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WRITE-UP

RE-THINKING SECTION 98 OF THE LAND ACT, 2020 (ACT 1036)

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RE-THINKING SECTION 98 OF THE LAND ACT, 2020 (ACT 1036)

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Introduction:

On December 23, 2020, the Land Act, 2020 (Act 1036) was assented to and became law, repealing several enactments such as the Land Registry Act, 1962 (Act 122), *Land Title Registration Act, 1986 (P.N.D.C.L. 152) and Administration of Lands Act, 1962 (Act 123).*

The Act was one passed to 'revise, harmonise and consolidate the laws on land to ensure sustainable land administration and management, effective and efficient land tenure and to provide for related matters.'

Among several other new provisions in the new Act was the introduction of a pre-requisite to the commencement of any action in court concerning land in a registration district.

By its Section 98(1), the new Act requires that a party who intends to commence an action in court over land must first exhaust the procedures for resolving conflict under the Alternative Dispute Resolution Act, 2010 ('the ADR Act'). Section 98(1) provides as follows:

> *(1) An action concerning any land or interest in land in a registration district shall not be commenced in any court unless the procedures for resolution of disputes under the Alternative Dispute Resolution Act, 2010 (Act 798) have been exhausted.*

Unless interpreted purposively, Section 98(1) has the tendency of resulting in an absurd conclusion. This paper considers the scope of section 98, the challenges the section poses and suggests an interpretation that the authors think gives effect to the likely intent of the lawmaker.

Scope:

Section 98(1) clearly provides its scope – ***all actions*** concerning a***ny land or interest in land in a registration district***. The Land Act appears to provides two distinct definitions of interest in land. Section 1 defines interest in land as allodial title, common law freehold, customary law freehold, usufructuary interest, leasehold interest and customary tenancy[2] .
In its definition section[3] however, interest in land has been defined again as 'any ***right*** or

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2 Also provided for in Section 81
3 Section 281

interest in or over land which is registrable under this Act'. This definition admits of two categories in defining interest in land under the Act – rights and interest, each of which is registrable under one of the three (3) systems for registration under the Act[4] .

Section 82 then defines these registrable rights to include a mortgage, easement, restrictive covenant, etc. Considering that interest in land could include mortgages, the question arises as to the implication of a literal interpretation of section 98(1) for other enactments such as the Borrowers and Lenders Act, 2020.

Section 98(1) requires that a party exhausts the procedures under the ADR Act before commencing an action in court. What are these procedures? ADR procedures are "rules" by which an ADR is conducted; such rules cover how the dispute itself is to be resolved. These rules may pertain to the appointment of an arbitrator or mediator, the seat and language of the adjudication, the applicable law,[5] etc.

Challenges:

Was the intention of the draftsman in Section 98(1) to provide that any such rules be exhausted before the commencement of an action? It is suggested that the lawmaker may have intended to provide for the ***methods*** of dispute resolution under Act 798, and not **procedures** of resolution under the ADR Act.

The ADR Act provides three (3) methods of dispute resolution – mediation, customary arbitration and arbitration. Is the requirement of the provision for a party to elect one of these methods? Or to elect more than one of the methods, or exhaust all three methods under the Act?

Assuming that the proper reading of Section 98(1) provided for a party to exhaust dispute resolution methods under the ADR Act, there remains a lacuna in the provision. The lawmaker fails to provide which method(s) the party is required to exhaust.

This requirement poses several other challenges to the parties involved, particularly the plaintiff who may be left without remedy in the face of an uncooperative defendant. Which method would the parties be required to commence? Which of the parties retains the superior

4 Section 80

5 Examples of such ADR rules would include the Ghana Centre of Arbitration Rules, International Chamber of Commerce (ICC) Rules, London Court of International Arbitration (LCIA) Rules and the United Nations Com mission on International Trade Law (UNCITRAL) Rules (usually used in ad hoc arbitrations)ICC Mediation Rules, 2014, the International Centre for Dispute Resolution (ICDR) International Mediation Rules, 2021 and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.

right to determine which method to commence or submit to? How do the parties resolve disputes and/or deadlocks over procedural matters such as the appointment of a tribunal, the applicable law, the seat and language of the proceedings, etc.

An even more unsurmountable challenge is the implication of Section 98(1) for the principles of arbitration. Arbitration as a dispute resolution mechanism is one borne out of contract. the voluntary nature of arbitration is one of the most fundamental elements of arbitration in dispute resolution. By the same ADR Act (Act 798), the principle of party autonomy is as good as sacrosanct in proceedings of arbitration. Any compulsion, therefore, by law for parties to resolve their disputes through arbitration cannot properly be called arbitration.

The most alarming challenge that a compulsion to submit to arbitration will pose is the effect of an award in precluding a party from commencing an action in Court. An arbitral award is final and binding on both parties and any person claiming through them[6] . An award made by an arbitrator has the same force as a decision of the High Court and may be enforced in the same manner with leave of court[7] . The implication of an arbitral award granted in proceedings prior to the commencement of an action in court is that neither party can commence an action in court on the same facts and against the same party when a binding award has been given in the same matter.

Finally, in traditional litigation proceedings in court, the courts are clothed with jurisdiction to make interim orders in relation to the subject matter of the property – interlocutory injunctions, preservation orders, etc. Such interim orders are necessary for maintaining the *status quo ante*. Where parties commence an ADR process as suggested by a literal interpretation of Section 98(1), the question that arises is how will the status quo ante be maintained pending a determination of the dispute by ADR?

Practically, by the time a dispute arises, one of the disputants may be developing the land in question. Experience has shown that some disputants develop lands in dispute with speed of light, sometimes in the night. Accordingly, unless during the ADR period, it is possible to maintain the status quo by injunction, for example, by the time the ADR process is completed, the disputed land may have been fully developed to the detriment of one of the parties.
These are questions posed by a literal reading of section 98(1) of the Act.

Re-thinking Section 98(1)

A literal interpretation of section 98(1) undoubtedly leads to absurdity and chaos. It is

6 Section 52, Act 798
7 Id., Section 57

suggested thus that section 98(1) be read together with the other sub-sections of section 98 and in the context of Chapter 5, which is titled 'Title Registration'. Section 98(2) and (3) provide as follows:

(1) *Where at the time of the publication of a notice under section 96, the Land Registrar has notice that an action or proceeding concerning land or interest in land in the registration district referred to in the notice is pending in a court or is subject to any alternative dispute resolution proceedings, the Land Registrar shall note any claim under this Act in respect of the same land or interest but no further action shall be taken on the claim until the matter is determined by the court or settled by alternative dispute resolution.*

(2) Where a dispute is pending as specified in subsection (2), a party shall, in writing, serve notice on the Land Registrar and the Land Registrar shall not take any further action in respect of the registration until the final determination of the dispute.

Section 96 is referenced in subsection (2) above. It provides for notice of registration districts for the purposes of registering interests in land[8] . Subsections (2) and (3) of Section 98 relate ***directly*** to pending applications for registration of title in lands in registration districts.

It is respectfully submittedthat Section 98(1) would be clearer where it restricts itself to disputes relating to pending applications to register interest in land in registration districts.

Prior to the enactment of Act 1036 and the repeal of P.N.D.C.L. 152, a similar settlement option was made available to parties to a dispute which arose in the process of registering interest in land or land in a registrable district. P.N.D.C.L. 152 provided for a Land Title Adjudication Committee[9] which was clothed with jurisdiction to determine disputes relating to the registration of land or interest in land in registration districts[10] .

It is respectfully submitted, without taking cognisance of the other challenges, that Section 98(1) of the new Land Act, 2020 is an attempt to provide a similar alternative dispute resolution method for disputing parties who have pending applications to register interest in land or land in registration districts.

The jurisdiction of the Land Adjudicating Committee, and, as is respectfully submitted, section 98(1) of Act 1036, is limited to disputes pertaining to registration of interests in land in registration districts.

8 Section 97, Act 1036
9 Section 22(1), P.N.D.C.L. 152
10 Section 22(4), P.N.D.C.L. 152

The Supreme Court in **Boyefio v NTHC Properties Limited**[11] carefully explained the scope of the Committee's jurisdiction, limiting it to disputes that occur in the course of registration. The Court through **Acquah JSC** held as follows:

> '*Now, section 22(3) and (4) of PNDCL 152 clearly and unambiguously define the jurisdiction of the adjudication committee as being the determination of any dispute relating to the registration of land or interest in land in any registration district…*
>
> *The adjudication committee is, therefore,* ***not a tribunal with general jurisdiction*** *to handle any land suit in a registration district but an internal or domestic tribunal of the Land Title Registry to* ***handle disputes likely to occur in the course of the registry's exercise to register title*** *to land and interests therein. (emphasis provided)*

Bamford-Addo JSC in the same case held as follows:

> *'According to the same memorandum of PNDCL 152, the object of this provision is to discourage expensive litigation over land by compelling the parties to make use of PNDCL 152, which in section 22 makes provision for the establishment of a land adjudication committee in each registration district which would adjudicate on disputes relating only to title to land to be registered.*
>
> *The powers and jurisdiction given to the Chief Registrar of Lands and the land adjudication committee under PNDCL 152 is circumscribed and limited to only matters relating to the registration of title in accordance with documentary evidence, as clearly indicated in sections 22(3), 23(3) and 23(5) of PNDCL 152. Consequently, section 12(1) of PNDCL 152 cannot operate to oust the general land jurisdiction of the High Court in the type of case or matter, concerning issues raised in the plaintiff's writ as referred to above.' (Emphasis provided)*

Conclusion

It is submitted that only a purposive interpretation of Section 98(1) will prevent a conclusion of absurdity and chaos.

Beyond a purposive interpretation of Section 98(1) to limit it to disputes relating to registration, it is suggested that an amendment of section 98(1) may be required to provide for a Dispute Adjudication Board as was provided under P.N.D.C.L. 152 to administer related to registration-related disputes. This suggestion is to avoid the challenges we have discussed as relating to referring such disputes to ADR generally (the coercion of disputants to submit their disputes to ADR contrary to the fundamental tenets of voluntary and contractual nature of ADR methods).

11 [1997-98] 1 GLR 768

Our attention has been drawn to a very recent ruling by his Lordship Justice Emmanuel Amo Yartey in the case of ***Losamills Consult. Limited v The Berekuso Stool & 2 others***[12] delivered on Monday, 1st November 2021. This was an application in which the Defendant/Applicant prayed the court to dismiss a writ of the plaintiff before the court on grounds that the Plaintiff did not fulfil the statutory provision requiring parties to disputes over land or interest in land to seek or attempt settlement through ADR before coming to court.

In the ruling, the learned judge considered the effect of section 98(1) of the Land Act, 2020 (Act 1036) and came to the conclusion that Section 98(1) deals specifically with matters relating to the registration of land or interest in land. The court held as follows;

"A critical examination of Section 98 of Act 1036 denotes it deals with issues relating to Registration only as is evident from that part of the Act. These include issues relating to double registration, caveating etc. There is no indication that Section 98 deals with boundary issues." Emphasis added.

The Court came to this conclusion based on two grounds; first, that the action in question related to a boundary dispute and second, that section 98(1) does not completely oust the jurisdiction of the court to hear the matter.

While we agree largely with the conclusion reached by the court, we respectfully disagree with its reasoning. The court in coming to its conclusion relied on the following authorities;

- ***Essilfie & Anor v Tetteh & Ors [1995-96] 1 GLR 297***
- ***Lee v Showmen's Guild of Great Britain [1952) 1 All ER 1175 at 1180-1181, CA***
- ***Lawlor v Union of Post Officer Workers [1965) 1 All ER 353 at 363***

It appears this line of cases dwelled on an attempt by parties to oust the jurisdiction of the court by their own private agreement. This can be distinguished from Section 98(1) in which the ouster is a statutory injunction and not an agreement between individual parties.

It is a settled principle of law that jurisdiction of a court is a creature of statute and there is a general presumption against creating and expanding the existing jurisdiction of the courts as held in ***Chief Timitimi v Amabebe***[13] ***, Dolphyne v Speedline Stevedoring Company and another***[14] ***.*** This means that a court cannot assume a jurisdiction that is not conferred by statute. It also means that where a statute limits the jurisdiction of a court, the court can only act within the limitations imposed by statute. Section 98 (1) is a clear statutory injunction which when read literarily will operate to

12 Civil Suit LD/0764/2021. Ruling delivered on November 1, 2021 (Unreported).
13 14 W.A.C.A. 374
14 [1996-97] SCGLR

suspend or postpone the court's jurisdiction if the preliminary efforts at settlement through ADR is not attempted before the matter is brought to court. It is our contention therefore that a literal interpretation will render the provision incongruous since ADR provisions by their nature are voluntary and subject to the agreement of the parties.

In rethinking Section 98(1) within the perspective of an amendment, it could be useful for the lawmaker to consider the wording of provisions in existing enactments that make room for parties to resort to ADR methods as an initial attempt at dispute resolution. A classic example of such a provision is ***Section 27 of the Minerals and Mining Act, 2006*** ('the Mining Act'). Sub-section (1) provides as follows:

> *Where a dispute arises between a holder of a mineral right and the Republic in respect of a matter expressly stated under this Act as a matter which shall be referred for resolution, all efforts shall be made through mutual discussion and* ***if agreed between the parties, by reference to alternative dispute resolution procedures*** *to reach an amicable settlement (emphasis mine).*

Such wording sufficiently caters for the principle of party autonomy which is a non-derogable principle of ADR.

Section 27(2) of the Mining Act further provides a timeline within which a party may submit a dispute to arbitration in event that the dispute resolution methods employed in Section 27(1) fail. The subsection provides as follows:

> *(2) Where a dispute arises between a holder who is a citizen and the Republic in respect of a matter expressly stated under this Act as a matter which shall be referred for resolution, which is not amicably resolved as provided in subsection (1) within thirty days of the dispute arising or a longer period agreed between the parties to the dispute, the dispute may be submitted by a party to the dispute, to arbitration for settlement in accordance with the Arbitration Act, 1961 (Act 38) or any other enactment in for resolution of disputes.*

It is recommended, in the light of the proposed amendment, that a provision akin to Section 27(2) of the Mining Act above be made in the Land Act, 2020. What that provision would seek to do is to secure party autonomy while safeguarding the goal of an expedited process of dispute resolution in the registration of interest or interest in land in registration districts.

Unless Section 98(1) is interpreted to restrict the type of disputes that may voluntarily be submitted to ADR proceedings to disputes arising as a result of registration of interest in land in registration districts, such absurdity cannot be avoided.

When Section 98(1) is purposively interpreted, it should lead to the conclusion that that section relates to disputes arising out of registration of land or interest in land within a registration district.