human rights to enforce the rights "*of anyone whose mandate they have*" (sic). The Applicant relies on the Court's decision in AMNESTY INTERNATIONAL TOGO & ORS. V TOGOLESE (2020) (supra) and stated that the Court admitted an NGO which has global recognition to enforce claims of citizens of Togo.

49. The Applicant also rebuts the contention by stating that the First Applicant must not necessarily be a victim to the alleged violation for it to become a competent party in the suit. That following ALHAJI MOHAMMED IBRAHIM HASSAN V GOVERNOR OF GOMBE STATE V FEDERAL REPUBLIC OF NIGERIA (2012) CCJELR it is enough for if the Applicant can show an interest in the claim to be qualified to have *locus standi*.

50. On the issue of Exhibit 1 being in German, the Applicant claims that a failure to provide the Court with a translation is not fatal but a mere irregularity that can be cured. The Applicant therefore urges the Court to declare that the First Applicant has the requisite *locus standi* to initiate the application.

Analysis of the Court

51. In the determination of the capacity of the First Applicant, the Court draws instruction from the FEDERATION OF AFRICAN JOURNALISTS & 4 ORS V. REPUBLIC OF THE GAMBIA JUDGMENT NO: ECW/CCJ/JUD/04/18 (Unreported) at page 17 the Court defined *locus standi* as "*...the interest to institute proceedings in a Court of law or to be heard in a given cause. In other words, the strict application of locus standi denotes that a [Applicant] wishing to sue must have sufficient interest in the subject matter in order to have a standing to litigate same. The position in law globally has moved beyond insistence on the strict rule of standing in human rights violation cases.*" The question then for the Court is whether the First Applicant has a standing in the claims before it, against the backdrop of the contention of the Respondent.

52. The Court in adjudging capacity of the First Applicant will rely on its decision in THE REGISTERED TRUSTEES OF SOCIO-ECONOMIC RIGHTS & ACCOUNTABILITY PROJECT (SERAP) V FEDERAL REPUBLIC OF NIGERIA & ANOR. (2014) CCJELR at page 33, paragraphs 20-22 where it held that: "*...concerning human rights, only victims may have access to the Court; ...aside from cases of collective interests, NGOs cannot substitute the victims;...the complainant SERAP is not the victim of any violation and has not received any prior authorization to act on behalf of the victims or their closest relatives*." What is evident is that the First Applicant must show that it is a victim, or it has brought the claim for collective interests of victims based on prior authorization by the victims, or as *actio popularis*. Having failed to expressly state the capacity in which it has brought the claims, the Court will *suo motu* establish same following the three categories set out.

53. In considering the first category, that the First Applicant is a direct victim, the Court has held in THE INCORPORATED TRUSTEES OF FISCAL AND CIVIL RIGHT ENLIGHTENMENT FOUNDATION & 11 ORS. V FEDERAL REPUBLIC OF NIGERIA & 2 ORS. (2016) CCJELR at page 381 that it is only direct victims that can move the Court on a claim for the violation of human rights. Therefore, such claimant should demonstrate to the Court that it has suffered in some way that vests in it a right to bring the claim. In this instance, the Court finds that the facts and evidence before it do not in any way demonstrate that First Applicant has suffered from a breach of a fundamental human right, to be vested with the status of a direct victim. The therefore, Court finds that the First Applicant is not a direct victim.

54. On the second category, that the First Applicant is bringing the claim in the collective interest as was held in SERAP V FEDERAL REPUBLIC OF NIGERIA (2014) (supra), it must demonstrate that it has brought the claim for collective interests based on prior authorization by the victims. The Court recalls the Applicant's submission that it is acceptable practice for NGOs to be allowed to lodge claims for human rights to enforce the rights "*of anyone whose mandate they have*" (sic). It is apparent to the Court that the Applicant has demonstrated knowledge that a claim for collective interest must be submitted with prior authorization. However, the Court finds that its records hold no evidence establishing prior authorization in respect of the First Applicant. Consequently, the Court dismisses the First Applicant in the instance of it acting in a collective capacity.

55. In the third category, acting "*actio popularis*" the Applicant must firstly establish its legal personality. In REV. FR. SOLOMON MFA & 11 ORS v. FEDERAL REPUBLIC OF NIGERIA & 5 ORS JUDGMENT NO: ECW/CCJ/JUD/06/19 (Unreported) at page 24 the Court held that *"It is trite that an organization without a legal capacity cannot sue and be sued; having not provided a certificate of registration from a recognized and appropriate body, MOFA has not established a legal capacity to sue on its behalf and for others."* It becomes imperative therefore, that legal personality is established before the Court; the First Applicant in this doing so submitted Exhibit 1, which is its Certificate of Registration. Peculiarly, the Court notes that this piece of evidence is in German and a translation of the same was not submitted. The Court further notes that the First Applicant expressly states that it is registered in Germany, which is outside the ECOWAS geographic borders.

56. The Court in considering the effect of a registration of a non-governmental organization outside the ECOWAS jurisdiction aligns itself with its jurisprudence in THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS AND ACCOUNTABILITY PROJECT (SERAP) v. FEDERAL REPUBLIC OF NIGERIA & 8 ORS (2010) CCJELR at page 231, paragraph 61 where it held that "*...taking into account the need to reinforce the access to justice for the protection of human and peoples' rights in the African context, the Court holds that an NGO duly constituted according to* ***national law of any ECOWAS Member State,*** *(emphasis ours) and enjoying observer status before ECOWAS institutions, can file complaints against Human Rights violations in cases that the victim is not just a single individual, but a large group of individuals or even entire communities.*" The effect of this ratio on the legal personality of the First Applicant is that having been registered outside the ECOWAS geographic zone, it does not qualify as a non-governmental organization with the legal personality to act in the interest of persons who have suffered or are suffering from a breach of a fundamental obligation.

57. Based on the foregoing, the Court finds that the First Applicant cannot institute an action as a victim, that it cannot institute an action on behalf of victims as it lacks authorization, and it cannot bring a claim *actio popularis* as it lacks the legal personality. In consequence of which the Court dismisses the first Applicant for lack of capacity to initiate the claims.

On the claim that Second and Third Applicants lack capacity as they do not enjoy observer status before any ECOWAS institution

58. On the contention that the Second and Third Applicants lack the capacity to bring the suit having not gained observer status before any ECOWAS institution. The Court must state that it is important that in a claim for the violation of human rights, the capacity of the Applicant is expressed in the narration of facts and evidenced to aid the Court in its determination of *locus standi*. However, failing to clearly state this is a mere inconvenience and not a fatal one, as the Court will sieve through the claim to determine the capacity of the Applicant therein. In this instance, the Court notes that the Second and Third Applicants have submitted Exhibits 2 and 3 respectively which are the Registration Certificates giving them legal personality. Notwithstanding this, the Court finds no mention as to the capacity in which they have brought the claim save for the fact that they claim to "*...have become aware*" of certain facts. This does not however, rob them of capacity as the Court views the claims as an act of enforcing the rights of citizens based on the obligations of the Respondent. The Court considers that legal personality is established by a Registration Certificate which has been adduced in this instance. The Court will rely on its reasoning in GANTA SUPPORT GROUP & ANOR V REPUBLIC OF LIBERIA JUDGMENT NO: ECW/CCJ/JUD/21/23 (Unreported) where it held that "*However, the bone of contention is the Respondent's objection that the First Applicant failed to annex a Board Resolution authorizing it to institute this action. Following the above cited jurisprudence, the Court considers that evidence of a proper constitution of the NGO under the laws of the respective Member State must be adduced for it to be considered duly registered. This requirement without more clothes a*

claimant party with legal capacity. Therefore, the Court will not venture into a wild goose chase to lift the veil of registration in search of authorization from the Board of Directors when the Rules of Procedure of the Court have not mandated it to do so. In other words, the Court will not place on parties a more arduous task other than what is categorically stated in Supplementary Protocol (A/SP.1/01/05) and the Rules of the Court." Based on the jurisprudence, the Court finds that the Registration Certificates of the Second and Third Applicants is sufficient in establishing legal personality.

59. Furthermore, in determining the capacity of the Second and Third Applicant, the Court aligns with its reasoning in NOSA EHANIRE OSAGHAE & 3 ORS V. REPUBLIC OF NIGERIA (2017) CCJELR at page 43 where it held that "*Generally, to be granted audience by a Court, a party must prove sufficient interest in the subject matter. There is however the exception in cases of actio popularis whereby duly constituted NGOS and public-spirited individuals are given access without the requirement of personal interest.*" Consequently, the Court views the claims of the Second and Third Applicants to be within the exception given in NOSA EHANIRE OSAGHAE (supra) which is that they have brought their claims as *actio popularis*. Based on the foregoing analysis, declares the Second and Third Applicants admissible.

On the claim that the Applicants are not properly before it

60. A final issue on admissibility that the Court must dispense with is the Respondent's contention that the Applicant is not properly before the Court. It is the Respondent's contention that the Applicant's use of Article 21 (1) of the ACHPR is not based on sound legal reasoning and merits. The Respondent submits that the principle of sovereignty over natural resources gives the State

the right to dispose freely of their natural resources and the purpose of the MIIF Act is to enhance the value of the royalties due to the Republic of Ghana.

61. The Applicants, in reply, maintain that the Respondent's actions are geared towards entering into a retainer ship agreement with MIIF and Agyapa Royalties Limited in respect of transactions surrendering the sovereignty of Ghana and its gold resources in perpetuity constitutes a breach of Article 21 (1) of the ACHPR.

62. The Court must state that for a claim to be properly before it must be within its jurisdiction or competence and the Applicants must possess the requisite *locus standi*. Having held that the Court has jurisdiction pursuant to Article 9 (4) of the ACHPR in respect of the claims under Article 21 (1) ACHPR, and that the Second and Third Applicants can access the Court for a claim of *actio popularis*; the Court admits the Second and Third Applicants and declares that the present claim is properly before it.

63. Therefore, on admissibility, the Court declares the claims admissible and properly before it.

XI. MERITS

64. The Court having considered the claims before it and the contentions to the claims has formulated a single issue for determination on the merits to wit: "*whether the Respondent has breached Article 21 (1) of the ACHPR as claimed.*"

65. It is necessary to recall that the Applicants also made claims pursuant to Article 2 (1) & (2), 3 (1), 16 (1) and 17 (3) of the Revised African Convention on the Conservation of Nature and Natural Resources. However, the Court has dispensed with hearing these on the merits as they are not within its competence pursuant to Article 9 (4) of the Supplementary Protocol (supra).

On whether the Respondent has breached Article 21 (1) of the ACHPR as claimed by the Applicant

66. The Court notes that the claim of the Applicants and the contention of the Respondent are based on Article 21 (1) of the ACHPR which provides that:

> *"All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it."*

Applicant's Case

67. It is the Applicants' claim that the Respondent has put all machinery in place to misappropriate the common wealth of Ghana without putting the exclusive interest of the people into consideration as required by Article 21 (1) of the ACHPR. They rely on the African Commission's decision in ENDOROIS V KENYA (Communication 276/2003) and state that gold is a cultural heritage of the people of Ghana and any interference with this is a violation of their right under Article 21 (1) of the ACHPR.

68. The Applicants claim that the Respondent has not denied the existence of the right guaranteed under Article 21 (1) of the ACHPR and that the Respondent did not state how this provision is contradicted by Article 257 (6) of the

Constitution of Ghana 1992. It is the Applicants' claim that this provision in the Constitution gives the President of Ghana the right to interfere with the sovereignty of Ghana over its gold mines. They submit that the Agyapa transaction is intended to deprive and deny the people of Ghana of the benefits due to them from the mineral resources of the country. Further, that various persons involved in the transaction are politically exposed persons. Based on the foregoing the Applicant is seeking from the Court the reliefs set out in paragraph 22 above.

Respondent's Case

69. The Respondent contends that Article 21 (1) of the ACHPR should be understood within a historical context that the exploitation and development of natural resources should be for the benefit of the citizens but most especially it must be subject to law and not arbitrary. This has led to the enactment of Article 256 (7) of the Constitution of Ghana 1992 and Section 1 of the Mines and Minerals Act 2006 (Act 703). The Respondent narrates that the Agyapa transaction is intended to be a means by which it efficiently invests a portion of the proceeds from the exploitation of natural resources. The Respondent argues that each nation has sovereign right over its natural resources and the same is to be exploited for the benefits of its citizens. The contention, in this wise, is that the citizens of Ghana will not lose out from enjoying the benefits of the mineral resources of the country as the Applicants wants the Court to believe.

70. For the reasons stated the Respondent, in its *viva voce* pleadings, prays that the Court declares that it has not violated Article 21 (1) of the ACHPR, that the application of the Applicants is frivolous, speculative, and baseless and an

abuse of the Court process. The conclusion of the Respondent is that the Court should dismiss the Applicants' claims.

Analysis of the Court

71. The Court notes that Article 21(1) proclaims that *"[a]ll peoples shall freely dispose of their wealth and natural resources."* Yet, on a closer look at Articles 21(4) and 21(5) which refer to the rights of States as opposed to peoples, it must be assumed that the drafters intended a distinction. The general view is that two interpretations of the term *"peoples"* are possible within the context of economic self-determination. On the one hand, *"peoples"* can refer to all peoples including tribal groups residing within a sovereign State. On the other hand the interpretation is that for purposes of economic self-determination the term "peoples" refers to exactly the same people that are entitled to political self-determination. As a practical matter, however, the exercise of economic self-determination is contingent upon the realization of political self-determination. In this instance, the Court views the claims of the Applicants are for the people of Ghana who enjoy economic and political self-determination. This is in line with the Respondent's defense that the Applicant cannot bring a claim for the people of Ghana as it is not a community but a Sovereign State.

72. However, whilst the Court enjoys the opportunity to delve into an academic discuss, it is incumbent on it to determine whether there has been a breach of Article 21 (1) of the ACHPR occasioning a violation of the people of Ghana. In so doing it must first consider what constitutes a breach thereunder; the right under Article 21 (1) is to be exercised in the interest of the people who

must not be deprived of it. Therefore, in claiming for a violation proof that the right has been exercised contrary to Article 21 (1) of the ACHPR must be adduced, i.e. that the Respondent has exercised the right in an interest that will not benefit the people and albeit leave them deprived of the same.

73. What is before this Court in this instance is a threefold claim under this issue: the first being an alleged transaction that interferes with the enjoyment of the right of the people of Ghana. The Applicants' claim in this regard is that the Respondent has put all machinery in place to misappropriate the common wealth of Ghana without taking the exclusive interest of the people into consideration. The second being that Article 256 (7) of the Constitution of Ghana goes contrary to the provision in Article 21 (1) of the ACHPR and the third is that certain persons involved in the transaction are politically exposed persons.

74. On the first issue the Court must remind the Applicants of the necessity of proof in in any claim for the violation of human rights. It is imperative that in claiming for a violation, the Applicants must show that the violation has been occurred and that some loss or injury resulted which can be linked to the Respondent under the principle of state responsibility. Therefore, the Applicants' allegation that the Respondent have put in place a machinery for misappropriation of the common wealth and submitting the process through which this has been done is in its narration of facts, does not give it the probative value it needs before this Court. It needs to be proved. In OUSAINOE DARBOE & 31 ORS. V REPUBLIC OF THE GAMBIA JUDGMENT NO: ECW/CCJ/JUD/01/20 at page 23 the Court stated that "*Proof is what allows one to establish the value of truth or falsity, regarding*

a statement or fact that is judicially relevant. To this end it is submitted that mere averments in pleadings does not amount to proof."

75. The Court notes that the Applicants have submitted Exhibit 4 which is a copy of the proposed Relationship Agreement to be executed between the Respondent, MIIF and Agyapa Royalties Limited. it is also noted by this Court that Exhibit 5 is a "*Report on the Analysis of the Risk of Corruption and Anti-Corruption Risk Assessment of the Processes Leading Up to the Request For Approval and the Approval of the Transaction Agreements And Tax Exemptions Granted by Parliament Thereunder In Relation to the Gold Royalties Monetisation Transaction Under the Minerals Income Investment Fund Act, 2018 (Act 978) and other Related Matters Thereto.*"

76. The Court is quick to state that the proof required in this instance of a claim for breach under Article 21 (1) of the ACHPR is that the common wealth of the people of Ghana has been disposed of in a way that does not benefit them thereby depriving them of it. What this Court has before it are in fact evidence of processes that flow from democratic institutions and have gained approval from the people's representatives i.e. the parliament. There is no evidence before this Court pointing to the actual misappropriation of the common wealth of the people of Ghana that has deprived the people from benefitting from it. As was held by the Court in FEMI FALANA & 1 OR v. THE REPUBLIC OF BENIN & 2ORS (2012) CCJELR at page 1, paragraph 34 where it stated that *"As always, the onus of proof is on the party who asserts a fact and who will fail if that fact failed to attain the standard of proof that would persuade the Court to believe the statement of claim. Furthermore even as in this case where the Defendants rested their respective positions on the*

evidence of the Plaintiffs, the Plaintiff is required to still prove his claim. It must be mentioned that a party is free to choose whether to adduce evidence in support of his pleadings or not and the Court has no power to interfere with the exercise of that right."

77. After considering the submissions and arguments of the parties, the Court has not found any evidence to support the allegation of misappropriation to the detriment of the people of Ghana. The Court finds it necessary to emphasize that for a violation of Article 21 (1) of the ACHPR to occur, the people must be deprived of the common wealth. In this wise, the Court dismisses the Applicants' claim for a violation of Article 21 (1) of the ACHPR.

78. As to the second issue and the claim that Article 256 (7) of the Constitution of Ghana is contrary to Article 21 (1) of the ACHPR the Court will reproduce the former for ease of reference:

> *"Every mineral in its natural state in, under and upon any land in Ghana, rivers, streams, water courses throughout Ghana, the Exclusive Economic Zone and any area covered by the Territorial Sea or Continental Shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana."*

79. The Court must first align with the *ratio descidendi* in NATIONAL COORDINATION OF DEPARTMENT DELEGATES OF COCOA COFFEE SECTOR (CNDD) V. REPUBLIC OF COTE D'IVOIRE (2009) CCJELR at page 311 where it held that if international instruments relating to human rights authorize States to amend in certain circumstances, rights and

freedom they have pledged to guarantee, international bodies like this Honorable Court do acknowledge their right to examine the legitimacy of the legal stance adopted by the States and their proportionality with the aims and objectives of the guaranteed rights. Such monitoring is intended to ensure that states while employing the margin of freedom accorded them to amend rights through the adoption of national laws, do not end up emptying those rights or freedoms of the very essence of their meaning.

80. In this wise the Court considers the general obligation of the state pursuant to Article 1 of the ACHPR is for the Member states to recognize the rights, duties and freedoms contained within the Charter and to implement legislation and other measures to give effect to the. This Court, having considered the obligation in Article 21 (1) of the ACHPR and the provision in Article 256 (7) of the Constitution of Ghana, adjudges that the latter has complied fully with the obligation under Article 1 of the ACHPR and dismisses the claim pertaining to Article 21 (1) of the ACHPR in this regard.

81. With respect to the third issue that there are politically exposed persons within the transaction, the Court finds that the Applicant has failed to show how this has affected the exploitation of the common wealth for the benefit of the people of Ghana. The Court finds instruction in the ratio in MR. OUSMANE GUIRO V. BURKINA FASO (2017) CCJELR at page 223 where it held that "*The Court cannot take unproven allegations at their face value. It is necessary for applicants to substantiate the complaints they raise before the Court with evidence.*" The Court aligns itself with this ratio and dismisses this allegation of the Applicants as it has not been proved.

82. In conclusion, the Court considers the claims of the Applicants a preemptive one which has been brought hastily without due consideration as to the rudiments of bringing a claim for the violation of human rights. Whilst it is important that human rights are jealously guarded, the Court will admonish the Applicants that democratic pillars, like Parliamentary approval, form checks and balances for the safeguard of human rights. Unless uncontroverted evidence establishes that these safeguards have been breached, any attempt to saddle the Respondent with liability will be discountenanced by the Court. Consequently, the Court dismisses all claims of the Applicants and so holds.

XII. COSTS

83. The Court recalls Article 66 (1) of the Rules of the Court which provides that *"[A] decision as to costs shall be given in the final judgment or in the order which closes the proceedings."* Therefore, in this instance where the Applicants have not prayed the Court for costs, it will rely on Article 66 (11) of the Rules of Procedure of the Court which states: *"If costs are not claimed, the parties shall bear their own cost"* and so holds.

XIII. OPERATIVE CLAUSE

For the reasons stated above the Court sitting in public after hearing both parties:

As to jurisdiction:

i. Declares that it has jurisdiction.

As to admissibility:

ii. **Finds** that the First Applicant lacks the capacity to initiate the action.

iii. **Declares** that the Second and Third Applicants are vested with capacity to initiate the action.

As to merits of the case:

i. **Finds** no violation of Article 21 (1) of the African Charter on Human and People's Rights.

ii. **Dismisses** the claim that Article 256 (7) of the Constitution of Ghana goes contrary to Article 21 (1) of the African Charter on Human and People's Rights.

iii. **Dismisses** all other reliefs sought by the Applicants.

COSTS:

i. Orders the parties to bear their own costs.

Hon. Justice Dupe **ATOKI** .....

Hon, Justice Sengu Mohamed **KOROMA**/Rapporteur .....

Hon. Justice Ricardo Claudio Monteiro **GONÇALVES** .....

Dr. Yaouza **OURO-SAMA** - Chief Registrar .....

Done in Abuja, this 10th day of July, 2023 in English and translated into French and Portuguese.