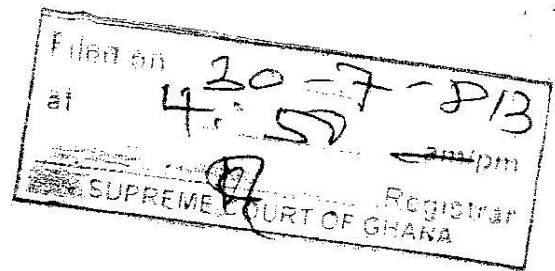


IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A. D. 2013



WRIT No. J1/6/2013

PRESIDENTIAL ELECTION PETITION

IN THE MATTER OF A PETITION CHALLENGING THE VALIDITY OF THE ELECTION OF JOHN DRAMANI MAHAMA AS PRESIDENT OF THE REPUBLIC OF GHANA PURSUANT TO THE PRESIDENTIAL ELECTION HELD ON 7TH AND 8TH DECEMBER, 2012.

Article 64 of the Constitution, 1992; Section 5 of the Presidential Election Act, 1992 (PNDCL285); and Rule 68 and 68A of the Supreme Court (Amendment) Rules 2012, C.I. 74.

BETWEEN:

- | | | |
|---|---|-----------------|
| 1. NANA ADDO DANKWA AKUFO-ADDO |] | |
| H/No. 2, Onyaa Crescent, Nima, Accra. |] | |
| 2. DR. MAHAMUDU BAWUMIA |] | |
| H/No. 10, 6 th Estate Road, Kanda Estates, Accra.] |] | ... Petitioners |
| 3. JAKE OTANKA OBETSEBI-LAMPTEY |] | |
| 24, 4 th Circular Road, Cantonment, Accra. |] | |

AND

- | | | |
|---|---|-----------------|
| 1. JOHN DRAMANI MAHAMA |] | |
| Castle, Castle Road, Osu, Accra. |] | |
| 2. THE ELECTORAL COMMISSION |] | ... Respondents |
| National Headquarters of the Electoral |] | |
| Commission, 6 th Avenue, Ridge, Accra. |] | |
| 3. NATIONAL DEMOCRATIC CONGRESS (NDC) |] | |
| National Headquarters, Accra. |] | |

ADDRESS FILED ON BEHALF OF 2ND RESPONDENT

1. By the Second Amended Petition filed on 8th February 2013, the Petitioners claimed the following declarations:

- i) A declaration that John Dramani Mahama, the 2nd Respondent herein was not validly elected president of the Republic of Ghana
- ii) That Nana Addo Dankwa Akufo-Addo, the 1st Petitioner herein, rather was validly elected President of the Republic of Ghana
- iii) Consequential orders as to this Court may seem meet.

2. The above-mentioned declarations are being sought by the Petitioners on the grounds that there have been "diverse and flagrant violations of statutory provisions and regulations" and "widespread irregularities and/or malpractices" in the conduct of the December 2012 Elections.

3. In the said Second Amended petition, the Petitioners put forward three grounds as the basis of their petition. However, by paragraph 23 of the affidavit of Dr. Mahamadu Bawumia filed on the 7th April 2013, pursuant to the directions given by the court on the 2nd April 2013, the grounds set out in the petition were subdivided by the Petitioners into six categories as follows:

- i) Over-voting, that is to say, widespread instances of polling stations where (a) votes cast exceeded the total number of registered voters or (b) votes exceeded the total number of ballot papers issued to voters on voting day in violation of Article 42 of the Constitution and Regulation 24 (1) of C.I.75
- ii) Widespread instances of polling stations where there were no signatures of the presiding officers or their assistants on the pink sheets in clear violation of Article 49 (3) of the Constitution and Regulation 36 (2) of C.I.75
- iii) Widespread instances of polling stations where voting took place without prior biometric verification in breach of Regulation 30 (2) of C.I.75
- iv) Widespread instances where there were the same serial numbers on pink sheets with different poll results, when the proper and due procedure established by the 2nd Respondent required that each polling station have

a unique serial number in order to secure the integrity of the polls and the will of lawfully registered voters

v) Widespread instances of polling stations where different results were strangely recorded on the pink sheets in respect of polling stations bearing the same polling station code, when, by 2nd Respondent's established procedure, each polling station was assigned a unique code in order to avoid confusing one polling station with another which could not be explained by a reference to special voting

vi) Twenty three (23) locations where voting took place which were not part of the twenty six thousand and two (26,002) polling stations created by the 2nd Respondent for purposes of the December 2012 elections.

4. The 2nd Respondent, in its Second Amended Answer to the Second Amended Petition, which was filed on 3rd April 2013, has denied all the allegations of constitutional and statutory violations, commissions and malpractices. It has accordingly joined issue with the Petitioners on their Petition.

5. The following issues for trial were set down by the Court:

(i) Whether or not there were violations, omissions, malpractices and irregularities in the conduct of the Presidential Election held on the 7th and 8th December 2012

(ii) Whether the said violations, omissions, malpractices and irregularities, if any, affected the results of the election.

6. As regards the burden of proof, it is submitted that the burden is squarely on the Petitioners to prove their allegations on a balance of probabilities as decided by this Honourable Court in the cases of GIHOC Refrigeration & Household v. Jean Hanna Assi and Poku vs Poku.

7. The Representation of the People Law 1992, (P.N.D.C.L. 284) as amended by the Representation of the People (Amendment) Law 1992 (P.N.D.C. L. 296), to apply to any public elections, in its Section 20 (2) (b), provides as follows:

'Where at the hearing of an election petition the High Court finds that there has been failure to comply with a provision of this Act or of the Regulations, and the High Court further finds

- (i) that the election was conducted in accordance with this Act and Regulations, and
- (ii) that the failure did not affect the result of the election,

the election of the successful candidate shall not, because of the failure be void and the successful candidate shall not be subject to an incapacity under this Act or the Regulations.'

Clearly, this Law requires that it is not enough to allege and indicate a failure, but that it must also be demonstrated that the failure affected the results of the election.

8. On December 9, 2012, the 3rd Petitioner led a delegation to meet the Chairman of the 2nd Respondent and presented to him Exhibit NDC 43 which, *inter alia*, claimed that the Petitioners had credible evidence of a conspiracy between the 1st and 2nd Respondents to falsify election results and that the preponderance of evidence available to them showed that there were discrepancies between the results being declared by the 2nd Respondent, on the one hand, and, on the other, the results from the Collation Centres.

9. There is evidence from the Chairman of the 2nd Respondent, that the 3rd Respondent and his delegation were unable to substantiate the said allegations. The Chairman of the 2nd Respondent in his evidence-in-chief on 30th May, 2013 page 82/83 of the transcript stated that "*what we found was that in some of the instances that you were complaining in all there was complain about seven constituencies, but we found out that in five instances the pink sheets they had produce were less than the total number of polling stations in the constituency and we must remember that there is one pink sheet to a polling station so if a constituency has a 100 polling stations and you are going to prove a*

discrepancy you must come with 100 pink sheets. In five instances they got less than the number of polling stations in the constituency. In the case of two they brought more pink sheets than there were polling stations in the constituency".

10. In the petition, as amended twice, it is alleged, in paragraph 24, that in some instances, votes by the 1st Petitioner were unlawfully reduced and those earned by the 1st Respondent were illegally padded with the sole purpose of procuring the victory of the 1st Respondent. When compelled by attempts by the Respondents to obtain further and better particulars of the alleged padding/reductions, the Petitioners cited three instances out of the 26,002 Polling Stations in which the 2012 Elections were held. At the trial, two of those instances were withdrawn by the Petitioners when the 2nd Respondent showed that they were false allegations and the 3rd was shown to be a transposition error made at the Collation Centre which involved 80 votes which did not make any difference in the overall results of the constituency in question (Evidence of 2nd Petitioner in transcript of April 25, 2013 at pages 19 and 29). The 2nd Petitioner also stated in evidence that the Petitioner's were no longer relying on the allegations made on December 9, 2012 and referred to above.
11. At the trial, the 2nd Petitioner who gave evidence on behalf of the Petitioners, stated, on several occasions, that the evidence in support of the categories of alleged irregularities, etc. were "on the face of the pink sheets" i.e. the Statement of Poll and Declaration of Results for the Office of the President. That form is in two parts, namely, the ballot accounting part (Form EC21B) and the Polling Station Results (Form EC22B) which also contains a declaration.
12. In an affidavit sworn to by the 2nd Petitioner and filed on April 7, 2013, pursuant to an order of the Court made on April 2, 2013, he referred to, and attached as exhibits, a number of pink sheets as evidence in support of the Petitioners' case. Although the 2nd Petitioner claimed to have filed 11,916 pink sheets, the Respondents maintained that the number

filed was far less than claimed resulting in the Court, on application by the 2nd and 3rd Respondents, appointing KPMG as a Referee, whose report confirmed that the number of unique Polling Station pink sheets filed by the 2nd Petitioner was lower than claimed.

13. In his evidence, the 2nd Petitioner urged the Court to consider the figures entered by the Presiding Officers in response to questions in the ballots accounting part thereof as evidence from a "primary document" and, for example, maintained that a blank space on the form meant zero (transcript of April 22, 2013 at page 62).
14. My Lords, the 2nd Respondent acknowledges that, in completing the ballot accounting part of the pink sheet, many of the Presiding Officers made clerical errors and left blank spaces wrongly and made errors which were not logical. The Petitioners did not submit any other evidence of the alleged irregularities other than as appearing on the face of the pink sheets.
15. My Lords, it is submitted that a pink sheet must be read as a whole and when so read, the errors it contains are discernible if one reads the form with the eye of a person desirous of conducting a careful analysis of its contents (as opposed to the eye of a person looking for errors and blank spaces for a possible harvest of votes for annulment). It is also submitted, my Lords, that the questions on the pink sheet are intrinsically or extrinsically verifiable. For example, the answer to Question A1 "What is the number of Ballots issued to the Polling Station?" can be verified by the answer to Question A2 "What is the range of serial numbers of the Ballot papers issued to the Polling Station?". By the same token, the answer to Question C6 "What is the Total of C1 plus C2 plus C3 plus C4? (this number should equal A1 above)" can be crossed checked on the form itself by the answers to the questions listed.

16. My Lords, in addition, there is evidence from the Chairman of the 2nd Respondent, Dr. Afari Gyan, and from the Representative of the 1st and 3rd Respondents, Mr. Johnson Asiedu Nketia, that statistics of ballots issued by the 2nd Respondent to each region, constituency and Polling Station were provided to the political parties and were therefore known to the Polling Agents at all Polling Stations. Thus, the Petitioners were in a position, to check the correctness of the figure entered in Question A1 on each pink sheet filed by them and to indicate the correct figure if that figure was not stated in response to Question A1. The same applies to other questions on the pink sheet which are logically linked to the answer to Question A1. The 2nd Petitioner, instead, preferred to insist that "the evidence is on the face of the pink sheets". Similarly, the answers to the questions in Section B "Information About the Register and Other Lists at the Polling Station" were verifiable because there was evidence from Dr. Afari Gyan and from Mr. Johnson Asiedu Nketia that the political parties were given copies of the final voters register prior to the elections. Again, the 2nd Petitioner, faced with blank spaces in the respective answers to questions, preferred to repeat his refrain of "you and I were not there" and "the evidence is on the face of the pink sheets". Thus, he could, any time he spotted a blank space or a clearly wrong entry on a pink sheet, add the relevant results to his tally and expect to harvest the total votes at the Polling Station for annulment.

17. My Lords, clearly, a high level of transparency and verifiability regarding the results at Polling Stations, was ensured by the vigilant voters who witnessed the public counting of the votes and the public announcement of the results at each Polling Station, which results were carried on the air waves and print media and were physically delivered to the Returning Officer at the Collation Centre where Collation/Counting Agents were present with their laptops and calculators for the collation (adding) of the votes cast in all Polling Stations in a constituency. At the Collation Centre, again, a high level of transparency and verifiability is ensured by the Constituency Summary Results Sheet (Form EL24B) with a declaration which is signed by

Collation/Counting Agents of the candidates with the opportunity to refuse to sign and to state reasons for refusal. The same applies to the presence of candidates' representatives at the "Strong Room" of the Electoral Commission.

18. Crucial to the transparency and verifiability of the electoral process, and an important factor to assist your Lordships in arriving at the truth as to what transpired at the Polling Stations is the role of the Polling Agents thereat and of the Collation/Counting Agents at the Collation Centres. The 2nd Petitioner chose to describe them as "mere observers" or "exalted observers". Nothing could be more removed from the truth. Regulations 35, 36 and 40 of the Public Elections Regulations 2012 (C.I. 75) set out explicitly the role of Polling/Counting Agents and the oath they swear, upon pain of perjury Dr. Afari Gyan was right in his testimony under cross examination. Also, their role is clearly set out in the 2nd Respondent's Guide to Candidates and their Agents, Exhibit EC1, and its Guide to Election Officials, Exhibit EC2, which were used for training by the 2nd Respondent and by the political parties.

19. My Lords, it is to be kept in mind that each genuine unique pink sheet of which a photocopy was filed as an exhibit attached to the affidavit of the 2nd Petitioner filed on April 7, 2013 (even if fraught with errors and blank spaces in the ballot accounting part) contains the attested results of votes cast at the Polling Station in public view into transparent ballot boxes sealed in public at 7.00 a.m. or soon thereafter, and unsealed at 5.00 p.m. or soon thereafter on election day, sorted out and counted in the presence of Polling/Counting Agents and the public, that is to say, the persons whose votes were being counted and whose votes the petitioners herein are, without any justification, it is submitted, seeking to have annulled.

Over-voting

20. The 2nd Petitioner, in paragraph 23 of his affidavit, claimed that over-voting occurred where (a) the votes cast exceeded the total number of

registered voters or (b) the votes exceeded the number of ballot papers issued to the Polling Station and that this was in violation of Article 42 of the Constitution and Regulation 24 (1) of C.I.75. My Lords, the Petitioners have not shown how these two provisions apply to the petition since Article 42 relates to the right of a citizen to vote and his entitlement to be registered as a voter and Regulation 24 (1) states that a voter cannot cast more than one vote when a poll is taken. It is not the case of the petitioners that any person voted or attempted to vote more than once. Indeed, it was confirmed by the 2nd Petitioner in his evidence. In his evidence-in-chief he maintained the two definitions of over-voting. The Chairman of the 2nd Respondent, Dr. Afari Gyan maintained that the classic definition of over-voting was where the votes in the ballot box exceeded the number of persons entitled to vote at the Polling Station. It is submitted, my Lords, that this position is supported by Regulation 36 (2) (a) of C.I.75 which refers to "the total number of persons entitled to vote at that Polling Station". Mr. Johnson Asiedu Nketia in his evidence-in-chief, also stated that this was the definition of over-voting of which he is aware. The evidence of the 2nd Petitioner on this definition when under cross-examination by Counsel for the 1st Respondent on May 24, 2013, is noteworthy ("transcript of May 24, 2013 at pages 13,14). The 2nd Petitioner conveniently ignored the fact that the Voters Register for each Polling Station had been provided to the political parties and was therefore known to the Polling Agents! On this subject, an attempt was made to suggest to Mr. Johnson Asiedu Nketia, when under cross-examination by Counsel for the Petitioner, that over-voting had occurred in 3 Polling Stations of which he presented pink sheets claiming over-voting on the basis of the number of voters on the Register as appearing on those pink sheets. Mr. Asiedu Nketia categorically stated that they could only be errors. Subsequently, Dr. Afari Gyan in his evidence-in-chief tendered the Registers of the 3 Polling Stations as Exhibits EC8, EC9 and EC10 which debunked the allegation that the votes in the ballot box exceeded the number of persons entitled to vote at the respective Polling Stations. The exhibits that Dr. Afari Gyan had for the 3 Polling Stations also showed that the

exhibits shown to Mr. Asiedu Nketia were different from those served on the 2nd Respondent. It is submitted that there is ample evidence for your Lordships to conclude that the Petitioners have not established that there was over-voting as they were not able to cite a single example among the 26,002 Polling Stations in which the votes in the ballot box exceeded the number of persons entitled to vote at the Polling Station. As regards the second definition, the evidence offered by the Petitioners "on the face of the pink sheets" were based only on errors made in completing the ballot accounting part of the pink sheets. Further, if any over-voting had occurred, it would have been detected during the counting of votes and the Polling/Counting Agents would have protested. The evidence is that there was no such protest.

No signature by the Presiding Officer

21. In response to the Further and Better Particulars submitted by the Petitioners on this subject, and in Exhibit P tendered by the Chairman of the 2nd Respondent on 8th July, 2013, the 2nd Respondent maintained that out of the 905 pink sheets that were not signed by the Presiding Officer, 99% were signed by the Polling Agents of the Petitioners. Dr. Afari Gyan admitted the obligation of the Presiding Officer to sign the declaration of results but stated that where he omitted to sign but the Polling Agents signed, the 2nd Respondent considered it acceptable for the purposes of the declaration of results. In this context, reference is made to paragraph 19 above to emphasize the fact that votes at each Polling Station were counted and declared in public. We respectfully urge your Lordships to conclude that on the evidence presented, there is no basis to annul the votes of any Polling Station on the basis of the absence of the signature of a Presiding Officer. The Petitioners have not shown how that affected the outcome of the elections.

No biometric verification

22. The evidence presented by the Petitioners for this category was "on the face of the pink sheet". They did not produce a single piece of evidence of a person who saw anyone voting without having been biometrically verified. Dr. Bawumia claimed that the law required finger print verification (emphasis added). Regulation 30 (2) of C.I.75 states as follows: "The voter shall go through a biometric verification process" (emphasis added). Further, Regulation 30 (1) of C.I. 75 states as follows: "A presiding officer may, before delivering a ballot paper to a person who is to vote at the election, require the person to produce (a) a voter identification card or (b) any other evidence determined by the Commission in order to establish by fingerprint or facial (emphasis added) recognition that the person is the registered voter whose name and voter identification number and particulars appear in the register." Further, Regulation 47 (1) (Interpretation) states that: "biometric verification equipment" means a device provided at a polling station by the Commission for the purpose of establishing by fingerprint the identity of the voter". In addition, my Lords, the Public Elections (Registration of Voters) Regulations, 2012 (C.I.72) in sub-regulation (7) of Regulation 12, states that "A registration assistant shall capture the biometric data, made up of the ten finger prints and the photograph of the head, showing the bare face and two ears without any obstruction, of the applicant." Also, sub-regulation (9) states that "The Commission shall make alternative arrangements in relation to biometric data for a person who has no fingers". In addition, Regulation 31 (Interpretation) states that "bio-data refers to biographic and biometric information of a person required for the purpose of establishing that person's identity". Thus, it cannot be stated that biometric verification is limited to finger prints and your Lordships are urged so to conclude. In any event, the Constitution, as clearly stated in the decisions of this Honourable Court in the cases of Tehn-Addy and Apaloo provide that a person cannot be denied the right to vote and entitlement to be registered. Most importantly, it is not disputed that there was no protest by any Polling

Agent or any person that anyone was allowed to vote without biometric verification and the evidence of the Chairman of the 2nd Respondent was that everyone who voted was biometrically verified. As regards the challenges faced by the malfunction of the verification equipment in some Polling Stations, it resulted in the continuation of the election for a second day.

Duplicate serial numbers on pink sheets

23. Your Lordships, this category can properly be described as the weakest link in an already weak chain. Throughout the trial not one person identified a Polling Station by anything other than its name and unique code. The allegation that the serial number was a security feature was not substantiated. The number was inserted not by the 2nd Respondent but by the printer in circumstances that were fully explained by the Chairman of the 2nd Respondent. The Polling Stations concerned had separate identities, results and officials.

Same Polling Station codes with different results

24. Under this category your Lordships are urged to conclude that the 2nd Respondent clearly showed that this occurred where the same Polling Station was used for special (early) voting and later used for the voting on election day or in places where there were split Polling Stations. The candidates sent Polling Agents to the Polling Stations concerned and the votes for special voting polling stations, under Regulation 21 (11) (c) of C.I. 75 the ballots for special voting "shall be counted in the same manner as those contained in the ballot boxes used on the polling day. The statement by the 2nd Petitioner that no pink sheets are used is a myth and was debunked by the evidence of Dr. Afari Gyan and Mr. Asiedu Nketia.

The 23 (should be 22) unknown Polling Stations

25. Your Lordships are urged to conclude that in so far as the Petitioners sent Polling/Counting Agents to the said polling stations, they cannot be heard to say that they were unknown and to request that the votes cast at those polling stations be annulled.

Conclusion

26. It is our respectful submission that the Petitioners have failed to establish that the irregularities that occurred, in the 2012 elections, affected the results and urge the Court to find that there is no justification for annulment of any votes.
27. The Petitioners readily withdrew their initial allegation of official collusion, vote padding and alteration of election results. This indicates that there was no fraud or official wrong doing in the elections. It not surprising then, that the petitioners hang their entire case on administrative/clerical errors "on the face of the pink sheet". Given the fact that the EC hires over one hundred thousand temporary officials, who are trained for only a short time, to conduct the presidential and parliamentary elections in a day or two, administrative and clerical errors are unavoidable. This is not to say that the Electoral Commission will not do everything in its power to ensure that such administrative errors are minimized. If elections were allowed to be annulled on the basis of such errors, which do not injure any candidate in particular, there would be loss of public confidence in the electoral system and the tendency to challenge practically the result of every election will be heightened. The right to vote is a fundamental right given by the constitution to Ghanaian citizens who are 18 years or older. In the desire to exercise their civic responsibility in relation to this right, Ghanaians spent considerable periods of time to register as voters during the registration period and stood in long queues to vote on Election Day for purposes of electing their leaders in accordance with our democracy. At no time did the petitioners allege that any person voted who was not entitled to vote. Neither have the petitioners shown that any candidate or a voter engaged in wrong doing in connection with the election. At no Polling Station did

the number of persons who voted exceed the number of persons eligible to vote there.

28. We wish to refer your Lordships to the recent Canadian case of *Opitz vs Wrzesnewskyj* SCC 55, ([2012] 3 S.C.R. in which the Supreme Court of Canada held as follows in paragraph 46:

(46) 'The practical realities of election administration are such that imperfections in the conduct of elections are inevitable. As recognized in Camsell v. Rabesca, [1987] N.W.T.R. 186 (S.C.), it is clear that "in every election, a fortiori those in urban ridings, with large numbers of polls, irregularities will virtually always occur in one form or another" (p. 198). A federal election is only possible with the work of tens of thousands of Canadians who are hired across the country for a period of a few days or, in many cases, a single 14-hour day. These workers perform many detailed tasks under difficult conditions. They are required to apply multiple rules in a setting that is unfamiliar. Because elections are not everyday occurrences, it is difficult to see how workers could get practical, on-the-job experience.

and in paragraph 56 as follows:

(56)

In our view, adopting a strict procedural approach creates a risk that an application under Part 20 could be granted even where the result 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. It also runs the risk of enlarging the margin of litigation, and is contrary to the principle that elections should not be lightly overturned, especially where neither candidates nor voters have engaged in any wrongdoing. Part 20 of the Act should not be taken by losing candidates as an invitation to examine the election records in search of technical administrative errors, in the hopes of getting a second chance.

and also in paragraph 66 as follows:

(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.

29. This decision is not binding on your Lordships but we urge your Lordships to consider it to be of strong persuasive effect.

30. It is respectfully submitted on behalf of the 2nd Respondent that the petition should be dismissed as being without merit.

DATED AT ACCRA THIS 30TH DAY OF JULY, 2013

SOLICITORS FOR THE 2ND RESPONDENT

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And to:

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