IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: DOTSE JSC (PRESIDING)

PWAMANG JSC

KOTEY JSC

OWUSU (MS) JSC

LOVELACE-JOHNSON (MS) JSC

TORKORNOO (MRS) JSC

MENSA-BONSU (MRS) JSC

WRIT NO.

J1/04/2020

25TH MAY, 2022

STEPHEN KWABENA OPUNI ..... PLAINTIFF

VRS

1. ATTORNEY-GENERAL

2. THE REGISTRAR ..... DEFENDANTS

(HIGH COURT, CRIMINAL DIVISION 1), ACCRA

JUDGMENT

MAJORITY OPINION

DOTSE JSC:-

PROLOGUE:-

We begin our decision in this case by referring extensively to the scholarly work of Prof. Kofi Kumado in his book, *" A Handbook of the Constitutional Law of Ghana and its History"* from pages 282-284 as follows:-

"Finally, by way of emphasis, we note that the position of the Supreme Court on its constitutionality powers under Article 2 (1) and 130 (1), as it has crystallised since the coming into force of the 1992 Constitution, has been succinctly summarised by Justice Akuffo in the ***Bimpong Buta v General Legal Council & Others, [2003-2004] 2 SCGLR 1206*** as follows:-

1. A person bringing an action under Article 2 of the Constitution 1992 **need not demonstrate that he has any personal interest in the outcome of the suit, that he as a citizen of Ghana suffices to entitle him to bring the action** ***(Tufuor v A.G. [1980] GLR, 637 SC and Sam (No.2) v A.G [2000] SCGLR 305).***
2. The "person" referred to in the context of Article 2 includes **both natural persons and corporate bodies** ***(NPP v A.G. CIBA case, [1996-97] SCGLR 729).***
3. The Supreme Court's power of enforcement under Article 2 of the Constitution, 1992 by exercise of its original jurisdiction, **does not cover the enforcement of the individual's human rights provisions,** that power by the terms of articles 33 (1) and 130 (1) of the Constitution 1992 **is vested exclusively in the High Court** ***(Edusei v A.G, [1998-99] SCGLR 1, Edusei (No. 2) v A.G. [1998-99] SCGLR, 753, Adjei-Ampofo v A.G [2003-2004] SCGLR 411).***
4. **Regardless of the manner in which they are clothed, where the real issues arising from a writ brought under Articles 2 or 130 (1) of the Constitution, 1992 are not, in actuality, of such character as to be determinable exclusively by the Supreme Court, but rather fall within a cause of action cognizable by any other court or tribunal of competent jurisdiction, this court will decline jurisdiction**

(Yiadom 1 v Amaniampong [1981] GLR 3, S.C, Ghana Bar Association v A.G. (Abban case) [2003-2004] SCGLR 250, Edusei No. 2 v A.G supra, Adumoa II v Twum II [2006] SCGLR 165.

In spite of the fact that the **Anin Doctrine has been clearly endorsed by the Supreme Court under the 1992 Constitution,** there have been some decisions or dicta of some members of the court which are not in consonance with it. (See dissenting opinion of Justice Atuguba in ***Osei Boateng v National Media Commission and Anr, [2012] 2 SCGLR 1038, National Media Commission v A.G. [2006] SCGLR 1, Agbevor v A.G. [2000] SCGLR 413, Adofo v A.G. [2005-2006] 42, Sumaila Bielbiel (No. 1) v Adamu Daramani & Anr. [2011] SCGLR 132, Amidu v A.G& Others review motion unreported judgment]7/10/2013"(now reported) as Amidu (No.3) v A.G (No.3) Waterville Holdings (BVI) Ltd. & Woyome (No.2) [2013-2014] 1 SCGLR 606)***per Dotse JSC who delivered the lead judgment.

The learned author continued thus:-

"In spite of the conflicting case law**, Date-Bah JSC's view on the subject is clearly preferable to the dissents against the Anin Doctrine and the present author agrees with him when he reiterates that:-**

It is only when an ambiguity, imprecision or lack of clarity in a constitutional provision exists that the Supreme Court may exercise its exclusive original enforcement jurisdiction under Article 130 (1) (a).

The preconditions specified above to the exercise of the Supreme Court's original enforcement jurisdiction under article 130 (1) (a) serves the useful purpose of enabling lower courts also to participate lawfully in the enforcement of provisions of the Constitution which are clear and unambiguous". See *Date-Bah*

S.K, Reflections on the Supreme Court of Ghana (London Wildy, Simmonds & Hill Publishing, 2015) page 43.

The learned author, Prof. Kofi Kumado concluded on page 284 of his book as follows:-

> "Besides, the additional value in allowing lower courts to participate in the enforcement of the provisions of the Constitution is that, given the very liberal access conditions to the Supreme Court provided by the Court, **the participation of lower courts saves the Supreme Court from becoming like "Makola Market" where everybody can shop needlessly resulting in the flooding of the Supreme Court. This flooding of the Supreme Court affects the court's ability to dispose of cases expeditiously.** When added to its other jurisdictions, we submit that it also adversely affects the quality of the court's output in constitutionality cases." Emphasis supplied.

WHAT THE PLAINTIFF CLAIMS IN THIS COURT

Before this court, the Plaintiff, a former Chief Executive of Ghana Cocoa Marketing Board who is standing criminal prosecution before the High Court, Criminal Division 1, Accra in Suit No. CR/158/2018 entitled ***Republic v Stephen Kwabena Opuni and 2 others*** instituted this writ claiming the following reliefs against the Defendants as follows:-

1. "Declaration that upon a true and proper interpretation of articles 19 (1) and 19 (2) (c) of the 1992 Constitution, the High Court (Criminal jurisdiction 1) in Suit Number CR/158/2018 entitled ***Republic v Stephen Kwabena Opuni & 2 Ors*** acted contrary to these provisions of the 1992 Constitution of Ghana when in its ruling dismissing the application for a submission of no case dated the 7th day of May 2021 it made final findings of fact specifically on pages 54, 55, 59, 66, 67 and 75, which presumed accused persons guilty **(albeit without using the word guilty)** in breach of the said articles 19 (1) and

2. An order expunging all final findings of facts against the accused persons in the said ruling of the High Court (Criminal Division 1) which presumed accused persons guilty of all the charges **for being inconsistent and in contravention of articles 19 (1) and 19 (2) (c) of the 1992 Constitution.**
3. A perpetual injunction restraining the High Court (Criminal Division 1) from continuing with the hearing of Suit Number C/158/2018 until all the final findings of facts made against accused persons which presumed them guilty are expunged.
4. Any further orders which this court may deem necessary to give full effect or to enable effect to be given to the letter and spirit of the 1992 Constitution."

FACTS PRECEDENT TO THE INSTANT WRIT

From the above, it is abundantly clear that the plaintiff's writ has been premised upon the Ruling delivered by the learned trial Judge presiding in the trial of the Plaintiff at the High Court, dated 7th May 2021 when he dismissed an application by the plaintiff herein on a submission of no case and directed the Plaintiff to open his Defence.

We wish to further explain that, the Plaintiff and two others have been facing criminal prosecution at the High Court since 2018 from acts relating to his tenure as Chief Executive Officer of Cocoa Marketing Board.

After the prosecution closed its case, the Plaintiff acting through his Counsel made a submission of no case. But as had been stated supra, this did not find favour with the court, which dismissed it and called upon the Plaintiff and the two others to open their Defence.

However, the Plaintiff herein, in Suit No. J5/58/2021 as an Applicant before this very court prayed for Certiorari and Prohibition in a case intitutled ***Republic v High Court,***

Criminal Division 1, Accra, Ex parte Stephen Kwabena Opuni, Attorney-General – Interested Party in which he claimed the following reliefs:-

"For Certiorari

1. Learned High Court Judge committed a grievous error of law apparent on the face of the record when contrary to the express provisions of statute and more specifically section 6 of the Evidence Act, 1975 (NRCD 323), he suomotu rejected exhibits 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74 and 75 after earlier admitting same during the hearing of the case without any objection from the Court or the Interested Party.
2. The learned High Court Judge committed a grievous error of law apparent on the face of the record when after earlier admitting exhibits 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74 and 75, he suomotu in his judgment rejected these exhibits **without giving Applicant an opportunity to be heard before the subsequent rejection as required under the rules of natural justice.**

And for prohibition

3. There is a real likelihood of bias on the part of the trial Judge, Clemence Jackson Honyenuga JSC sitting as an additional High Court Judge **in view of the fact that he has made final findings of facts and has predetermined and prejudged the case before hearing Applicant.**
4. There is a real likelihood of bias on the part of the trial Judge, Clemence Jackson Honyenuga JSC sitting as an additional High Court Judge in that in the said ruling he exhibited patent bias against the interest of the Applicant when he rejected exhibits 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74 and 75 which support the case of the Applicant but retained exhibits PP, LL series and MM series which are statements obtained in identical circumstances to support

the case of the Prosecution and which were tendered through the same PW7 by the Interested Party.

This court, by a majority of 3-2, granted the Plaintiff's application quashing part of the decision of the learned trial Judge in expunging the admitted exhibits and also prohibited the learned trial Judge from continuing with further hearing of the case.

However, the 1st Defendant, herein, therein Interested Party/Applicant considering the decision of the ordinary Bench to be fundamentally flawed, applied for a review of that decision claiming it had occasioned a substantial miscarriage of justice.

On the 26th day of October 2021 this court by a majority of 4-3 in CMJ7/20/2021 successfully reviewed the decision of the ordinary bench and restored the High Court decision in respect of the impugned exhibits and directed the Plaintiff and his other two accused persons to open their defence before the same court.

It is after the Plaintiff and the other accused persons have returned to the trial court and have duly opened their defence that this writ has been filed.

EVALUATION OF THE PLAINTIFF AND DEFENDANTS STATEMENT OF CASE

Plaintiff's Original Statement of Case in Support of His Writ

The Plaintiff filed a 20 paged Statement of case and attached to it an Exhibit marked as *"OWOP11"* on 24/11/2021 in support of the instant writ.

The catch and dominant prayer of the Plaintiff which runs through all his submissions in support of this writ can be summed up when learned Counsel for the Plaintiff, Samuel Codjoe states as follows on page 2 of the original Statement of case:-

> "In dismissing the applications, the learned trial Judge in his ruling made definite findings of fact which presumed all accused persons guilty for all offences charged. **Although the learned trial Judge did not use the specific**

word "*guilty*" the findings made by the trial Judge in the ruling is explicit and unambiguous to the effect that accused persons are presumed guilty of all the offences charged. This is in spite of the fact that the accused persons who pleaded not guilty are yet to open their defences." Emphasis

After referring to various other quotations from the ruling of the learned trial Judge on the submission of no case to justify the fact that, the learned trial Judge concluded that the Plaintiff herein and the other two co-accused persons are guilty of the offences charged, learned Counsel for Plaintiff, Samuel Codjoe reiterated his views again as follows:-

"It is our submission that all these final findings of fact as standalones and or when read together presumes accused persons guilty of the offences charged. This is at a time when accused persons have not yet opened their case and or pleaded guilty to the offences charged. This act of presuming accused persons guilty when they have not yet opened their respective defences is inconsistent and in contravention with the provisions of Articles 19 (1) and 19 (2) (c) of the Constitution, 1992 and therefore unconstitutional." Emphasis

At this stage, we consider it worthwhile to set out the provisions of Article 19 (1) and 19(2) (c) of the Constitution, 1992 upon which the plaintiff's instant action has been founded.

Article 19 (1)

"A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court."

Article 19 (2) (c)

" A person charged with a criminal offence shall

(c) be presumed to be innocent until he is proved or has pleaded guilty."

In a defensive approach, to justify why the Plaintiff resorted to the instant writ, learned Counsel for the Plaintiff referred to a plethora of cases which in substance indicates that, learned Counsel himself is conscious of the magnitude of the task ahead of him in convincing this court about the genuineness of the writ.

Reference to cases like ***Tufuor v Attorney-General, supra, New Patriotic Party v Attorney-General (31st December case) [1993-94] 2 GLR 35 at 168, per Hayfron Benjamin JSC, Awuni v WAEC [2003-2004] SCGLR 471 at 556 per Date-Bah JSC, Ampiah Ampofo v CHRAJ [2005-2006] SCGLR 227, Asare v Attorney-General [2012] 1 SCGLR 461 at 480, Asare v Attorney-General [2003-2004] SCGLR 823 at 834 per Date-Bah JSC, Republic v High Court, Accra; Ex-parte Yalley [2007-2008] SCGLR 512*** show and exemplify the said phenomenon.

Learned Counsel for the Plaintiff Samuel Codjoe then concluded that, from the decisions in the cases referred to above, it is clear that the preference of this court in interpretation of constitutional provisions is to adopt the purposive approach. Learned counsel also reiterated the view that, this court from its settled practice would only give an ordinary meaning to provisions of the Constitution when the ordinary meaning would reflect the legislative purpose.

Learned Counsel for the Plaintiff then embarked upon an exercise of referring to Black's Law Dictionary, 9th Edition in defining the key words in articles 19 (1) and 19 (2) (c) of the Constitution. We consider this exercise and invitation to the court as wasteful, unnecessary and not well intentioned.

We will summarily dismiss the said submissions as unworthy of any serious intellectual discourse bearing in mind the trajectory of this case especially the decision of this court in the Review decision in ***Republic v High Court, (Criminal Division 1) Ex-parte***

Stephen Kwabena Opuni, Attorney-General CM No. J7/20/2021, dated 26th October 2021 already referred to supra.

We have also evaluated the reference and reliance on the decision of this court in the case ***of Eric Asante v The Republic, Criminal Appeal No. J3/7/2013*** dated 26/01/2017 per our very distinguished brother Pwamang JSC and conclude without any hesitation that the said reference and its submissions are without any basis whatsoever and is not worth any further consideration save its dismissal in limine.

Again without any real or genuine inference, learned Counsel for the Plaintiff refers and relies on the cases of ***Sam (No.2) v A.G, supra, N.P.P v N.D.C [2000] SCGLR 461 and Agyei Twum v AG [2005-2006] SCGLR 732*** to reiterate the position that, whilst it is a requirement to prove the existence of personal interest in an action to enforce the fundamental human rights, there is no such requirement to prove the existence of a controversy or dispute in a claim by a Ghanaian citizen for a declaration that an act by any person is inconsistent and or in contravention of a provision of the 1992 Constitution.

The above rendition has already been eloquently stated in the prologue to this judgment. **The Plaintiff herein is in this court not as a citizen seeking interpretation or enforcement of a constitutional provision as has been clearly established by various decisions of this court and referred to as the *Anin Doctrine*, but as an interested party with a personal interest to enforce fundamental human rights provisions in Articles 19 (1) and 19 (2) (c) of the Constitution 1992**. Clearly, then it would appear that resort to the instant writ is misplaced and references to the decisions of this court in ***Bilson v Apaloo [1981] GLR 24, and in Bilson v A.G [1993-94] 1 GLR 104*** are inapplicable. This is because, it had been held by the decision of this court in the unreported Review decision dated 26/10/2021, ***Suit No. J7/20/2021 Republic v High Court, (Criminal Division 1) Ex-parte Stephen Kwabena Opuni,*** that the learned trial

Judge did not make any final conclusions in the matter and that ***"the trial Judge's ruling only connote the discharge of the evaluative duty placed on a Judge to connect the offences that an accused person is charged with, with the said accused, and an assessment of whether the prosecution has presented evidence on the state of mind of the accused, as they undertook the actions alleged to be the offences.***

The directions of Ali Kassena et al is for a court to do this, being mindful of the extremely high standard of proof required in criminal prosecutions, and nothing less." *Per TorkornooJSC.*

Based on the above submissions, learned Counsel for the Plaintiff, then reiterated their concluding prayers on page 17 of their Statement of case thus:-

> "We state that, the present case concerns an actual act of a trial Judge in making finding of fact presuming accused persons standing trial who are yet to open their defence **guilty albeit without using the word "guilty" of the offences charged."**

Plaintiff finally prays this court for the following:-

1. This court to make the necessary orders and directions to ensure compliance with the provisions of articles 19 (1) and 19 (2) (c) of the Constitution 1992.
2. An order from this Court to direct the trial Judge to expunge all findings of fact contained in the ruling of the learned trial Judge dated 7th May 2021 which presumed the Plaintiff and the other co-accused guilty **albeit without use of the specific words "guilty".**
3. That this court should restrain the learned trial Judge from continuing with the hearing of the trial until the impugned portions of the Ruling have been expunged.

DEFENDANTS ORIGINAL STATEMENT OF CASE IN ANSWER

In a 27 paged statement of case filed on behalf of 1st Defendant by learned Chief State Attorney, Mrs. Evelyn Keelson on 6th December 2021, the following important submission is made in paragraph 29

> "My Lords, the Plaintiff's writ which is disguised as a constitutional matter, only seeks to re-open the case comprehensively dealt with by this Honourable Court in exercise of its supervisory and review jurisdictions. It is our respectful contention that the instant action is a gross abuse of the original jurisdiction of the court. **The 1st defendant will accordingly apply, preliminarily, for the court to dismiss same."**
>
> Based on the above indication, learned counsel for the 1st Defendants posed the following valid question "**whether or not the Plaintiff has validly invoked the Supreme Court's exclusive original jurisdiction under articles 2 and 130 of the Constitution, 1992?"**

Learned counsel for the 1st defendant then referred to the case of ***Aduamoa II v Twum II [2000] SCGLR 165***, which set out this court's original jurisdiction under articles 2 (1) and 130 (1) of the Constitution as follows:-

Comment [HM1]: Spelling.

> *"The originaljurisdiction vested in the Supreme Court by articles 2 (1) and 130 (1) of the 1992 Constitution to interpret and enforce the provisions of the Constitution is* ***a special jurisdiction meant to be invoked in suits raising genuine or real issues of the interpretation of a provision of the Constitution or the enforcement of a provision of the Constitution. Or the question whether an enactment was made ultra vires Parliament, or any other authority or person by law or under the Constitution."*** Emphasis supplied

It bears emphasis that, the 1st Defendants also reiterated the principles of law stated in the prologue to this judgment, and relied on the decision of this court in the case of

Mayor Agbleze, Destiny Awlimey and Jean-Claude Koku Amenyaglo v The Attorney-General, Electoral Commission, Writ No. J1/28/2018 dated 28th November 2018, where the court after discussing a number of previous decisions came out with a pronouncement which we may refer to as the perfect re-statement of the ***Justice Anin Doctrine.***

WHAT THEN IS THIS ANIN DOCTRINE?

This has been captured from pages 279-281 of Professor Kofi Kumado's invaluable book referred to supra as follows:-

> *"Under the 1992 Constitution, the main provisions for invoking the constitutionality issue are Articles 2 (1) and 130 (1). The constitutionality issue can arise as the sole issue or as the collateral issue. The Supreme Court had earlier held that any Ghanaian may raise a constitutionality issue under the 1979 Constitution. Under the 1992 Constitution, this conclusion was affirmed and extended to cover a legal person.*
>
> The equivalent provision to Article 130 under the 1979 Constitution was Article 118. As under the 1992 Constitution, Article 118 gave exclusive original jurisdiction for the interpretation or enforcement of the Constitution to the Supreme Court. **The Court of Appeal explained the implications or the principles relating to this jurisdiction in the case of the Republic v Special Tribunal, Ex parte Akosah. Speaking for the Court of Appeal, Anin J. A. explained the principles as follows**:-

"From the foregoing dicta, we would conclude that an issue of enforcement or interpretation of a provision of the Constitution under article 118 (1) (a) arises in any of the following eventualities:-

(a) **Where the words of the provisions are imprecise or unclear or ambiguous.** Put in another way, it arises if one party invites the court to declare that the words of

the article have a double-meaning or are obscure or else mean something different from or more than what they say;

(b) Where rival meanings have been placed by the litigant on the words of any provisions of the Constitution;

(c) where there is a conflict in the meaning and effect of two or more articles of the Constitution and the question is raised as to which meaning shall prevail;

(d) where on the face of the provisions, there is a conflict between the operation of particular institutions set up under the Constitution, and thereby raising problems of enforcement and of interpretation.

On the other hand, there is no case of 'enforcement or interpretation' where the language of the article of the Constitution is clear, precise and unambiguous. In such an eventuality, the aggrieved party may appeal in the usual way to a higher court, against what he may consider to be an erroneous construction of those words; **and he should certainly not invoke the Supreme Court's original jurisdiction under article 118**. Again, where the submission made relates to no more than a proper application of the provisions of the Constitution to the facts in issue, **this is a matter for the trial court to deal with; and no case for interpretation arises.**

In the above quote, Justice Anin reinforces the distinction between interpretation or enforcement of the Constitution and the rules relevant thereto on one hand and application on the other hand. As laid down in the Maikankan case under the 1969 Constitution, the Supreme Court's exclusive original jurisdiction arises only if there is a case for interpretation or enforcement on the basis of the principles enunciated by him. Otherwise, any court may entertain the action by applying the Constitution." Emphasis supplied

PRELIMINARY ISSUES RAISED BY THE 1ST DEFENDANTS

Arising from the principles of law raised by 1st defendants, the following preliminary legal issues have been raised by them against the Plaintiffs invocation of this court's original jurisdiction in this case.

1. That the present action or writ is an abuse of the original jurisdiction of the court, and ought to be dismissed because of the following:-
    a. The reliefs being claimed by the plaintiff, being personal and human right in nature, are not fit for an invocation of the courts original jurisdiction.
    b. The instant action is a veiled action against an act or omission by a superior court and is therefore not amenable to the court's original jurisdiction.
    c. The substantive issues raised for determination in this action are res judicata.

In articulating their views on the above preliminary issues, it is interesting to observe that learned counsel for the 1st defendants referred to most of the cases listed in the prologue. Some of these cases are

- ***Sam (No.2) v A.G., supra***
- ***Adjei Ampofo (No.1) v Accra Metropolitan Assembly and Anr (No. 1) 2007-2008] SCGLR 611***
- ***Bimpong Buta v GLC and others supra***
- ***Gyimah & Brown v Ntiri (Williams- Claimant) [2005-2006] SCGLR 247***
- ***Republic v High Court, Accra (Commercial Division) Ex-parte Hesse (Investment Consortium Holdings SA & Scancom Ltd. –Interested Parties) [2007-2008] 2 SCGLR 1230***

Before concluding, her statement of case, learned Chief State Attorney for the 1st Defendants, Mrs. Evelyn Keelson responded to the substantive issues raised by the Plaintiff.

Learned Counsel submitted that**, in the unlikely event that this court does not find favour with the preliminary issues, the court must nonetheless dismiss the action because it is without any merit and substance whatsoever**.

Learned Counsel for the 1st Defendants further submitted that, there is actually no aspect of the learned trial Judge's decision on the submission of no case which is in breach of Article 19 (1) on fair hearing or 19 (2) (c) on the presumption of innocence.

Learned Counsel reiterated the point that, learned trial Judge duly performed the duties cast upon him by virtue of Sections 173-174 of the *Criminal and Other Offences (Procedure) Act 1960 (Act 30)* to evaluate the evidence adduced by the Prosecution whether a prima facie case had been established.

Learned counsel referred to the unreported decision of this court in the case of ***Asamoah v The Republic Suit No. J3/4/17 dated 26th July 2017*** which states that the learned trial Judge was not legally bound to give them a hearing before arriving at a decision under Sections 173 and 174 of Act 30 that a prima facie case had been made against them. Learned Counsel for the 1st Defendant also referred to the locus classicus case of ***Armah v The State [1961] GLR 136, SC at 141.***

Learned Counsel also referred to the unreported review decision of this court in Suit No. CM J7/20/21 intitutled ***Republic v High Court (Criminal Division 1) Ex-parte Stephen Kwabena Opuni, AG*** supra, per our distinguished sister TorkornooJSC.

In conclusion, learned counsel for the 1st defendants prayed this court that the plaintiff has not legitimately invoked the original jurisdiction of the court and accordingly urged this court to dismiss the plaintiff's writ as being vexatious, frivolous and unmeritorious.

DIRECTIONS BY THIS COURT ON 01/02/2022

When this suit came up for hearing on the 1st of February 2022, the court directed the parties and their Counsel to address in detail the preliminary legal issues raised by the 1st Defendants in paragraphs 4.0, 4.2 and 4.4 accordingly.

We have since observed that both the Plaintiff and the 1st Defendants complied with the orders of the court and filed their respective further statements of case on 7th February 2022.

JOINT MEMORANDUM OF AGREED ISSUES

Pursuant to Rule 50 of the Supreme Court Rules, 1996, C. I. 16, the parties have duly filed their joint memorandum of Agreed Issues.

On the 1st of March 2022, this court set down the issues in the memorandum of issues as follows:

1. Whether or not the instant action by the Plaintiff is an abuse of the original jurisdiction of the Supreme Court.
2. Whether or not the reliefs claimed by the Plaintiff in the instant action, being personal and human rights in nature, are fit for an invocation of the Supreme Court's original jurisdiction.
3. Whether or not the substance of issues raised in the instant action are res judicata.

We will thus proceed to discuss the issues raised in the memorandum of Agreed Issues seriatim.

ISSUE I

The facts in this case actually admit of no controversy whatsoever. These facts have already been set out supra.

ARGUMENTS OF DEFENDANTS IN SUPPORT

Learned Chief State Attorney, Mrs. Evelyn Keelson in her submission contended that the instant action by the Plaintiff is a flagrant abuse of the original jurisdiction of this court. The basis of this contention are two fold, namely:-

i. That the reliefs of the Plaintiff being personal and human rights in nature are not fit for the invocation of this court's original jurisdiction.
ii. That the substance of the matters raised in the Plaintiff's action have already been determined by this Court in Suit No. CM. No J7/20/21 dated 26th October 2021 supra, are res judicata and same ought not to be entertained further by this court.

WHAT CONSTITUTES ABUSE OF PROCESS

Even though learned Chief State Attorney Mrs. Evelyn Keelson rightly referred to the unanimous decision of this court in the case of ***NAOS Holding Inc. v Ghana Commercial Bank Ltd [2011] 1 SCGLR492,*** the principles upon which that decision was based has been firmly established and grounded in a long line of established locus classicus decisions of the English and local courts.

THE RULE IN HENDERSON V HENDERSON[1843 HARE 100

The doctrine of abuse of process, commonly referred to as the rule***in Henderson v Henderson*** supra, was set out by the English Court of Appeal in ***Barrow v Bankside Agency Ltd [1996] 1 WLK 257 at 260***. This rule in ***Henderson v Henderson*** is very well known. The rule is set out as follows:-

> *"It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all.* ***In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for***

the decision on the first occasion but failed to raise. *The rule is not based on the doctrine of res judicata in a narrow sense, or even on any strict doctrine of issue or cause of action estoppel.*

It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do."emphasis

Our distinguished brother, Date-Bah JSC in his concurring opinion in the case of ***Sasu v Amua-Sakyi & Anr [2003-2004] 2 SCGLR 742, at 769***, explaining further on this rule in ***Henderson v Henderson*** stated as follows:-

"As Lord Bingham of Cornhill observed in ***Johnson v Gove Wood and Co. [2002] AC 1 at 31,*** **the three doctrines of cause of action estoppel, issue estoppel and the rule in Henderson v Henderson have a common purpose."**

He stated:-

"But Henderson v Henderson, abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: ***that there should be finality in litigation and that a party should not be twice vexed in same matter."*** **Emphasis**

See also the decision of this court in ***In re Kwabeng Stool; Karikari v Ababio II [2001-2002] SCGLR 515.***

Again this court, in a unanimous decision in the case referred to by learned counsel for Defendants, ***Naos Holding Inc v Ghana Commercial Bank Limited*** at 492 of the report supra, relied on the said rule.

PLAINTIFF'S ARGUMENTS IN RESPECT OF ISSUE 1

Learned counsel for the Plaintiff Samuel Codjoe, lumped up all the issues together and argued same. It appears the focus of learned counsel for Plaintiff was on issues 2 and 3. In respect of the determination of whether the instant suit is an abuse of process, save for arguments in respect of Article 127 (3) of the Constitution 1992, Plaintiff appears not to have made any real or genuine response to the arguments in respect of this issue on abuse of process.

At this stage it is necessary to set out in detail the relevant Articles of the Constitution 1992 germane to the determination of this case.

1. Articles 2 (1) (a) (b) (2) (3) (4) & (5) (a) & (b) and 130 (1) and (2) of the Constitution, 1992

2. "Enforcement of the Constitution

(1) A person who alleges that –

(a) an enactment or anything contained in or done under the authority of that or any other enactment; or

(b) any act or omission of any person,

is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

(2) The Supreme Court shall, for the purposes of a declaration under clause (1) of this article, make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made.

(3) Any person or group of persons to whom an order or direction is addressed under clause (2) of this article by the Supreme Court, shall duly obey and carry out the terms of the order or direction.

(4) Failure to obey or carry out the terms of an order or direction made or given under clause (2) of this article constitutes a high crime under this Constitution and shall, in the case of the President or the Vice-President, constitute a ground for removal from office under this Constitution.

(5) A person convicted of a high crime under clause (4) of this article shall

a. be liable to imprisonment not exceeding ten years without the option of a fine; and

b. not be eligible for election, or for appointment, to any public office for ten years beginning with the date of the expiration of the term of imprisonment. "

2. ***Article 130 (1) & (2)***

130. "Original jurisdiction of Supreme Court

(1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, **the Supreme Court shall have exclusive original jurisdiction in**

a. all matters relating to the enforcement or interpretation of this Constitution; and

b. all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.

(2) Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination and the court in which the question

arose shall dispose of the case in accordance with the decision of the Supreme Court."Emphasis supplied

We have apprized ourselves with the decisions of this court in the following cases referred to us by learned Counsel for the Plaintiff. These are:-

- ***Sumaila Bielbiel No. 1 v Adamu Daramani & Attorney-General (No.1) [2011] 1 SCGLR 132 at 137***
- ***KOR v Attorney-General & Justice Duose [2015-2016] 1 SCGLR 114***
- ***Amidu v President Kufuor & Others [2001-2002] SCGLR 86 at page 100***
- ***NPP v NDC [2000] SCGLR 461***
- ***Agyei Twum v A.G. supra***

All of the above listed cases do not answer the points of substance from the Plaintiffs perspective as argued before us.

We are of the opinion that learned Counsel for the Plaintiff did not really comprehend the arguments on the abuse of process so ably argued by learned Counsel for the Defendants.

What must be noted is that, in this case, the Plaintiff has at all times acted by his Counsel. It was Counsel who advised the Plaintiff to invoke the supervisory jurisdiction of this court in respect of the Certiorari and Prohibition applications. As has been stated supra, these matters had been put to rest by virtue of the decision by the review panel which concluded and held as follows:-

"In conclusion, I would review the decision of 28th July 2021 by restoring the High court's ruling excluding the eighteen exhibits and ordering the accused persons to open their defence before the court as currently assigned with the duty of hearing their case. "

What must be noted is that, the decision of the plaintiff to conduct his case by piecemeal approach by first resorting to the supervisory jurisdiction and when that failed by a second bite of the cherry by the invocation of this court's original jurisdiction is what the rule in Henderson v Henderson and approved by many decisions of this court frowns upon.

For example this court in the unanimous decision in the case of ***Naos Holding Inc. v Ghana Commercial Bank*** Ltd, explained the effect of the principle as follows in holding 2:-

> *"In the circumstances of the instant case, to allow the Plaintiff's appeal, would* ***amount to an abuse of the court process in that, the courts would be enabling and encouraging the plaintiff to challenge the factual findings and conclusions rendered by the Judges to the earlier proceedings. In such a situation, it would be unfair and unjust to a party in the earlier proceedings that the same matter would be*** *relitigated* ***again.*** *To allow such a litigation to remain pending before the court, would not only be tantamount to bringing the administration of justice into scorn, opprobrium and ridicule but also into serious disrepute.*
>
> *Per curiam: The Supreme Court* ***must deprecate and frown upon the conduct of the plaintiff company in its bid to use the judicial process to perpetuallykeep aflame in the law courts, matter whose flames had already been put out by previous litigation to finality."*** **Emphasis**

Flowing from the above, we can safely state that, when a matter has been concluded in a court of competent jurisdiction like this Supreme Court, and there is no more an avenue for the parties to proceed any further with the case, it will amount to an abuse of the process if any of the parties should by any other process seek to re-invent or re-incarnate any aspect of the matter that had been determined to finality. Public policy

requires that cases must be brought to expected ends, and this is irrespective of how a party who has lost serially in the case feels about it. This policy consideration of the principle of abuse of process must be treated seriously by the courts and enforced.

We are of the considered view that the result reached by this court in resolving that the instant action is an abuse of process could have disposed of the entire case. However, in view of the fact that, there is the need to perpetually put out the flames that had been put out by the decision in the review decision and also send out guidelines to parties and practitioners of the law, it is considered worthwhile totreat determination of issues 2 and 3 as well.

This will enable this court to send clear and unequivocal signals that, no litigant or legal practitioner would be permitted to play "a game of chess" or treat this court as the "MAKOLA MARKET" where one could go on shopping without any restraint.

DETERMINATION OF ISSUES 2 AND 3

Learned Chief State Attorney, Mrs. Evelyn Keelson, Counsel for the Defendants articulated her views in respect of the above issues as follows:-

Relying on the following cases:-

- ***Sam (No.2) v A.G. supra***
- ***Adjei Ampofo (No. 1) v AMA& A.G. (No.1)***
- ***Bimpong Buta v GLC& Others supra***
- ***Aduamoa II & Others v Twum II supra***
- ***Gbedemah v Awoonor-Williams (1969) 2 G & G 438***
- ***Tait v Ghana Airways Corporation (1970) 2 G&G 527***
- ***Yiadom v Amaniampong supra***
- ***Edusei (No. 2) v A. G. supra,***
- ***Rockson v GFA [2010] SCGLR 443,***

Learned Chief State Attorney for the Defendants, reiterated and re-emphasised the **Anin Doctrine** espoused in the prologue to this rendition. In that respect, this court has been urged to be very tactful in the way it assumes its interpretative or enforcement jurisdiction spelt out in Articles 2 (1) (a) and (2) and 130 (1) of the Constitution 1992 referred to supra.

Based on the above references, learned Counsel for the Defendants concluded in respect of issue 2 that, the Plaintiff's writ in the instant case**only seeks to enforce Human Rights provisions of the Constitution in relation to himself as "*Stephen Kwabena Opuni*", and not as a citizen of Ghana as clearly held in the case referred to supra. Learned counsel therefore argued that the court's jurisdiction under Articles 2 (1) and 130 (1) of the Constitution has not been properly invoked, and thus must be dismissed.**

In respect of issue 3, which deals with **whether or not the substance of the instant action are res judicata or not,** learned Counsel for the Defendants, Mrs. Evelyn Keelson referred copiously to the rendition of our respected Sister Torkornoo JSC in the majority decision of this court in the review case in ***Suit No. J7/20/2021 intitutled Republic v High Court [Criminal Division 1] Ex-parte Stephen Kwabena Opuni, AG supra as follows:-***

> *"My Lords, the ruling brought to us on review shows that the majority panel accepted on page 25 of the ruling that at the stage of the learned trial judge's ruling,* ***his duty was to determine whether on the evidence adduced on behalf of the prosecution, a sufficient case has been made against the accused persons to require them to open their defence, and the duty of the court included reviewing the evidence led, an assessment of it and whether it proves the ingredients of the offence the accused is charged with and can be relied upon to sustain a conviction in the absence of exculpating evidence.*** *The ruling said:*

'This calls for us to remind ourselves of the powers of a trial judge under section 174(1) of the Criminal and Other Offences (Procedure) Act 1960 (Act 30) that cover no case to answer in a summary trial such as in this case (The court set out the provision and went on)

'So at this stage of the trial the duty of the judge is limited to a determination of whether on the evidence adduced on behalf of the prosecution, a sufficient case has been made against the accused person to require her to open her defence. This involves a review of the evidence led against the accused person and an assessment of it to determine if the evidence sufficiently connects the accused person to the charge and if, in the absence of any exculpating evidence by the accused person, the evidence proves the ingredients of the offence the accused person is charged with…'

However, the ruling linked the exclusion of exhibits to the expected assessments of the trial judge, and held that 'a reasonably well-informed observer, taking into account the exclusion of exhibits that ***appear to favour the accused persons and the pronouncements made by the judge which connote that the 2nd and 3rd accused*** *persons have defrauded Cocobod and it would not have happened but for the applicant herein deliberately and knowingly facilitating it and that by that he has caused financial loss to the state,* ***would come to the conclusion that the judge would not be impartial in the consideration of any defence the accused person has to put forward'(page 26 to 27)*** *(emphasis mine)"*

Our respected Sister Torkornoo JSC continued her rendition by explaining further what the majority view referred to as *"appear to favour"* meant in the following delivery:-

"I have emphasized the words *"appear to favour"* because to my mind, these words clearly reveal that the evidential and probative value and import of the exhibits that were excluded was not clear on the very face of those exhibits. To determine their import on the fortunes of the case of the parties before the court required a closer examination of the contents of the said exhibits. **But how can any person, including even a well-informed observer of judicial proceedings, use the prima facie indication of an exhibit to determine whether a pronouncement of its admissibility or non-admissibility was prejudicial?** Further, such an assessment cannot match up to the standard of *"credible evidence of bias"* that is needed for a Judge to be prohibited from continuing the judicial duties properly assigned to them." Emphasis

We also take note of all the cases referred to by learned counsel for the Defendants in her legal submissions pursuant to the orders of this court dated 1st February 2022 in respect of the preliminary issues raised above.

Based on the said cases and the principles established therein learned Chief State Attorney Counsel for Defendants concluded her submissions as follows:-

"In our submission, on the facts of the instant case, the case for an application of the doctrine of res judicata could not have been more compelling. **The Plaintiff herein was the same applicant in the previous suit in which the same questions were determined by this court. The determination by this court of the issue whether the judgment of the presiding Judge, Honyenuga JSC violated Plaintiff's human rights is thus conclusive and fully binding on all parties to that action.** Neither plaintiffs herein nor any other party to that criminal action pending at the High Court **has any right to apply to either this court or any other superior court raising the same issue for resolution. Plaintiff is estopped per res judicata." Emphasis**

PLAINTIFF'S ARGUMENTS IN RESPECT OF ISSUES 2 AND 3

Learned Counsel for the Plaintiff, Samuel Codjoe emphasised in respect of the issue 2 which is in respect *"whether the reliefs claimed by the Plaintiff being personal and human rights in content are fit and proper for the invocation of the Supreme Court's original jurisdiction,"* and submitted that the writ involves not only an interpretation of articles 19 (1) and 19 (2) (c) of the Constitution, but also an enforcement of the said provisions of the Constitution, 1992.

Learned Counsel for Plaintiff argued as follows:-

> ***"We state that, the fact that a decision in this case might result in the benefit to Plaintiff is in our opinion irrelevant, this is because every decision of this court which results in setting aside of any act and or omission of any person in authority whatsoever and or howsoever will result in a benefit to at least some persons in the society."***Emphasis

Learned Counsel then referred and relied on a plethora of cases such as the following to ground his submissions that the writ in the instant case is properly before the court.

- ***Sumaila Bielbiel No. 1 v Adamu Daramani & Attorney-General supra***
- ***KOR v Attorney-General & Justice Duose supra***
- ***Amidu v President Kufuor & Others supra***
- ***Sam(No.2) v A.G. supra***
- ***NPP v NDC supra***
- ***Agyei Twum v A.G. supra***

Based on the above, learned Counsel for the Plaintiff contended that, whilst human rights actions are limited to persons with direct interest in the case, any person in so far as the person is a Ghanaian, can bring an action for the interpretation and enforcement of the Constitution if there is a breach of a provision of the Constitution.

Flowing from the above submissions, learned Counsel for Plaintiff concluded his arguments in respect of Issue 2 as follows:-

> *"From the above mentioned case which is the "(Sam No. 2 case)" we submit that when it comes to the invocation of the Court's special jurisdiction under article 2 (1) of the Constitution 1992,* ***the only requirement to be clothed with capacity is being a citizen of Ghana. This is irrespective of or regardless of a person's personal interest in the matter****. We reiterate that the present writ has been commenced by Plaintiff in his capacity as a Ghanaian who seeks to ensure that the constitutional provisions in articles 19 (1) and 19 (2) are enforced."*

On issue 3, which is whether or not the substance of issues raised in the instant action are res judicata, learned Counsel for the Plaintiff, Samuel Codjoe argued that the present writ is entirely different from the earlier application for judicial review by the Plaintiff which culminated in the review decision in the unreported decision of this court dated 26th October 2021, Suit No. J7/20/2021 supra.

Learned Counsel then relied on the following cases to argue that the principle of res judicata does not apply in this case:-

- *Unreported decision of this Court in* ***Peter Egyin Mensah & Anr.v Intercontinental Bank (GH) Ltd, Suit No CA.J4/13/2009 dated 25/11/2009*** *per our illustrious Sister Adinyira JSC*
- ***Gyimah & Brown v Ntiri, (Williams - Claimant) [2005-2006] SCGLR 247***
- ***Unreported decision of this court, in Board of Governors, Achimota School v Nii Ako Nortei II, Suit No. J4/9/2019 dated 20th May 2020*** *where the decision in* ***Boni and Anr. v The Republic [1971]1 GLR 454*** *was quoted with approval, in which the conditions that must exist for a plea of res judicata to succeed have been stated as follows:-*

"The civil law doctrine of res judicata can be relied upon when the following conditions exist:

1. ***There must be the same parties***
2. ***Must be suing in the same capacity***
3. ***The issue (s) before the court must be the same as that alleged to have been the subject matter of adjudication in previous proceedings.***" Emphasis

Learned counsel for the Plaintiff then sought to indicate what to him are differences in the contents of the previous judicial review application and the instant writ as well as the capacity in respect of which the parties especially the plaintiff has mounted both actions.

EVALUATION OF ISSUES 2 AND 3

ISSUE 2

In this respect, we wish to reiterate the criteria set out by this court in the locus classicus case of ***Bimpong Buta v GLC & Anr supra, and Sam (No.2) v A.G*** supra.

In those line of cases, the most important criteria herein that must guide our discussion is the fact that, the power of enforcement under Article 2 of the Constitution 1992, by which this court exercises its original jurisdiction does not cover the enforcement of the individual's human rights provisions because that power has been vested exclusively in the High Court, pursuant to Articles 33 (1) and 130 (1) of the Constitution 1992.

See cases ***like Edusei v AG, supra, Edusei (No.2) v A.G supra and Adjei Ampofo v A.G. supra.***

Secondly, even though the plaintiff is a citizen of Ghana, he has a personal interest in the outcome of the determination of the writ, reference ***Tufour v A.G. supra and Sam (No.2) v A.G. supra.***

In the instant case, the Plaintiff has invoked the original jurisdiction seeking enforcement of a human rights provisions in Articles19 (1) and (2) (a) of the Constitution 1992.

After reflecting on the changing fortunes, scope, remit and of the applicability of the enforcement and interpretative jurisdiction of the Supreme Court, it is safe to conclude and adopt the statement thus:-

> *"Regardless of the manner in which they are clothed, where the real issues arising* ***from a writ brought under Articles 2 or 130 (1) of the Constitution 1992 are not in actuality, of such character as to be determinable exclusively by the Supreme Court, but rather fall within a cause of action cognisable by any other court or tribunal of competent jurisdiction, this court will decline jurisdiction."***

See ***Bimpong-Buta v GLC& Others, supra***

For instance the brazen attempt by the plaintiff to deliberately abuse the invocation of this courts original jurisdiction is such that it has all the parameters to turn this court into a real *"MAKOLA MARKET"* as suggested by the respected scholar, Prof. Kofi Kumado in his book referred to supra.

These provisions in Article 130 (1) and (2) of the Constitution 1992 explain in reality the rationale of the said provisions where regardless of the manner and phraseology which a party uses, where the real issues arising from a writ brought under Article 2 or 130 (1) of the Constitution, 1992 are not in actual or real terms to be determined by the Supreme Court under their enforcement, interpretative or whether an enactment was made in excess of the powers conferred on parliament, but rather falls within a cause of action cognizable by any other court, it is to that court that the jurisdictionwill lie, in such a situation, the Supreme Court will decline jurisdiction.

For example as is clearly set out in Article 130 (1) of the Constitution, 1992, if the matter is in respect of the Fundamental Human Rights provisions under the Constitution, then by virtue of Article 33 of the Constitution, it is the High Court that has jurisdiction in the enforcement of those Fundamental Human Rights provisions. See ***Yiadom v Amaniampong*** supra, ***Ghana Bar Association v A.G. (Abban case) supra, Aduamoa II v Twum II*** supra, just to mention a few cases.

Thus if any matter arises in any proceedings in a court other than the Supreme Court in which an issue relates to a matter orquestion in Article 130 (1) of the Constitution 1992, that court shall stay the proceedings and refer the matter to the Supreme Court for determination and or interpretation. See for example the cases of

- ***The Republic v High Court (Fast Track Division) Accra; Ex-parte Electoral Commission (Mettle Nunoo & Others, Interested Parties) [2005-2006] SCGLR 514 and***
- ***The Republic v High Court, Accra; Ex-parte CHRAJ (Addo Interested Party) [2003-2004] SCGLR 312***

In both instances, the High Court referred constitutional provisions to the Supreme Court for interpretation and or enforcement and the cases were determined by the lower courts as directed by the Supreme Court.

CASES OF CONSTITUTIONAL INTERPRETATION BY SUPREME COURT

In ***Martin Kpebu (No. 1) v Attorney-General (No. 1) [2015-2016] 1 SCGLR 143,***the Plaintiff therein a private legal practitioner successfully mounted the suit therein pursuant to Articles 2 (1) and 130 of the Constitution **for a declaration that on a true and proper interpretation of articles 19 (11) and 14 (1) of the Constitution, 1992, Section 104 (4) of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) was inconsistent with the said articles.**

The Plaintiff therein was not personally interested in the outcome of the case for himself. In other words the Plaintiff did not derive any personal benefit to himself.

In ***Martin Kpebu (No. 2) v Attorney-General (No.2) [2015-2016] 171***, in this case as well, the Plaintiff, a private Legal Practitioner successfully sued **in the Supreme Court under articles 2 (1) and 130 (1) of the 1992 Constitution for a declaration (as subsequently amended by the order of the Court) that section 96 (7) of the Criminal and Other offences (Procedure) Act 1960 (Act 30), as amended by Section 7 of the Criminal Procedure (Code Amendment) Act, 2002 (Act 633) and futher amended by Section 41 (1) (a) of the Anti-Terrorism Act, 2008 (Act 762) contravenes articles 14 (1), 15 (2) and 19 (2) (c) of the 1992 Constitution.**

In the above case for example Article 19 (2) (c) of the Constitution has already been interpreted by the Supreme Court and does not need any further interpretation. If anything at all, the High Court where the plaintiff is standing trial is obliged and bound to apply the said provision as interpreted by the Supreme Court.

We however note and observe that, the learned trial Judge correctly applied the rules of procedure that are applicable when a submission of no case is made in the trial court under Act 30, and has also not violated Article 19 (2) (c) provisions of the Constitution which provide that an accused like the Plaintiff is presumed innocent until proven guilty by a court after trial.

That explains why learned counsel for the plaintiff repeated ad nauseam that even though they claimed that the learned trial Judge made final findings of facts against the plaintiff and others in respect of the charges, he was quick to add that *"albeit without using the word guilty"* in breach of the articles 19 (1) and 19 (2) (c) of the Constitution 1992. This clearly meant that learned Counsel for the Plaintiff knew at all material times that the learned trial Judge acted within the remit of his powers.

All these point to the fact that the instant writ by the Plaintiff being personal and human rights in content, the invocation of the Supreme Courts original jurisdiction is misplaced. We think it is a desperate move by the Plaintiff to delay his trial before the court for the criminal prosecution he is facing.

A close reading of the provisions of the entire Article 2 of the Constitution 1992 gives the clearest intentions that it is the fulcrumand bedrock of the entire Constitution. For example, this Supreme Court is empowered to make such orders and or give directions as it may consider appropriate pursuant to declarationsso made. See Article 2 (2) of the Constitution.

Furthermore, Article 2 (3) of the Constitution stipulates that any person or group of persons to whom constitutional stipulations are directed shall duly obey and or carry them out.

So serious are the sanctions for any breaches and or violations of these constitutional directives by this court that, disobedience to these, constitutes the offence of High Crime under this Constitution and capable of constitutingvalid grounds for the removal from office of the President and the Vice-President if found to be in breach. Article 5 of the Constitution 1992 then stipulated the sanctions regime for conviction for the offence of High crime to imprisonment not exceeding 10 years without the payment of a fine, and such a convict will not be eligible for election or appointment to any public office from the date of the expiration of the term of imprisonment.

The above clearly then demonstrates that, the framers of the Constitution intended this court to consider itsArticle2 (1) (a) (b) and (2) jurisdictions asserious andshould not be toyed with as plaintiff has sought to do in these proceedings.

Comment [HM2]: Please check structure.

In our considered view, breaches or violations of this article 2 (1) (a) and (b) provisions of the Constitution are so serious that, any person invoking the said provisions must do

so only on concrete and substantial grounds. With the greatest respect to learned Counsel for the Plaintiff, we are of the view that his advice to Plaintiff to invoke the jurisdiction of the court in the instant case has been misplaced and found to be a gross abuse of this court's processes.

Having considered the rival contentions of the parties and based on our own appreciation of the facts and the law, we are of the view that the reliefs claimed by the Plaintiff in the instant action are not fit for the invocation of the Supreme Court's original jurisdiction.

ISSUE 3

1. The conditions necessary for res judicata to prevail have already been set out supra elsewhere in this judgment.

WHAT ARE THE GERMANE ISSUES?

These admit of no controversy whatsoever. In the first place, it is the same plaintiff herein, Stephen Kwabena Opuni who was the Applicant in the Judicial Review case and is the Plaintiff herein. The first condition has therefore been met.

Secondly, in the previous application, the Plaintiff herein was the Applicant and in the instant case, he is the Plaintiff. There is no doubt that the capacities are also the same.

Thirdly, are the issues before the court in the previous suit the same as in the instant writ?

In the previous application for Certiorari and Prohibition, the Plaintiff herein sought to quash the decision of the trial High Court basically for failing to grant him a hearing thereby breaching his fundamental human rights in breach of the rules of natural justice.

Again, the Plaintiff herein, therein Applicant sought to Prohibit the learned trial Judge on the grounds that there is a real likelihood of bias on the part of the learned trial Judge and that he had made final findings of facts and has predetermined and prejudged the case before hearing the Plaintiff.

In the instant writ, the Plaintiff appears to be more charitable to the learned trial Judge, however the value of the reliefs and their contents with the previous case and decision are the same.

We have already set out in detail the provisions of Articles 19 (1) and 19 (2) (c) of the Constitution 1992, supra.

In the ***Republic v Eugene Baffoe-Bonnie and 4 Others, [2019] 1 Ghana Law Times Report – 1***, the provision on fair trial in Article 19 (1) had been interpreted. No sustained argument has been made in respect of breach of the Plaintiff's right to fair trial as provided therein.

The ***Martin Kpebu Case No. 2***, already referred to supra dealt with in great detail, the provisions of Article 19 (2) (c) of the Constitution 1992 which deals with the presumption of innocence until an accused is proven guilty or has pleaded guilty.

In the instant proceedings, learned counsel for the Plaintiff himself has stated ad nauseam that the Plaintiff is yet to be pronounced guilty. Wherein then lies the need for the instant writ?

In the case of ***In re Kwabeng Stool; Karikari and Another v Ababio II and Others*** supra, the Supreme Court unanimously held as follows:-

> *"If an action is brought,* ***and the merits of the questions are determined between the parties, and a final judgment is obtained by either, the parties are precluded and cannot canvass the same question again in another action,*** *although some objection*

or argument might have been urged upon the first trial which would have led to a different conclusion.

In order that estoppel by record may arise out of a judgment, the court which pronounced the judgment must have had jurisdiction to do so." Emphasis

In the case of ***Bassilv Hongah (1954) 14 WACA, 569 at 572***, Coussey JA, speaking on behalf of the court held and stated thus:-

"Estoppel prohibits a party from proving anything which contradicts previous acts or declarations to the prejudice of a party who relying upon them has altered his position. ***It shuts the mouth of a party. The plea of res judicata prohibits the court from enquiring into the matter already adjudicated upon.*** *It ousts the jurisdiction of the Court."* Emphasis

See also the following cases:-

- ***Nyame v Kese a.k.a Konto [1999-2000] 1 GLR 236-254***
- ***Boakye v Appollo Cinema & Estates Ghana Limited [2007-2008] SCGLR 458***
- ***In Obroni & Anr v A.G. & Others [2015-2016] 1 SCGLR 364***, the plaintiffs sought to relitigate a matter previously determined by the Supreme Court, but the Court upheld a preliminary legal objection on the grounds that the action was res judicata.
- See also the case of ***Akuse-Amedeka Citizens Association (No. 3) v A.G. & Electoral Commission [2015-2016] SCGLR 372*** where the Supreme Court per our esteemed brother Gbadegbe JSC raised the principle to a higher level by which even though the parties were different, the applicability of the judgment was held to apply as follows:-

  "As earlier said, it raises the same questions for our decision as was the position in ***Obroni v A.G*** decided on 3rd July 2014 now reported in [2015-2016] 1

SCGLR364,**thedecisions are binding and conclusive against all persons situate within the jurisdiction irrespective of the question whether they were parties to the said case or in privity to the parties."** Emphasis

In the celebrated case of ***Nyame v Kese aka Konto***, supra Wiredu CJ, held that the principle of res judicata can also be raised against privies of the original parties to the actions.

EPILOGUE

In our considered opinion, the issue of res judicata has been legitimately raised and argued to our satisfaction. This is because we find that all the conditions necessary to uphold the existence of the principle of res judicata have been duly met.

Under the circumstances we accordinglyuphold all the preliminary legal objections raised by the Defendants against the instant writ.

In reality, based under the ***Anin Principle*** stated supra in this rendition, it is clear that there is no ambiguity, imprecision or lack of clarity in the constitutional provisions which the plaintiff is seekinginterpretation and or enforcement of. Apart from not meeting the tests of interpretation and or enforcement, as laid down by the Anin doctrine and followed in thelong line of cases such as ***Bimpong-Buta v GLC, Tufuor v A.G. and Others***, the instant writ is clearly incompetent.

In addition, the writ is also substantially bereft of any merit whatsoever and is accordingly dismissed not only on the basis of the preliminary legal objectionsbut also because it is substantially hollow and lacking any consideration whatsoever.

Before we conclude this delivery, we commend learned Counsel for the Defendants, Mrs. Evelyn Keelson, Chief State Attorney for her depth of research, and incisive analysis and submissions which has greatly assisted this court.

The Plaintiff's writ is thus dismissed upon the grounds contained in this delivery.

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)

(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

PROF. H.J.A.N. MENSA-BONSU (MRS.)

(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

PWAMANG JSC:-

My Lords, on 24th November, 2021 the plaintiff herein filed a writ to invoke the original jurisdiction of the Supreme Court praying for the following reliefs;

1. A declaration that upon a true and proper interpretation of articles 19 (1) and 19 (2) (c) of the 1992 Constitution, the High Court (Criminal Jurisdiction 1) in Suit Number CR/158/2018 entitled Republic vs. Stephen Opuni and 2 Ors acted contrary to these provisions of the 1992 Constitution of Ghana when in its ruling dismissing the application for a submission of no case dated the 7th day of May, [2021] it made final findings of fact specifically on pages 54, 55, 59, 66, 67 and 75, which presumed accused persons guilty (albeit without using the word guilty) in breach of the said articles 19 (1) and 19 (2) (c) of the Constitution, 1992.

2. An order expunging all final findings of facts against the accused persons in the said ruling of the High Court (Criminal Division 1) which presumed accused persons guilty of all the charges for being inconsistent and in contravention of articles 19 (1) and 19(2) (c) of the 1992, Constitution.

3. A perpetual injunction restraining the High Court (Criminal Division 1) from continuing with the hearing of Suit Number CR/158/2018 until all the final finding of facts made against accused persons which presumed them guilty are expunged.

4. Any further orders which this court may deem necessary to give full effect or to enable effect to be given to the letter and spirit of the 1992 Constitution.

When the writ with accompanying statement of case were served on the defendants, the Attorney-General filed a statement of case in response. The response can be viewed from two stand points; first, it raises preliminary objections to the action. The 1st defendant argues that the plaintiff is in the wrong forum since he is seeking the enforcement of his personal Human Rights guaranteed under Chapter Five of the Constitution and that can only be done in the High Court. Furthermore, the matters argued in the plaintiff's statement of case had already been determined by the Supreme Court in a review decision on an earlier case when the plaintiff invoked the supervisory jurisdiction of the Court to quash the very decision he is complaining about. On those grounds, the 1st defendant contends that the matter is res judicata so it is an abuse of the original jurisdiction of the Supreme Court for the plaintiff to seek to re-litigate the same matters. The second part of the 1st defendant's response is in answer to the substantive arguments of the plaintiff in his statement of case, to which he takes the view that there was no breach of the provisions of the Constitution by the High Court as he alleges.

At the first hearing of the case on 1st February, 2022, the Court directed the parties to file memorandum of issues pertaining to the preliminary objections raised in the 1st defendant's statement of case and to proceed to argue those issues fully in written submissions that were to be filed not later than 7th February, 2022. The parties complied and three issues were settled jointly by the parties as follows;

1. Whether or not the instant action by the plaintiff is an abuse of the original jurisdiction of the Supreme Court.
2. Whether or not the reliefs claimed by the plaintiff in the instant action, being personal and human rights in nature, are fit for an invocation of the Supreme Court's original jurisdiction.

3. Whether or not the substance of the issues raised in the instant action are res judicata.

The parties also filed written submissions on the three issues as directed and following that there was a hearing of parties in open court on 1st March, 2022. The hearing was in respect of the three preliminary issues settled by the parties and adopted by the court for trial. After the hearing, the case was adjourned to 13th April, 2022 for judgment. The judgment was not ready on that date so the case was further adjourned to 17th May, 2022 on which date the decision of the court was given with the reasons to be filed on 27/5/2022. I was the sole dissenter and I hereby set out my reasons.

I have narrated the full procedural progress of the case for the reason, that in this delivery, I confine myself to the issues that the court conducted a hearing on, which are the preliminary objections taken by the 1st defendant. I do not discuss the substantive arguments on which the Attorney-General resisted the plaintiff's action. I intend to determine the issues starting with issue (2), after which I shall tackle issue (3). If the defendant succeeds on these issues then my answer to issue (1) would obviously be in the affirmative but if he losses on them then the answer to issue (1) shall be negative.

In his written submissions on issue (2), the defendant submits as follows at pages 6-7 thereof;

> "Clearly, the action of the plaintiff, as demonstrated, seeks to enforce only provisions in the Human Rights Chapter of the Constitution in relation to him, and in respect of which no interpretative issue arises from those provisions. The court's jurisdiction under articles 2(1) and 130(1) cannot be deployed to ventilate such a grievance.
>
> The burden rested entirely on the plaintiff to demonstrate that his action, apart from being an enforcement of a provision in the fundamental human rights, raised serious

issues bordering on an interpretation of the issue and further, that, the reliefs sought were not wholly personal to him. This, he has woefully failed to show in his statement of case. ***In such circumstances, the Court has no concurrent jurisdiction with the High Court***, and this Court ought to dismiss the suit in its entirety." (Emphasis supplied).

My Lords, in the above submission, the defendant alludes to a profound question about the nature of the Human Rights enforcement regime under the Constitution, 1992. The question is whether the Supreme Court has concurrent jurisdiction with the High Court in the enforcement of Human Rights in relation to a claimant? The question arises because the Constitution in article 33(1) has provided a forum for a person who considers that her Human Rights have been breached or are about to be breached to seek remedy and that is the High Court. Article 33(1) is as follows;

(1) Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened *in relation to him*, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress. (Emphasis supplied)

But, the Supreme Court is given jurisdiction under articles 2(1) and 130(1) to enforce and interpret the Constitution, which presumably includes the provisions of the Constitution on Human Rights. Article 2(1) is as follows;

ENFORCEMENT OF THE CONSTITUTION

2(1) A person who alleges that -

(a) an enactment or anything contained in or done under the authority of that or any other enactment; or

(b) any act or omission of any person; is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

(2) The Supreme Court shall, for the purposes of a declaration under clause (1) of this article, make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made.

Article 130 is as follows;

ORIGINAL JURISDICTION OF THE SUPREME COURT

(1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in -

(a) all matters relating to the enforcement or interpretation of this Constitution; and

(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.

(2) Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination; and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court.

The Constitution, 1969 contained similar set of provisions, though not exactly same wording, and the question of whether the jurisdiction to enforce personal Human Rights is exclusive to the High Court or the Supreme Court has concurrent jurisdiction in that regard was considered in detail in **Gbedemah v Awonoor-Williams (1970)2 G &**

G 438, and **Tait v Ghana Airways (1970) 2 G & G 529.** In those cases the interpretation that was adopted was to the effect that the jurisdiction of the High Court to enforce personal Human Rights was exclusive and the Supreme Court had no concurrent jurisdiction with the High Court. Under this Constitution, the question was again discussed extensively in **Edusei v Attorney-General [1997-98] 2 GLR 28**where the interpretation arrived at in **Gbedemah v Awonoor-Williams** was upheld and applied by majority decision of the Supreme Court**.** Following Edusei v Attorney-General (supra) the position appears to be that the High Court has exclusive jurisdiction as against the Supreme Court in the enforcement of human rights in relation to persons who complain that their human rights have been breached or are about to be breached. The only remedy available to such person is to sue in the High Court pursuant to article 33(1) and 140(2) of the Constitution but she cannot invoke the original jurisdiction of the Supreme Court.

However, it has now been held that where the case is not about the breach or threatened breach of the personal Human Rights of the plaintiff but is for a declaration of the existence of a Human Right for the public benefit, then the Supreme Court has jurisdiction to entertain the action under its original enforcement jurisdiction in articles 2(1). In **Adjei-Ampofo v Accra Metropolitan Assembly [2007-2008] SCGLR 611** the Supreme Court in holding (2) of the head note of the report stated the law in definite terms as follows;

"where the human right or freedom sought to be enforced is not in relation to the plaintiff's personal rights and freedoms, but for the purpose of enforcing a provision of the Constitution under article 2(1), the proper court is the Supreme Court. In the later case, such a plaintiff would not have access to the High Court for lack of locus standi. Likewise, in the former case a plaintiff would not have access to the Supreme Court because his or she would be seeking to invoke the Supreme Court's original jurisdiction to enforce his or her personal fundamental right or

freedom. Thus the two jurisdictions are not concurrent….The court's jurisdiction in such case is determined by whether or not the plaintiff is pursuing a personal interest…or the enforcement of a provision of the Constitution in interest of the public good.."

It is this existing state of the law on the right forum for enforcing Human Rights that has informed the objection of the 1st defendant covered under issue (2). However, my understanding of the nature of the issue that has arisen in this case is different from the point of law decided in the earlier cases. In my appreciation of this case, the issue is; where a prayer for the enforcement of personal human rights of an individual plaintiff is coupled to an issue of interpretation of a Human Rights provision of the Constitution, can it be said that she is in the wrong forum, simply because she has coupled a relief for enforcement of her personal Human Rights to the interpretation she is seeking? What such an issue entails is, that the very existence of the right has to be ascertain by interpretation of a constitutional provision in Chapter Five of the Constitution. For example, where a person claims a specific Human Right under article 33(5) of the Constitution (rights not specifically mentioned in Chapter Five but are considered inherent in a democracy) and contends that the right has been breached in relation to her but she is denied the right on the ground that the framers of Constitution did not intend to include that right. It seems to me indubitable that, in those circumstances, if the plaintiff commences her action for interpretation in the Supreme Court, she can be driven away on ground of absence of jurisdiction by reason of wrong forum. This would not happen because the case in our example calls for interpretation of article 33(5) of the Constitution in relation to the right claimed by the plaintiff.

The distinguishing feature of the case before us is, that in the earlier cases the courts came to the conclusion that there was no real question warranting the invocation of the original jurisdiction of the Supreme and that in substance the cases were for enforcement of a personal guaranteed Human Right of the plaintiff by the Supreme

Court pursuant to article 2(1). In Edusei v Attorney-General, the Supreme Court in holding (1) of the head note held as follows;

"although the applicant couched his reliefs as seeking the interpretation of certain provisions of the Constitution, 1992 vis-à-vis sections of the Passport and Travel Certificate Decree, 1967 (NLCD 155), it was clear from, inter alia, the reliefs sought in his writ as well as the written submissions in the statement of case that he was in substance and effect seeking the enforcement of his fundamental rights under the Constitution, 1992, and not the interpretation of the Constitution, 1992 as to vest the Supreme Court with appropriate jurisdiction under article 130(1)(a) of the Constitution. However, if one read together articles 2(1), 33, 130(1) and 140(2) of the Constitution, the in escapable conclusion was that the enforcement jurisdiction of the Supreme Court did not include the enforcement of the provisions of the Constitution relating to the liberties of the individual as a court of first instance; that jurisdiction had been expressly reposed on the High Court under article 33(1) of the Constitution, 1992."

The Supreme Court did not say that where a prayer for enforcement of personal Human Rights was coupled to a genuine question for enforcement or interpretation, they would have no jurisdiction. After all, the jurisdiction to interpret the Constitution is exclusive to the Supreme Court and the coupling of an issue of enforcement of personal Human Rights cannot negate that jurisdiction conferred by article 130(1) of the Constitution. Edusei v Attorney-General is only authority for the principle that the Supreme Court does not have original jurisdiction to entertain a stand alone relief for enforcement of personal Human Rights.

A related jurisdictional question, which does not immediately arise but is imminent on the submissions of the defendant is, if in exercise of its interpretative jurisdiction the Supreme Court holds that the Constitution indeed guarantees a right for the plaintiff in our example and that the defendant has breached it or is threatening to breach it, is the Supreme Court to stop at a declaration to that effect and direct the plaintiff to go and

commence fresh proceedings in the High Court pursuant to article 33(1)? If we adopt a water-tight separation of jurisdictions for the enforcement of personal Human Rights as was stated in Adjei-Ampofo v Accra Metropolitan Assembly, then it would appear as if the Supreme Court would have no jurisdiction to proceed to enforce the personal human rights after the interpretation. But, the question never came up and was not considered in Adjei-Ampofo v Accra Metropolitan Assembly, Gbedema v Awonnor-Williams and Edusei v Attorney-General. Nevertheless, in Edusei v Attorney-General the court in what I will consider an obiter held in holding (1) that;

"Specifically, the contention that the Supreme Court had concurrent jurisdiction with the High Court in the enforcement of fundamental human rights and freedoms was clearly inconsistent with the exclusiveness of the original jurisdiction vested in the High Court in the main part of article 130(I) of the Constitution, 1992 and was indeed a failure to appreciate the "subject to" part of article 130(1) of the Constitution, 1992 and the meaning and effect of the word "exclusive" in the main part of the same article."

This holding is rather broad and went beyond the facts in the case, which were that there was no real case for invoking the original jurisdiction of the Supreme Court. Nonetheless, my considered opinion is, that where the human right that a person claims is said to arise on an interpretation of a provision of Chapter Five of the Constitution, then, since the Supreme Court is the only court with jurisdiction to interpret the Constitution, the proper forum to file the case is the Supreme Court pursuant to Article 130(1) of the Constitution. Such plaintiff cannot be driven away from the Supreme Court on ground of wrong forum. I shall dare add that, if the Supreme Court upholds the case of the claimant to a right in the exercise of its interpretative jurisdiction, it ought not to be the case that they have to send the claimant away empty handed and to direct her to go to the High Court to file a new suit for enforcement. That would defeat the policy of judicial economy and, in my understanding, there is no justification for

such an interpretation from a close reading the words of the Constitution. I shall repeat article 130(1) below for ease of my analysis;

(1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have *exclusive* original jurisdiction in -

(a) all matters relating to the enforcement or interpretation of this Constitution; and

(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.(Emphasis supplied).

Whereas the framers of the Constitution placed the adjective, "exclusive", before the original jurisdiction of the Supreme Court, and thereby qualified it as such, no equivalent adjective is placed to qualify the jurisdiction of the High Court in the enforcement of the Human Rights referred to as provided in article 33 of the Constitution.

In the same vein, article 140(2) of the Constitution that states the Human Rights enforcement jurisdiction of the High Court is as follows;

(2) The High Court shall have jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by this Constitution.

Here too, there is no qualifying adjective that makes the jurisdiction exclusive to the High Court. It must also be noted that in article 140(2) the jurisdiction is not restricted to rights personal to a person who complains. In my view, the words, "subject to the jurisdiction of the High Court…." in article 130(1) were meant to align the original general constitution enforcement jurisdiction of the Supreme Court to the Human Rights enforcement jurisdiction of the High Court by indicating the appropriate forum

for orderly administration of justice in matters of personal Human Rights enforcement. I am not convinced that the framers of the Constitution intended to make the jurisdiction of the High Court to enforce personal Human Rights as stated in article 33(1) exclusive to the High Court. In **Edusei v Attorney-General (supra)**the majority took the view that the words "Subject to the jurisdiction of the High Court…" make that jurisdiction exclusive but in my humble opinion, the framers of the Constitution did not intend to prohibit the Supreme Court from enforcing personal Human Rights, no matter how the question arises in the Supreme Court. In my view, if the question arises in a genuine case of interpretation or enforcement that is exclusive to the Supreme Court, the court may exercise concurrent jurisdiction to enforce personal Human Rights.

Another situation under our Constitution where a question of enforcement of personal Human Rights may arise in the Supreme Court out of exercise of its original jurisdiction is where a person invokes the original jurisdiction of the Supreme Court under article 2(1)(a) to strike down an enactment that is inconsistent with or in contravention of a Human Rights provision in Chapter Five of the Constitution. The provision is as follows;

(1) A person who alleges that -

(a) an enactment or anything contained in or done under the authority of that or any other enactment….is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

(2) The Supreme Court shall, for the purposes of a declaration under clause (1) of this article, make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made.

Though the impugned enactment may be adversely affecting Human Rights claimed by a person for her personal benefit, the only court with jurisdiction to entertain her action is the Supreme Court and she cannot be denied access to the court. Now, by clause (2) above, the Supreme Court is given express authority to make orders and give directions for enforcement if it declares that an enactment or anything done under it contravenes provisions of the Constitution, including by necessary implication, the provisions of Chapter Five on Human Rights. If the contravention is in relation to the plaintiff, the Supreme Court would be abdicating its mandatory jurisdiction if it were to send her away reasoning that her remedy lies in the High Court pursuant to article 33(1) of the Constitution. It ought to be emphasized that although in Edusei v Attorney-General the plaintiff invoked article 2(1)(a) to strike down some provisions of the Passport and Travel Certificate Decree, 1967 (NLCD 155), which ordinarily the Supreme Court had jurisdiction over, the court formed the opinion that that relief was not added in good faith but was only a ruse. If the court had decided to assume jurisdiction over that relief, it most likely would have held differently on the rather tight exclusiveness of the jurisdiction of the High Court to enforce personal Human Rights that they ended up stating. Clause (2) of article 2 uses the words "The Supreme Court shall…make orders.." and if the court in Edusei v Attorney-General had entertained the action for striking down NLCD 155, it would have been bound by the mandatory terms of Clause (2) to make enforcement orders in favour of the plaintiff, if it upheld his case that the Decree was inconsistent with the Constitution.

My Lords, to hold that the Supreme Court has no jurisdiction to enforce personal Human Rights in the circumstances discussed above would have the effect that, on the facts of this case, the plaintiff herein should have gotten a cattle dealer to sue for the same reliefs and then the Supreme Court would assume jurisdiction under Adjei-Ampofo v Attorney-General without any questions. That is playing the ostrich.

I am not unaware, that by virtue of article 130(2) of the Constitution, if a complainant files an action in the High Court to enforce her personal Human Rights and the very existence of the right has to be discerned by interpretation of a Human Rights provision of the Constitution or by striking down an enactment, the case has to be referred to the Supreme Court for interpretation and then back to the High Court for enforcement. That is a procedure that has been sanctioned by the Constitution for all matters for enforcement or interpretation that arise in proceedings in any court. But, my point is that, if the complainant comes straight to the Supreme Court for interpretation and then enforcement of her personal Human Rights, there is no policy justification or provision of the Constitution that, in my view, prohibits the Supreme Court from entertaining the action, definitely for the interpretation and also for the enforcement. After all, article 33(1) that was considered previously as dictating the forum to be the High Court and only the High Court in matters of personal Human Rights enforcement states as follows;

"…then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress."

This proviso certainly, in my opinion, is accommodative of any other action that is lawfully available in the Supreme Court, for instance. See **Akisatan v Thomas (1950) 12 WACA 90.** It must be borne in mind that article 33(1) is about choice of forum and does not dictate any specific remedy or procedure. See **Awuni v WAEC [2003-2004] SCGLR 471.**

Therefore, as correctly queried by the 1st defendant, the right question for me in this case ought to be, is there a genuine question for interpretation that arises on the face of the facts the plaintiff relies on so as to warrant the invocation of the exclusive interpretation jurisdiction of the Supreme Court? If such question arises, then it matters not that a prayer for enforcement of that right in relation to the plaintiff is coupled to it.

The minimum the Supreme Court can do in such case is to assume jurisdiction over the question for interpretation and after determining that decide whether to exercise jurisdiction to enforce the right declared in favour of the plaintiff, that is if a declaration is so made.

So, is the question for interpretation in this case real or it is a ruse? The guiding principles for answering this question are well articulated in the *locus classicus*, **Republic v Special Tribunal; ex parte Akosah [1980] GLR 592**. The provisions of the Constitution the plaintiff prays to be interpreted in this case are Article 19(1) &(2)(c) and he claims that the scope and bundle of rights those provisions cover include a right not to be prejudged at a criminal trial. He alleges that that right of his was violated in the trial he is facing in the High Court and that the court prejudged him when it had not heard his evidence. That, for me, raises a real question for interpretation coupled with enforcement, especially the part that alleges violation of the Constitution by a Court, which belongs to the third arm of government. The issue whether a court can be said to have violated the Human Rights of a party in the course of proceedings and whether the remedies available in such situation include declaration and injunction by the Supreme Court. The 1st defendant argues in some part of its written submissions that the Supreme Court has already pronounced on that matter in relation to the plaintiff so it is res judicata, but that is different from a denial that there is a question for interpretation arising on the facts alleged in this case. In the case of **Raphael Cubagee v Asare and Ors [2018-2019] 1 GLR 234**at p.250 the Supreme Court held as follows;

> "The Supreme Court has been given exclusive jurisdiction to interpret the Constitution and interpretation involves determining the scope of provisions and discovering the intent of the framers of the Constitution. *See Republic v High Court (Commercial Division), Accra: Ex Parte Attorney-General (Balkan Energy Ghana Ltd & Ors Interested Parties) [2011] 2 SCGLR 1183 at pp 1190-1191."*

Consequently, I am of the considered opinion that the original jurisdiction of the Supreme Court has been properly invoked by the plaintiff's action, not withstanding that the case also involves enforcement of his personal Human Rights.

The next issue is that of res judicata which is a principle based on public policy directed at curtailing re-litigation of matters that have already been finally decided by the courts. The principle operates in two ways; matters of fact that have been decided one way or the other should be allowed to lie after final appeals, even if some errors were committed. The argument is that after a matter has been exhaustively considered by the courts, the parties and all concerned should be left to move on. The second front of res judicata covers points of law decided by a final court which should stay undisturbed as indicative of the state of the law to ensure certainty about what the law is. This way the people are able to tune their conduct to be in conformity with the law which would be difficult if the law keeps changing. This is known as the doctrine of judicial precedent, also called *stare decisis*. Now, it is only the Supreme Court that is not bound by its previous decisions. Article 129(3) of the Constitution, 1992 states that;

(3) The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law.

What the above provision means is, that where the Supreme Court in a previous decision took a certain view of the law but in a later case it reflects on the earlier decision and decides that the first position is unsatisfactory and ought to be corrected, it may depart from the previous decision. Therefore, to the extent that the plaintiff herein is praying the Supreme Court to decide that the true scope of Article 19(1)&(2) forbids the conduct he has complained of against the High Court, then nothing prevents the Court in these present proceedings to arrive at a conclusion that departs from what the

Court held in the review motion when its supervisory jurisdiction was invoked. Yes, the Court may also, after hearing the parties on their respective preferred interpretations of Article 19(1)&(2) confirm the earlier position taken in the review motion, but that, again is different from denying the plaintiff a hearing in a matter of interpretation of the Constitution on a preliminary objection based on res judicata.

We risk stultifying the growth of our constitutional jurisprudence if we adopt and apply strictly the common law principle of res judicata on questions of interpretation of our Constitution which has been described as a living organism capable of growth.

In conclusion, for the reasons explained above, I shall dismiss the preliminary objections raised by the 1st defendant. Since I do not consider that the parties have been heard effectively on the substantive issue in this case, I express no opinion on them.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

COUNSEL

SAMUEL CUDJOE ESQ. WITH HIM JOHNSON NORMESINI ESQ. AND ZEINAB ABDUL AZIZ FOR THE PLAINTIFF.

GODFRED DAME YEBOAH (ATTORNEY-GENERAL) WITH HIM ALFRED TUAH YEBOAH (DEPUPTY ATTORNEY-GENERAL), UMMU ZAKARI (PRINCIPAL STATE ATTORNEY) AND LILLY ADDAE MENSAH (SENIOR STATE ATTORNEY) FOR THE DEFENDANTS.