IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- A.D. 2021

CORAM: YEBOAH, CJ (PRESIDING)

APPAU, JSC

MARFUL-SAU, JSC

AMEGATCHER, JSC

PROF. KOTEY, JSC

OWUSU (MS.), JSC

TORKORNOO (MRS.), JSC

WRIT NO.

J1/05/2021

4TH MARCH, 2021

ARTICLE 64 OF THE CONSTITUTION AND SUPREME COURT RULES,

1996

(C. I. 16) AS AMENDED BY C. I. 74 AND C. I. 99)

AMENDED PRESIDENTIAL ELECTION PETITION

PRESIDENTIAL ELECTION HELD ON 7TH DECEMBER, 2020

JOHN DRAMANI MAHAMA - PETITIONER

H/NO. 33 CHAIN HOMES

AIRPORT VALLEY DRIVE

ACCRA

AND

1. ELECTORAL COMMISSION - 1ST RESPONDENT

NATIONAL HEADQUARTERS

6TH AVENUE

RIDGE-ACCRA

2. NANA ADDO DANKWA AKUFO-ADDO - 2ND RESPONDENT

HOUSE NO. 02 ONYAA CRESCENT

NIMA-ACCRA

JUDGMENT

THE UNANIMOUS JUDGMENT OF THE COURT WAS READ BY YEBOAH CJ.

YEBOAH CJ:-

In this amended petition(hereinafter referred to as the Petition) , the Petitioner, who was the Presidential Candidate of the National Democratic Congress (NDC) in the 7th December 2020 Presidential Elections, is seeking six reliefs against the Electoral Commission as 1st Respondent and the Presidential Candidate of the New Patriotic Party

(NPP) as the 2nd Respondent. The reliefs are in the nature of three (3) declarations and three (3) orders.

Aside of relief (e), which is praying the Court to restrain the 2nd Respondent from holding himself out as the President-elect of Ghana, all the other reliefs were directed against the 1st Respondent. These reliefs are:

(a) A declaration that Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Elections held on 7th December 2020, was in breach of Article 63(3) of the 1992 Constitution in the declaration she made on 9th December 2020 in respect of the Presidential Election that was held on 7th December, 2020;

(b) A declaration that**, based on the data contained in the declaration made by Mrs. Jean Adukwei Mensa**, Chairperson of 1st Respondent and the Returning Officer for the Presidential Election held on 7th December 2020, **no candidate satisfied the requirement of article 63(3) of the 1992 Constitution to be declared President-elect;**

(c) **A declaration that the purported declaration made on 9th December 2020 of the results of the Presidential Election by Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Election held on 7th December 2020** is unconstitutional, null and void and of no effect whatsoever;

(d) An **order annulling the Declaration of President-Elect Instrument, 2020 (C.I.135) dated 9th December 2020,** issued under the hand of Mrs. Jean Adukwei Mensa,

Chairperson of 1st Respondent and the Returning Officer for the Presidential Election held on 7th December 2020 and gazetted on 10th December, 2020;

(e) An order of injunction restraining the 2nd Respondent from holding himself out as President-elect;

(f) An order of mandatory injunction directing the 1st Respondent to proceed to conduct a second election with Petitioner and 2nd Respondent as the candidates as required under article 63(4) and (5) of the 1992 Constitution. {Emphasis mine}

The language in which the first four reliefs (a – d) were crafted is suggestive that they were directed against the Chairperson of the 1st Respondent. However, the Petition is not against her personally but against the 1st Respondent as an Institution of State established under the 1992 Constitution.

The article and rule under which the Petitioner mounted the action are; article 64 (1) of the 1992 Constitution and Rule 68A of the Rules of the Supreme Court, C.I. 16 (as amended by C.I. 74 and C.I. 99). They provide:

Article 64. (1)

"The validity of the election of the President may be challenged only by a citizen of Ghana who may present a petition for the purpose to the Supreme Court within twenty-one days after the declaration of the result of election in respect of which the petition is presented".

Rule 68A. "Despite rule 45(4), the parties in a petition shall be (a) the petitioner as specified in article 64(1) of the Constitution, and (b) the person declared elected as President and the Electoral Commission who together shall be the respondents."

Though the Petitioner is not, in substance, attacking the validity of the 7th December, 2020 Presidential elections but only the declaration made on the 9th of December, 2020, the petition is seen by many as a re-hash of the Presidential Election Petition of 2012/2013. In that Petition, the 2nd Respondent herein, then as 1st Petitioner and others, invoked article 64(1), purportedly to invalidate the election of the petitioner herein, then as 1st Respondent, as President-elect. As a novelty then in the constitutional history of the Fourth Republic, Ansah, JSC, prefaced his judgment in that petition in the following words:

> ***"The facts surrounding this suit have been fully played out in near epic dimensions before the public. However there is no way this suit can be seen as a likeness of the numerous cases on various aspects of our 1992 Constitution. Indeed, I venture to say it cannot be compared to any of the cases touching on various aspects of our Constitution.***
>
> ***By virtue of its peculiar nature and potential effects, many commentators have rightly described this suit as one posing a test of the structural maturity of our democratic ethos, causing all eyes worldwide to focus, even if only briefly on our polity, to see if and how we can surmount this unquiet challenge. Without doubt, the resolution of this case portends much for the future path of our democratic development"*** – {See; **In Re Presidential Election Petition; Akufo-Addo, Bawumia & Obestebi-Lamptey (No. 4) v Mahama, Electoral Commission & National Democratic Congress (No. 4) [2013] SCGLR (Special Edition) 73 @ p. 151.**

Ansah JSC's description of the Petition before the Court in 2013 in the above words was apt, as that case remains one of the most important constitutional cases this apex Court has determined in our current constitutional dispensation.

It is therefore not strange that the attention that greeted the 2012 Petition also gripped the instant one before us thus placing the two seemingly similar cases, on the same pedestal. The big question however is are the two cases alike or do they present similar issues for determination? The answer in both questions is a big 'NO'. It is therefore not surprising that the Petitioner in his closing address filed on 23/02/2021, admitted the dissimilarity in the instant petition and that of 2012/2013.

BACKGROUND TO THE PETITION

On 7th December, 2020, the 1st Respondent herein, the Electoral Commission, which is the constitutional body established under article 43 of the Constitution, 1992 to conduct all elections and referenda in Ghana, conducted Parliamentary and Presidential election in all two hundred and seventy-five (275) constituencies in the country, which are made up of thirty-eight thousand, six hundred and twenty-two (38,622) polling stations.

The election was conducted under Public Elections Regulations, 2020 [**C.I. 127**]. At the end of the exercise, the 1st Respondent, through its Chairperson declared the 2nd Respondent Nana Addo Dankwa Akufo-Addo, who was the Presidential candidate of the New Patriotic Party (NPP), as the one validly elected as the President of the Republic of Ghana. This declaration was made on the 9th of December, 2020. Pursuant to article 63(9) of the Constitution, 1992 and regulation 44(10) (d) and (11) of C.I.127/2020, an Instrument, **"DECLARATION OF PRESIDENT-ELECT INSTRUMENT, 2020" [C.I. 135]** was published under the hand of the Chairperson of the 1st respondent to that effect and published in the Gazette on 10th December, 2020. The Instrument reads:

"IN exercise of the power conferred on the Electoral Commission under Article 63(9) of the 1992 Constitution, this Instrument is hereby made.

NANA ADDO DANKWA AKUFO-ADDO, the New Patriotic Party (NPP) Presidential Candidate having, in the Presidential Election held on the 7th of December, 2020 pursuant to Article 63(3) of the Constitution, obtained more than fifty per cent of the total number of valid votes cast, is hereby declared the President-Elect of the Republic of Ghana.

Given under my hand the 9th day of December, 2020.

Signed

MRS. JEAN MENSA

Chairperson of the Electoral Commission"

Article 63(9), on whose strength the Instrument was made provides:

"An instrument which –

(a) is executed under the hand of the Chairman of the Electoral Commission and under the seal of the Commission; and

(b) states that the person named in the instrument was declared elected as the President of Ghana at the election of the President, shall be prima facie evidence that the person named was so elected."

The Petitioner filed this Petition to challenge the declaration made on grounds of alleged errors and lack of transparency on the part of the 1st Respondent in the correction of the said errors. The grounds for the Petitioner's petition are that the said declaration violated articles 23, 296(a) and (b) and 63(3) of the Constitution, 1992 and therefore unconstitutional, null and void and of no effect whatsoever. These articles of the

Constitution mentioned in Petitioner's petition are those allegedly violated for which the Petitioner sought the reliefs under paragraph 3 (a) - (f) of his petition provide: -

> *"23. Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal.*
>
> *296. (a) Where in this Constitution or in any other law discretionary power is vested in any person or authority – that discretionary power shall be deemed to imply a duty to be fair and candid;*
>
> *(b) The exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law.*
>
> *63(3). A person shall not be elected as President of Ghana unless at the presidential election the number of votes cast in his favour is more than fifty per cent of the total number of valid votes cast at the election."*

THE PETITION ITSELF

The Petitioner, per his reliefs and grounds, is not challenging the data presented by the 1st Respondent, from which the 2nd Respondent's declaration as President-Elect was made. As a result of that, he has not presented to the Court any figures to contradict the data of the 1st Respondent. Petitioner's case simply is that the figures or data declared by the Chairperson of the 1st Respondent as the valid votes cast and those obtained by the two top contestants; i.e. Petitioner and 2nd Respondent, when computed, do not give the 2nd Respondent more than fifty percent (50%) of the said votes to merit her declaration, as provided under article 63(3) of the Constitution, 1992. The Petitioner averred that the declaration was therefore unconstitutional, null and void. The Petitioner proceeded

further to seek an order to set aside the Instrument affirming the declaration (i.e**. CI 135**) and a further order to organize a fresh re-run between the Petitioner and the 2nd Respondent in compliance with Article 63(4) & (5) of the Constitution, 1992. The above constitutional provisions were reproduced under regulation 44 (1), (2) and (3) of C.I. 127 and they read:

> **"63 (4) Where at a Presidential Election, there are more than two candidates and no candidate obtains the number or percentage of votes specified in clause (3)of this article a second election shall be held within twenty-one days after the previous election.**
>
> **(5) The candidates for a Presidential election held under clause (4) of this article shall be the two candidates who obtained the two highest numbers of votes at the previous election."**

From the nature of the reliefs sought in this Petition, relief (b) appears to be the major relief on which the other five reliefs, i.e.; (a), (c), (d), (e) and (f) are buttressed. The success or failure of reliefs (a), (c), (d), (e) and (f) depend on the success or failure of relief (b). For purposes of emphasis, we wish to reproduce petitioner's relief (b). It reads:

> *"A declaration that* ***based on the data contained in the declaration made by Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Elections*** *held on 7th December 2020, no candidate satisfied the requirement of Article 63(3) of the 1992 Constitution to be declared President-elect."(emphasis ours)*

This relief (b) as quoted above raises an arithmetical question. It cannot be resolved without resorting to some calculations. The first task is to know the data the 1st Respondent presented, which the Petitioner was referring to. The data would contain, inter alia, the total number of votes cast at the election, the total number of valid votes

cast, the total number of valid votes cast in favour of the 2nd Respondent and the total number of valid votes cast in favour of the Petitioner. A percentage of each of the candidates is then calculated against the total valid votes cast.

This is the only way to determine whether or not the 2nd Respondent obtained more than 50% of the valid votes cast or not, as the Petitioner has challenged.

In effect, if the Petitioner is able to satisfy this Court that the data contained in the declaration made by the Chairperson of the 1st Respondent, did not give the 2nd Respondent more than 50% of the total valid votes cast in the Presidential election on 7th December, 2020, then all the other reliefs sought under (a), (c), (d), (e) and (f) must be granted as a matter of course as that would mean; article 63(3) has been violated thus rendering the said declaration unconstitutional , null and void.

The Petitioner, in advancing reasons to support his petition contended that though the 1st Respondent effected corrections to its original data as announced on 9th December 2020, the said corrections were null and void as they do not reflect on the declaration made on 9th December, 2020. Again the 1st Respondent did not indicate when the said corrections were made and also, did not involve the Petitioner and his agents when making the corrections. The Petitioner attached to his petition a pen drive of the video clip of the declaration made by the Chairperson of the 1st Respondent, a copy of C I 135, a copy of a Press Release issued by the 1st Respondent on 10th December, 2020 announcing the errors in the declaration and the corrections made and a few other documents like summary and spread sheets.

According to the Petitioner the 1st Respondent was not fair to him when it failed to engage his agents and to involve them in the corrections of the errors before the declaration. There was therefore no transparency in the corrections made, making the declaration and **C.I. 135**, unconstitutional, null and void as same constituted a violation of Articles 23, 296

(a) and (b) and 63(3) of the 1992 Constitution. It is for this reason that the Petitioner sought under his relief (d), an order annulling **C.I. 135** and a further order directing the 1st Respondent to proceed to conduct a second election between the first two candidates; i.e. 2nd Respondent and Petitioner as the only candidates, as required under article 63(4) & (5) of the 1992 Constitution.

Clearly, from the nature of the reliefs sought in the instant petition, it is not identical with the 2012 Presidential election petition. That petition sought to invalidate the presidential election conducted by the Electoral Commission by the annulment of over four million (4,000,000) votes due to alleged irregularities such as; over-voting, lack of signatures of presiding officers on some pink sheets, no biometric verification in some of the constituencies. However, in this one, the petitioner is not seeking any such relief. He has not asked for the annulment of any votes cast anywhere during the election and he has not said that the election was badly conducted. He is only seeking to annul **C.I.135** and a re-run between the candidates with the two highest numbers of votes because a computation of the data presented by the 1st Respondent does not give the 2nd Respondent more than 50% of the total valid votes cast. That is why PW 1 the General Secretary of the NDC, Mr. Johnson Asiedu Nketiah testifying under oath, told the Court that, they did not come to Court to challenge figures so they brought no figures of their own to this Court. ''According to him, they were judging the Chairperson of the 1st Respondent by ''her own Bible'', by which he meant they were judging her by her own data from which the 2nd respondent was declared President-Elect.

THE 1ST RESPONDENT'S CASE IN ANSWER

The 1st Respondent denied Petitioner's claim that, from its data as presented in the declaration, the 2nd Respondent did not obtain more than 50% of the valid votes cast in the Presidential election held on 7th December, 2020. The 1st Respondent admitted the Petitioner's contention that it initially made mistakes in the figures announced on the 9th

of December, 2020 during the declaration by juxtaposing the total number of votes cast in the Presidential elections with that of the total number of valid votes cast. However, this error was immediately corrected and the correct figure mentioned in a press release the following day 10th December, 2020 and accordingly published in the official Gazette. 1st Respondent contended further that even with the error, the fact that the 2nd Respondent obtained more than 50% of the total valid votes cast was not in doubt. The 1st Respondent prayed the Court to dismiss Petitioner's petition for disclosing no cause of action.

THE 2ND RESPONDENT'S CASE IN ANSWER

The 2nd Respondent also denied Petitioner's case and described same as incompetent and devoid of any substance whatsoever. He was of the view that even though Petitioner said no candidate obtained more than 50% of the total valid votes cast and sought a re-run between the two of them, the Petitioner did not indicate the number of valid votes or percentage thereof that he should have obtained in the election, or the number of valid votes or percentage thereof that the 2nd Respondent should have obtained in the election to support the allegations and request for the re-run. He contended further that the corrections of the errors by the 1st Respondent in her statement on the 9th of December, 2020 annexed by the Petitioner to her statement in support of the petition, were made within the authority of the 1st Respondent and do not infringe any law. According to 2nd Respondent, the corrections effected by the 1st Respondent in its press release of 10th December, 2020, provided a proper reckoning of the percentage of votes obtained by the 2nd Respondent using the valid votes cast rather than total votes cast and shows that the 2nd Respondent obtained more than 50% of the valid votes cast as required under article 63(3) of the Constitution. He averred that Petitioner's claims are anchored on an innocuous mistake made by the 1st Respondent in interchanging total votes cast for total valid votes cast, when announcing the various percentages obtained by each candidate on 9th December, 2020. 2nd Respondent contended strongly that when the total valid votes

cast are used as the yardstick, he would still be the outright winner of the election by more than 50% of the votes, even if by statistical projection, the votes of all the 128,018 registered voters in Techiman South were to be added to Petitioner's vote.

The 2nd Respondent averred further that, if the number of votes obtained by each candidate in Techiman South is factored into the results declared by the 1st Respondent on 9th December, 2020, the 2nd Respondent's share of the valid votes cast is still well over 51%, a fact the Petitioner has not questioned in the petition. 2nd Respondent denied allegations of violation of articles 23 and 296 of the Constitution as misconceived. On the alleged vote padding and errors referred to by the Petitioner, the 2nd Respondent, who denied same, contended that, granted the allegations were true, they did not have any effect whatsoever on the results of the election. He said the alleged unconstitutionality of a declaration or gazette notification of an election does not constitute a challenge to the validity of an election of a person as President. He emphatically concluded that the Petitioner has neither challenged the conduct of the election itself nor its validity so his action is not an election petition properly so-called and ought to be dismissed *in limine*. 2nd Respondent served notice of his intention to raise a preliminary objection to the Petition on the ground, inter alia, that the petition did not meet the requirement imposed on a petitioner under article 64(1) of the Constitution, 1992. He consequently filed a preliminary objection, as the 1st Respondent also did, for the dismissal of the petition on the ground that it discloses no reasonable cause of action in terms of article 64(1) of the Constitution, 1992.

Though both the 1st and 2nd Respondents prayed the Court to set down for legal arguments their objection *in limine* to Petitioner's petition, the Court decided to hear the petition in detail and resolve the preliminary legal objection together with the other issues raised by the pleadings of the parties.

ISSUES SET DOWN BY THE COURT FOR DETERMINATION

The Court directed each of the parties to file memorandum of issues for trial. The parties complied and filed issues they considered material for consideration. Out of those issues and the materials contained in the petition and the answers to the petition, this Court adopted the following as the real issues arising from the pleadings for determination:

1. **Whether or not the petition discloses any reasonable cause of action;**
2. **Whether or not based on the data contained in the declaration of the 1st Respondent, of the 2nd Respondent as President-elect, no candidate obtained more than 50% of the valid votes cast as required by article 63(3) of the 1992 Constitution;**
3. **Whether or not the 2nd Respondent still met the article 63(3) of the 1992 Constitution threshold by the exclusion or inclusion of the Techiman South Constituency Presidential election results;**
4. **Whether or not the declaration by the 1st Respondent dated 9th December, 2020 of the results of the Presidential election conducted on the 7th December, 2020 was in violation of article 63(3) of the 1992 Constitution; and**
5. **Whether or not the alleged vote padding and other errors complained of by the Petitioner, affected the outcome of the Presidential election results of 2020.**

MODE OF TRIAL

Since the rules of this court, regulating Presidential Election Petition trials, that is, C.I.16 as amended by C.I.74 & C.I.99 has a regimented timetable, that include a scheduled date for pre-trial case management protocols, the Court adopted the procedure in the High Court Civil Procedure Rules, C.I.47 as amended by C.I.87 on the filing of witness statements with exhibits, if any. The Court accordingly directed the parties to comply by

filing witness statements within specified periods. They were also directed to file their written submissions for and against the preliminary objections raised to the petition by the respondents. Though the Petitioner defaulted initially in the directions to file witness statements and their answer to the legal submissions made by the respondents on the preliminary objections, they later complied when the Court admonished them to do so within twenty-four hours or have their petition determined in accordance with the law. The Petitioner who did not file any witness statement of his own, filed witness statements of two witnesses he intended to rely on to establish his case. The 1st Respondent also filed a witness statement of its Chairperson whilst the 2nd Respondent filed a witness statement through his attorney.

STANDARD OF PROOF, BURDEN OF PROOF AND PERSUASION .

A Petition of this nature is a form of civil litigation and like all civil cases; the standard of proof is one on the balance of probabilities or preponderance of the probabilities. The proof prescribed in civil trials is provided under sections 10, 11 and 12 of the Evidence Act, 1975 [NRCD 323]. These sections on the burden of proof, burden of persuasion and burden of producing evidence, which apply equally to election petitions, provide thus:

> *"10. (1) For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court.*
>
> *(2) The burden of persuasion may require a party (a) to raise a reasonable doubt concerning the existence or non-existence of a fact, or (b) to establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.*

11. (1) For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party…..

12. (1) Except as otherwise provided by law, the burden of persuasion requires proof ***by a preponderance of the probabilities…***

(2) ***'Preponderance of the probabilities'*** *means that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence".*

As was held by this Court per Adinyira, JSC in **Ackah v Pergah Transport Ltd [2010] SCGLR 728 at p. 736:** ***"It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail…"***

See also the case of Aryee v Shell Ghana Ltd & Fraga Oil Ltd (2017-2020) SCGLR 721 at 733, where this court speaking through Benin JSC had this to say:

''It must be pointed out that in every civil trial all what the law required is proof by preponderance of probabilities: See section 12 of the Evidence Act, 1975(NRCD 323). The amount of evidence required to sustain the standard of proof would depend on the nature of the issue to be resolved. The law does not require that the court cannot rely on the evidence of a single witness in proof of the point in issue. The credibility of the witness and his knowledge of the subject- matter are determinant factors: See Armah v Hydrafoam Estates (Gh) LTd (2013-2014) 2 SCGLR 1551. Indeed, even the failure by a party himself to give evidence cannot be used against him by the Court in assessing his case: this court's decisions in Re Ashalley Botwe Lands: Adjetey Agbosu v Kotei (2003-2004) SCGLR 420 per Georgina Wood JSC (as she then was), at page 448: and Armah v Hydrafoam

Estates Gh Ltd. Referred to (supra). In the last case cited, the Plaintiff did not testify in the action at all and only relied on the testimony of the Court appointed witness, yet he succeeded and this Court considered the process valid so long as the evidence relied upon was credible and sufficient to discharge evidential burden he assumed.''

Cases on election petitions in Africa and other common law jurisdictions give credence to the notion that in such cases where a petitioner seeks to annul an election or a declaration pertaining to an election, he bears the legal burden of proof throughout. See

1. **ABU-BAKR v YAR' ADUA [2009] All FWLR (Pt 457) 1 SC;**

2. **ODINGA v UHURU KENYATTA [2013] PETITION (NO. 5);**

3**. OPITZ v WRZESNEWSKJI [2012] SCC 55;**

4. **BESIGYE v MUSEVENI YOWERI KAGUTA & ELECTORAL COMMISSION OF UGANDA [2001] UGSC.**

In the Ugandan case of Besigye v Museveni & Electoral Commission of Uganda (supra), the Ugandan Supreme Court held:

"The burden of proof in election petitions as in other civil cases is settled. It lies on the petitioner to prove his case to the satisfaction of the Court. .''

In the Yar' Adua case the Supreme Court of Nigeria held: ***"that the burden is on the petitioner to prove, not only non-compliance with the electoral law, but also that the non-compliance affected the results of the election…"***

This Court adopted the same principle in the first Presidential Election Petition, titled ***Akufo-Addo, Bawumia & Obetsebi Lamptey v. Mahama & Electoral Commission (No. 4) (2013) SCGLR (Special Edition) 73***.

THE TRIAL ITSELF- EVIDENCE LED BY PETITIONER

The Petitioner did not testify himself and appointed no Attorney to testify on his behalf but called three witnesses in all. They were; Mr. Johnson Asiedu Nketiah (P.W.1), Dr. Kpesah Whyte (P.W.2) and Mr. Robert Joseph Mettle-Nunoo (P.W.3). Under the law, the Petitioner is not bound to testify himself if only he could prove his case through other witnesses or by any other means. {*See the case of* ***In Re Ashalley Botwe Lands: Adjetey Agbosu & Ors. v Kotey & Ors (supra).***

We know of no law in the common law jurisdiction, especially in civil trials that mandates a court to compel a party to testify against his will. The failure of the Petitioner to testify himself is therefore not fatal to his cause as the law permits that. What is required from him by law is for him to call requisite witness(s) or put before the court, sufficient material as evidence.

Initially, the Petitioner indicated calling two witnesses so only two witness statements were filed on the orders of the Court. These witnesses were P.W.1 and PW2. After the two witnesses had completed their testimonies through the adoption of their witness statements and cross-examination, the Petitioner prayed the Court to permit him to call a third and final witness to conclude his case. Though the prayer came at a time that the Petitioner had not given any prior indication of such an intention, for which counsel for the Respondents raised objections to the move, the Court obliged him and made an order for a witness statement to be taken from this witness to enable him testify for the Petitioner. The Petitioner did so and closed his case with this witness who testified as PW.3.

Out of these three witnesses, the one whose testimony appeared to have some relevance to the issues at stake was Mr. Johnson Asiedu Nketiah, P.W.1. He was, in fact, the star witness of the Petitioner. His testimony vividly explained the reasons why the Petitioner is in Court. As for the other two witnesses; i.e. P.W.2 and 3, Dr. Kpessah Whyte and Mr. Robert Joseph Mettle-Nunoo, the little said about their testimonies relative to the issues at stake, the better. P.W.2 and 3 were the agents who represented the Petitioner in the National Collation Centre dubbed the 'Strong Room'. Their testimonies were based mainly on what allegedly happened in the Strong Room during the final collation and the fact that they failed to sign the final form of the Presidential Elections called 'Form 13' because of disagreements they said they had with the Chairperson of 1st Respondent and her staff in the Strong Room. They recounted a fanciful tale of how the Chairperson refused to heed their complaints on some irregularities they noticed in some of the collation forms that came from some of the regions. We describe this evidence as fanciful because despite these alleged protest they went ahead to verify and certify 13 out of the 16 Regional Collation Sheets. Their testimony included an account of how the Chairperson of the 1st Respondent, managed to trick them to leave the Strong Room by sending them on an errand to confer with the Petitioner, during which period she declared the results of the presidential elections without their participation.

Whilst the testimony of P.W.1 was emphatic that the Petitioner is not in Court to challenge or compare the figures or data presented by the 1st Respondent with any other figures, the testimonies of P.W.2 and PW 3 were in respect of alleged irregularities in the figures or data on some of the regional collation forms that they sighted in the Strong Room, but which they ultimately signed or certified. Notwithstanding all these allegations of misunderstandings with staff of the 1st Respondent in the strong room and the fact that they were absent during the declaration, they did not give any indication as to how these happenings and their absence affected the final results announced by the 1st

Respondent. Having signed or certified those forms, the witnesses, particularly P.W.3 cannot turn round to talk of irregularities in the said forms. Their testimonies would have carried some little weight if the purpose of the petition was to challenge entries made on the collation forms or summary sheets, but that is not the case. Their testimonies were therefore of no relevance whatsoever to the issues set down for determination and we find them unworthy for any consideration whatsoever in the settlement of the issues.

Infact regarding the testimonies of PW 2 and PW3, if their evidence is to be believed then they have to blame themselves for abandoning their post at the National Collation Center at a time the verification and certification of the results were ongoing and PW3 had then verified and certified 13 Regional Collation Result out of the 16.

The agents of the Petitioner were given the opportunity to be in the strong room. In addition the petitioner had two additional agents as back-up or stand by. PW2 and PW3 were not under any obligation to leave the strong room under any circumstances. Besides other Presidential candidates had their agents or representatives in the strong room and eight (8) of them signed Form 13. If the Petitioner's agent's believed that in their absence something untoward happened, the Petitioner should have called any of the other agents in the strong room to testify in court any infractions that happened in their absence, if .any. The law is that where corroborative evidence exists, the law expects a party to call such evidence in proof of his case and not mount the witness box and repeat his averments on oath. The dictum in Majolagbe v. Larbi & Others (1959) GLR 190,by Ollenu J (as he then was) is still good law. The Petitioner's agents were given the opportunity to represent petitioner in the strong room and they decided to leave. They cannot complain now that the declaration was done in their absence.

With respect to the duties of party agents or representatives, we refer and to the Kenyan case of ***Raila Amolo Odinga & Another v Independent Electoral and Boundaries***

Commission & 4others, No.2 of 20th September 2017, where NJOKI S. NDUNGU, SCJ **opined thus:**

> *''Once the Constitution gives citizens the right to vote, the freedom to choose, and conditions are created for the realization of that right, it is not the business of the Court to aid the indolent. If party agents are required to be present, sign statutory form and undertake any other legitimate duty that is imposed upon them as part of the political process in an election, then they are under obligation to do it. To fail to do so is not only to fail one's party, but also to fail our democracy. The Courts must frown upon any such inaction, reluctance and delay.*
>
> *''A candidate, or her agent, cannot abscond duty from a polling station and then ask the Court to overturn the election because of her failure to sign a statutory form. Every party in an election needs to pull their own weight, to ensure that the ideals in Article 86 are achieved: that we shall once and for all have simple, accurate, and verifiable, secure, accountable, transparent elections.''*

Again, in the Nigerian case of **Atiku Abubakar v Independent National Electoral Commission & Buhari (supra) Mohammed Lawal Garba, JCA stated thus:**

> *''It is pertinent to restate that from the evidence of all the witnesses called by the appellants they admitted that their polling agents signed all the result sheets and did so voluntarily on the instruction of their party, the 1st respondent. The implication is therefore obvious as it would have authenticated the validity of the documents, in other words, the results sheets. The agents, in law were all presumed to understand what they appended their signatures thereto. They could not in the circumstance have turned around to deny the contents of their signatures.''*

EVIDENCE OF P.W.1

With regard to the first witness P.W.1, the gravamen of his evidence as per his witness statement, after the Court had expunged some portions of same upon objection raised by the Respondents, is captured in the answers he gave during cross-examination by counsel for the 1st and 2nd Respondents. According to him, the Petitioner did not come to Court to challenge the validity of the figures or data presented by the Chairperson of the 1st Respondent that is why in his testimony; he did not provide any data to contradict that of the 1st Respondent. His assertion was that the figures initially collated by the Chairperson contained errors, which his Party, the NDC pointed out in a letter addressed to the Chairperson on the 9th of December 2020 before the declaration. However, in effecting corrections to the wrong figures or data, the 1st Respondent did not invite them for their participation but unilaterally effected the said corrections, contrary to articles 23 and 296 (a) and (b) of the 1992 Constitution.

The question is; what is the legal implication, if any, of 1st Respondents' failure to involve the Petitioner and his agents in correcting administrative or clerical errors made in the computations or the declaration? Neither the Petitioner nor his witnesses mentioned any to us and we do not find any. This court has held in several cases including the recent ones of ***Gregory Afoko v Attorney –General: Writ No. J1/8/2019 dated 19th June 2019 (unreported) and Mayor Agbleze & 2 Others v. Attorney –General Suit No. J1/28/2018 dated 28th November 2018 (unreported),*** that breaches or violations of Article 23 on administrative justice and the exercise of discretion under Article 296 of the 1992 Constitution by administrative bodies, which includes the 1st Respondent, are not matters for the Supreme Court. These are infractions that the Petitioner could have sought redress in the High Court. To quote Marful-Sau, JSC in the Afoko case supra:

'' Article 23 of the Constitution deals with administrative actions and even where a breach of that provision is alleged, the remedy lies in the High Court and not this Court. Article 23 is part of Chapter 5 of the 1992 Constitution on Fundamental Human Rights and Freedoms, which by Article 33(1) &(2) of the Constitution, ought to be enforced in the High Court''.

See also ***Edusei v Attorney- General(1996-97) SCGLR 1 and***

Edusei v. Attorney- General No.2 (1997-98) SCGLR 753,

On the exercise of discretion under article 296 and alleged breaches or violation of same, this Court in the *Mayor Agbleze case* supra, held per Kotey (Prof.), JSC as follows:

"Throughout the Constitution, discretion has been vested in persons or bodies charged with the responsibility to exercise one power or the other. Where the discretionary power is not exercised according to law, the recourse by an aggrieved party lies in some other remedy provided for in the Constitution and not an invitation to invoke the original jurisdiction of this Court."

Though the two authorities cited above involve the invocation of the original jurisdiction of this Court under articles 2(1)(b) and 130(1) of the 1992 Constitution, the same applies to an election petition. The 1st Respondent is an independent body that performs its functions without anybody's directions or assistance. Article 46 is specific about this. It reads:

"Except as provided in this Constitution or in any other law not inconsistent with this Constitution, in the performance of its functions, the Electoral Commission shall not be subject to the direction or control of any person or authority."

There is no dispute that the 1st Respondent complied with article 296 (c) when it published the Regulations [C.I. 127]. By this publication, the 1st Respondent did not breach clause

(b) of article 296 as its actions were not capricious and arbitrary. They were regulated by C.I. 127 and there is no complaint anywhere by the Petitioner that the 1st Respondent did not comply with C.I. 127. If it is the case of anybody that the 1st Respondent violated articles 23 and 296 in the discharge of its duties, which included the declaration of the Presidential results under article 63(3) of the 1992 Constitution, the remedy of that person lies in the High Court, because strictly, such a complaint cannot be an election petition challenging the validity of the election of the President of Ghana.

THE RESPONDENTS CASE

At the close of the Petitioner's case, the Respondents decided or elected not to testify at the proceedings. They relied on Order 38 rule 3E (5) of the High Court Civil Procedure Rules, C.I.47 as amended by C.I.87, which the Court adopted to regulate the trial in addition to the rules provided under C.I.16 as amended by C.I.74 and C.I.99. The Respondents prayed the Court to decide the issues before it on the strength of the oral and documentary evidence led by the Petitioner through his witnesses. This decision by the respondents, which is not a novelty but accepted as settled practice, attracted strong opposition from counsel for the Petitioner who insisted that the Chairperson of the 1st Respondent must be made to testify for her to be cross-examined. All the attempts employed by counsel for the Petitioner, which included an attempt to re-open Petitioner's case for him to subpoena the Chairperson of the 1st Respondent to testify for him as a witness and an application to review the Court's ruling on Respondents' decision not to call evidence, which were all resisted by counsel for the Respondents, were dismissed by the Court.

We will like to reiterate the point made above that in law the step taken by the Respondents has the sanction of time- honoured and settled practice in our adversarial

system of justice. The position of the law is that after the close of the Plaintiff or a Petitioner's case, a defendant or a respondent for that matter has three options opened to him.

The Defendant or Respondent may elect to open his defence and call witnesses if he so wishes. Secondly, the defendant or respondent may elect to rest his case on the Plaintiff's or Petitioner's, when he is of the view that the case of the Plaintiff or Petitioner is weak and has failed to raise a prima facie case to warrant the defence to answer. Lastly, the Defendant or respondent may elect to make a no case submission where- upon he may be put to an election by a trial judge. This no case submission is to the effect that even if the whole of the evidence led by the plaintiff is admitted there is no prima facie case made out by the Plaintiff or Petitioner.

Mohammed Lawal Garba, JCA of the Court of Appeal of Nigeria in the Presidential Election Petition between ***ATIKU ABUBAKAR & ANOTHER v INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC) & 2 Others, PETITION NO. CA/PEPC/002/2019, dated 11th September 2019 stated:***

> *"The trite position of the law is that a Defendant to an action or a Respondent in an election Petition is entitled to rest his case on that of the Claimant or the Petitioner where he has, through devastating cross-examination, elicited or extracted sufficient evidence to support and prove the facts or assertions contained in his pleadings. In such circumstance, a Defendant or Respondent can decide not to call any witness. It does not amount to not calling evidence or failure to call evidence."*

The Nigerian Court of Appeal, in coming to the above conclusion, relied on the dictum of Justice Kekere-Ekun, JSC in the case **of *PASTOR IZE-IYAMU ANDREW & ANOR v INEC [2018] 9 NWLR (PART 1625) 50 7 @ 582E-F*,** where the Supreme Court held:

"Evidence elicited from a party or his witness under cross-examination, which goes to support the case of the party cross-examining, constitutes evidence in support of the case or defence of the party. If at the end of the day the party cross-examining decides not to call any witness, he can rely on the evidence elicited from cross-examination in establishing his case or defence. One may however say that the party called no witness in support of his case, not evidence as the evidence elicited from his opponent under cross-examination which is in support of his case or defence, constitutes his evidence in the case. The exception is that the evidence so elicited under cross-examination, must be on facts pleaded by the party concerned for it to be relevant to the determination of the question/issue in controversy between the parties, having regard to the fact that the relevant evidence elicited from the appellants relate to the facts pleaded by way of defence to the action, they form part of the respondent's case and can be relied upon by the respondents in establishing their defence to the action without calling witnesses to further establish the said defence."

This Court therefore after the Respondents have decided not to call witnesess, directed the parties in the petition, to file their closing addresses or submissions for consideration by the Court in resolving the issues set down for trial.

SUBMISSIONS BY THE PETITIONER AND THE RESPONDENTS.

The Respondents filed their written submissions as directed by this Court on 17th February 2021. Petitioner, on the other hand, did not comply with the directives of the Court to file his closing address or submission by the close of 17th February, 2021. He, however, later sought leave of the Court to file it out of time which the Court granted.

He therefore filed his submission or closing address on the 23rd of February 2021. We shall refer to the relevant portions of the submissions or closing addresses when necessary, in addressing the issues set down for determination.

EVALUATION OF THE EVIDENCE ON RECORD AND THE DECISION OF THE COURT

This Court set down five (5) issues for determination. These are:

1. **Whether or not the Petition discloses any reasonable cause of action.**
2. **Whether or not based on the data contained in the declaration of the 1st Respondent of the 2nd Respondent as President-Elect, no candidate obtained more than 50% of the valid votes cast as required by article 63(3) of the 1992 Constitution.**
3. **Whether or not the 2nd Respondent still met the article 63(3) of the 1992 Constitution threshold by the exclusion or inclusion of the Techiman South Constituency Presidential Election results.**
4. **Whether or not the declaration by the 1st Respondent dated 9th December, 2020 of the results of the Presidential elections conducted on the 7th December, 2020 was in violation of article 63(3) of the 1992 Constitution.**
5. **Whether or not the alleged vote padding and other errors complained of by the Petitioner affected the outcome of the Presidential election results of 2020.**

We shall now address the issues settled for determination in this petition.

ISSUE 1

REASONABLE CAUSE OF ACTION

The first issue is whether or not the petition discloses a reasonable cause of action. Though this issue was raised by the Respondents as a preliminary point, the court decided to deal with it alongside the determination of the substantive issues settled for the trial. The court accordingly ordered the parties to file their respective submissions on

the issue. The case of the Respondents on this issue is that examining the petition and considering the reliefs thereof, no reasonable cause of action has been raised to properly invoke the jurisdiction of the court, under Article 64 of the 1992 Constitution, and for that matter the petition should be dismissed summarily.

According to the respondents the Petition does not challenge the voting process and the counting of ballots neither does the Petition challenge the collation of votes from the polling stations through to the National Collation Center and the declaration of the results of the Presidential Election. The Respondents argued further that the thrust of the petitioner's complaints relates to the errors contained in the declaration of the winner of the Presidential Election by the Chairperson of the 1st Respondent on the 9th December 2020, and the subsequent correction of the errors. The Respondents posited that the facts alleged in the petition and reliefs thereof do not meet the threshold of challenging the validity of the Presidential Elections as envisaged under Article 64 (1) of the 1992 Constitution.

The Petitioner opposed the preliminary objection and argued that the petition discloses a cause of action against the respondents.

The Petitioner argued, for example, that the petition alleges that the figures used by the Chairperson of the 1st Respondent to declare the results was in breach of the constitution; that the figures supplied by the 1st Respondent did not at all reflect the actual results of the elections; that the 1st Respondent officials padded votes in favour of the 2nd Respondent and also alleged wrong aggregation of votes. The Petitioner therefore submitted that the objection be dismissed.

It is trite that a party such as the Petitioner who initiates an action in court against another must have an accrued cause of action. A cause of action is the existence of facts which give rise to an enforceable claim or a factual situation the existence of which entitles one

to obtain from the court a remedy against another. Generally, before a party issues a writ, he must have a right recognized in law, which right has been violated by the defendant. In ascertaining whether the petition the subject of this action discloses a reasonable cause of action, it is important, that the court critically examine the petition so filed, in particular the grounds, the reliefs endorsed therein, and the answers filed by the Respondents, for the court to satisfy itself that on the face of the petition, triable issues have been raised. These issues could be issues of fact, law or both law and fact. We think that once the court is, satisfied that the issues raised in an originating process such as a petition or a writ is not frivolous then a cause of action has been disclosed to invoke the jurisdiction of the court.

In the case of **Daasebre Asare Baah II & 4 Others v. Attorney- General (2010) SCGLR 463,** this court speaking through Georgina Wood, CJ, stated thus:

> ***''to identify the real substances of actions brought before the court, we have observed that the proper approach is to examine the writ as well as the pleadings, in this type of litigation, the reliefs and the facts verified by affidavit……..''***

Further, it is always the duty of a court not to assume jurisdiction over a suit where the court had no jurisdiction over either the subject matter of the suit, the parties to the action or where a party to the suit is not clothed with capacity regarding the subject matter in issue. Again, a court may not assume jurisdiction over a case where issues of limitation, estoppel per rem judicata are raised, and proved as preliminary points. In the circumstances of any of the above being applicable the court ought not to assume jurisdiction to determine the merits of the case before it. In the absence of the existence of any of these factors the Court decided to incorporate its ruling on this issue in its final judgment.

In this petition, the Petitioner was one of the candidates who contested the Presidential Election held on the 7th of December 2020 and thus had the right to challenge the validity of the results declared by the Chairperson of the 1st respondent if he is so aggrieved. The Petitioner by this petition is challenging the act of the Chairperson of the 1st Respondent declaring the 2nd Respondent the winner of the elections on grounds that the 2nd Respondent did not cross the constitutional threshold of more than 50% votes. The Petitioner has also alleged wrong aggregation of votes and vote padding by officers of the 1st Respondent in favour of the 2nd Respondent. We are of the opinion that these allegations relate to the integrity of the election and if proved may impact the validity of the election. The allegations thus provide enough grounds for the invocation of the jurisdiction of this court under Article 64 of the 1992 Constitution and thus confer on the Petitioner a cause of action to initiate the action.

The 2nd Respondent at paragraph 23 of his written submissions in support of the preliminary objection did concede that the allegation of wrong aggregation of votes and vote padding could be described as irregularities in an election but the number of votes involved in the allegations cannot materially affect the outcome of the election. On this concession, as well as our own thinking, we are convinced that the Petition discloses a reasonable cause of action. We wish to state that a court called upon to decide whether or not a party has a cause of action must not dwell so much on the strength of that party's case, since that can only be determined if the matter is submitted to trial. For example, in this Petition, the court must assume jurisdiction in order to determine; whether the averments regarding the declaration of results and the issue of CI 135 are sustainable in law, whether there was vote padding and if so whether it had any impact on the results declared by the Chairperson of the 1st Respondent. On this issue therefore, the argument that the Petitioner may have a weak case is no good ground to summarily dismiss the

petition as contended by the respondents. ***See Appiah II v. Boakye (1993-94) 1GLR 417*****,** where this Court held that whenever the pleadings in a case raised some questions fit to be decided by evidence, the mere fact that a party's case or defence might be weak would be no ground for striking it out.

On this point, we agree with the decision in the oft-quoted case of **Dyson v. (1911) Attorney General 1KB 410** cited by counsel for the Petitioner on terminating proceedings without plenary trial. In that case Moulton LJ said at page 419 thus;

> ***''The court will not permit a plaintiff to be driven from the judgment seat without considering his right to be heard, except in cases where the cause of action is obviously and almost incontestably bad''***

Having carefully considered the pleadings especially the constitutional provisions referred to and the issues raised by the parties, it is our view that this petition is not incontestably bad in law, or frivolous and vexatious such that it ought to be summarily dismissed. Any alleged breach of the fundamental law of the land must be carefully examined by this court as the only court clothed with jurisdiction to do so. It is on the basis of these reasons that we hold that the preliminary objection raised by the respondents herein should be overruled for the petition to be determined on the merit.

ISSUE 2

VALIDITY OF THE DECLARATION OF THE RESULT OF THE PRESIDENTIAL ELECTION

We will now address issue (2), which is 'whether or not based on the data contained in the declaration by the 1st Respondent of the 2nd respondent as President –elect no candidate obtained more than 50% of the valid votes cast as required by Article 63 (3) of

the 1992 Constitution.' The source of this issue could be traced to the errors in the declaration made by the Chairperson of the 1st Respondent on the 9th of December 2020. In that declaration which was tendered as Exhibit 'A' by PW1, Mr Asiedu Nketia, the Chairperson of the 1st Respondent was seen and heard giving the particulars of the total votes of each of the twelve candidates obtained at the end of the polls excluding the votes from Techiman South Constituency, which was still outstanding. There is no doubt that in providing particulars of the votes cast, the Chairperson of the 1st Respondent announced the figure 13,434,574, when she was referring to the total valid votes cast, which was in actuality 13,121,111. As a result of this erroneous reference, the petitioner pleaded at paragraphs 6, 7, 8, 9 and 10 of the petition, which are re-produced as follows:

> ***"6. Purporting to declare the results, Mrs Jean Adukwei Mensa, Chairperson of 1st respondent and the Returning Officer for the Presidential Election said: "At the end of the transparent, fair, orderly timely and peaceful Presidential Elections the total number of valid votes cast was 13,434,574 representing 79% of the total registered voters''***
>
> ***7. In the declaration, Mrs Jean Adukei Mensa, Chairperson of 1st respondent and the Returning Officer for the Presidential Election, further said that 2nd respondent of the NPP obtained 6,730,413 votes being 51.595% of the total valid votes cast.***
>
> ***8.The claim that the percentage of the total votes cast was 51.595% of the total valid votes that she herself distinctly stated to have been 13, 434, 574, was manifest error, as votes cast for 2nd respondent would amount to 50% and not the 51.595% erroneously declared.***
>
> ***9.Mrs Jean Adukwei Mensa, Chairperson of 1st respondent and the Returning Officer for the Presidential Election, further declared that: "John Dramani***

Mahama of the NDC obtained 6,214,889 votes, being 47.366% of the total valid votes cast.

10. From the total valid votes cast of 13,434, 574, the petitioner's percentage would be 46.260% and not the 47.366% erroneously declared.''

From the evidence on record, it seems the petitioner built his case around this figure of 13,434,574 erroneously announced by the Chairperson of 1st Respondent as the total valid votes cast. The description she gave to this figure was wrong. Exhibit 'A' which is a video clip of the declaration gave details of all the votes obtained by all the Presidential candidates and this gave a total valid votes cast of 13,121,111. Out of this figure the 2nd respondent Nana Akufo-Addo of the NPP obtained 6,730, 413, while the petitioner, John Dramani Mahama obtained 6,214,889.

The evidence on record is that the Chairperson of 1st Respondent having detected the error in announcing the figure of 13,434,574 as the total valid votes cast corrected the error and issued a Press Release on the 10th of December 2020. The thrust of the issue under consideration is the error in the description of figures quoted by the Chairperson of 1st respondent while declaring the results of the Presidential Election.

In this petition, evidence has been adduced through PW1, Mr Asiedu Nketia to show that the actual total valid votes cast excluding the votes from Techiman South at the time the declaration was made was 13, 121,111. This figure has been admitted by the Petitioner in paragraph 12 of his petition which reads as follows;

''12. If the total number of valid votes standing to the names of each of the Presidential Candidates is summed up, this would yield a total number of valid votes cast of 13,121,111, a figure that is completely missing from the purported

declaration by Mrs Jean Adukwei Mensa on 9th December 2020 and the purported rectification on 10th December 2020.''

In law a party is bound by his pleadings and the only way he could free himself from the averments in a pleading is through amendments. See **Hammond v Odoi (1982-83) 2 GLR 12 15.**

The above pleading was supported by the evidence of PW 1 Mr Asiedu Nketia while under cross-examination on the 1st of February 2021, by counsel for the 2nd Respondent. The relevant part of the cross-examination is reproduced below:

"Q. I am saying that from the declaration in the video clip that we just saw, which really is the basis of all your case, and you should know what is in it, the total number of valid votes that 2nd Respondent obtained is 6,730,413?

A. That is correct my Lords.

Q. The total number of votes that the petitioner obtained from the declaration announcement, your exhibit 'A' is 6,214,889?

A. That is so my Lords.

Q. And I am also putting it to you that if you do a sum of these valid votes……

By Court: You asked this question about an hour ago more than once or twice and it has been answered.

Q. ***Can you tell the court what is 6,730, 413 as a percentage of 13,121,111?***

A. My Lords is 51.29453 ad infinitum. So it can be round up to 51.295%.

Q. So 51.295% not so?

A. Yes

Q. What about the Petitioner, his total valid votes are 6,214,889. What is this sum as a percentage of 13,121,111?

A. It is 47.365569 ad infinitum. So it can be rounded up to 47.366%

Q. So you admit that from the Chairperson of 1st Respondent's declaration on 9th December, 2ndRespondent crossed the more than 50% threshold?

A. From the declaration as announced……..

Q. From the figures that we just calculated, these figures which were announced, if you do them as a percentage of the actual total valid votes, these are the percentages you get for the petitioner and the 2nd Respondent. That is what I am putting to you?

By Court: Mr. Akoto Ampaw, when you recapture your question, this is what raises a difficulty. Your previous was, the 2nd Respondent crossed the 50% threshold. In recapturing, you changed the second part. So kindly stick to the question.

Q. I am saying that from the calculation of the figures of Petitioner and 2nd Respondent, 2nd Respondent clearly crossed more than 50% threshold?

A. Well if the figures are correct, yes.

Q. Again, you see that when you calculated the percentage for the 2nd Respondent you came to a figure of 51. 295%?

A. Yes my Lords."

Now, from the pleadings of the Petitioner at paragraph 12 thereof and the evidence elicited from Mr. Asiedu Nketiah, as shown above, there is no doubt that the Petitioner accepts that the total valid votes cast was 13, 121,111 and not the figure 13,434,574 erroneously described by the Chairperson of 1st Respondent on the 9th December 2020.

Having determined on the evidence adduced at the trial that the total valid votes cast was 13, 121, 111, there is no legal basis for anyone to contend that a different figure of 13, 434, 574 be used as the total valid votes cast in measuring the more than 50% threshold required under Article 63 (3) of the 1992 Constitution.

Indeed, PW1, Mr. Asiedu-Nketiah under cross-examination on the same 1st February, 2021 by counsel for 2nd Respondent admitted that it will be wrong for anybody to use the total votes cast to measure the threshold. PW1 testified under cross-examination as follows:

> **"Q. So you admit that it is completely wrong for anybody to use the total votes cast as a basis for determining the percentage of votes obtained by different candidates?**
>
> **A. Yes**
>
> **Q. Anybody who does that, he cannot be accepted anywhere in Ghana.**
>
> **A. Yes, my Lord."**

The cross-examination of PW1 continued on the same day as follows:

> **"Q. I am putting it to you that you used this erroneous figure as a basis for calling for your re-run?**
>
> **A. The question again, I want to get the question again so I can answer.**
>
> **Q. You cannot use that wrong figure as a basis for your claim that there should be a re-run between the 2nd Respondent and the petitioner.**
>
> **A. Yes, my Lord."**

By the above evidence, PW1, Mr Asiedu –Nketiah conceded that the figure representing total votes cast, that is 13,434,574, cannot be the basis for measuring the more than 50%

threshold required for a candidate to be elected the President, under **Clause 3 of Article 63** of the **1992 Constitution** which provides thus:

> ***"A person shall not be elected as President of Ghana unless at the presidential election the number of votes cast in his favour is more than fifty per cent of the total number of valid votes cast at the election."***

The above provision of the Constitution is clear, that the threshold to be crossed by a candidate declared as President should be more than fifty percent (50%) of the total **valid** votes cast and not the total votes cast.

From the evidence on record, it is clear to us that it is absolutely wrong to hold on to the error committed by the Chairperson of 1st Respondent in announcing the total votes cast when from the data used in announcing the results the true figure representing the total valid votes cast actually totalled and was known to be 13,121,111. The evidence also is that this error was corrected. More so, there is no evidence on record showing that the error and subsequent correction had any adverse impact on the result so declared. As demonstrated, the candidate declared as winner still passed the more than fifty percentage threshold as required by Clause 3 of Article 63 of the 1992 Constitution.

It has also been argued on behalf of the petitioner that the Chairperson of 1st Respondent could not have on her own corrected the error she made, without consulting the stakeholders of the 2020 Presidential Election.

No statute or Regulation was cited to us by Counsel for the Petitioner for this submission and our collective industry has not revealed any. This submission does not find favour with the court in view of Article 297(c) of the 1992 Constitution, which provides thus:

> ***"297. In this Constitution and in any other law:-***

(c) where a power is given to a person or authority to do or enforce the doing of an act or a thing, all such powers shall be deemed to be also given as are necessary to enable that person or authority to do or enforce the doing of the act or thing.''

It is also important to make reference to section 22 of the Interpretation Act, 2009 Act 792, which deals with omission and errors in the course of executing administrative or executive functions. The section provides as follows:

'' 22 (1) Where an enactment confers a power or imposes a duty on a person to do an act or a thing of an administrative or executive character or to make an appointment, the power or duty may be exercised or performed in order to correct an error or omission in a previous exercise of the power or the performance of the duty.''

We are therefore of the considered opinion that the Chairperson of the 1st Respondent had the right to effect the correction she made when she erroneously referred to total votes instead of the total valid votes cast in the declaration.

In concluding this issue, we hold that there is evidence on record to show that based on the data contained in the declaration of the Chairperson of the 1st Respondent, the 2nd respondent obtained more than 50% of the valid votes cast as required by Article 63(3) of the 1992 Constitution.

ISSUE 3

EFFECT OF TECHIMAN SOUTH CONSTITUENCY PRESIDENTIAL ELECTION RESULT

The next issue is whether or not the 2nd respondent still met the Article 63 (3) of the 1992 Constitution threshold by the exclusion or inclusion of the Techiman South Constituency Presidential Election results. This issue is partly addressed by the resolution of issue (2)

above. The declaration by the Chairperson of 1st Respondent which was tendered in evidence by Mr. Asiedu Nketiah as Exhibit 'A', clearly shows that the votes declared was without the votes from Techiman South Constituency. It thus shows that from evidence on record, as already held, without the votes of Techiman South Constituency, the 2nd respondent satisfied the threshold of more than 50% of the valid votes cast. The evidence on record adduced through the cross-examination of PW1, Mr. Asiedu Nketiah, as demonstrated above, confirms that the 2nd respondent obtained 51.295% of the total valid votes cast excluding the votes from Techiman South constituency.

What was the result, when the votes from Techiman South Constituency Presidential election were added to the respective votes of the 2nd Respondent and the petitioner? It is important to state that at the time the petition was filed the results of the Presidential Election at Techiman South constituency had been announced. The result of the Techiman South constituency was part of Exhibit 'E' which was tendered by PW1, Mr. Asiedu-Nketiah. The evidence on record clearly shows that even though PW1 complained about the tabulation of the total valid votes and the total votes cast, the votes obtained by the individual candidates were not challenged. The results were certified by agents of the petitioner and the 2nd Respondent. According to Exhibit 'E', out of the total voting population of 128,018, the total valid votes cast was 99,436 out of which the petitioner obtained 52,034 increasing his National total valid votes to 6,266,923 **(6,214,889+52,034)**. The 2nd respondent also obtained 46,379 bringing his National total valid votes obtained to 6,776,792 **(6,730,413 + 46,379)**

It has been established without any dispute whatsoever that the national total valid votes cast without the votes from Techiman South was 13,121,111, so adding the total valid votes from Techiman South will give a National valid votes cast as 13, 220, 547 **(13,121,111 + 99,436).** From the calculations above, the total valid votes obtained by the 2nd Respondent was 6,776, 792 which gives a percentage of the total National valid votes for

the 2nd respondent as 51.259%. The computation therefore shows clearly that with the inclusion of the Techiman South constituency Presidential results, the 2nd respondent nonetheless made the more than 50% threshold required under Clause 3 of Article 63 of the 1992 Constitution.

It has been argued by the Petitioner that going by the announcement of the Chairperson of the 1st respondent, the 2nd respondent would not have obtained the more than 50% threshold if all the votes of Techiman South was allocated to the petitioner. This will mean crediting the Petitioner with all the 128, 018 votes being the total voter population of the Techiman South constituency, on the presumption that every registered voter did vote and there were no rejected ballot. The Petitioner would have obtained 6,342,907**(6,214,889 +128,018),** and this would also have increased the National total valid votes to 13, 249, 129 (**13,121,111 +128,018).**

With this scenario, the total valid votes obtained by the 2nd Respondent would remain 6,730,413, meaning that the 2nd Respondent obtained zero votes in Techiman South Constituency. The 2nd Respondent's votes expressed as a percentage of the total valid votes cast (13,249,129) will still give 2nd Respondent 50.7989% of the valid votes cast thus meeting the threshold required of Article 63(3) of the 1992 Constitution.

The above analysis which is based on the scenario that the 2nd Respondent did not gain any valid vote in Techiman South Constituency is very inaccurate and misleading since the results from that constituency were known, even before the Petition was filed in this Court. The end result is that the 2nd Respondent still met the threshold of more than 50% of the total valid votes cast with the exclusion or inclusion of the Techiman South Constituency Presidential election results.

Contrary to counsel for the Petitioner's written address that paragraph 13 and 14 of the Petition stands unchallenged on record by virtue of Order 23rules (1) and (3) of the High

Court (Civil Procedure) Rules, C I 47 since the 1st Respondent failed to answer the Notice to Admit Facts served on it the petitioner tendered Exhibit 'B' the Press Release of the 1st respondent dated 10th December 2020.

The pleadings, Exhibit 'B' and the testimony of PW1 spoke to issues raised in this request to Admit facts.

We have already held that the correction made by the Chairperson of the 1st respondent in the Press Release was within her mandate by virtue of Article 297 (c) of the 1992 Constitution and section 22 (1) of the Interpretation Act 2009, Act 792.

Scondly,PW1 Johnson Asiedu Nketia under cross examination admitted that the total valid votes obtained by all the twelve Presidential candidates captured in Exhibit 'A' is 13, 121, 111.

As a matter of law regarding the application of Order 23 of CI 47, we must make it clear that with the coming into force of CI 99 no party in a Presidential election dispute can arrogate to himself or apply the rules of other courts without this Court's expressed adoption of those rules. There was no application to invoke Order 23 of CI 47 before this Court.

ISSUE 4

WHETHER THE DECLARATION OF 9TH DECEMBER WAS IN VIOLATION OF ARTICLE 63(3) OF THE 1992 CONSTITUTION?

This issue seeks to ascertain whether on the 9th of December, 2020, the 1st respondent who was also the Returning Officer of the Presidential Elections declared a candidate who contested the elections as having been validly elected President when that candidate did not meet the required 50% threshold under Article 63 (3) of the 1992 Constitution.

The case put up by the Petitioner that has generated this issue has been particularly set out in paragraphs 26, 27,28, and 29 of the Petition which for purposes of emphasis are reproduced as follows:

''26. The gazette notice of the outcome of the Presidential Election is required to be based on the declaration actually made by Mrs Jean Adukwei Mensa as the Chairperson of the 1st Respondent and the Returning Officer of the results of the Presidential Election.

27. The gazette notification contained in CI 135, being notification of the public declaration made by Mrs Jean Adukwei Mensa on the evening of 9th December,2020 is also unconstitutional, null and void of no effect whatsoever and therefore liable to be set aside.

28. On 10th December, 2020, an unsigned Press Release of 1st Respondent claimed that its Chairperson, Mrs Jean Adukwei Mensa had ''inadvertently'' used the figure of 13,433,573 for the total valid votes cast. The said release claimed that '' the total valid votes cast is not 13,119,460. A copy of the Press Release is attached and marked as exhibit 'D' and available on the 1st respondent website; www.ec.gov.gh as at 11:45 hours GMT on the 29th December 2020.

29. In this purported corrective Press Release, 1st Respondent introduced two completely new figures of the total votes in the Presidential Election. Thus there was no correction properly so called, since to be valid, a correction of a prior mistake must correctly name the mistake to be corrected. In this case, the mistake to be corrected was itself mistakenly stated. The numbers 13,434,574 and 13,433,573 are completely different with a margin of 1001 votes.''

Both the 1st and 2nd Respondents have made specific denials of these averments in their respective answers to the Petition. The 1st Respondent in denial of these allegation averred as follows:

''1st Respondent therefore says that the Petitioner's simulation of the results which deliberately uses and relies on the total number of votes cast, which was inadvertently mentioned as total number of valid votes at the Press Conference to arrive at the conclusion that the percentage of valid votes for 2nd Respondent would not meet the Article 63 (3) threshold is misleading, untenable and misconceived.''

The 2nd Respondent denial as particularly averred to in paragraph 30 of his amended answer to the petition is as follows:

'' 2nd Respondent does not admit paragraphs 28 and 29 of the Petition and says in further answer thereto, that in any event, the margin of 1001 votes contained in the alleged error, cannot, under any circumstance affect the outcome of the election, even if added to Petitioner's votes''.

It is this conflicting positions of the parties which have engendered the setting down of the above issue for determination by this court. As was accentuated by this court per Benin, JSC in the case of ***Sarpong (decd) (substituted by) Koduah v Jantuah (2017-20) 1SCGLR 736 at page 747,*** the principle of law is that the burden of persuasion rest with the person who substantially asserts the affirmative of the issue on the pleadings and this is the principle of law that has been unremittingly followed by our courts for decades. By law therefore, the burden of persuasion on this issue is cast squarely on the Petitioner.

Besides, there is a constitutional presumption of validity of the Constitutional Instrument in which a person is named as President of Ghana in the outcome of a Presidential Election. This has been provided for under Article 63(9) of the 1992 Constitution as follows:

''An Instrument which-

a. is executed under the hand of the Chairman of the Electoral Commission and under the seal of the Commission; and

b. states that the person named in the instrument was declared elected as the President of Ghana at the election of the President;

Shall be prima facie evidence that the person named was so elected.''

The presumption above is reverberant of the statutory presumption that is provided for in section 37 of the Evidence Act 1975 (NRCD 323), which is reproduced below as follows;

'' 37(1) It is presumed that official duty has been regularly performed.''

Expatiating on the scope of the application of section 37 (1) of the Evidence Act, Aikins, JSC delivering the judgment of this court in the case of ***Brobbey and Others v Kwaku (1995-96) 1 GLR 125*** observed thus

''This states the common law presumption of Omnia Praesumuntur rite esse acta and the Commentary on the Evidence Decree confirms at page 31 that it is generally applied to judicial and governmental acts but may also be applied to duties required to be performed by law''.

Accordingly, a presumption is thus a rule of law, statutory or judicial, which leads to a decision on a particular issue in favour of the party who establishes it or relies upon it, unless it is rebutted. In Halsbury's Law of England, fourth edition Re-issue Volume 11(2) at paragraphs 1008-1009 page 883 which deal with rebuttal presumptions of law, the authors lucidly state the presumption thus:

''A rebuttable presumption of law is one which leads to a decision on a particular issue in favour of a party who establishes it or relies upon it, unless it is rebutted. Rebuttable presumptions of law may be created by statute or may exist at common law, and may cast either a legal or an evidential burden on the party seeking to rebut the presumption.''

The presumption that is raised in Article 63(9) of the 1992 Constitution undoubtedly is a rebuttable one as the 1992 Constitution makes room for the contestation of the Instrument aforesaid. Being a rebuttable presumption therefore, there is no gainsaying that the onus of its rebuttal lies on the party against whom the presumption operates. The onus of rebuttal of this prima facie evidence that the 2nd Respondent was validly elected in accordance with the provisions of Article 63(3) of the 1992 Constitution thus rests on the Petitioner who has mounted a challenge against the said process.

In the instant Petition, two statutory presumptive situations exist. Section 37 of Evidence Act creates the presumption that the Chairperson of the 1st Respondent regularly performed her constitutional and statutory duties during the Presidential Election of 7th December, 2020 leading to the declaration of the results made on 9th December, 2020, unless otherwise rebutted by admissible, cogent and credible evidence pointing to the contrary. Additionally, the effect of the Instrument under the hand of the Chairperson of the 1st Respondent i.e. the Declaration of the President-elect Instrument 2020 (CI 135) constitutes prima facie evidence that the 2nd Respondent was duly and validly elected pursuant to Article 63(3) of the 1992 Constitution. 2020. Thus the presumption created by the combined effect of the two provisions which are constitutional and statutory can only be dislodged or displaced by sufficient evidence in law.

It is our considered opinion that the error in the declaration made by the Chairperson of the 1st Respondent in the declaration of the results on the 9th December, 2020, which error, was acknowledged and corrected and which in reality did not adversely affect the electoral fortunes of any of the candidates who contested the Presidential Election including the Petitioner herein, is insufficient to rebut the presumption aforesaid.

We have already determined in this judgment that in her declaration of 9th December 2020, the Chairperson of the 1st respondent erroneously announced the figure of 13,434,574 as the total valid votes cast instead of 13,121,111, which excluded the votes from Techiman South Constituency. We have demonstrated that the figures announced in the declaration which is contained in Exhibit 'A' in reality represented the true will of the voters, in that no credible evidence has been adduced to challenge any of the figures allotted to the respective candidates from the Polling Stations.

The complaint of the petitioner relating to Exhibit 'A', is about the error committed by the Chairperson of the 1st respondent.

The evidence on record was that this error was corrected the very next day after the declaration on the 10th of December 2020 through a Press Release. There is no dispute that the Chairperson of the 1st Respondent committed an error when she made the declaration. We are however satisfied from the evidence on record that, the figures announced as representing the valid votes obtained by the respective candidates were right and represented the will of the voters. We therefore hold that the error committed by the Chairperson of the 1st Respondent cannot void the declaration, which actually announced the true wishes of the voters. To hold otherwise, will mean that errors in statement and numbers committed by the Chairperson of the 1st Respondent in an election, which do not impact on the outcome of the result, could nullify the actual result.

Indeed, as discussed earlier in this judgment there is ample evidence that the figures that were announced by the Chairperson of the 1st Respondent clearly gave the 2nd Respondent, total valid votes of 6, 730, 413, which represents 51.295% of the total valid votes of 13,121,111. This satisfied the more than 50% threshold of valid votes as required under Clause 3 of Article 63 of the 1992 Constitution. The declaration by the 1st Respondent therefore did not violate Clause 3 of Article 63 of the 1992 Constitution.

The thrust of Petitioner's case is that by the collated figures, none of the candidates obtained more than the 50% threshold required under Article 63(3) of the 1992Constitution and as such the 1st respondent should be ordered by this court to conduct fresh elections between the 2nd respondent and the Petitioner. However, the Petitioner has failed to adduce any credible evidence to establish his claim that none of the Candidates obtained more than the 50 % threshold. PW1, Mr. Asiedu Nketiah, testified under cross –examination that even though the petitioner had all the documents that the 1st respondent used to collate the results from the Polling Stations to the Regional Collation Center, the Petitioner decided not to tender them in evidence to support the petition.

Under cross-examination by Counsel for the 2nd respondent on the 1st of February 2021, this is what PW1 said among others:

"Q. As you know, all the documents that the EC was using to collate the results from the Polling Stations right up to the Regional Centre, you had carbon copies of them, didn't you?

A. Yes we do

Q. And I am saying that you have not put together your carbon copies to show that indeed nobody won the elections?

A. Yes, my Lords because that is not the purpose of our petition. We did not come to court to take over the work of the Electoral Commission. But we are entitled if we see the results are flawed, they are not borne out of data, we are entitled to challenge and insist that we must have a credible results and a declaration that is on the votes that were cast at the polling stations

Q. I am saying that you have not provided any basis of your own for your call for a runoff?

A. No my Lords, we have not brought that data here, we did not consider it necessary to bring any such data here.''

The evidence is thus clear that the Petitioner failed to lead credible evidence to prove his case that none of the candidates who contested the Presidential elections with him made the more than 50% threshold as required by Clause 3 of Article 63 of the 1992 Constitution and so there should be a re-run. All the petitioner sought to do by way of evidence was to tender Exhibit 'A' to demonstrate that the Chairperson of the 1st respondent committed errors in making the declaration, but as already stated that error could not take away the valid votes of the people.

Having held that the declaration by the Chairperson of the 1st respondent on the 9th of December 2020, did not violate Article 63(3) of the 1992 Constitution, we will end the resolution of issue (4) with two admonitions. The first is that of our esteemed brother Baffoe- Bonnie, JSC in the case of **Akufo –Addo and Others v Mahama & Another (supra) at page 439:**

''Elections are complex systems designed and run by fallible human beings. Thus, it is not surprising that mistakes, errors or some other imperfection occur during an election. Because absolute electoral perfection is unlikely and because finality and stability are important values, not every error, imperfection, or combination of problems found in an election contest, voids the election or changes its outcome……''

The second is to express our extreme disagreement with these positions that petitioner literally hangs all his reliefs on. The Petitioner attacked the oral declaration made by the Chairperson of the 1st Respondent in reliefs (a),(b) and (c), and consequently, sought an annulment of C.I 135 in relief (d). He also invited the court to injunct the 2nd Respondent from holding himself out as the President elect on the account of the errors described in

the declaration in his relief (e), and for the court to order a re-run between the petitioner and the 2nd Respondent on the account of the alleged effect of these errors in relief (f). But as shown from the evaluations and analysis above, it was part of the Petitioner's case in paragraph 6 of the petition that the first alleged error arose because of a mis-description of the number of total votes cast as ''total valid votes cast''. The Petitioner also asserted his knowledge of the total valid votes cast in paragraph 12 of his petition. And yet, the Petitioner is inviting this Court to ignore the substantive truth of the result of the election and give him reliefs on the basis of the errors pointed out in his own petition. He is also inviting the court to use the mistakes he has described to tamper with the true and known result of the Presidential Election and the will of the people.

By his relief (a), it is only when the court upholds the error in the description of total votes cast instead of total valid votes that the declaration will be in breach of Article 63 (3). Again by his relief (b), it is when the court ignores the substantive results of the election that it would declare that no candidate won more than 50% of the votes.

The Petitioner is making this claim knowing that if the Court agrees, the Court will essentially change the true outcome of the election. In the combined effect of reliefs (c) and (f), the Petitioner is asking this Court to find the oral declaration made on 9th December 2020 to be unconstitutional, null and void and yet for this Court to use void declaration to change the result of the election by ordering a re-run between the two leading candidates. These are submissions that must never appeal to any Court of justice, equity and good conscience.

ISSUE 5

THE ALLEGED VOTE PADDING

The last issue set down for this trial is whether or not the alleged vote padding and other errors complained of by the Petitioner affected the outcome of the Presidential Election results of 2020. The Petitioner has alleged in his petition that the 1st respondent favoured the 2nd respondent with padded votes totaling 5,662 in 32 constituencies. In proof of this allegation the Petitioner tendered through PW1, Mr. Asiedu Nketiah, Exhibit F, which is a spreadsheet covering sample details from 26 constituencies showing the alleged vote padding by certain officials of the 1st respondent in favour of the 2nd Respondent. It is pertinent to note that even though the pleadings of the petitioner alleges that the vote padding took place in 32 constituencies totaling 5,662 votes, PW1 in his witness statement testified that the vote padding rather took place in 26 constituencies and totaled 4,693 votes.

We also note that even though PW1, alleged in his witness statement that the vote padding was done by some officials of the 1st Respondent, his evidence did not name any alleged official. That leg of the allegation was not proved either.

The allegation of vote padding in favour of the 2nd Respondent was denied by both respondents. Having been so denied, one expected the petitioner to adduce credible evidence to prove same. However, the only evidence adduced on this issue was the tendering of Exhibit 'F', the spreadsheet containing samples from 26 constituencies showing the alleged vote padding.

To be specific, the allegation as stated at paragraph 36 of Mr. Asiedu Nketiah's witness statement, was that when the votes of 2nd respondent obtained in all polling stations as shown on their respective pink sheets in the 26 constituencies are aggregated, the resultant figure differs from the figure that was declared by 1st Respondent for 2nd Respondent as captured on the summary sheets of the respective constituencies. Having alleged as above, one expected that the pink sheets of the polling stations in the 26 constituencies would have been exhibited to prove the vote padding as alleged. This was

not done apart from the spreadsheet which was a self-serving document. PW1, Mr Asiedu Nketiah admitted that what he had tendered were only samples. But no effort was made to submit the rest if indeed they existed.

Besides the allegation of vote padding, the Petitioner also alleged that there was wrong aggregation of votes totalling 960 votes in favour of 2nd respondent. This was contained in Exhibit 'E' tendered by PW1, Mr. Asiedu Nketiah.

We find the allegation of vote padding very serious since its occurrence undermines the integrity of an election, its impact being that votes are unlawfully added to the votes of a candidate to increase the total votes of that candidate. We have observed already that this allegation was not proved as expected of the Petitioner. However, assuming the vote padding of 4,693 took place at all, in favour of 2nd Respondent as alleged by PW1 in Exhibit 'F', this court will then have to ascertain its impact on the final results declared by the 1st respondent.

Indeed, evidence on record clearly showed that the impact of the alleged vote padding even if proved would have been very insignificant and would not have materially affected the outcome of the elections. It would therefore not have been a proper ground for the annulment of the 2020 Presidential Elections. This is so because if one deducts the alleged votes padded from the total valid votes obtained by the 2nd respondent, he would still have crossed the more than 50% threshold required under Article 63(3) of the 1992 Constitution. This fact was established through the cross-examination of PW1, Mr. Asiedu Nketiah on the 1st of February, 2021 by counsel for the 2nd respondent as follows:

"Q. The original figure is 6,730,143 subtract from the 4,693 what do you get?

A. You get 6, 725,720.

Q. What is that figure as a percentage of 13,121,111?

A. 51.295%

Q. So you see, that even if we were to deduct your alleged padded votes from the vote of the 2nd respondent, he still crosses the 50+ threshold?

A. I disagree because samples cannot be subtracted from another population figure.''

We observe that PW1, from the above extract was merely being evasive, since it is obvious that if you took away the alleged padded votes of 4,693 from the total valid votes of the 2nd Respondent as at 9th December 2020, as shown above, the 2nd Respondent would still have obtained more than 50% of the total valid votes cast satisfying the threshold of Article 63 (3) of the 1992 Constitution.

On this issue we are settled in our minds that the allegation of vote padding though serious in an election such as the Presidential election, was not proved by credible evidence. Furthermore, even if the vote padding took place, same was not material or substantial to change the final results so declared by the Chairperson of the 1st respondent.

In holding that the impact of the vote padding if even proved could not have affected the declaration, we are emboldened by the decision of Lord Denning in the case of Morgan v Simpson (1975) 1 QB 151, which was cited by counsel for the Petitioner in his closing address. We observe however, that counsel for Petitioner only referred us to only one of the three propositions articulated by Lord Denning.

In that case Lord Denning summarized the duty of Courts in making declarations upon hearing election petitions. He stated three propositions as follows:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.

2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls, provided that it did not affect the results of the election.

3. But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls and it did affect the result then the election is vitiated.

When Lord Denning's propositions are read as a whole the combined effect of the propositions is that an election would be voided upon the occurrence of infractions that actually affects the votes of the citizens cast at the polling stations and not the incidence of administrative errors and or mistakes committed by officers charged with the conduct of such election.

We find this same sentiment expressed by our own eminent jurist Adinyira JSC, in the first Presidential Election petition case Akufo- Addo & Others v. Mahama & Others No. 4 (2013) SCGLR (Special Edition) 73. At page 237 to 238, her Ladyship had this to say:

''courts usually apply the election code to protect---- not to defeat the right to vote. Public policy favours salvaging the election and giving effect to the voter's intent, if possible. The right to vote is at the core of our democratic dispensation, a principle I have affirmed in this opinion with reference to the Tehn Addy and Ahumah- Ocansey line of cases (supra)''

CONCLUSION

We conclude this judgment by emphasizing that the Petitioner did not demonstrate in any way how the alleged errors and unilateral corrections made by the 1st Respondent affected the validity of the declaration made by the Chairperson of the 1st Respondent on the 9th December, 2020, as already stated in this judgment. The Petitioner has not produced any evidence to rebut the presumption created by the publication of C I 135 for which his action must fail. We have therefore no reason to order for a re-run as prayed by the Petitioner as in relief (f).

We accordingly dismiss the Petition as having no merit.

(SGD.) ANIN YEBOAH

(CHIEF JUSTICE)

(SGD.) Y. APPAU

(JUSTICE OF THE SUPREME COURT)

(SGD.) S. K. MARFUL-SAU

(JUSTICE OF THE SUPREME COURT)

(SGD.) N. A. AMEGATCHER

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