IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- AD 2024

CORAM: OWUSU (MS.) JSC (PRESIDING)

LOVELACE-JOHNSON (MS.) JSC

ACKAH-YENSU (MS.) JSC

ASIEDU JSC

GAEWU JSC

DARKO ASARE JSC

ADJEI-FRIMPONG JSC

WRIT

NO. J1/01/2023

13TH NOVEMBER, 2024

NII ODAI AYIKU IV ……. PLAINTIFF

VRS

1. ATTORNEY GENERAL ……. 1ST DEFENDANT

2. KING ODAIFIO WELENTSI III ……. 2ND DEFENDANT

JUDGMENT

OWUSU (MS.) JSC:

By his amended writ, the plaintiff invokes the original jurisdiction of the Supreme Court pursuant to articles 2 (1) (b) and 130 (1) (a) of the 1992 Constitution for the following reliefs:

1. *A declaration that the act of passage of Executive Instrument 18 (EI 18) did not and could not qualify as an Executive, Legislative or Judicial act within the contemplation of existing laws in operation at the time of its passage.*
2. *A declaration that the passage of EI 18 was an enactment made in excess of powers conferred on the Provisional National Defence Council (PNDC) as per the (Establishment) Proclamation 1981 and PNDC (Establishment) Proclamation (Supplementary) and Consequential Law 1982 (PNDCL 42) the 1992 Constitution of Ghana and Chieftaincy Act, 1971 (Act 370) in operation at the time of passage and the Chieftaincy Act, 2008 (Act 759).*
3. *A declaration that by the true and proper interpretation of the laws existing at the time and in particular Section 52 of the Chieftaincy Act, 1971 (Act 370) and now in operation as Section 63 (a) of the Chieftaincy Act, 2008 (Act 759), the passage of EI 18 was done in error on the face of the law.*
4. *A declaration that EI 18 is inconsistent with the Chieftaincy Act, 2008 (Act 759) and therefore void by reason of its inconsistency and by operation of law.*
5. *A declaration that EI 18 is inconsistent with the 1992 Constitution of Ghana and therefore void by reason and to the extent of its inconsistencies.*
6. *A declaration that upon a true and proper interpretation of articles 12 and 17 of the 1992 Constitution of Ghana, EI 18 operates to undermine the fundamental human rights of the plaintiff, Nii Odai Ayiku IV, in so far as it tends to discriminate against the plaintiff within the Chieftaincy Institution.*
7. *A declaration that notwithstanding Section 34 (3) and (4) of the Transitional Provisions of the 1992 Constitution of the Republic of Ghana, the continued operation of EI 18 conflicts with articles 12 (1) (2) and 17 (1) (2) and (3) of the 1992 Constitution and therefore void to the extent of its inconsistency.*

8. *A declaration that the effect of any action deemed unconstitutional under the 1992 Constitution of Ghana cannot prevail and continue within the life of the 1992 Constitution.*
9. *A declaration that EI 18 is unconscionable and must be removed from the Statutes books of Ghana.*
10. *An Order setting aside or striking down EI 18 as null and void for its inconsistency with 1992 Constitution of Ghana.*

In sum, the plaintiff by this action is praying this Court to declare EI 18 that is the Nungua Chieftaincy Affairs (Nii Adai Ayiku IV) Prohibition Instrument 1983 invalid and therefore void for reasons of its inconsistency with the 1992 Constitution of Ghana and abuse of the powers conferred on the Provisional National Defence Council (PNDC) as per the (Establishment) Proclamation 1981 and the consequential law 1982 (PNDCL 42) in the face of the Chieftaincy Act, 1971 (Act 370) and Chieftaincy Act 2008, (Act 759). Counsel for the plaintiff referred us to the case of **ADOFO v ATTORNEY GENERAL [2003-2004] SCGLR 239** where this Court reiterated its power to strike down legislation in conflict with any provision of the 1992 Constitution as one to safeguard liberty from encroachment by the legislature.

In his statement of case, counsel for the plaintiff referred us to article 1 (2) of the 1992 constitution and cases **like SAM (No. 2) v ATTORNEY GENERAL [2000] SCGLR 305** and **KWAKYE v ATTORNEY GENERAL 1981 GLR 9;** where the Supreme Court declared that, certain laws were inconsistent with and in contravention of the 1992 Constitution and to that extent was null and void. He continued that this Court assumed jurisdiction in the case of **ELLIS v ATTORNEY GENERAL [2000] SCGLR 24** notwithstanding the effect of Section 34 (1) of the Transitional Provisions of the 1992 Constitution. He continued that, in the case of **NEW PATRIOTIC PARTY v INSPECTOR-GENERAL OF POLICE**, this Court declared *Sections 7, 8, 12 (a) and 13 of the Public Order Decree, 1972 (NRCD 68)* void. Similarly, in the case of **NEW PATRIOTIC**

PARTY v ATTORNEY-GENERAL (31ST DECEMBER CASE) dated 8th March, 1994, the Supreme Court held that, notwithstanding the provisions of the Public Holidays Law, 1989 (PNDCL 220), it was no longer lawful to declare 31st December of each year a public holiday and use public funds to celebrate the occasion.

In providing justification for the issuance of the present writ, counsel for the plaintiff referred us to the case of **EDUSEI v ATTORNEY- GENERAL** and urged on us that, this Court has jurisdiction to entertain the present suit to determine whether or not the existence of EI 18 and its continued operation is inconsistent with the letter and spirit of the 1992 Constitution. He then gave the background of this case as follows:

> *"That the plaintiff, Nii Odai Ayiku IV, was nominated, selected, enstooled and gazetted as the chief of Nungua on 25th of March, 1956. His name was entered in the Register of Chiefs in the Eastern Region as a Divisional Chief. On 2nd September, 1983, the PNDC government published an Executive Instrument EI 18, prohibiting the plaintiff's right of enjoying his status as the Chief of Nungua on the ground that the plaintiff has been destooled. According to counsel for the plaintiff, EI 18 was issued pursuant to Section 52 of the Chieftaincy Act, 1971 (Act 370)."*

Then in the case of **IN RE NUNGUA CHIEFTAINCY AFFAIRS; ODAI AYIKU IV v ATTORNEY-GENERAL (BORKETEY LAWEH XIV APPLICANT) [2010] SCGLR 413;** this court held that:

"(a) The High Court lacked jurisdiction in the matter for the reason that the determination of the issues would require a prior determination of a cause or matter affecting Chieftaincy.

(b) The High Court and indeed this Court had no jurisdiction to make any order or grant any remedy or relief in respect of the legislative action taken in the form of EI 18".

According to counsel for the plaintiff, the gravamen of the plaintiff's relief is the determination under holding (4) of the judgment in the In Re Nungua Chieftaincy Affairs case supra which states that:

> ***"Given the provisions of article 299 and Section 34 (3) of the Transitional Provisions of the 1992 Constitution, no Court, not even the Supreme Court, being the highest court in Ghana, could have made any order or grant any remedy or relief relating to the plaintiff's claim, seeking a declaration that the Nungua Chieftaincy Affairs (Nii Odai Ayiku IV) (PROHIBITION) INSTUMENT, 1983 (EI 18) was a nullity. Consequently, the plaintiff's action brought before the High Court was not maintainable and should have been dismissed by the trial High Court…"***

In the view of counsel for the plaintiff, EI 18 was in the nature of injunctive order, not of the effect of destoolment of a validly enstooled chief. Nonetheless, EI 18 is considered part of the existing laws of Ghana and given constitutional validity pursuant to article 11 (1), (4) and (5) of the 1992 Constitution. Consequently, in the absence of any destoolment by a validly customary process, EI 18 was enacted upon a complete falsehood and therefore a violation of the Chieftaincy Act 1971, (Act 370) and an affront to the rule of law. The reason being that, the *(PNDC ESTABLISHMENT PROCLAMATION SUPPLEMENTARY AND CONSEQUENTAIL PROVISIONS) Law 1981* did not revoke the laws on Chieftaincy and indeed the Chieftaincy Act 1971 (Act 370) in operation at the time. In other words, by section 53 of PNDCL 43, the Chieftaincy Institutions in existence before 31st December, 1981 continue in existence with the same functions, compositions and powers notwithstanding the abrogation of the said Constitution. Consequently, counsel argued, the Executive body under PNDC government did not have the power to

destool chiefs in the exercise of the executive functions. Therefore, the passage of EI 18 did not qualify as "Executive Action" to be covered under Section 34 of the Transitional Provisions of the 1992 Constitution. Secondly, PNDCL 313 which granted indemnity for acts done by the government itself and its appointees is to a large extent, inconsistent with Section 34 of the Transitional Provisions. Therefore, EI 18 runs contrary to the dictates of the Chieftaincy Act, 1971 (Act 370) and section 53 of PNDCL 43 in that, the Secretary responsible for Chieftaincy Affairs published EI 18 which is injustice perpetuated against the plaintiff.

Consequently, given the nature and construction of EI 18, since there is no instrument which could be invoked to repeal such an instrument, the only way is to invoke the original jurisdiction of the Supreme Court for a declaration to that effect. Counsel for the plaintiff then submitted that, in spite of the holding of this Court in the In Re Nungua Chieftaincy Affairs case supra on ouster of jurisdiction of this Court pursuant to *article 299 and Section 34 (3) of the Transitional Provisions of the 1992 Constitution*, this Court has jurisdiction to entertain this suit. This is because it is the Supreme Court that has jurisdiction to strike down statutes or Acts as being inconsistent with the 1992 Constitution in the exercise of its original jurisdiction under article 130 (1) (b). This is especially so as EI 18 was enacted in error under the erroneous belief that the plaintiff has been destooled as a chief of Nungua. He referred to Exhibit "NOA7" a response from the National House of Chiefs dated 15th December, 2005 stating that;

> *"According to the records in the National Register of Chiefs, Nii Odai Ayiku IV, KNOWN in private life as Otu Kwei is the only person registered as Nungua Manste".*

But more importantly, counsel for the plaintiff submitted, at the time of the passage of EI 18 in 1983, plaintiff was a chief and since EI 18 was passed pursuant to Section 52 of the Chieftaincy Act, 1971 (Act 370), same is unlawful or invalid in the face of existing law of its inconsistency and error of law on the face of the record. He cited the case of

REGISTERED TRUSTEES OF AFRICANA MISSION v QUARSHIE (RTD) [2016] 98 GMJ 187 to buttress his point and invited us to hold that, there is error on the face of the records. That being the case, the continuous operation of EI 18 after the promulgation of the 1992 Constitution undermines article 270 and is inconsistent with the said Constitution in so far as it tends to discriminate against the plaintiff in the enjoyment of his rights in the Chieftaincy institutions.

In coming to this conclusion, counsel for the plaintiff urge us to adopt a purposive approach in the interpretation of EI 18 vis-à-vis article 270 of the 1992 Constitution.

In respect of Section 34 (3) of the Transitional Provisions of the 1992 Constitution, counsel for the plaintiff argued that, the section intends to provide indemnity to actors and appointees of the Military regimes in respect of their executive, legislative and or judicial actions. But urged us to consider the indemnity for the actions of the actors and appointees in retrospect but not in perpetuity in respect of the effect of same and in particular as they affect the human right of citizens. He continued that this writ is not only to challenge the unlawfulness of EI 18 but also to invoke the authority of this Court to lift the suppression of the right of the plaintiff to assume his status as citizen of Ghana who has attained the title of the chief of Nungua in fulfilment of article 17 (1) (2) of the 1992 Constitution which abhors discrimination of citizens. Counsel for the plaintiff therefore invites the Supreme Court to hold that the passage of EI 18 could not pass as an Executive Act to qualify for consideration for indemnity under the Transitional Provisions of the 1992 Constitution.

He concluded his submissions by referring to Section 36 of the Transitional Provisions of the 1992 Constitution and argued that the effect of the said section is that, the continuity of law and its effect before the coming into effect of the 1992 Constitution survive only upon their consistency with the provisions of the 1992 Constitution. Therefore, this Court

should uphold its jurisdiction notwithstanding the Transitional Provisions of the 1992 Constitution and hold that EI 18 as enacted by the PNDC pursuant to Section 52 of the Chieftaincy Act 1972 (Act 370) was made in error on the face of the records and is an infringement on the right of the plaintiff as well as the Institution of Chieftaincy.

ARGUMENTS OF THE DEFENDANT:

1st Defendant in his statement of case submitted that the plaintiff's action is not maintainable as held in the case **of IN RE NUNGUA CHIETAINCY AFFAIRS; ODAI AYIKU IV v THE ATTORNEY- GENERAL (BORKETEY LAWEH XIV APPLICANT) [2010] SCGLR 413** for the following reasons:

1. The above case decided and pronounced on the issues the plaintiff is trying to resurrect through the backdoor when the Supreme Court in that case put to rest the hullabaloo of the Nungua Chieftaincy Affairs.

2. When EI 18 of 1983 was passed by the PNDC, the government at the time had clothed itself with executive, legislature and judicial powers. Therefore EI 18 took the form of legislative action.

3. The plaintiff is coming by unapproved and unauthorized backdoor to get this Court pronounce on a cause or matter affecting Chieftaincy.

4. The Courts Act, 1993 (Act 459) as amended and the Chieftaincy Acts of 1971, (Act 370) and the current Chieftaincy Act, 2008 (Act 759) prohibit this Court, given the fact that EI 18 prohibits the plaintiff from acting as the Chief of Nungua. Counsel for the 1st Defendant argued that, in his writ, the plaintiff contends that he is the lawfully enstooled Chief. In this regard, the caution by Her Ladyship Georgina Theodora Wood is very apt when she said a court's duty at all times is to be on

the alert and unmask such clever undertakings or camouflages so that cases may be assigned to their proper forum". He referred us to case of **THE REPUBLIC v HIGH COURT KOFORIDUA; EX PARTE OTOTU KONO 1 (AKWAPIM TRADITIONAL COUNCIL INTERESTED PARTY) [2009] SCGLR 1, 11** and submitted that, the plaintiff's instant action is one on Chieftaincy.

5. On the application of the Transitional Provisions of the 1979 and 1992 Constitution, counsel for the Defendant referred us to the case of **KWAKYE v THE ATTORNEY- GENERAL (1981) GLR 944** and submitted that, the Supreme Court has long made pronouncement on Sections 15 (2) and (3) of the Transitional Provisions of 1979 Constitution as well as Section 34 (3) and (4) of the Transitional Provision of the 1992 Constitution. The import of this Court's decision in the case referred to supra is that, Section 15 (2) of the Transitional Provisions outs any judicial organ from jurisdiction to make any order or grant any remedy in respect of such acts. Similarly, the case of **FATTAL v MINISTER FOR INTERNAL AFFAIRS (1981) 1 GLR 104 SC** the ratio decidendi of the KWAKYE and FATTAL cases were cited with approval by this Court in the **IN RE NUNGUA CHIEFTAINCY AFFAIRS** case.

6. But more importantly, the plaintiff in his writ describes himself as the Paramount Chief of Nungua Traditional Area and stated that as his capacity in which he brings the action. Counsel for the Defendant on plaintiff's capacity submitted that, given the fact that the plaintiff had to flee the Country in 1983 and new Chiefs including Nii Welentsi and his predecessors were installed in his stead as Paramount Chiefs of Nungua Traditional Area, the plaintiff cannot style himself any longer as the Paramount Chief of Nungua Traditional Area. This is because there cannot be two Paramount Chiefs on the Stool simultaneously and therein lies the plaintiff's veiled mischief. According to counsel for the defendant,

plaintiff ought to have joined the sitting and incumbent Paramount Chief of Nungua to this action for the latter to vindicate his rights. Counsel for the defendant at this stage implored this Court to make an Order joining the sitting and incumbent Nungua Mantse to this action for an effective determination of the suit. The sitting and incumbent Nungua Mantse must be heard as his rights and interests will be affected one way or the other by the outcome of this action.

Counsel for the defendant argued further that, the plaintiff cannot invoke the original jurisdiction of the Supreme Court on a Chieftaincy matter. He referred us to the cases of **KYERE v KANGAH (1978) GLR 83** and **ADUAMOA 11 v ADU TWUM 11 [2000] SCGLR 165 and** submitted that, between 1983 when EI 18 was passed and 1993 when the Country returned to Constitutional rule, the plaintiff had slept on his right. Again, between the year 2010 when the case **of IN RE NUNGUA CHIEFTAINCY AFFAIRS; ODAI AYIKU IV v THE ATTORNEY-GENERAL (BORKETEY LAWEH XIV APPLICANT) [2010] SCGLR 43** Supra was decided and October 2022 when the present suit was instituted, a period of well over twelve (12) years had passed. The plaintiff is thus caught by laches and acquiescence. He is thus barred from instituting the instant action.

Based on the forgoing, counsel for the defendant invited us to dismiss plaintiff's action as same is a rehashed of what the Supreme Court decided in **2010 in the NUNGUA CHIEFTAINCY AFFAIRS** case supra. Plaintiff did not go for a review of that decision. This matter is thus res judicata and cannot be resurrected.

On 10th of October, 2023, one King Odaifio Welentsi III of Nungua filed an application to join the present suit. In his affidavit in support of the application for joinder, he deposed that he is the Nungua Mantse, and his name has been duly entered as such in the Register of the National House of Chiefs. That the plaintiff's claim that he is the Paramount Chief

of Nungua is false. That he has an interest in this case in that if the plaintiff succeeds in his claim before this Court, his position as the Chief of the Nungua Stool will be adversely affected hence the application for joinder. The plaintiff opposed the application for joinder.

On the 13th of December, 2023, this Court joined King Odaifio Welentsi III as 2nd defendant in this suit and ordered that, he be served with all processes filed in this case by the parties.

In his Statement of case, counsel for the 2nd defendant summed up the plaintiff's claim as follows:

> "In essence the plaintiff is seeking an Order of this Court to nullify the Nungua Chieftaincy Affairs (Nii Odai Ayiku IV) (Prohibition) Instrument, 1983, (EI 18) on the basis that it is unlawful and unconstitutional and for this reason the restoration of the status of the plaintiff as Chief of Nungua".

Counsel acknowledged the fact that any citizen of Ghana has a right to Challenge in the Supreme Court any act or omission which is inconsistent with or in contravention with the provisions of the 1992 Constitution. He referred us to the following cases:

1. **TUFFOUR v ATTORNEY-GENERAL [1980] GLR 639;**
2. **NEW PATRIOTIC PARTY v ATTORNEY-GENERAL [1996-97] SCGLR 729** and
3. **ADJEI AMPOFO v ACCRA METROPOLITAN ASSEMBLY & ANO. (N0.1) [2007-2008] SCGLR 11.**

He then submitted that, the plaintiff has already exhausted that right and cannot be seen to take a second bite at the cheery. Counsel then challenges the plaintiff on his claim that

he is the Chief of Nungua and stated that, 2nd defendant is the current Mantse of Nungua Traditional Council who had occupied the Stool since 2011. He referred us to Exhibits "KOW1" and "KOW2" (an extract from the National Register of Chiefs, Greater Accra Region certified on the 20th November 2013 and 9th August, 2018 respectively) attached to his Statement of Case. In Exhibit KOW1, the date of change of the status is stated as 20th February 1991.

On this Court's jurisdiction in Chieftaincy matters, counsel for the 2nd defendant submitted that, the issue stated in the Memorandum of Issues filed by the plaintiff is a matter that can appropriately be dealt with by the Regional House of Chiefs per article 274 (3) of the 1992 Constitution. He referred to the case of **YIADOM 1 v AMANIAPONG [1981] GLR 3** to buttress his point.

On the Power of Attorney of the plaintiff dated 8th January, 2014, (Exhibit NOA9), counsel for 2nd defendant submitted that, it was not executed for the prosecution of the present suit but for a specific case pending against the Attorney-General in 2014. Consequently, "Exhibit NOA9" cannot be used to prosecute a case commenced in 2022 as same was not executed with the proper authority from the donor. He continued that, assuming there was a valid Power of Attorney given to two attorneys, both have to act jointly and not by one attorney as Ellis Afotey Quaye purported to do in verification of the Statement of Case for the plaintiff. Consequently, the said Ellis Afotey Quaye lacks capacity to act on behalf of the plaintiff in this case.

Counsel for 2nd defendant further argues that, the plaintiff contends that EI 18 undermines his right as a Chief and thus the Executive Instrument ought to be lifted for him to assume his position as a Chief of Nungua. If that is the case, then the plaintiff's action is not about interpretation of the provision of the Constitution but rather the substance of plaintiff's case is for the enforcement of his rights as a citizen of Ghana. That being the case, then the proper forum for the plaintiff to seek redress for his human rights

violation is the High Court as stipulated in article 130 (1) and 140 (2) of the 1992 Constitution. He cited the case of **FEDERATION OF YOUTH ASSOCIATION OF GHANA (FEDYAG) v PUBLIC UNIVERSITIES OF GHANA & Others [2010] SCGLR 265** to support his contention.

On the Transitional Provisions vis-à-vis EI 18, counsel for 2nd defendant argued that, plaintiff contends that EI 18 was enacted upon complete falsehood and as such it violates the Chieftaincy Act 1971 (Act 370) and therefore the provisions of Section 34 (3) and (4) of the Transitional Provisions is inapplicable to EI 18 which cannot qualify as an Executive, legislative or judicial Act of the PNDC. Counsel for the 2nd defendant's response is to refer us to the case of In Re Nungua Chieftaincy Affairs case supra in which the plaintiff sued the Attorney-General in 2004 at the High Court, Accra. The case travelled all the way to the Supreme, where this Court held in holding (4) of the headnotes of the Report in that case as follows:

> ***"Given the provisions in article 299 and Section 34 (3) of the Transitional Provisions of the 1992 Constitution, any court, not even the Supreme Court, being the highest Court in Ghana, could have made any order or grant any remedy or relief relating to the plaintiff seeking declaration that the NUNGUA CHIEFTAICY AFFAIRS (NII ODAI AYIKU IV) (PROHIBITION) INSTRUMENT, 1983 before the High Court was not maintainable and should have been dismissed by the EI 18, before the High Court*** (our emphasis). ***The Court of Appeal had therefore rightly affirmed the subsequent decision of the High Court (differently constituted) setting aside the default judgment earlier made by the High Court in respect of the plaintiff's action".***

Counsel for the 2nd defendant therefore submitted that the issue raised by the plaintiff as far as the nullity or otherwise of EI 18 is concerned the matter is res judicata as between the parties. The plaintiff cannot be seen to be relitigating the matter. The plaintiff has also

not canvassed any good reason to compel this Court from departing from its previous decision on the matter. On res judicata counsel cited the case of **TOGBE GOBO DARKE XII v TOGBE AYIM MORDEY VI [2018-2019] 2 GLR 651** and concluded that, the apex Court of the Republic has spoken and its decision is final on the matter of EI 18. All the issues raised in this suit are matters which properly belonged to the *IN RE NUNGUA CHIEFTAINCY AFFAIRS* case supra and any matter concerning EI 18 ought to have been raised then. Consequently, this case is vexatious and oppressive to the people of Nungua and ought to be dismissed in limine.

In his Further Arguments of Law filed on the 7th of May, 2024, in response to defendants' Statement of Case, counsel for the plaintiff maintained that the ***IN RE NUNGUA CHIEFTAINCY AFFAIRS*** case did not take into account Section 36 (2) of the Transitional Provisions of the 1992 Constitution and its effect was also never discussed by the Supreme Court. Secondly, estoppel cannot operate to impeach the exercise or enjoyment of a Constitutional right. He cited the case of **ATTORNEY-GENERAL v SWEATER & SOCKS FACTORY LTD [2013-2014] 2 SCGLR 946** to support his contention and urged us to grant plaintiff's reliefs.

In this suit, the parties filed separate Memorandum of Issues in terms of Rule 50 (3) of CI 16.

For the plaintiff, the following Memorandum of Issues were filed:

1. Whether or not the plaintiff has been destooled as the chief of Nungua according to tradition and culture.
2. Whether or not EI 18 was enacted in error.
3. Whether or not the continuous operation of EI 18 undermines the plaintiff's right to the enjoyment of the status as a Chief.

4. Whether or not the continuous operation of EI 18 undermines the Chieftaincy Act 1971 (Act 370) and the Constitution of Ghana.
5. Whether or not the continued operation of EI 18 is unconstitutional and therefore unlawful.
6. Whether or not the operation of the Transitional Provisions ousts the jurisdiction of the matters of Human Rights.

For 2nd defendant, the following Memorandum of Issues were filed:

1. Whether the plaintiff's Attorney has authority to commence this action on behalf of the plaintiff.
2. Whether the matter concerning the constitutionality of EI 18 is res judicata having been previously determined by this Court.
3. Whether this Court has jurisdiction to determine matters concerning the destoolment of plaintiff being a cause or matter affecting Chieftaincy.

Having gone through the respective Memorandum of Issues filed by the parties, we note that the resolution of the following Issues will effectively dispose this case. They are:

1. Whether the matter concerning the Constitutionality of EI 18 is res judicata.
2. Whether or not the plaintiff has been destooled as the chief of Nungua according to custom and culture.
3. Whether or not EI 18 was enacted in error.
4. Whether or not the continued operation of EI 18 is unconstitutional and therefore unlawful.

In resolving the 1st Issue that is;

Whether or not the matter concerning the Constitutionality of EI 18 is res judicata;

We note that EI 18 was adequately discussed and addressed by the Supreme Court albeit an obiter in the case of **IN RE NUNGUA CHIEFTAINCY AFFAIRS; ODAI AYIKU IV v ATTORNEY-GENERAL (BORKETEY LAWEH XIV APPLICANT) [2010] SCGLR 413, 416-417.** In holding (4) of the headnotes, this Court held among other things as follows;

> ***"Given the provisions in article 299 and section 34 (3) of the Transitional Provisions of the 1992 Constitution, no court, not even the Supreme Court, being the highest court in Ghana, could have made any order or grant any remedy or relief relating to the plaintiff's claim, seeking a declaration that the Nungua Chieftaincy Affairs (Nii Odai Ayiku IV) (Prohibition) Instrument, 1983 (EI 18), was a nullity. Consequently, the plaintiff's action brought before the High Court was not maintainable and should have been dismissed by the trial High Court*** (our emphasis)
>
> ***The Court of Appeal had therefore rightly affirmed the subsequent decision of the High Court (differently constituted), setting aside the default judgment earlier granted by the same High Court in respect of the plaintiff's action. Kwakye v Attorney-General [1981] GLR 944 at 944 and 976-977, SC; Fattal v Minister for Internal Affairs [1981] GLR 104, SC; and Ellis v Attorney-General [2000] SCGLR 24 at 28 followed".***

In the words of our sister Rose Owusu, JSC who wrote the lead judgment:

> ***"Section 34 (3) of the Transitional Provisions of the 1992 Constitution was passed rather at an abnormal time, so far as good governance is concerned, and nobody could challenge it at the time. The indemnity provision in the transitional provisions is to make sure that when time returned to normal, i.e., under a properly elected government in a constitutional regime, the law could still not be***

challenged. In the Ellis case, the plaintiff like the plaintiff-appellant sought a declaration that the *Hemang Lands (Acquisition and Compensation) Law, 1992 (PNDCL 294),* ***is null and void under the Constitution, 1992. The Supreme Court unanimously dismissed the action, having*** **upheld a preliminary objection that the action was not** ***maintainable in view of the Transitional Provisions".***

For the avoidance of doubt, we will state the plaintiff's writ before the High Court which culminated in the Appeal before the Supreme Court in the case referred to supra.

"By the writ of summons, the plaintiff who described himself in the statement of claim as the Mantse (Chief) of Nungua in the Ga traditional Council, claimed the following declarations:

(i) That the Nungua Chieftaincy Affairs (Nii Odai Ayiku IV) (Prohibition) Instrument, 1983 (EI 18). Is null and void having been based on facts which are untrue;

(ii) That EI 18 cannot operate to 'destool' the plaintiff without judicial process; and

(iii) That notwithstanding EI 18, the plaintiff is the lawfully enstooled Mantse of Nungua and entitled to exercise the functions appertaining to that status".

See page 418 of the report.

As stated above, the unconstitutionality or otherwise of EI 18 was not the issue before the Supreme Court in the In Re Nungua Chieftaincy case decided by the Supreme Court in 2010. Thus, the issue is not res judicata. However, there are a number of decisions of this Court that make such an enquiry not maintainable in Court. For instance, in the case of **ELLIS & ANOTHER v ATTORNEY-GENERAL [2000] SCGLR 24, 25-26,** the Supreme Court was called upon to decide whether or not PNDCL 294 is a legislative act, properly

so-called. In other words, was PNDCL 294 passed in accordance with and within the ambit of the applicable law? Their Lordships answered this question in the affirmative. In holding (1) of the Report, this is what they said:

> ***"The court could not declare the Hemang Lands (Acquisition and Compensation) Law, 1992 (PNDCL 294), null and void under the 1992 Constitution, because the Law had been passed and the plaintiffs' lands had been acquired and vested in the Republic under the Law before the coming into force on 7 January 1993 of the Constitution, which could only be applied prospectively and not retrospectively".***

In the words of *Bamford-Addo JSC:*

> ***"The effect of section 36 (2) is that the existing law passed by any Government <u>except the PNDC or the Armed Forces Revolutionary Council Government</u>*** (our emphasis) ***could be challenged under section 36 (2) of the transitional provisions of the Constitution if it is found to be inconsistent with a provision of the 1992.The exception to this is clearly stated in the provisions of section 34 (3) of the transitional provisions and affects PNDCL 294, which is a legislative act of the PNDC Government… By virtue of section 34 (3) of the transitional provisions of the 1992 Constitution, PNDCL 294 cannot be questioned by this court; nor can any remedy or relief be granted in respect of any such challenge to the unconstitutionality of the said law notwithstanding section 36 (2) of the transitional provisions".***

His Lordship Charles Hayfron-Benjamin JSC also had this to say in supporting the decision of the court:

> ***"In the present case… the issue is whether PNDCL 294 is a legislative act, properly so-called. In other words, was PNDCL 294 passed in accordance with and within the ambit of the applicable law? The applicable law for determining the validity of any law was the Provisional National Defence Council (Establishment) Proclamation, 1981, by section 4 of which the law passed by PNDC would be valid if it was signed by the chairman thereof and gazetted. There is no gain saying that PNDCL 294 possesses these attributes and therefore, in terms of section 34 (3) of the transitional provisions, its validity cannot be "questioned" in any court".***

Similar sentiments were expressed by the Supreme Court in the case of **KWAAKYE v ATTORNEY-GENERAL [1981] GLR 944** where the plaintiff issued a writ to invoke the original jurisdiction of the Supreme Court, seeking a declaration that he was never tried, convicted or sentenced by any special court established under the Armed Forces Revolutionary Council (Special Courts) Decree, 1979 (AFRCD 3) as amended and that the purported sentence of 25 years' imprisonment imposed on him by the special court was an infringement of his fundamental human rights inconsistent with Chapter 6 of the 1979 Constitution and therefore void and of no effect. The court per Apaloo CJ stated at page 961 of the report as follows:

> ***"That being so, section 15 (2) of the transitional provisions, outs any judicial organ from jurisdiction to 'make any order or grant any remedy or relief in respect of such act'. It follows that the declaration sought by the plaintiff cannot lawfully be granted."***

See also the case of **FATTAL v MINISTER FOR INTERNAL AFFAIRS [1981] GLR 104**

It must be noted that, section 15 (2) and (3) of the Transitional Provisions of the 1979 Constitution, the words used were in similar terms like section 34 (3) and (4) of the 1992 Constitution.

Relating the *Ellis v Attorney-General* and the *Kwakye v Attorney-General* cases to the case under consideration, EI 18 was passed in 1983 and had taken effect before the 1992 Constitution came into force. Therefore, the Constitution can only be applied prospectively and not retrospectively. The last paragraph of EI 18 states:

> *"Nii Odai Ayiku IV, formerly Nungua Mantse and otherwise in private life known as Otu Tawiah is hereby prohibited from purporting to exercise the functions of a chief and accordingly no person shall treat Nii Odai Ayiku IV as a chief."*
>
> This EI 18 was signed by:
>
> "K. DWEMOH-KESSIE
>
> The Secretary responsible for Chieftaincy Matters."

The EI 18 was passed before the 1992 Constitution came into force on 7 January 1993 and section 34 (3) of the transitional provisions provides that:

> *"…no executive, legislative or judicial action taken or purported to have been taken by the Provisional National Defence Council… shall be questioned in any proceedings whatsoever and, accordingly. It shall not be lawful for any court or other tribunals to make any order or grant any remedy or relief in respect of any such act."*

Since the Supreme Court had already made pronouncement on section 34 (3) and section 36 (2) of the Transitional Provisions of the 1992 Constitution, this court cannot entertain plaintiff's action. Additionally, counsel for the plaintiff has not given us any reason to depart from the previous decision of this Court. The plaintiff's action should fail on this issue.

Counsel for the plaintiff had also argued that EI 18 was in the nature of an injunctive order not of the effect of destoolment of a validly enstooled chief. Our short response is that, this submission should be articulated at the proper forum, that is the appropriate Judicial Committee of the Regional House of Chief which is the proper forum for vindicating issues in respect of a cause or matter affecting Chieftaincy. See article 274 (1), (3) (d) of the 1992 Constitution which provides as follows:

(1) There shall be established in and for each region of Ghana a Regional House of Chiefs.

(3) A Regional House of Chiefs shall-

(d) "Have original jurisdiction in all matters relating to a paramount stool or skin or the occupant of a paramount stool or skin, including a queen-mother to a paramount stool or skin".

The second issue is whether or not the plaintiff has been destooled as a chief of Nungua according to custom and culture.

This is a cause or matter affecting chieftaincy which this court has no original jurisdiction to entertain. Section 76 of the Chieftaincy Act, 2008 (Act 759) defines what amounts to a cause or matter affecting chieftaincy as:

"Cause or matter affecting chieftaincy" means a cause, matter question or dispute relating to;

(a) nomination, election, appointment or selection or installation of a person as a chief or the claim of a person to be nominated, elected, appointed or installed as a chief or;

(b) the destoolment or abdication of any chief…"

Therefore, if the plaintiff is saying he has not been destooled as the chief of Nungua according to custom and culture the proper forum to articulate his grievance is the

Judicial Committee of the appropriate Regional House of Chiefs and not to invoke the original jurisdiction of this court. See also section 117 of the Courts Act, 1993 (Act 459) the interpretation section. Section 117 (1) provides:

> In this Act unless the context otherwise requires-
>
> "Cause or matter affecting chieftaincy" means any cause, matter, question or dispute relating to any of the following-
>
> (a) Nomination, election, selection, installation or deposition of a person as a chief or the claim of a person to be nominated, elected, selected, installed as a chief.
> (b) The destoolment or abdication of any chief.

From all of the forgoing, issue No. two (2) fails and it is accordingly dismissed.

This brings us to the third (3) issue and that is whether or not EI 18 was enacted in error.

The question is what is the error the plaintiff is complaining about. In his amended statement of case filed on 18 of January 2024, paragraph

> *4.6 states:*
> *"My Lords, EI 18 was premised on the proposition that the Plaintiff, NII ODAI AYIKU IV, has been destooled, when in fact and indeed the Plaintiff had not been destooled."*
> *Paragraph 5.2 states:*
>
> *"My Lords, having proved the absence of any destoolment by a valid customary process as per the above evidence, the Plaintiff humbly submits that EI 18 was enacted upon a complete falsehood, and therefore a violation of the Chieftaincy Act 1971 (Act 370) and an affront to the rule of law".*

At the risk of sounding repetitive, in resolving the second issue we have held that, the appropriate forum to resolve the issue whether or not the plaintiff has been destooled is the appropriate Judicial Committee of the Regional House of Chiefs and not an invocation of the original jurisdiction of the Supreme Court. For this reason and the reasons given in our resolution of the second issue set down for the hearing of this case, Issue three also fails and it is hereby dismissed.

The last issue for determination is whether or not the continued operation of EI 18 is unconstitutional and therefore unlawful.

In resolving the first issue we made reference to the case of **ELLIS v ATTORNEY-GENERAL [2000] SCGLR, 24** where their Lordships held that the plaintiffs in that case were not entitled to question the legislative action of PNDC by virtue of the ouster clause in section 34 (3) of the transitional provisions of the 1992 Constitution. Secondly, the Supreme Court held in the ***Ellis case*** that the 1992 Constitution could only be applied prospectively and not retrospectively and since EI 18 was passed before the coming into force of the 1992 Constitution, we cannot declare same as unconstitutional and therefore unlawful. Thirdly, going by the decision in the ***Ellis case,*** EI 18 is a legislative act, properly so called, as the applicable law for determining the validity of any law was the Provisional National Defence Council (Establishment) Proclamation, 1981.The last Issue has not been made out and it is therefore dismissed.

From all of the forging, the plaintiff's action ought to fail and same is hereby dismissed.

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

(SGD.) **A. LOVELACE-JOHNSON (MS.)**
(JUSTICE OF THE SUPREME COURT)

(SGD.) **B. F. ACKAH-YENSU (MS.)**
(JUSTICE OF THE SUPREME COURT)

(SGD.) **S. K. A. ASIEDU**
(JUSTICE OF THE SUPREME COURT)

(SGD.) **E. Y. GAEWU**
(JUSTICE OF THE SUPREME COURT)

(SGD.) **Y. DARKO ASARE**
(JUSTICE OF THE SUPREME COURT)

(SGD.) **R. ADJEI-FRIMPONG**
(JUSTICE OF THE SUPREME COURT)

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MOHAMMED B. SAHNOON ESQ. FOR THE 2ND DEFENDANT.