

IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: DOTSE JSC (PRESIDING)
AMEGATCHER JSC
PROF. KOTEY JSC
OWUSU (MS.) JSC
LOVELACE-JOHNSON (MS.) JSC
TORKORNOO (MRS.) JSC
PROF. MENSA-BONSU (MRS.) JSC

WRIT NO.

J1/19/2023

3RD MAY, 2023

DAFEAMEKPOR ROCKSON-NELSON PLAINTIFF

VS

ATTORNEY-GENERAL DEFENDANT

JUDGMENT

AMEGATCHER JSC:-

The facts culminating in the plaintiff's current action are straightforward, uncomplicated, and agreed upon. They are that on 11th January 2021, the President issued a directive with reference SCR/DA39/314/401 to all Metropolitan, Municipal and District Chief Executives (MMDCEs) who were in office before the presidential inauguration on 7th January 2021 to remain at post until further notice. The directive also prohibited the MMDCEs from making policy-related decisions in line with Section 14(5) of Act 843.

The Plaintiff, claiming that the directive breaches the fundamental law of the land, issued this writ invoking the Original Jurisdiction of this Court in accordance with Articles 2(1)(b) and 130(1)(a) of the Constitution, 1992, seeking an interpretation and enforcement of Articles 243(1) and 246(2) of the Constitution.

Summary of Plaintiff's Case

The plaintiff's case is that the directive issued by the President of the Republic of Ghana, under article 243 (3), directing all MMDCEs to continue in office is unconstitutional. The plaintiff asserts that, since the said directive was issued under article 243 (3), it can be reasonably inferred that the President purported to exercise his power under article 243(3) (b) to remove from office all MMDCEs who were at post immediately before the issuance of the said directive. Having removed them, they were, per the directive, to remain in office until further notice. The plaintiff argues that the office of MMDCEs is specifically provided for under Chapter 20 of the 1992 Constitution of Ghana. As such, matters regarding the appointments, tenure, emoluments and removal from office must comply with the constitutional provisions to be valid. The plaintiff also argues that article 243 (1) provides that the President shall appoint the District Chief Executives (DCEs) with

the prior approval of not less than two thirds majority of members of the Assembly present and voting at the meeting. The plaintiff further argues that article 246 (2) provides that unless the MMDCE resigns or dies or ceases to hold office under clause (3) of article 243, the term of office is four years and shall not hold office for more than two consecutive terms.

The plaintiff again asserts that the concept of acting MMDCEs is alien to the 1992 Constitution and must not be countenanced by this Court. Article 243 (1) of the constitution makes the prior approval by members of the Assembly a condition precedent to the appointments of MMDCEs. Consequently, no person can purport to act or hold himself out as MMDCE when that person has not received prior approval from the members of the Assembly. Additionally, the plaintiff argues that the wording of article 243 (1) is similar to that of article 78 (1), which requires parliamentary prior approval to appoint a Minister of State. And Articles 243(1) and 78 (1) of the 1992 Constitution puts fetters on the appointing powers of the President. Again, the plaintiff argues that the President cannot purport to remove a Minister of State from office and then subsequently re-appoint the same minister back into the same office in an acting capacity without parliamentary prior approval. In the same vein, the President cannot remove MMDCEs from office and then purport to re-appoint them into office in acting capacities without the prior approval of members of the Assembly.

The plaintiff further argues that the power to *suo motu* appoint MMDCEs has not been expressly granted to the President, nor can it be implied under article 243 (1). Thus, the concept of acting MMDCEs is not only foreign to the constitution but also dangerous in that it allows the President to circumvent the laid down procedure under article 243 (1)

to impose any person he desires on the District Assemblies against the law, which intend defeats the whole concept of participatory democracy as envisioned under chapter 20 of the Constitution.

Plaintiff also asserts that the President's instruction to the MMDCEs to refrain from making policy-related decisions in accordance with Section 14(5) of the Presidential (Transition) Act, 2012 (Act 843) does not apply to MMDCEs. This is because MMDCEs do not fall within the category of persons to whom Section 14 of the Act applies, as the tenure of their office does not end upon the assumption of office by a newly elected president. Therefore, the plaintiff concludes that any agreements, contracts, or decisions made by the MMDCEs in this period are illegal and do not bind the Republic.

The plaintiff concludes his submission that the President exceeded his power by the said directive under article 243 (3). Hence, the continued stay in office of the affected MMDCEs is unlawful and unconstitutional. Consequently, all agreements or contracts entered into and decisions made by the MMDCEs are unlawful.

Ultimately, Plaintiff seeks the following reliefs:

1. A Declaration that upon a true and proper interpretation of Article 243(1) and Article 246(2) of the 1992 Constitution, the President of the Republic of Ghana has no power or authority to instruct or direct Metropolitan, Municipal and District Chief Executives to remain in office in an acting capacity.

2. A Declaration that upon a true and proper interpretation of Article 243(1) of the Constitution, 1992, the prior approval of the members of the District and Metropolitan Assemblies is a mandatory pre-condition for the President to direct, instruct or appoint any person to either act or hold office as a Metropolitan, Municipal and District Chief Executive.
3. A Declaration that the Presidential directive dated 11th January 2021 with reference number SCR/DA 39/314/01 Directing Metropolitan, Municipal and District Chief Executives to continue in office in an acting capacity contravenes Articles 243(1) and 246(2) of the 1992 Constitution and is therefore null and void and of no legal effect.
4. A Declaration that all acts, decisions, orders, and rules made by the said acting District, Municipal and Metropolitan executives pursuant to the Presidential directive dated the 11th of January 2021 contravenes Articles 243(1) and 246(3) of the Constitution, 1992.
5. A Declaration that all public expenses arising and pursuant to those decisions, acts, orders, or rules made by the acting District, Municipal and Metropolitan Chief Executives are unlawful.
6. A Declaration that all agreements or contracts entered into and decisions made by the said acting District, Municipal and Metropolitan Chief Executives are unlawful and same are not binding on the Republic of Ghana.
7. A Declaration that all liabilities or obligations, or demands placed on the Republic of Ghana as a result of the acts, decisions, orders, agreements, or

contracts entered into by the acting District, Municipal and Metropolitan Chiefs Executive during the period of their acting capacity are not binding on the Republic of Ghana.

8. An Order directed at all Metropolitan, Municipal and District Chief Executives continuing in office pursuant to the above-mentioned Presidential directive to vacate office with immediate effect.
9. Any other Order(s) or Direction(s) that this Honourable Court may deem necessary.

Summary Defendant Case

The defendant, by his statement of case, has raised a preliminary objection to the matters the plaintiff is seeking declarations on the basis that the matters are moot. The defendant also contends that contrary to the plaintiff's allegation, the President did not appoint anyone to hold office as DCE or MMCE without prior approval by the respective Assemblies. The defendant admits that the appointment of a DCE is anchored on Article 243(1) but contends that the President has not made any nominations for Article 243 (1) to be triggered. The defendant adds that the plaintiff has not demonstrated the act of omission, which warrants the exercise of this Court's exclusive original jurisdiction under Articles 2(1) and 130.

The defendant further contends that in any case, the President has implied powers to direct or instruct persons suitable to act as his representative when the office of a DCE has become vacant. The defendant submits that the President has implied powers to ask

a suitable person to act for a reasonable time until a substantive appointment is made. The defendant relies on the case of **J.H. Mensah v Attorney General (1996- 19997) SCGLR, Articles 57(1), 58 (1), and (3) and 297(a)**. In this light, the defendant argues that the President, as the head of government and in the name of his executive authority, can authorize officers subordinate to him to exercise executive authority per article 58 (3). The defendant also submits that as head of government, the President has the authority to appoint public officers. Under Article 297 (a), the President can direct that such persons so appointed hold the office in an acting capacity.

The defendant additionally submits that a close reading of the Constitution shows that the purpose for the appointment of DCEs is to represent the President at the local level of governance. And as DCEs, they are charged with the day to day performance of executive and administrative functions of the District Assemblies in accordance with Article 243 (2). Therefore, reading Articles 243 (1) 246, 57 (1), 58 (1)(3) purposively warrants a conclusion that where the office of a DCE becomes vacant, the President has the power to instruct or direct any person he deems fit to act temporarily as he contemplates a substantial appointment. This will ensure the local representation of the President at all material times to ensure government business continues. The defendant ends his submission on the note that the office of the DCE is a public office within the context of Article 190 (1), and any interpretation that precludes the President from directing a person to act as DCE in the meantime would mean an absence of central government and for that matter executive authority at the local level.

Reply

In the plaintiff's reply to the defendant's statement of case, he contends that the matters before the court are not moot since the same has the propensity of re-occurring. **The plaintiff further contends that the fact that the DCEs concerned acted for well over a year pursuant to the President's directive afore-mentioned without prior approval by the district assemblies is a clear indication of an act or omission on the part of the President whose authority extends to the execution and maintenance of the Constitution per article 58 (2).** The plaintiff points out that paragraphs 5, 6, 7 and 8 of his writ are not moot because the act of the President directing or instructing MMDCEs to remain in office is very much alive in our democracy and would continue if this Court does not make a definite pronouncement.

Jurisdiction

The condition precedent for invoking the original jurisdiction of this Court has been established in a plethora of cases, and we do not think we should reproduce these cases, which have become so notorious at the Bar and in our law reports. However, the pleadings call for scrutiny of the constitutional provisions to ascertain whether the directive of the President dated 11th January 2021 constitutes an act or omission and, indeed, whether the President can and did instruct MMDCEs whose tenure had expired to remain in office in an acting capacity under Article 243(1). This clearly brings the plaintiff's case within our jurisdiction under article 2 (1) and 130 of the Constitution, 1992.

Memorandum of Issues.

The parties filed a joint memorandum on 1st July 2022 on the following issues:

“

1. Whether upon a true and proper interpretation of article 243 (1) and 246 (2) of the 1992 Constitution, the President of the Republic has power or authority to instruct or direct Metropolitan, Municipal and District Chief Executives to remain in office in an acting capacity after expiration of their term of office.
2. Whether the Presidential directive dated 11th January 2021, with reference number SCR/DA 39/314/01 directing Metropolitan, Municipal and District Chief Executives to continue in office in an acting capacity contravenes Articles 243 (1) and 246 (2) of the 1992 Constitution and is therefore null and void and of no effect.
3. Whether upon a true and proper interpretation of article 243 (1) and 246 (2) of the 1992 Constitution all agreements or contracts entered into by persons acting as Metropolitan, Municipal and District Chief Executives are binding on the Republic of Ghana.
4. Whether the Plaintiff's action is moot.
5. Whether the President has implied power or authority to instruct or direct a suitable person to act as his representative in a District Assembly where the office of the District Chief Executive is vacant.”

Preliminary Legal Objection

A preliminary objection was raised by the learned Attorney-General that goes to the root of the determination of this matter. His reasons are that the matters for which the plaintiff seeks declarations are moot and that the plaintiff, by his Writ, only seeks to invite this Court to give its opinion. He argues that the issues have long been resolved by the

subsequent due appointment of the DCE's thereby eliminating any justiciable controversy for determination.

To begin with, we hold the opinion that constitutional cases, such as this one, serve as continuous aide-mémoire to the Supreme Court that it is perpetually bound by constitutional mandate to conserve and preserve the democratic values contained therein. This Court identifies these values in the constitutional plan and carves them to life through the constitutional cases before the Court. Accordingly, where a question arises whether an authority under the Constitution has acted within or without the limits of its power, it presents a perfect opportunity to this Court, which it must welcome with necessity so that in determining the matter, it advances these constitutional and democratic values. For this reason, the Supreme Court cannot entertain any disinclination to delve into the merits of the issues presented by a plaintiff, no less on the arid ground of mootness unless the reliefs and pleadings are clear that no useful purpose would be served in interrogating the issues. The legal principles laid down as regards the principle of mootness are elaborately discussed by this Court in the case of **Amidu v Kufuor And Others [2001-2002] 2 GLR 510**. The relevant portions are extracted hereunder.

“To read the doctrine of mootness into article 2 of the Constitution, 1992 will be a dangerous step to take. A breach of the Constitution, 1992 cannot be countenanced under any circumstances; nor can any plea of extenuating circumstances be allowed to prevail. A Constitution cannot be operated and defended by such considerations, lest we put expediency above constitutionalism. **The mootness doctrine can easily expose the Constitution, 1992, to frequent breaches resulting in subsequent loss of sanctity.** A Constitution must be a sacrosanct document and must remain so in all situations or circumstances. And it cannot remain inviolate as a sacred document if certain alleged infringements are denied judicial attention because there are extenuating or special circumstances justifying such a breach. **There cannot be any plea of justification when**

a breach of the Constitution is alleged; otherwise, this court could be accused of casting an indulgent judicial eye on certain breaches, by certain persons, of the fundamental law.” [Emphasis is Ours]

It bears emphasis that the rule of law constitutes the core of our constitutional dispensation, and the essence of this rule confines the State to the Constitution, 1992, in exercising its powers. Consequently, if any act is alleged to be co-signed by the President in a purported exercise of his executive authority, but the exercise is in flagrant violation of constitutional limitations, the plaintiff, as a citizen of Ghana, would have sufficient cause to challenge the act by filing a Writ to invoke the powers of the Supreme Court under Article 2 of the Constitution, 1992. Upon such circumstances, it would be the constitutional duty of this Court to entertain the writ and adjudicate upon the validity of such alleged act. See cases of **Tufuor v Attorney-General [1980] GLR 637**, **New Patriotic Party v Attorney-General [1996-97] SCGLR 729**, **Sam v Attorney-General [1999-2000] 2 GLR 336**, **Federation of Youth Association of Ghana (FEDYAG) vs. Public Universities of Ghana & Others [2010] SCGLR 265**, **Amidu (No. 2) v Attorney-General, Isofoton SA & Forson (No. 1) [2013-2014] 1 SCGLR 167**.

The court’s duty becomes most pertinent where the alleged unconstitutional act can recur or create an executive precedent to validate future actions. Actions that are capable of repetition or that have the potential to threaten the Rule of Law ought to be put under constitutional scrutiny. See **J.H. Mensah V Attorney-General [1996-97] SCGLR 320** at page 359. This is particularly important, as even under American Jurisprudence, where the doctrine of mootness is rooted in the United States Constitution under Article III, Section 2, Clause 1, the Supreme Court of the United States nevertheless has established several exceptions to the general mootness principle.

For the above reasons, it is our opinion that the learned Attorney General’s objection that the act complained of has since been rectified, and substantive MMDCEs appointed is

overreaching for advancing the mootness doctrine in respect of an alleged unconstitutional act. The least the Supreme Court can do is investigate the merits of the plaintiff's case.

Directive From The Office Of The President

The gravamen of this writ is the directive dated 11th January 2021 from the office of the President to the Metropolitan, Municipal and District Chief Executives (MMDCEs). The constitutionality of this directive has been set down by the parties for our determination as issue 2, i.e., **whether the Presidential directive dated 11th January 2021, with reference number SCR/DA 39/314/01 directing Metropolitan Municipal and District Chief Executives to continue in office in an acting capacity contravenes Articles 243 (1) and 246 (2) of the 1992 Constitution and is therefore null and void and of no effect.**

We believe a determination of this issue will, one way or the other, affect the other issues raised in the memorandum of agreed issues. Article 2 of the Constitution, 1992 provides that:

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.

It is a necessary requirement under article 2(1)(b) of the Constitution, 1992, that there should be an “**act or omission of any person**” which is inconsistent with or is in contravention of any provision of the Constitution. Indeed, it has been stated that even a threat to breach the Constitution, 1992 is enough to ground an action under Article 2 of the Constitution, 1992. See **Mensah v Attorney-General (supra)**. It appears that the directive from the Presidency exhibited to the plaintiff’s Statement of Case and marked as Exhibit DRN1, which provoked this action, made references to a constitutional provision and an Act of Parliament which were inapplicable to the office of the MMDCEs in the peculiar facts of this case. The plaintiff also read into the Exhibit meanings not contained in the directive. To fully appreciate the message communicated in the Exhibit, it would be appropriate to reproduce the contents of the directive at this stage.

SCR/DA39/314/01

11th January 2021

CONTINUATION OF RESPONSIBILITY AS METROPOLITAN, MUNICIPAL AND DISTRICT CHIEF EXECUTIVES

I am directed by H.E. the President to inform all Metropolitan, Municipal and District Chief Executives (MMDCEs) who were at post immediately before the inauguration ceremony on Thursday, 7th January 2021, to remain at post until further notice.

This directive is in accordance with Article 243(3) of the 1992 constitution of the Republic of Ghana.

You are to take note that the Provision of Section 14(5) of the Presidential (Transition) Act (2012) which states that you “shall not take a decision involving a policy issue.” Also, you are not to act in accordance with letter No. SCR/DA555/555/01 dated 21st December, 2020 which gives directives on financial commitments, recruitment among others. (Copy attached for ease of reference).

We count on your cooperation.

Warm regards,

**HON. AKOSUA FREMA OSEI-OPARE
CHIEF OF STAFF**

Exhibit DRN1 first referred to Article 243(3) of the 1992 constitution. The article reads as follows:

243(3) The office of District Chief Executive shall become vacant if –

- (a) a vote of no confidence, supported by the votes of not less than two-thirds of all the members of the District Assembly is passed against him; or**
- (b) he is removed from office by the President; or**
- (c) he resigns or dies.**

Article 246(2) on the tenure of office of the MMDCEs provides as follows:

Unless he resigns or dies or he earlier ceases to hold office under clause (3) of article 243 of this Constitution, the term of office of the District Chief Executive shall be four years; and a person shall not hold office as a District Chief Executive for more than two consecutive terms.

The clear meaning of these provisions is that the MMDCEs term of office is fixed at four years from the date of approval by the Assembly, renewable consecutively once. However, the Assembly may pass a vote of no confidence, or the President may remove an MMDCE from office during their term. Until these events occur, a person appointed as an MMDCE continues in office for four years. We have taken judicial notice of the fact that the appointment of the MMDCEs by the President takes months after the President is sworn into office. We have also taken judicial notice of the fact that the approval process by the Assembly runs into weeks and, in some cases, months, with some approval processes going into a second and third round of voting. As such, the starting and ending point for calculating the four-year tenure of the MMDCEs differ depending on when two-thirds of the Assembly approved them. It follows that all MMDCEs in office at the time of Exhibit DNR1 had a right to remain in their positions as their term had not ended, and no vacancies had occurred.

If Exhibit DRN1 did not remove from office the MMDCEs who were at post on the 7th of January 2021 when the President was sworn into office, they could not have been requested to act in the office once their tenure had not expired. In our opinion, the directive from the Office of the President to the MMDCEs *“to remain at post until further notice”* was unnecessary because their tenure of office was not tied to that of the President.

Another misconception in Exhibit DRN1 is the reference to Section 14(5) of the Presidential (Transition) Act (2012) (Act 843) as the basis for the directive to the MMDCEs not to take any decision involving a policy issue. Section 14(5) of Act 843 states as follows:

14(5) Before the assumption of office of the incoming Minister, a person so appointed by the President shall be in charge of the relevant Ministry but shall not take a decision

involving a policy issue except in the Ministry of Justice where the Solicitor-General shall be in charge of the Ministry.

To understand the category of officials affected by Section 14(5), the section must be read together with Section 14(1) and the schedule attached to the Act. Section 14(1) provides as follows:

14. (1) On the assumption of office of the person elected as President, a person holding any of the offices specified in the Schedule shall cease to hold that office and shall be paid the relevant retirement benefits and the enjoyment of facilities as provided by law.

The category of officials specified in the schedule is as follows:

SCHEDULE

Section 14

- 1.The persons holding office under the Presidential Office Act, 1993 Act 463).
- 2.Ministers and Deputy Ministers of State.
- 3.Regional and Deputy Regional Ministers of State.
- 4.Special Assistants, Special Aides to the President, to the Vice- President and to the Ministers of State, Deputy Ministers, Regional Ministers and Deputy Regional Ministers.
- 5.Non-career Ambassadors and High Commissioners.
- 6.Persons appointed by the President or a Minister of State as members of Statutory Boards and Corporations.

As noted correctly by the plaintiff, Section 14 of Act 843 contemplates political office holders. The MMDCEs are not political office holders. It is essential for this Court to take judicial notice of the fact that MMDCEs are not elected on partisan lines by the Assembly.

Currently, discussions are ongoing to amend the Constitution and allow political parties to participate in local level elections. Until then, MMDCEs are part of the public services as provided for in Article 190 of the Constitution, 1992. Their terms of office are also defined by the Constitution, and a vacancy in their offices can only be filled by the clear provisions of the Constitution. Indeed, the local government, of which the MMDCE is the head is a body corporate that can sue and be sued in its own name. These facts are explicit by the provisions of the Local Government Act, 2016 (Act 936).

Upon interrogating the plaintiff's claim in juxtaposition to the directive in Exhibit DRN1, it immediately becomes evident that the allegations made by the plaintiff are a far cry from the directive's contents. It is worth questioning whether there has been any "**act or omission**" that requires the interpretation and enforcement of Articles 243(1) and 246(2) of the Constitution, 1992. A careful examination of Exhibit DRN1 reveals that while the laws referred to were inapplicable to the MMDCEs, read as a whole, the letter is an administrative directive that sought to provide guidance to the MMDCEs on what they can and cannot do until the President gave further directives regarding their continuous stay in office. Astonishingly, the plaintiff seemed to have formed for himself a convincing tale based on the contents of Exhibit DRN1 that all MMDCEs were first removed from office and then directed to continue in their offices in an acting capacity. This is not the case, and it is evident from the face of the letter.

Conclusion

In the present case, there is no perceived threat to the Constitution. Instead, the springboard of the plaintiff's claim is the Presidential directive, which allegedly **directed all MMDCEs to continue in office in an acting capacity**. The directive contained in Exhibit DNR1 did not order the removal of all MMDCEs and did not direct them to

continue in their roles in an acting capacity. Consequently, the plaintiff's contention that the directive instructed MMDCs to continue in their offices in an acting capacity lacks merit. In view of these facts, the legal issues raised by (1) of the agreed memorandum of issues are not necessary for determination. Similarly, issues (3) and (5) of the memorandum of issues cannot be entertained by this Court. To do so would amount to rendering an advisory opinion, which is against the established position of the Supreme Court that the apex court does not engage in rendering advisory opinions to prospective litigants. See **Bilson v Attorney-General [1993-94] 1 GLR 104, SC**. Again, considering the current state of the Plaintiff's Statement of Case, which relies heavily on Exhibit DRN1, any declaration that this court may make would be meaningless and devoid of substance. Therefore, it is unnecessary to delve into these issues as they do not present any justiciable controversy for determination. Consequently, we conclude that the plaintiff's claim lacks merit and is dismissed in its entirety.

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTAY

(JUSTICE OF THE SUPREME COURT)

**M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)**

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