

BAFFOE-BONNIE JSC:

On the 7th and 8th days of December, 2012, Ghanaians went into general elections to elect 275 members of parliament and an Executive President and Vice President. The Elections were conducted by the second respondents, a constitutional body vested with the exclusive powers to conduct public elections in Ghana. The Parliamentary elections though, had its own problems, is not the subject of this petition. So any reference to the December Election in this judgment, unless otherwise contrarily stated, is a reference to the 2012 Presidential Elections in Ghana.

The Executive Presidency was contested by 8 persons and their running mates who, by law, would be designated Vice-President when such person is so elected. Seven of the candidates were sponsored by Political Parties, namely:

1. National Democratic Congress(NDC)JOHN DRAMANI MAHAMA,
2. New Patriotic Party (NPP)NANA ADDO DANQUAH AKUFFO-
ADDO,
3. Convention People's Party (CPP) DR MICHAEL ABU SAKARA
FOSTER,
4. Peoples National Convention(PNC)HASSAN AYARIGA,
5. Great Consolidated People's Party(GCPP),DR.HENRYHERBERT
LARTEY;
6. Progressive People's Party (PPP) Dr. PAPA KWESI NDUOM
7. UNITED FRONT PARTYAKWASI ADDAI ODIKE

One person JACOB OSEI YEBOAH stood as Independent candidate.

On the 9th of December, the second respondent, per its Chairman Kwadwo Afari Gyan, who is constitutionally designated as the returning officer of the Presidential Elections, declared the NDC's John Dramani Mahama, duly elected as President with a 52 per centum majority, and

the NPP's Nana Addo Dankwa Akuffo-Addo, as runner-up with 47 percentum of the votes. The declaration, showing positions and percentage of votes won has been gazzeted as C.I. 85.

Feeling aggrieved, the 1st petitioner, Nana Addo Dankwah Akuffo-Addo, who stood on the ticket of the New Patriotic Party as presidential candidate, his running mate, Dr. Mahamadu Bawumia, and Jake Obetsebi Lamptey, the Chairman of the New Patriotic Party, filed a 33-paragraph petition challenging the declaration by the 2nd of the 1st respondent as the validly elected president. The reliefs that the petitioners seek are:

1. a declaration that John Dramani Mahama was not validly elected as president of the Republic;
2. a declaration that Nana Addo Dankwah Akuffo-Addo, the 1st petitioner, rather was validly elected president of the Republic of Ghana; and
3. consequential orders as to this court may seem meet.

The petition had initially been brought against the President elect and the E.C. but the NDC was joined to the action as a third party on the basis that they sponsored the 1st respondent, and were therefore necessary parties. Their application to join was approved by a 6 to 3 majority. After the initial pleadings, amendments, further amendments and a host of interlocutory applications from all parties, which said applications included an application for further and better particulars, an application to serve interrogatories, etc, the case was finally set down for hearing.

After sifting through a mass of pleadings the Court set the following two issues down for trial:

1. Whether or not there were irregularities, malpractices, and/or statutory violations in the conduct of the December 2012 Presidential Elections; and
2. Whether or not these irregularities, malpractices and statutory violations, if any, substantially or materially affected the outcome of the December 2012 Presidential Elections.

Giving further directions as to the mode of trial the court decided that trial was going to be by affidavit evidence and that parties could give viva voce evidence and be cross examined. Witnesses who filed statements may be cross examined with the leave of the court.

THE PETITIONERS' CASE

It is the case of the Petitioners that during the conduct of the December 2012 Presidential Elections, there were several irregularities, malpractices, omissions and commissions and downright violations of statutory provisions including constitutional provisions that were pervasive in a significant number of polling stations throughout the nation. These anomalies were such that certain number of polling stations totaling about 11,138 (specifically identified), should have their results annulled. Some of the anomalies pointed out by the Petitioners were as follows:

1. Failure of the Presiding officer of the polling station to sign the declaration of the results;
2. The use of Pink Sheets with Duplicate Serial numbers;
3. Allowing some people to vote without Biometric Verification; and
4. Over voting.

Two other in fractions were also isolated ie. Pink Sheets of Unknown polling stations, and Polling stations with duplicate pink sheets. But the second petitioner sought to abandon these when he

said the numbers involved in those two infractions were not significant to affect the outcome of the elections.

FAILURE OF THE PRESIDING OFFICER TO SIGN DECLARATION FORMS (PINK SHEETS)

It is the case of the petitioners that, a number of polling stations pink sheets were not signed by the presiding officers as required by law and so all those polling stations should have their results annulled and the figures so annulled be deducted from the results as declared. They claim that if the votes are annulled for this constitutional or statutory violation alone the results as declared will be affected. It is their case that the use of the word 'shall' in a document connotes a mandatory situation as against 'may' which is permissive. And when it is used in a no less statute as the constitution of the State, anything done contrary to what shall be done is a violation that cannot be saved.

The 2nd respondent put up three defences to this claim. This is what they said in their response to the petition;

The 2nd Respondent denies paragraph(f) of ground 1 of the 2nd Amended Petition and says that upon being served with the further and better particulars provided by the Petitioners following orders of this honorable court dated February 5 and 7, 2013, it conducted an examination and analysis which showed that: of the 2,009 pink sheets that the Petitioners claimed to be unsigned, 1,099 were in fact, signed by the Presiding officer at the polling station or, at the instance of the Returning Officer at the Collation Centre; 905 were unsigned, representing 3.5% of the total number of pink sheets nationwide; and 1,989 pink sheets, representing 99% claimed to be unsigned were signed by the Polling or Counting Agents of the candidate. Thus, the 2nd Respondent maintains that the request by the Petitioners that votes cast at the

said polling stations are invalid and should be deducted is without merit and should be refused. It should also noted that when several pages of paper impregnated with carbon are used in order to have several copies of each page, it could happen that if the person signing or writing thereon does not press hard enough on the paper, the signature or writing could appear faint or illegible on some of the pages.

In addition to this Counsel has also submitted that the absence of the signature of the presiding Officer is not sufficient to annul the votes of persons who have exercised their franchise under the constitution, particularly in a situation where the accredited representatives of the parties or the candidates have duly signed to authenticate the regularity of the conduct of the polls. The right to vote as guaranteed under the constitution is paramount and not only must it ensure that persons qualified to vote exercise it, but it must also be ensured that peoples' votes once regularly exercised are not annulled on the basis of technicalities. Failure to sign by the presiding officer ought to be seen as an irregularity that does not affect any party or conduct of the polls. The call for annulment of votes under this head is therefore misplaced.

THE USE OF PINK SHEETS WITH DUPLICATE SERIAL NUMBERS

It is the case of the Petitioners that the Pink Sheets were imported into the country with numbers embossed on each pink sheet to differentiate it from any other pink sheets. In that case each pink sheet should bear a different serial number in all 26002 polling stations in the country. However this was not done. They detected that out of the over 11000 pink sheets reviewed, over 10000 had their counterparts or duplicates used instead of their "original" pink sheets. This was done because the second respondents had intentionally imported more pink

sheets with the view to manipulating the results of the polls. The use of counterpart pink sheets instead of different pink sheets for each polling station is an irregularity which should lead to annulment of votes in all polling stations affected, in this case about 10,000 plus polling stations with a total voter population of over 2.5 million voters.

The response of the second respondent to this claim is that the petitioners claim has no basis and not well founded. Yes it is true that each pink sheet has a different number, but they are not in series and therefore not serial numbers properly so called. The numbers are not security numbers that can be used to track the polling stations in which they are actually used. So any pink sheet with any number can be sent to any region, constituency or polling station. Pink sheets are packed at random and their distribution does not follow any pattern in terms of the numbers embossed on them.

Rather, when the pink sheets are sent to the regions thence to the constituency and polling stations, they are blank. It is when they are filled in that the polling station codes become the identifying marks and reference points. For example, when one picks a pink sheet with a number like A170202 written in the polling station code number column, even without reference to the name one can say that this pink sheet comes from a constituency in the western region. The letter A is western region, the first two digits are constituency codes and then polling station etc. In effect a pink sheet is not identifiable by the number embossed on it but rather by the polling station code written on it. So whether two pink sheets bearing the same embossed numbers are used by two different polling stations either in the same region or in different regions it doesn't matter and definitely cannot call for the annulment of ballots validly cast. This category should also be dismissed.

VOTING WITHOUT PRIOR BIOMETRIC VERIFICATION.

For the first time in the history of elections in this country, the 2012 general elections was supposed to be conducted with identification of potential voters by biometric verification. The nation spent a lot of time and energy registering eligible voters biometrically. Biometric registration involved taking the finger prints of eligible voters in addition to facial recognition. In the round up to the elections a lot of inter party discussions took place and it was finally decided that voters who could not be biometrically verified on the election day would not be allowed to vote even if they had their names in the register. There appeared in the political landscape the popular slogan “NO VERIFICATION, NO VOTING.” C.I.75 reg 30(2) supported this slogan. The constitutionality of this CI is being challenged in court, so I will stay off discussion on this for now.

Be that as it may, constitutionality or otherwise, all the parties went into the general election with the understanding that no verification, no voting. The whole concept of biometric registration and verification before voting had been introduced as a way of reducing to the barest minimum, if not eradicate completely, the incidence of claims of double voting and impersonation that crop up after every election. It was supposed to increase transparency and enhance people’s acceptability of the election results. Indeed at one of the numerous press conferences the electoral commissioner made it clear that at the end of the polls, where the votes cast exceed the number of persons verified to vote by even one vote, the results of the said polling station will be cancelled. Based on this understanding, some voters were turned away from some polling stations and were not allowed to vote because they could not be verified. But as borne out by some of the pink sheets at a number of polling stations reviewed by the petitioners, some people were allowed to vote without prior biometric verification. In fact in quite a number of cases recordings on the pink sheet indicated that all voters voted without prior biometric verification.

The response of the respondents, particularly the EC, was that no persons voted without biometric verification as agreed on by the parties before election day. And that the entries found in the pink sheets which creates the impression of people voting without prior biometric verification, were wrongly made and part of the administrative lapses that did not affect the conduct of the polls. That the respective polling agents signed at the various polling stations without any excuse belies the claim that any electoral irregularity went on.

OVER VOTING

The petitioners claim that there were indications that in quite a number of polling stations there was over voting. And this is evident on the face of the pink sheet. The petitioners give three main definitions of over voting:

1. Where the ballots found in the ballot box exceed the number of ballot papers issued to the polling station;
2. Where the ballot papers found in the ballot box exceed the number of persons REGISTERED to vote in the polling station; or
3. Where the ballots found in the box exceed the persons actually verified to vote, i.e.those registered and actually appearing at the polling station, verified and given ballot papers to vote and actually voting.

According to the petitioners all these figures are verifiable from the face of the pink sheets. The votes in all such polling stations should be annulled and same deducted from the overall votes garnered by the parties. Statistically, this infraction alone could lead to a change in political fortunes of the two.

The respondents disputed this three tier definition and said the classical definition of over voting is where the ballot papers actually exceed the number of persons actually registered at the polling station. Even then when it comes to over voting the pink sheet may not be the primary or only source of information. And that if figures on the pink sheet indicates that the ballot papers found in the box actually exceed the figure written for the number of registered voters, one will have to cross check from the actual register of the polling station. It might well be that the presiding officer might have made a mistake when writing the figure of number of registered voters.

In their estimation there was no over voting and therefore this category should also be rejected.

ANALYSIS

Before going into the evidence given by the parties in support of their respective cases, there are some three subject areas that I want to get out of the way. Their impact on the substantive matter before the court will be seen in the course of delivery.

BURDEN OF PROOF

I must begin the analysis of this case with the statement that in spite of its nature and despite all the emotions that this case has aroused, the rules and procedure for arriving at the conclusion of this case, unless specifically spelt out by C.I. 75 are still the same. So who bears the burden of proof and the burden of persuasion and what is the degree or standard of proof? Generally speaking, this

depends largely on the case, that is, the facts averred and therefore the facts in issue. In the absence of express or statutory provisions to the contrary, the ordinary rules that obtain in civil causes or matters should apply. Generally, the burden of proof is therefore on the party asserting the facts, with the evidential burden shifting as the justice of the case demands. The standard or degree of proof must also necessarily be proof on the preponderance of the probabilities

In the case of **Ackah v Pergah Transport Limited & Others [2010] SCGLR 728**, my very able sister Mrs. Justice Sophia Adinyira, JSC, summed up the law on the burden of proof in civil cases, at page 736, as follows:

“It is a basic principle of law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail....It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that, on all the evidence, a reasonable mind could conclude that the existence of a fact is more reasonable than its non-existence. This is the requirement of the law on evidence under sections 10 (1) and (2) and 11(1) and (4) of the Evidence Act, 1975 (NRCD 323).”

Even though election petitions seem different it has been held that the laws relating to the burden of proof and standard of proof are the same as those in civil cases. In the Nigerian election case of **Abubakar v Yar’Adua [2009] All FWLR (Pt 457) 1 SC**, the Supreme Court of Nigeria held that the burden is on the Petitioner to prove, not only non-compliance with the electoral law, but also that the non-compliance affected the results of the election.

In the same vein, the Canadian case of **Opitz v Wrzesnewskyi 2012 SCC 55-2012-10-256**, the Canadian Supreme Court held, by majority opinion, that:

“An applicant who seeks to annul an election bears the legal burden of proof throughout...”

Also, in Col. Dr. Kizza Besigye v Museveni Yoweri Kaguta & Electoral Commission, Election Petition No. 1 of 2001, the majority of the Ugandan Supreme Court Justices held as follows:

“...the burden of proof in election petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court. The only controversy surrounds the standard of proof required to satisfy the Court”.

As to how this burden of proof is discharged see the cases of *Majolagbe v Larbi* 1959 GLR 1`90 AT PG 192 where Ollennu J repeating his dicta from the case of *Khoury v Richter* (unreported) said;

“Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way, eg by producing documents, description of things, reference to other facts, instances or circumstances, and his averment is denied, he does not prove it by merely going to into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he avers is true”

It bears emphasis therefore that unless the burden shifts the petitioners bear the burden of proof on all matters raised and the standard of proof is on the preponderance of probability

DEFINITIONS

Elections are complex systems designed and run by fallible humans. Thus, it is not surprising that mistakes, errors, or some other imperfection occurs during an election. Because absolute electoral perfection is unlikely and because finality

and stability are important values, not every error, imperfection, or combination of problems supports an election contest, voids the election, or changes its outcome. This court must spend sometime to determine whether votes affected by minor irregularities are nonetheless valid, and if so, separating them from the votes that are invalid because they are tainted by more serious irregularities.

As indicated in the opening pages of this ruling, the claim of the petitioners is based on allegations of irregularities, malpractices and downright constitutional violations. These anomalies are such that they cannot be glossed over and that if they are taken into consideration it would affect the fortunes of the contestants.

Irregularity is defined by the Oxford Advanced Learners Dictionary as follows

“Activity or a practice which is not according to the usual rules, or not normal: *alleged irregularities in the election campaign*”

Malpractice on the other hand is defined as **“careless, wrong, or illegal behavior while in a professional job.**

Constitutional violation is where a person goes against, or refuses to obey a provision in the constitution.

From the various definitions it can be seen that while constitutional violations and malpractices are all irregularities, not all irregularities may be constitutional violations or malpractices.

The petitioners have isolated essentially four main irregularities as having affected the elections. While conceding that the isolated irregularities, and even more irregularities might have occurred, the respondents assert that these irregularities are essentially administrative lapses or infractions that did not affect the conduct of the polls.

While answering questions under cross examination, Dr. Afari Gyan, the Electoral Commissioner and principal respondent in this case said, there were several irregularities that occurred during the elections, even more than the petitioners have catalogued, but the test should always be whether the irregularities affected the conduct of the polls.

The word irregularity is defined as activity or practice which is not according to the usual rules or not normal. What in effect this means is that when a thing is done not in the regular way it is irregular. For example, if election is expected to begin at 7.00am and it begins at 8.00am or later as happened in several places all over the country during the 2012 December elections, there was an irregularity; if the presiding officer is expected to sign as the constitution mandates, though it is a constitutional violation, it is also an irregularity; when a person knowingly votes twice against the law, though it is a malpractice, it is an irregularity. Etc.etc.

According to the petitioners when such irregularities occur in any polling station it brings the results of such polling station into disrepute and the election in that station becomes tainted or compromised. The results of such polling station should be annulled and not added to the regularly taken results to taint it. An irregularity is an irregularity and the results should be seen in the same light.

While conceding that there can be many irregularities, it is obvious that not every irregularity necessarily affects the conduct of the polls and therefore should call for an annulment of results. For example starting an election at 10am instead of 7am is an irregularity, but unless it can be proved that the late start of the polls was deliberately done to give one party or candidate an advantage over another, or even deliberately done to deny some voters the right to vote to the gain or to the detriment of a particular party, such an irregularity cannot, or ought not be used to annul a regularly taken poll. So, as asserted by the 2nd

respondent, the test should be whether an irregularity affected the conduct of the polls. Incidentally the petitioners seem to think otherwise.

ARTICLE 42 OF THE CONSTITUTION AND ANNULMENT OF VOTES

Article 42 of the 1992 constitution provides as follows

“Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda”

The petitioners claim that as a result of some irregularities, an aggregate number of votes TOTALLING OVER 4 MILLION ARE TAINTED AND THEREFORE SHOULD BE ANNULLED. Not only should the votes be annulled, the court should go ahead and declare the winner of the general election based on the UNTAINTED VOTES. This I daresay is a very bold request for which this court will need a lot of convincing to grant!

To annul a vote is an act of disenfranchising a person and therefore a really big legal issue and can only be resorted to if a voter engages in an election malpractice For example PNDC law 284 as amended, provides as follows

Section 29 UNAUTHORISED VOTING

A person who knowingly votes

(a) At an election at which that person is not entitled to vote, or

(b) More than once at an election,

Commits an offence and is liable on conviction to a fine not exceeding 500 penalty units or to a term of imprisonment not exceeding 2 years or both the fine and the imprisonment, and is disqualified for a period of five years from the date of the expiration of the term of imprisonment, from being registered as a voter or voting at an election

An annulment of votes or for that matter disenfranchisement must therefore be traceable to an offence by the voter. If eligible Ghanaian citizens, ie qualified and registered, go to queue for so many hours to exercise their constitutionally granted right to vote, and, assuming their votes become tainted through no fault of theirs, but through administrative lapses, then it is my strong and considered opinion that they cannot be disenfranchised with the annulment of their votes. The least the petitioners could ask for is CANCELLATION of the results. Where it is proved that the identified administrative lapses affected the Conduct of the Polls, then voters in such places must be given the second chance to exercise their franchise if cancelling their votes, can seriously impact the outcome of the general election. By so doing, governance will be carried out by persons elected by majority of the people ready and willing to exercise their constitutional right to vote, and not by a small minority of the people, as is being advocated for by the Petitioners.

Article 1(1) of the Constitution 1992 provides as follows;

“The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution.”

The only way of actualizing this provision is to guarantee universal adult suffrage. The right to vote as guaranteed by the constitution is paramount and in Ghana this right has been specifically protected. The cases of TehnAddyy Electoral Commission [1996 97 SCGLR 589] and Ahumah Ocansey V Electoral Commission; Centre for Human Rights & Civil Liberties(CHURCIL) v Attorney General & Electoral Commission (consolidated) 2010 SCGLR 575 are landmark decisions in the protection of the right to vote.

TheAhumahOcanseycase emphasised that this right to vote is so fundamental that even prisoners, or persons incarcerated for offending the society, unless specifically debarred from voting are entitled to exercise their right to vote. In that case the electoral commission was seeking to rely on a portion of C.I. 12 reg 1d which, together with section 7(5) of the PNDC LAW284, had the potential of disenfranchising prisoners by reason of residence. The Attorney General argued that once the impugned law affected prisoners who had offended society, it was alright. This Court refused to buy into this argument and ruled per Georgina Wood CJ that;

“.....the attorney general’s counter argument that the impugned legislation is reasonably required in the public interest, in that access to prisons must be restricted, and further that violators of the law must be punished, kept away from the public, under lock and key, disenfranchised and not to have any say in who governs them. These, counsel contend, do serve as their just deserts for causing pain and suffering to others. In short counsel contends the legislation meets the opportunity test. THIS ARGUMENT, EXAMINED IN THE BEST OF LIGHTS I AM AFRAID, WOULD HAVE no place in participatory democracy, with the guaranteed rights that are enshrined in the constitution”

In the Tehn-Addy case, commenting on the paramountcy of the constitutional right to vote, this is what Acquah JSC(as he then was) said

“ ...In order to give meaning and content to the exercise of this sovereign power by the people of Ghana, article 42 guarantees the right to vote to every sane citizen of eighteen years and above. The exercise of this right of voting, is therefore indispensable in the enhancement of the democratic process, and cannot be denied in the absence of a constitutional provision to that effect”

Per curiam (i) A heavy responsibility is ... entrusted to the Electoral Commission under article 45 of the Constitution, in ensuring the exercise of the constitutional right to vote. For in the exercise of this right, the citizen is able not only to influence the outcome of the elections and therefore the choice of a government but also he is in a position to help influence the course of social, economic and political affairs thereafter. He indeed becomes involved in the decision-making process at all levels of governance.”

The right of prisoners to vote was the subject for comment in the Canadian case of Sauvé v Attorney-General of Canada, the Chief Electoral Officer of Canada and the Solicitor-General of Canada [2002] SCR 519; 2002 SCC 68,

“The right of every citizen to vote, guaranteed by s. 3 of the Canadian Charter of Rights and Freedoms, lies at the heart of Canadian democracy. The Law at stake in this appeal denies the right to vote to a certain class of people – those serving sentences of two years or more in a correctional institution. The question is whether the government has established that this denial of the right to vote is allowed under s. 1 of the Charter as a ‘reasonable limit ...demonstrably justified in a free and democratic society.’ I conclude that it is not. The right to vote, which lies at the heart of Canadian democracy, can only be trammled for good reason. Here the reasons offered do not suffice.”

In the course of the judgment in the Ahumah Ocansey case reference was made to several cases both local and foreign to support the principle that once a right, like the right to vote, is guaranteed in the constitution, then unless there is an absolute need to do the contrary, any legislation that seems to take away this guaranteed right must be viewed with circumspection and frowned upon.

Though the right to vote seems on the surface not to be what is in issue in this petition, it actually is at the center. What the petitioners are seeking to do is to annul the regularly cast votes of some citizens of Ghana. From the authorities and analysis above, it is clear that not only must the courts ensure that voters' guaranteed right to vote be protected but that that right when regularly exercised must be protected. Guaranteeing a person's right to vote without ensuring that the right once exercised is protected is as bad as preventing him from exercising his right to vote. On this basis a call for the annulment of votes must be actually backed by credible evidence of legal infraction on the part of the voter and not on administrative lapses

IN the case of **OPITZ V WRZESNEWSKYI SCC 55,(2012 3 SCR** cited by the respondents the Supreme Court of Cananada said at paragraph 56

“In our view adopting the strict doctrinaire approach creates a risk that an application under Part 20 could be granted even where the results of the election reflects the will of the electors who in fact had the right to vote. This approach places a premium on form over substance and relegates to the back burner the Charter right to vote and the enfranchising objective of the Act.”

Par 66 “

“By contrast, if a vote cast by an entitled voter were to be rejected in a contested election application because of an irregularity, the voter would be irreparably disenfranchised. This is especially undesirable when the

irregularity is outside of the voter's control, and is caused solely by the error of an election official."

It is my considered opinion that even if any or all the categories of irregularities as identified by the petitioners are upheld the results ought not be annulled, since the said infractions are not traceable to the millions of people who will be disenfranchised. But rather the results may only be CANCELLED as having being compromised or tainted by administrative lapses. In that case we should not cancel the whole Election (including the uncompromised parts), nor should the election be called based only on the remaining untainted votes, as being suggested by the petitioners, but the voters and polling stations whose votes are cancelled as a result of the administrative lapses must be given the second chance to exercise their constitutionally guaranteed right to vote before the final results are declared.

The petitioners' novel legal theory of annulling so called tainted votes that would permit a segment of the population ie. some 4 million voters, to be disenfranchised finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation. The right to vote and thereby partake in governance and decision making has been fought for by some democrats from of old. Some have paid the ultimate price to ensure that no category or class of people are disenfranchised. It is not too long ago that the blacks of South Africa were given the right to vote. The same thing applies to USA. In some countries women were given the right to vote not too long ago. We in Ghana have had the universal Adult suffrage since independence. Even though some countries prohibit prisoners from voting, in Ghana we don't. This is how far we have come in our quest for democratic governance. We should do everything possible to protect this right. And the least we could do is not to disenfranchise people through technical or administrative lapses over which they have no control.

It is my opinion that the basis of the petitioners' claim, i.e. the declaration of the First petitioner as winner after annulment of some 4 million votes, is completely flawed.

Now let us examine the various heads or categories of irregularities as isolated by the petitioners.

ABSENCE OF PRESIDING OFFICER'S SIGNATURE.

Article 49 sub clause 3 of the 1992 constitution reads;

“The presiding officer, the candidates or their representatives and in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating

- a) The polling station; and*
- b) The number of votes cast in favour of each candidate or question.*

And the presiding officer shall there and then announce the results of the voting at that polling station before communicating them to the returning officer.”

In the light of this constitutional provision it is the contention of the petitioners that failure to sign by the presiding officer is an infraction that should lead to the annulment of votes. This is because according to them once the signing is mandatory the consequence is that the votes do not become valid without the signature.

I do not think so. Though the article makes signing mandatory, it does not prescribe any consequences for failure to sign. Looking at the said article critically, the word shall as used go to show the sequence of events or series of things that have to be done. And here the sequence is shall sign, shall there then announce the results before forwarding same to the presiding officer. The article only uses the word shall to denote a series of things to be done and the sequence in which it should be done. Failing to do it the way suggested by the article

makes it an irregular performance of duty. *It is an irregularity that does not go to the roots.* Then the question that has to be asked are (1) has anybody been specifically adversely affected by this irregularity that should lead to an annulment or even cancellation of votes regularly cast?

This court's attention has been drawn to the recent decisions of this court, cases of where the court strictly interpreted shall in Article 181 of the constitution and concluded that failure to secure parliamentary approval for a loan is fatal as provided by the constitution.

See the recent cases of Faroe Atlantic. Martin Alamisi Amidu v Isofoton and Martin Amidu v Woyome

But a critical look at the wording of articles 181 will show clearly that there are differences in the wording. Article 181 (2) reads

“An agreement entered into under clause(1) of this article shall be laid before Parliament and shall not come into operation unless it is approved by a resolution of parliament”

The article carries in its belly its own sanctions. The agreement shall be laid in parliament and unless carried by resolution of parliament shall not come into effect. This is not the same as article 49 where no consequences are provided for failure to sign. To strictly interpret the word shall to mean mandatory and therefore its violation should lead to annulment of votes regularly cast, would lead to a serious absurdity. I am here persuaded by the modern purposive approach to interpretation where the intent rather than the bare words as used influence interpretation. To this end the famous quote of Sowah CJ in the Case of is very much apposite here. He said

“A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account, therefore

ought to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and hopes for a better and fuller life.

The constitution has its letter of the law. Equally the constitution has its spirit.Its language, therefore, must be considered as if it were a living organism capable of growth and development. Indeed it is a living organism capable of growth and development as the body politic of Ghana itself is capable of growth and development. A broad and liberal spirit is required for its interpretation. it does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time."

In the *Kuenyehia V. Archer* [1993-94 2 GLR 525 AT 562 Francois JSC said,

"It appears that the overwhelming imperatives are the spirit and objectives of the Constitution itself, keeping an eye always on the aspirations of the future and not overlook the receding footsteps of the past. It allows for a liberal and generous interpretation rather than a narrow legalistic one. It gives room for a broader attempt to achieve enlightened objectives and tears apart the stifling straight jacket of legalistic constraints that grammar, punctuation and the like may impose,"

To strictly interpret this article the way the petitioners are seeking to do is to take the importance away from the voter and giving same to the persons who run the elections. If the absence of the single signature of the presiding officer can lead to the annulment of the votes of hundreds of thousands of voters, then the election ceases to be about the voters and shifts to the presiding officer. So that if a presiding officer, either from pressure of work, oversight, or plain mischief fails to sign, then fatally, hundreds of voters are disenfranchised.

Again a corrupt politician needs only to team up with a few hundred presiding officers in an opponent's stronghold, and bingo! fortunes are turned. This will be carrying strict interpretation to absurd limits.

An affidavit filed by one of the petitioners' witnesses read;

I, Abdulai Abdul Hamid of House No. A77, Gunfong, Pong-Tamale, in the Northern Region of the Republic of Ghana, and teacher by profession, make oath and say as follows:

- 1. That I am a witness of the Petitioners herein and the deponent hereto.*
- 2. That I swear to this affidavit on the basis of information personally known to me.*
- 3. That on the 7th and 8th of December 2012, the Electoral Commission of Ghana conducted Parliamentary and Presidential Elections in Ghana.*
- 4. That at all material times I was the presiding officer at Temporary Booth Chief's Palace polling station at Pong-Tamale, in the Savelugu Constituency of the Northern Region of Ghana during the December 2012 Parliamentary and Presidential Elections.*
- 5. That I declared the results thereafter*
- 6. That subsequently on the 16th day of February 2013, I received a call on my cellular phone with number 0246933648 from one Salamatu Osman, an employee at the district electoral office of the electoral commission, via telephone number 0372091677.*
- 7. That the said Salamatu Osman informed me that I had not signed the Statement of Poll and Declaration of results for the office of president("pink sheets"), and that she had been instructed by Mr. Ben, the District Electoral Officer, to invite me to attend the office in order to sign same.*

8. *That she further stated that the signature was necessary for the office to process the documents relating to the payment of my entitlements as a presiding officer in the December 2012 presidential and parliamentary elections.*
9. *That I proceeded on that basis innocently to sign the pink sheet for the 2012 presidential election.*

Wherefore I swear to this affidavit in support”

This affidavit put in by the witness of the petitioners is self-explanatory. The witness did not sign the pink sheet at the polling station as required and he was later tricked by the representative of the 2nd respondent to sign. Ostensibly, this affidavit was put in to show that some pink sheets were not signed at the polling stations and that long after the results had been declared the 2nd respondent was clandestinely seeking to sign pink sheets. There were two other affidavits confirming the contents of this affidavit.

But the questions that these affidavits fail to answer are why didn't Mustapha, the petitioners own witness, sign the document at the polling station? Was it oversight, pressure of work or plain mischief because he had not been paid? And is he saying that the whole polling station results should be annulled because he forgot to sign as a result pressure of work or as away of protesting his not being paid?

It is my considered view and I hold that non-signing by the presiding officer is a mere irregularity that does not go to the root of the matter. It did not affect the conduct of the polls and therefore should not lead to the annulment or even cancellation of votes.

The petitioners claim on this ground is dismissed.

DUPLICATE PINK SHEETS

It is the case of the Petitioners that the Pink Sheets were imported into the country with numbers embossed on each pink sheet to differentiate it from any other pink sheets. In that case each pink sheet should bear a different serial number in all 26002 polling stations in the country. However this was not done. They detected that out of the over 11,000 pink sheets reviewed, over 10000 had their counterparts or duplicates used instead of their “original” pink sheets. This was done because the second respondents had intentionally imported more pink sheets with the view to manipulating the results of the polls. The total number votes being sought to be annulled under this so called irregularity is over 2.5 million.

The response of the second respondent to this claim is that the petitioners claim has no basis and not well founded. Yes it is true that each pink sheet has a different number, but they are not in series and therefore not serial numbers properly so called. The numbers are not security numbers that can be used to track the polling stations in which they are actually used. So any pink sheet with any number can be sent to any region, constituency or polling station. Pink sheets are packed at random and their distribution does not follow any pattern in terms of the numbers embossed on them.

In their address the second respondent said this category can properly be described as the weakest link in an already weak chain. I couldn't agree more. Throughout the proceedings the petitioners failed to show how this so called irregularity affected the conduct of the polls. Yes it would have been better if only one set of 27000, or 28000 pink sheets were printed by one printing house and the pink sheets numbered from one to 28,000. Instead of 2 sets totalling 54,000 printed by 2 separate printers each numbered from 1 to 27,000. So what?

Apart from the financial loss occasioned by the printing of the excess pink sheets, in what way did this affect the election? The petitioners failed to convince me about the veracity of their claim as far as this irregularity is concerned and I reject same.

OVER VOTING

The petitioners claim that there were indications that in quite a number of polling stations there was over voting. And this is evident on the face of the pink sheet. The petitioners give three main definitions of over voting

- 1 Where the ballots found in the ballot box exceed the number of ballot papers issued to the polling station;
- 2 Where the ballot papers found in the ballot box exceed the number of persons REGISTERED to vote in the polling station; or
3. Where the ballots found in the box exceed the persons actually verified to vote, i.e.those registered and actually appearing at the polling station, verified and given ballot papers to vote and actually voting.

According to the petitioners all these figures are verifiable from the face of the pink sheets. The votes in all such polling stations should be annulled and same deducted from the overall votes garnered by the parties.

The respondents disputed this three tier definition and said the classical definition of over voting is where the ballot papers actually exceed the number of persons actually registered at the polling station. Even then when it comes to over voting the pink sheet may not be the primary or only source of information. And that if figures on the pink sheet indicates that the ballot papers found in the box actually exceed the figure written for the number of registered voters, one will have to cross check from the actual register of the polling station. It might well be that the presiding officer might have made a mistake

when writing the figure of number of registered voters. Mr Asiedu Nketiah for the 1st and 3rd respondent denied the possibility of over voting and said this could be due to the presence of foreign object in the ballot box which is weeded out at the sorting out stage. In their estimation therefore there was no over voting and so this category should also be rejected.

I do not think the petitioners are describing overvote as objects found in the ballot box. I cannot see how a foreign object as described by the witness be counted as overvote. If an aggrieved votes tears off an A4 sheet and writes on it **THEY ARE ALL GREEDY BASTARDS**, and places same in the ballot box, it is a foreign object. This is not the type of paper that will feature in the petitioners overvote column. My understanding of the petitioners over votes is that it relates to the votes declared for candidates and those rejected for cause. That will be A+B in the last column on the pink sheet against any of the columns already mentioned.

Seen this way I must say that that I agree with the petitioners definitions of over voting. But this expanded description of over voting is what runs the petitioners into problems and that led to the two often touted mantras; “you and I were not there” and “on the face of the pink sheet.” For example on one pink sheet the total ballots declared for the various candidates, and the rejected ballots were in the region of 800. But when it came to question A1 on the question paper which was “What is the number of ballots issued to the polling station”?, the answer was 10. This pink sheet was selected as one with over votes because of the enormous difference between the votes found in the box and the papers sent to the polling station. But if one looks at the very next question, which is “What are the serial numbers of the ballot papers sent to the polling station?”, the answer there clearly indicates that there were 10 booklets of 100 leafs each, making 1000. So though the first answer seems to suggest over voting, there really was no over voting if one looks at the document properly. And there were

several pink sheets with this kind of problem. That is why Dr. Afari Gyan suggested that the pink sheet should be read as a document in full and not question by question as the petitioners seemed to be doing. But Dr. Bawumia preferred, “on the face of the pink sheet”.

Again because of the definition ascribed to the Over voting, any time the answer to questions AI, B1, and C1 showed a blank, it was set apart as over voting. The questions are,

A1 “What is the number of Ballots issued to the polling station?”

B1 What is the number of voters on the polling station register?

C1 What is the number of ballots issued to voters on the polling station register?

The reason for this was that once any of these figures was blank one could not compare it properly with the total number of ballots in the ballot box. According to the petitioners this was deliberately done to hide over voting. There were hundreds of such pink sheets in the over voting category. The respondents on the other hand suggested that if any of these questions posted a blank answer, there were other sources where one could then to correct this. For example if B1 shows blank, the polling station has a register which can be referred to easily to ascertain the correct figure, so there was no need to rush to declare over votes on that account. Dr. Bawumia countered with his mantra, the pink sheet is the primary source of information at the polling station, and that on the face of the pink sheet blank means zero.

I have no doubt at all that the pink sheet is the primary source of information at the polling station, after all it is the information on the pink sheet that is collated and form the basis of any or final declaration. But I definitely do not agree that other sources may not be referred to for information if any doubt arises. Each

polling station has the official register, and each polling agent has the polling station register. So if the question B1 has a blank, answer the correct figure is ascertainable from other sources. There should not be the rush to declare over votes just because on the face of the pink sheets the column shows blank.

I have noticed that the petitioners have identified some 180 pink sheets where C1=blank or C1=0. The votes tally on that list alone is over 93,000 votes.

There were also several pink sheets in this category which clearly on second look did not reflect over voting. While in the box, Dr Bawumia admitted to several such pink sheets which they had originally selected to contain over voting, actually did not reflect over voting upon second look. There were some pink sheets on which errors had apparently occurred as a result of carbonation, For example there were some pink sheets on which in the figures column two candidates were said to have received 11, but in the words column it was "one". It could be seen from the additions that "one" was used in both the words and figures columns, and that if eleven was used the total in both the figures and words columns would be wrong. The only plausible explanation for this 11 and "one" is that if the person filling the pink sheet wanted to deepen the figure 1 and the carbon shifted it would appear as a second 1 or 11 on the copy. So while the original copy would show a deepened 1 it would appear as 11 on the carbon copies.

However, aside of these many errors which may be described as clerical, there were also very many pink sheets which recorded cases of actual overvoting. ie where rejected ballots and valid votes put together were more than persons actually verified to vote. However sifting the ones actually affected by over voting from the many affected by the many clerical errors, one is left with very few pink sheets whose results will not impact positively on the outcome of the overall results. I will therefore dismiss the claim on account of this ground.

VOTING WITHOUT PRIOR BIOMETRIC VERIFICATION.

For the first time in the history of elections in this country, the 2012 general elections was supposed to be conducted with identification of potential voters by biometric verification. The nation spent a lot of time and energy registering eligible voters biometrically. Biometric registration involved taking the finger prints of eligible voters in addition to facial recognition. In the round up to the elections a lot of inter party discussions took place and it was finally decided that voters who could not be biometrically verified on the election day would not be allowed to vote even if they had their names in the register. There appeared in the political landscape the popular slogan “NO VERIFICATION, NO VOTING.” C.I.75 reg. 30(2) this slogan. It reads

Red 30(2) The voter shall go through a biometric verification process.

The constitutionality of this CI is being challenged in court, so I will stay off discussion on this for now.

Be that as it may, constitutionality or otherwise, all the parties went into the general election with the understanding that no verification, no voting. The whole concept of biometric registration and verification before voting had been introduced as a way of reducing to the barest minimum if not eradicate completely, the incidence of claims of double voting and impersonation that crop up after every election. It was supposed to increase transparency and enhance people’s acceptability of the election results. Indeed at one of the numerous press conferences the electoral commissioner made it clear that at the end of the polls, where the votes cast exceed the number of persons verified to vote by even one vote, the results of the said polling station will be cancelled. Based on this understanding, some voters were turned away from some polling stations and were not allowed to vote because they could not be verified.

So prevalent was this phenomenon of turning away voters who could not be verified that the 1st respondent is on record to have made a plea in the electronic media for the 2nd respondent to review this policy to enable eligible voters be identified by other means other than by finger print. The basis of this plea, according to the release, was to avoid a situation where otherwise qualified citizens are disenfranchised just because a mere machine could not identify them. This plea, we are told, was not heeded to by the 2nd respondent and people were turned away by the machines.

It is the case of the petitioners however that the 2nd respondent while insisting on biometric identification in some places, at some polling stations people were allowed to vote without verification and in some cases everybody voted without biometric verification. According to the petitioners the evidence for this accusation can be found on the face of the pink sheet.

In the ballot accounting column (column c) of the pink sheet is a question

C3 What is the number of ballots issued to voters verified by the use of Form1C(but not by the use of BVD).

The petitioners have tendered quite a number of pink sheets on which this question had been answered with figures and even sometimes figures reflecting the total number of voters who cast their ballots in that polling station, indicating that every person voted without being verified by the biometric device. To the extent that C.I 75 reg 30(2) says everybody must be verified by the BVD before casting their vote, and to the extent that some people were turned away either because the BVD had broken down, or the BVD could not detect their finger print, it was discriminatory to have allowed some other persons to vote without BVD. Therefore for purposes of equity, polling stations that had persons voting without BVD should have their votes annulled. These

annulled votes should again be deducted from the votes declared for the various contestants.

The respondents agreed that the slogan NVNV was actually coined for this election and was indeed used. And that nobody voted without being verified by the BVD. The third respondent's representative Mr. Johnson AsieduNketiah actually opined that if anybody allowed any voter to vote without the BVD, then that person should be at 'Nsawam'(prisons) by now. The 2nd respondent confirmed this by saying that the agreement on the NVNV had been reached at an IPAC meeting and was enforced to the letter. To this end, polling stations which had their BVDs breaking down, actually had replacements. Again in about 400 polling stations where BVDs could not be immediately replaced, the elections were postponed to the next day.

As to how come that the question C3 appeared on the pink sheet despite the agreement reached at the IPAC to strictly adhere to the NVNV slogan The 2nd respondent gave a lengthy explanation and concluded that the presiding officers were not required to fill in that column since everybody was supposed to use the BVD. All counsel for the respondents that the BVDs were used throughout and so the figures in C3 did not reflect what actually took place at the polling stations. They went to the extent of saying in some cases the figures in C3 had actually been lifted from somewhere and placed there. A lot of theories were propounded for the figures in C3. They concluded that apart from the face of the pink sheet, the petitioners had not given any other evidence of voting without BVD, and that their agents had signed without complaining. The petitioners had therefore failed to prove that voting took place without biometric verification.

I do not think that the petitioners failed to discharge the burden placed on them. As was said in the beginning like any civil action the petitioner bears the burden of proof. The onus was therefore on the petitioners to prove that some voters

voted without going through the BVD. As said earlier the primary source of this election is the pink sheet. But it does not mean that other sources may not be referred to disprove writings on the document. The petitioners have pointed to the pink sheet as their informant that some people voted without prior biometric verification. The long explanation by the 2nd respondent flies in the face of the recordings on the pink sheets. They presiding officers were not expected to fill them because nobody was expected to vote without biometric verification. But they have filled them. Where did they get the figures from? If the figures reflecting that all voters at a polling station voted without going through BVD was lifted, how about those pink sheets which show figures unrelated to any other figures on the pink sheet?

We are told that the BVDs still have embedded in their memories data reflecting the number of voters that were actually verified by each machine. These devices are still in the custody of the 2nd respondent. One would have thought that the memories of the BVDs could have settled this problem. But they never felt it necessary to tender them in evidence.

In the absence of any credible explanation it is my opinion that the petitioners have discharged the burden of proof placed on them. In spite of the agreement on the NVNV, and despite reg 30(2) of CI 75, some people were allowed to vote without verification. Viewed against the backdrop that some people were actually prevented from voting because they could not be verified, to have allowed voting in some polling stations was discriminatory and should lead to cancellation of their votes.

I will therefore uphold the petitioners claim on this ground only to the extent that those voters that have their votes cancelled should have the chance to recast their votes lest they be disenfranchised.

To conclude I hold as follows

- 1 I dismiss the petitioners claim to annul votes on account of claim of duplicate serial numbers as frivolous
- 2 I dismiss the petitioners claim that votes should be declared invalid on account of the non-signing by the presiding officer. To disenfranchise hundreds of thousands of voters (through no fault of theirs) because a presiding fails to sign will not have a place in modern democratic governance.
- 3 I uphold the principle that once overvoting is detected in a polling station the elections there are compromised and should be cancelled but the voters there should be given a second chance to cast their votes. However I find that in view of the admissions made by the 2nd petitioner with regard to some pink sheets and the many clerical errors, I find that the number of pink sheets affected in this category has so reduced that the votes affected are not too significant to make any impact even if they are cancelled. I dismiss the claim on this ground too.
- 4 I hold that the petitioners have discharged the burden of proof on them that voting took place in some polling stations without prior biometric verification. This was discriminatory since other persons had been turned away for their inability to be verified. All those stations affected by this phenomenon should have their votes cancelled and the voters given a second chance to vote again.

(SGD) P. BAFFOE BONNIE

**JUSTICE OF THE SUPREME
COURT**