

**IN THE SUPERIOR COURT OF JUDICATURE  
IN THE SUPREME COURT  
ACCRA**

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 7<sup>TH</sup> AND 8<sup>TH</sup>  
DECEMBER, 2012**

*Article 64 of the Constitution, 1992; Section 5 of the Presidential Election Act,  
1992 (PNDCL 285); and Rule 68 and 68A of the Supreme Court (Amendment)  
Rules 2012, C. I. 74*

**BETWEEN**

- |                                |   |   |             |
|--------------------------------|---|---|-------------|
| 1. NANA ADDO DANKWA AKUFO-ADDO | ) | - | PETITIONERS |
| 2. DR. MAHAMADU BAWUMIA        | ) |   |             |
| 3. JAKE OBETSEBI LAMPTEY       | ) |   |             |

**AND**

- |                                 |   |   |             |
|---------------------------------|---|---|-------------|
| 1. JOHN DRAMANI MAHAMA          | ) | - | RESPONDENTS |
| 2. THE ELECTORAL COMMISSION     | ) |   |             |
| 3. NATIONAL DEMOCRATIC CONGRESS | ) |   |             |

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**WRITTEN SUBMISSIONS FILED ON BEHALF OF 3<sup>RD</sup> RESPONDENT**

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**A. INTRODUCTION**

1. The petition in this case was originally filed on 28<sup>th</sup> December, 2012 and amended twice pursuant to leave granted by the Court. The 2<sup>nd</sup> Amended Petition filed on 8<sup>th</sup> February, 2013, seeks the following reliefs: “..... that the Supreme Court declares:

- (1) That John Dramani Mahama, the 2<sup>nd</sup> Respondent herein was not validly elected President of the Republic of Ghana.
- (2) That Nana Addo Dankwa Akufo-Addo, the 1<sup>st</sup> Petitioner herein, rather was validly elected President of the Republic of Ghana.
- (3) Consequential orders as to this Court may seem meet.” (see paragraph 30 of the 2<sup>nd</sup> Amended Petition).

The Court, on 2<sup>nd</sup> April 2013, set down the following issues arising from the pleadings for determination in this suit. .

- “(i) whether or not there were violations, omissions, malpractices and irregularities in the conduct of the presidential election held on 7th and 8th December 2012; and
- (ii) whether or not such violations, omissions, malpractices and irregularities, if any, affected the outcome of the said election.”

## **B. SUMMARY OF WHY PETITION FAILS**

2. It is our submission that the Petitioners have woefully failed to establish the alleged “irregularities, violations” etc, nor have they proved that the alleged “irregularities, violations” etc affected the outcome of the 2012 Presidential election. We will make it abundantly clear to this Honourable Court that the case presented by the Petitioners comes nowhere close to discharging the burden of proof that lies on them to establish their allegations and warrant the reliefs they seek from this Honourable Court. On the contrary, the documentary evidence provided by them and the oral testimony of their witness, the 2<sup>nd</sup> Petitioner, contains admissions about the results declared which fundamentally undermine the case of the Petitioners and confirm the position of the Respondents that the elections were conducted freely and fairly and that the results declared by the Chairman of 2<sup>nd</sup> Respondent, namely that 1<sup>st</sup> Respondent was the winner of the 2012 Presidential election, reflected the sovereign will of the people of Ghana and were lawful. It is our respectful submission that, on a correct interpretation of constitutional provisions and other laws governing the election and having regard to the evidence before this Court, the following

conclusions regarding the main allegations of the Petitionersemerge clearly.

- (i) There was no evidence that any voter in the election voted more than once or that any person not entitled to vote was allowed to vote. Indeed, the evidence proffered by Petitioners themselves showed overwhelmingly that the candidate's agents of the 1<sup>st</sup> Petitioner, as well as other candidates' agents, signed the declaration of results in the various polling stations after votes were counted in full public view. No complaint by the agents of the candidatesat polling stations or constituency centres regarding over-voting was recorded anywhere. The claims of over voting of the Petitioners were, in large part, admitted not to hold and were abandoned by 2<sup>nd</sup> Petitioner under cross-examination. Claims still pressed by Petitioners are also untenable on a proper interpretation of information provided on the pink sheets and available evidence and must all be rejected.
- (ii) The challenges of the country using biometric verification devices for the first time in elections in Ghana were successfully overcome and no one voted without going through the biometric verification process. The testimony provided by the Chairman of the 2<sup>nd</sup> Respondent, about the C3 column on the Statement of Poll and Declaration of Results for the office of the President forms ("the pink sheets") , was unchallenged and explained the problems the Presiding Officers had in filling that part of the pink sheet.
- (iii) The absence of the signature of the Presiding Officer on the pink sheets does not justify annulment of votes that were cast lawfully in the exercise of the constitutional rights of citizens. While failure to sign constitutes a breach of the duty imposed on that election official by the Constitution, nowhere does the Constitution require or justify the annulment of votes cast and, hence, the results announced at the relevant polling station because of such a breach. The Presiding Officers can be compelled to perform their duty to sign, by order of mandamus. Annulment of votes in these situations would not only be an unconstitutional deprivation of the right to vote of the citizen but would also amount to punishing

innocent voters retroactively for the omission of the Presiding Officer.

- (iv) The claim by the Petitioners that unique serial numbers were provided to polling station pink sheets was baseless and there was no irregularity involved in the same serial number appearing on more than one such pink sheet. The attempt to nullify votes on this ground is absurd and to do so would also unconstitutionally deprive millions of citizens of their right to vote. Serial numbers are not, and have never been, security features on pink sheets, unlike ballot papers. Petitioners have provided no legal basis for this category of their claim.
  - (v) Claims about unknown polling stations were also baseless and Petitioners who deployed agents on behalf of the 1<sup>st</sup> Petitioner cannot in good faith make these claims. Claims about different results being given for the same polling station are also not warranted.
  - (vi) The claims about vote padding in favour of 1<sup>st</sup> Respondent and reduction of votes of 1<sup>st</sup> Petitioner (except in one instance of an error in transposition affecting 80 votes), as well as allegations about improper receipt and transmission of results at the offices of Superlock Technologies Limited (“STL”), were withdrawn and were also not borne out by the evidence.
3. Even before elaborating on the evidence and submissions of law that lead to the above conclusions, however, there is an even more basic reason why the claims of the Petitioners must fail in limine. The claim in the 2<sup>nd</sup> Amended Petition the verifying affidavit of 1<sup>st</sup> Petitioner that results in 11,916 polling stations were being put in issue, and the subsequent claim in the affidavit of the 2<sup>nd</sup> Petitioner to have filed 11,842 exhibits in 24 (twenty-four) mutually exclusive categories numbering and representing 11,842 different polling station results which are being sought to be annulled, have been shown to be untrue. The referee, KPMG, found the number of polling stations that were uniquely identified to be 8675.

4. In the 8675 polling stations figure given by the KPMG representative, 339 of this number listed as Appendix E.4 in Volume 5 of the Report (pages 193 to 201) must be immediately taken out as they appear in Exhibits that are indisputably out of the range indicated in the relevant paragraph (paragraph 56) of the affidavit of the 2<sup>nd</sup> Petitioner. There are also 93 of these 8675 polling stations that were not within the polling stations that were disclosed by Petitioners as part of their case when the Court ordered further and better particulars of the 11,916 polling stations. Worse still, as further elaborated below in the section of these submissions on the evidential burden not being discharged, the exhibits of the Petitioners are often contradictory, with the same polling station sometimes featuring under different exhibit numbers, or one exhibit number being used for two different polling stations. There is total confusion in the exhibits and thousands of them must be wholly discounted as not usable or being incapable of providing evidence. As we argue further below, it is impossible to make a cogent case out of this exhibit mess which Petitioners should have cleared up by now, but have failed to do. That failure is now irredeemable.

#### **C. THE CASE OF THE PETITIONERS**

5. In paragraph 23 of the 2<sup>nd</sup> Amended Petition, the Petitioners allege the following main irregularities, violations, etc in the conduct of the Presidential election: Over-voting, voting without biometric verification, absence of signature of Presiding Officer on “pink sheet”, and the same serial number on “pink sheets” for different polling stations. On account of these claims Petitioners seek to have votes annulled. They also claimed in paragraph 24 that there were cases of illegal padding of votes of the 1<sup>st</sup> Respondent, on the one hand, and reduction of votes of the 1<sup>st</sup> Petitioner, on the other hand. It is also the contention of the Petitioners that there were “unknown polling stations” where voting took place and votes at these places should also not count. Petitioners also claim that in certain instances, there were different results given for the same polling station.
6. The total number of polling stations affected by the allegations of the Petitioners was given in the 2<sup>nd</sup> Amended Petition and the verifying

affidavit sworn to by the 1<sup>st</sup> Petitioner as 11,916. The Petitioners claim that the votes at these polling stations should be annulled and gave the total number of these votes as 4,670,504 (four million, six hundred and seventy thousand, five hundred and four), a figure which is also in the verifying affidavit of the 1<sup>st</sup> Petitioner attached to the 2<sup>nd</sup> Amended Petition. In the affidavit filed on behalf of the Petitioners by 2<sup>nd</sup> Petitioner, the figure of votes to be annulled is 4,637,305 (four million, six hundred and thirty-seven thousand, three hundred and five). It is noteworthy that the number of votes sought to be annulled is almost half of votes cast in the election and almost a third of the registered voters for the election.

7. The Petitioners, in the 2<sup>nd</sup> Amended Petition, created 26 categories into which they put various combinations of their allegations (by the time of the affidavit of 2<sup>nd</sup> Petitioner, these were down to 24) and claimed that each of these categories was exclusive of the others. In each category, they indicated the number of votes they seek to have annulled (see paragraph 27 of 2<sup>nd</sup> Amended Petition and paragraphs 44 to 67 of the affidavit of 2<sup>nd</sup> Petitioner). The category accounting for most of the votes Petitioners seek to annul is the duplicate serial number category in paragraph 56 of the 2<sup>nd</sup> Petitioner's affidavit. The number of votes to be annulled in this category exclusively, according to the 2<sup>nd</sup> Amended Petition, verified by the affidavit of the 1<sup>st</sup> Petitioner, is 2,583,633 (two million five hundred and eighty-three thousand, six hundred and thirty-three), and according to the affidavit of 2<sup>nd</sup> Petitioner is (2,614,556) two million six hundred and fourteen thousand, five hundred and fifty-six. The Petitioners claimed that with all the votes in the 11,916 polling stations being annulled, the 1<sup>st</sup> Petitioner would be the winner of the election and should be so declared by the Court. The 11,916 was purportedly reduced to 11,842 polling stations in the affidavit of 2<sup>nd</sup> Petitioner and has been further reduced again a number of times during the oral testimony of 2<sup>nd</sup> Petitioner.
8. Under cross-examination, 2<sup>nd</sup> Petitioner admitted that the figure in paragraph 44 of 320 polling stations where he alleged exclusive instances of over-voting took place was wrong having regard to the

statement in paragraph 37 of his affidavit that: “..... while overvoting occurred in 2065 polling stations, in 1755 of these... overvoting took place along with NBV, DS,NS and DP.” The figure of 320 should have been 310. 44, the number of exhibits alleged to have been filed was 320 and, in the KPMG Report, 318 exhibits are recorded in this category (see Appendix A.2.1 at pages 11 to 18 of Volume 1 of the Report). Even while admitting the error, 2<sup>nd</sup> Petitioner asserted that the number of affected votes was the same, suggesting quite strangely that, irrespective of changes in the number of polling stations in a category, the number of affected votes is the same!

9. Again, in paragraphs 38 and 52 the figure of 379 given for polling stations where exclusive instances of voting without biometric registration should have been 388 if, as suggested in the first sentence of paragraph 38, there is meant to be a subtraction of the figure 1,891 from 2279. On the other hand, Appendix A.2.9 in the KPMG Report (pages 87 to 97, Volume 1) lists 382 sheets counted, two pairs of which share an exhibit number (MB-L 374 and MB-L 147) but with different polling situations in the two exhibits. In paragraph 38 also, the first sentence contains another error: “That while voting without biometric verification occurred in 2,279 polling stations, in 1891 of these stations, .., overvoting [sic] took place along with DS, NS and DP.” “Over-voting” in the second half of the paragraph may have been intended to be “voting without biometric verification”. It would have been expected that Petitioners would make the needed corrections to these errors, after the matter arose in cross-examination. Paragraph 39 of the affidavit also has an apparently erroneous figure of 306 as the number of exclusive instances of absence of signature of presiding officers. In the corresponding paragraph 58, the correct figure of 310 for the category is given.
10. In paragraph 71 of his affidavit, 2<sup>nd</sup> Petitioner goes on to state the main thrust of the case of the Petitioners: “That upon the annulment of the votes in the **eleven thousand eight hundred and forty two (11,842)** (Emphasis 2<sup>nd</sup> Petitioner’s) polling stations, the affected number of votes which were originally credited to each candidate in the

presidential election and which ought to be deducted from the respective votes declared in favour of each candidate are as follows.....". He proceeds to give the figures against the respective candidates. That total figure of 11,842 polling stations was reduced by 2<sup>nd</sup> Petitioner under cross-examination, initially by 83 and then by 704. No explanation was provided as to how, with these reductions in polling stations, the same number of votes to be annulled, as stated in the affidavit of 2<sup>nd</sup> Petitioner, could be achieved.

11. The 11,916 was not only reduced to 11,842 polling stations in the affidavit of 2<sup>nd</sup> Petitioner but further reduced to 11,221 in his testimony before the Court. He stated:

"My lords, as you recall in my affidavit, I stated that we were going to lead evidence or deal with 11,842 polling stations. In our submission of the evidence we actually ended up submitting 11,221 polling stations. And then subsequently after further quality review we have deleted 83 polling stations. So this brings us to a total of 11,138 and these polling stations that we have deleted I am happy I have a copy of them to make copies available to everybody and all my analysis yesterday was based on 11,138 polling stations." (See pages 13, 14, and 28 of the transcripts of the proceedings of 18<sup>th</sup> April 2013)

12. Thus since the filing of the affidavit of the 2<sup>nd</sup> Petitioner, the Petitioners claimed to have deleted in total 704 polling stations from the figure of 11,842 stated in the 2<sup>nd</sup> Petitioner's affidavit. (See also page 80 of the transcripts of the Proceedings of 6<sup>th</sup> May 2013). In the result as shown below, the Petitioners moved away from their original claim of having about 4.63 million votes annulled to a new claim of having 4,381,415 votes annulled.

"Q. Now can you tell the court, the total number of votes that will be reduced as a result of this update in terms of the difference between the original number of votes you were seeking to have



annulled and the total number of votes that you are seeking to have annulled now?

A. My lords, the difference between the original number of votes that we were seeking to have annulled, this is about 4.63 million and what we are seeking to have annulled now is 4.38 million is about 251,000 votes.

ADINYIRA: How many votes do you want to have annulled now?

WITNESS: The total number of votes we are seeking to have annulled now is 4,381,415 my lord.” (See page 14 of transcripts of proceedings of 18<sup>th</sup> April 2013)

13. During his cross-examination by Counsel for the 3<sup>rd</sup> Respondent, he maintained that they supplied 11,842 polling station results:

“Q. We are in the process of doing exactly that and that is why I am putting it to you that in your Exhibit MB-P category, that is where you massed up your heap of papers, duplicated, triplicated, quadruplicated, it is in exhibit P that we find that happening most?

A. My lord we are totally rejecting that proposition. We have pink sheets for every one of the 11,842 polling stations.”

(See page 43 of the transcripts of proceedings of 9<sup>th</sup> May 2013)

On the last day but one of the trial, in cross-examination of Dr. Afari-Gyan, Counsel for the Petitioners, in a final throw of the dice, yet again put new figures - both as regards polling stations and as regards votes to be annulled – to the witness as representing the case of the Petitioners:

“Q. Out of the total of 10,081 polling stations, total over votes amounted to 742,492?

A. My lord unless I know the specific polling stations it will be difficult to say yes or no...

Q. The total of all the violations and irregularities affects 3,916,385 votes. Of that 2,612,788 are votes attributed to the 1<sup>st</sup> Respondent and 1,228,229 are votes attributed to the 1<sup>st</sup> Petitioner?

A. My lords I have no basis for knowing that.”

Q. You will see from the figures we have been looking that the major beneficiary of these violations is the 1<sup>st</sup> Respondent?

A. My lords that is not correct...” (See pages 48 and 49 of the transcripts of the proceedings of 16<sup>th</sup> July 2013).

14. The answer that Dr. Afari-Gyan gave to Counsel for the Petitioners in response to these new figures is the response that we respectfully commend to this Honourable Court as the response to the whole Petition brought before you: “

“Q. So I am asking you do you have any other figures apart from the ones I have just quoted to you?

A: And I am saying that I have no basis to change the results as announced.” (See pages 49 of the transcripts of the Proceedings of 16<sup>th</sup> July 2013)

The figures put to Dr. Afari-Gyan in cross-examination by Counsel for the Petitioners as to the number of votes to be annulled basically rolled up, for instance, all the allegations of over-voting in the different categories, no matter whether the over-voting allegation occurs in a particular

polling station with other alleged irregularity, violation etc. or not. The same goes for all the figures he put forward for voting without biometric verification, absence of signature of Presiding officer, duplicate serial number. None of his latest numbers were in terms of exclusive categories in the affidavit of 2<sup>nd</sup> Petitioner which initiated an attempt, albeit a failed one, to avoid double counting. As indicated by Dr. Afari-Gyan, without an indication of the polling stations –now reduced to 10,081-in relation to which these numbers are being put forward, and broken down into the 24 exclusive categories in the affidavit, those global figures have no value in these proceedings.

15. It is essential to identify which polling stations are included in the total numbers to enable clarity as to which votes are being sought to be annulled and also certainty that all polling stations included in those figures are among those in the exhibits identified in the KPMG Report and/or also in the further and better particulars. Your Lordships should, respectfully, be concerned about the situation we all currently find ourselves in. A Petition was filed with certain numbers. It was amended and new numbers were provided in the Amended Petition. Those numbers were changed again when it came to providing evidence in the affidavit that was filed in support of the case of the Petitioners. In the witness box during cross-examination those, numbers kept changing even though 2<sup>nd</sup> Petitioner insisted that deleting polling stations and the related votes did not change the totals. The new numbers Counsel for the Petitioners put forward at the end appear to recognize that the numbers of votes to be annulled would change as the polling stations in respect of which irregularities, violations etc are alleged change. Any new number put forward must, therefore, have its associated list of polling stations where votes are being tallied for annulment. That is, indeed, why Your Lordships made your orders in respect of further and better particulars to be filed as to polling stations in contention. Respondents are entitled to know which specific polling stations are in issue so as to be able to answer the case of the Petitioners. The Court also needs clarity about this, especially as what is being sought is the annulment of votes, an issue of great constitutional significance.

16. The constantly changing figures of the Petitioners, from the original Petition to the last day but one of trial, portray the uncertain, speculative and indefinite nature of the case of the Petitioners. This is also what is reflected in the fact that though 2<sup>nd</sup> Petitioner confidently insisted that exhibits in respect of 11,842 had been filed, the report of the referee, KPMG, shows that this is far from the case as we elaborate further below. The confusion about the exhibits that we shall also elaborate is an apt characterization of the whole case of the Petitioners. 2<sup>nd</sup> Petitioner admitted, under cross-examination, major problems and errors in regard to their exhibits. In one case, for instance, an exhibit from a Parliamentary election was among their exhibits:

“Q: Now take a look at Exhibit MBP004890, the code number is K030206 and the name is Gudayiri Primary. Doc., is that presidential results?

A. No, this is for the office of the Member of Parliament. This is a parliamentary result.

Q. And what is it doing among your exhibits in support of presidential results?

A. I think we had seen this in reference to your response. I am not sure how it got in there. It is a parliamentary results; it should not be among the exhibits.” (see page 40 of transcripts of proceedings of 22<sup>nd</sup> April 2013).”

17. There were repetitions of exhibits, including repetitions of the same exhibit in different categories. He admitted numerous instances of irregularities in the exhibits, such as the lack of an exhibit number in the stamp of the Commissioner of Oaths before whom the affidavit was sworn, difficulties in identifying the number of the exhibit, illegible exhibits, the same polling station appearing in different exhibits. Many times he talked of “mislabelling” even though he could not say what the

right label should have been on the exhibits which he claimed were mislabelled:

“Q. Look at this MBE 164 and then MBP 005038?

A. Yes my lord, it is the same situation of mislabelling of the pink sheet. In the analyses this pink sheet was used only once. (At page 32 of the transcripts of the proceedings of 30th April 2013; see also pages 29 to 33 of transcripts of the same date).”

18. 2<sup>nd</sup> Petitioner, by his submission of lists of deleted exhibits, admitted that many exhibits filed did not in fact support the case the Petitioners put forward and had to be discarded. In the absence of substitutes being provided for the discarded polling stations, the case of the Petitioners falls. Petitioners appear to believe that their ever-changing presentation of their Petition is not subject to rules concerning pleadings. The orders of the Court which require the provision of further and better particulars of the case of the Petitioners are, in effect, been disregarded through the manner in which the Petitioners have been proceeding. The Claim by 2<sup>nd</sup> Petitioner in cross-examination that, despite the admissions about certain exhibits not supporting the claims filed “the analysis remains the same is disingenuous and wholly untenable.
19. It is worth recalling that at the close of pleadings, upon the application of the Respondents, the Court ordered further and better particulars to be provided by the Petitioners regarding the 11,916 polling stations in respect of which the Petitioners claimed there had been various “irregularities, violations etc.” The Court also ordered further and better particulars in respect of the claim in paragraph 24 of the 2<sup>nd</sup> Amended Petition that votes for the 1<sup>st</sup> Respondent had been padded whilst those in favour of 1<sup>st</sup> Petitioner had been reduced. Evidently, for the case of the Petitioners to be made out, not only was there a need for them to provide further and better particulars according to the orders made by the Court, but they now have to provide the necessary proof of each of the allegations they particularise.

20. Further to that, and based on the orders of the Court for testimony to be provided by affidavit, the Petitioners filed an affidavit deposed to by the 2<sup>nd</sup> Petitioner with the evidence on which they rely. In this affidavit, filed on 7<sup>th</sup> April 2013, the Petitioners state their various allegations about irregularities, violations etc in the conduct of the 2012 Presidential election and create twenty-four categories, with one or more of the six types of alleged irregularities, violations etc. The number of exhibits in respect of each of these categories is stated in the affidavit, with the numbers of votes that are sought to be annulled in each category being specifically given. These exhibits as placed in the different categories in paragraphs 44 to 67 of the affidavit -were supposedly attached to the affidavit and are meant to identify the polling stations in respect of each category so that it is clear how the numbers of votes being sought to be annulled have been arrived at. We show below that the confusion and contradiction of exhibits make it impossible to know exactly which votes from which polling stations the Petitioners are really asking to be annulled, which is a basic and major stumbling block to their case being tenable.

**D. EVIDENTIAL BURDEN NOT DISCHARGED BY PETITIONERS**

21. It is essential to proving the case of the Petitioners that they not only clearly establish the legal basis on which they ask this Honourable Court to annul votes of millions of voters, which would deprive these citizens of their constitutional right to vote, but also that they clearly establish the factual basis on which they have brought the petition. This requires that the pink sheets that they reference in the relevant paragraphs of the affidavit must be available to the Court and to the other parties. It is submitted that based on the uncontested evidence of the referee, KPMG, the Petitioners have failed to make available the pink sheets claimed to be made available in the affidavit of 2<sup>nd</sup> Petitioner and, for this reason alone, their petition must be dismissed.
22. In this context, it is necessary to emphasize the legal responsibility of the Petitioners to adduce evidence sufficient to discharge the evidential burden that is provided for in section 11(1) of the Evidence Decree 1975, (NRCD 323) as follows:

“For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.”

As indicated in the Commentary on the Decree: “Sections 10 and 11 provide convenient terminology for distinguishing between the risk of non-production of evidence and the risk of non-persuasion.” (page 14). A party with the burden of producing evidence must produce sufficient evidence to require the judge to weigh the evidence before deciding.

This is a threshold issue, different from the “burden of persuasion” which is provided for in section 10 of the Decree as follows:

- “(1) For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.
- (2) The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.”

23. Her Ladyship, Mrs Justice Sophia Adinyira, JSC, succinctly summed up the law on the burden of proof by reference to this statute in Ackah v. Pergah Transport Limited & Others [2010] SCGLR 728, 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).'

24. In this part of our submissions, we focus on the failure of the Petitioners' case arising from non-production by them of the evidence which they state in their affidavit that they are producing. We highlight the following:

- (i) The independent count by the referee of exhibits filed by the Petitioners and the description of what was filed not only shows that the number of exhibits alleged to have been filed by the Petitioners was not in fact filed, but also discloses total confusion and contradictions regarding their exhibits.
- (ii) Far from clarifying the confusion and contradictions in exhibits, the oral evidence provided by the 2<sup>nd</sup> Petitioner, when confronted under cross-examination with examples of the confusion, compounded the problem as he belatedly admitted to "mix-ups", "mislabelling" of the exhibits etc.
- (iii) Exhibits filed by the Petitioners did not support the categories of claims their case was founded on and the figures provided by the 2<sup>nd</sup> Petitioners in respect of votes affected by the alleged irregularities and violations in each category are not borne out by exhibits filed by them, especially when account is taken of their deletion of some of the exhibits.
- (iv) The Petitioners have failed to comply with basic legal and practical requirements of providing evidence to the Court in a coherent and usable manner to prove their case. No legally permissible evidence is available to this Court on the basis of which the evidential burden on the Petitioners can be said to have been discharged.
- (v) Moreover, decisive evidence is provided on the face of the documents filed by the Petitioners themselves to confirm that the case of the Petitioners is flawed from the outset. In particular, the



certification of results by the agents for the 1<sup>st</sup> Petitioner at the polling stations in respect of which pink sheets have been filed, a fact that is clear on the face of the pink sheets, contradicts the case put forward before this Court by the Petitioners.

25. “You and I were not there!” This oft-repeated statement of 2<sup>nd</sup> Petitioner actually undermines the value of his evidence completely since he is admitting his lack of personal knowledge and, therefore, his lack of qualification to be a witness as to the facts in issue. Section 60 (1) of the Evidence Decree states: “A witness may not testify to a matter unless sufficient evidence is introduced to support a finding that he has personal knowledge of the matter.” As illustrated by his evidence set out below, 2<sup>nd</sup> Petitioner explicitly disavowed any personal knowledge, thus disqualifying himself as a witness of the matters in issue.

“Q. I am suggesting to you that this is clearly an error of picking up and filling part C1 with it.

A. You and I were not there, we can only take the evidence on the face of the pink sheets.” (See page 68 of the transcripts of proceedings of 23<sup>rd</sup> April 2013)

“A. You and I were not there, we are speaking about the records, the pink sheet is telling us that all the voters voted without biometric verification.” (See page 52 of the transcripts of proceedings of 25<sup>th</sup> April 2013”)

He relied totally on the ballot accounting part of the pink sheet for support in respect of allegations of irregularities.

26. As seen on the pink sheet itself, there are two Forms of the Electoral Commission that have been combined into one. Form EL 21B is for ballot accounting information and Form EL 22B is for the results of votes counted. This distinction came out clearly during the cross-examination of Johnson AsieduNketia by Counsel for the Petitioners:

“A: ... I need to say that the top part of the pink sheet is a different form called Form EL 21B and the declaration part which is down is also called Form EL 22B, so they are two different forms which make up the pink sheet...

.....

A: Yes, my lord, it will be an entry error. And that is found on Form EL 21B which is different from the declaration form which is Form EL 22B” (See pages 10, 11 and 64 of transcripts of proceedings of 29<sup>th</sup> May 2013).

27. The ballot accounting part of the pink sheet is filled in with information which is taken from other primary sources. Thus, for instance, information about the number of persons registered at that polling station is taken from the register while information about ballot papers supplied to the polling station is also taken from the record of what was supplied to the polling station from the constituency level. Contrary to what 2<sup>nd</sup> Petitioner claimed, the pink sheet is not the “primary record” of most of those ballot accounting matters. We shall highlight below important differences in the two parts of the pink sheet, especially as they relate to the roles of the Presiding Officers and agents of the candidates as well as the modes of ascertaining the accuracy of information in each part.

#### **E. FINDINGS OF REFEREE ON EXHIBITS**

28. The report of the referee, KPMG, concerning the pink sheets, was tendered in evidence and admitted without objection as Exhibits 1, 1A, 1B, 1C. The representative of the firm, Nii Amanor Dodoo, who tendered the Report, was subjected to cross-examination by Counsel for all the parties. In his evidence, the representative gave the total number of polling station codes that were identified in the exhibits filed by the Petitioners and in the custody of the registrar as 8675. This was a far cry from the 11,842 alleged in the affidavit of 2<sup>nd</sup> Petitioner and maintained by him in oral evidence at one point as filed. At another point under cross-examination he claimed to have filed exhibits relating to 11,221 polling stations:

“My lords, as you recall in my affidavit, I stated that we were going to lead evidence or deal with 11,842 polling stations. In our submission of the evidence we actually ended up submitting 11,221 polling stations. And then subsequently after further quality review we have deleted 83 polling stations. So this brings us to a total of 11,138 and these polling stations that we have deleted I am happy I have a copy of them to make copies available to everybody and all my analysis yesterday was based on 11,138 polling stations.” (See pages 13, 14, and 28 of the transcripts of the proceedings of 18<sup>th</sup> April 2013).

29. At the tail end of cross-examination by Counsel for the 3<sup>rd</sup> Respondent, 2<sup>nd</sup> Petitioner not only claimed to have filed exhibits in respect of 11,842 polling stations but also claimed that in respect of each of the 24 categories in paragraphs 44 to 67 of his affidavit, he had filed the exhibits in respect of the number of polling stations stated in each paragraph.
30. The KPMG Report completely exposes all these claims of the 2<sup>nd</sup> Petitioner as false. In paragraph 2.3 of the Report, (Exhibit 1), Table 1 (at pages 7-8), which lists the exhibits filed by the Petitioners, based on information supplied by the Registrar, indicates gaps in the exhibits as shown even from the labelling of those in the P series. Line 18 of the Table has MB-P 476 to MB-P 1234 and the next line starts with MB-P 2070 and ends at 2818. Similarly, line 22 of the Table 2 has MB-P 2641 to MB-P 3106 and the next line starts with MB-P 3183 and ends at MB-P 3342. Line 24 of the Table has MB-P 3289 to MB-P 3345, while line 25 has MB-P 3810 to MB-P 4832. These gaps were also noted in paragraph 2.4 of the KPMG Report (page 7) as well as in the oral evidence of the KPMG representative. Beyond the labelling, the KPMG Report establishes that the exhibits filed by the Petitioners are not in respect of anything close to 11,842 polling stations.
31. The KPMG Report (Exhibit 1) records at page 5 (paragraph 2.3) that the referee obtained information from the Registrar about the process of filing of the exhibits. It is stated that at the time of filing of the exhibits, “..they were randomly checked with the Petitioners’ representatives. As

some copies of the exhibits were not up to the number required a request was made for additional copies. Although additional copies were subsequently brought, they did not in all instances make up the number required.

“We understand from the Registrar that generally the court requires a minimum of ten copies of documents filed for its purposes.” The Report goes on to indicate from the Table 1 that in respect of most of the exhibits in the P series – as recorded from line 17 to line 32 of the Table - less than the minimum required number of copies were filed. Indeed, in six instances, only one copy was filed.

The KPMG representative indicated in his oral testimony that of the 13,926 exhibits counted, as many as 1545 had illegible data – partially or entirely. Since the referee was required by the Court to “specify[ing] in respect of each pink sheet, its exhibit number, if any, as well as its polling station name and code number”, the Report indicates, in respect of each of the 13926 exhibits counted, what is incomplete on each document and also lists these 1545 Exhibits in Appendix E.5 (Exhibit 1D).

32. As part of their bid to boost up the 8675 number of polling stations determined by the independent referee, the Petitioners applied to the Court to have a further determination by the referee, from extraneous information, of data on the unclear aspects of the list of 1545 referred to above. The application was dismissed, though the Court allowed Counsel for the Petitioners to cross-examine the 2<sup>nd</sup> Respondent’s witness, Dr. Afari-Gyan, Chairman of the Electoral Commission, on the identity of the polling stations using the polling station codes. Dr. Afari-Gyan indicated in this cross-examination that 1234 of those polling stations had been identified by their polling station code (see Exhibits BB and BB1. admitted in evidence during the cross-examination of Dr. Afari-Gyan), even more than the figure of 1219 which the Petitioners had identified (see Exhibit AA admitted in evidence during the cross-examination of Dr. Afari-Gyan). Counsel for the Petitioners has sought to add to the 8675 count the number of polling stations now identified in an attempt to get closer to the 11,842 figure of exhibits. This is, however, not proper. Identifying polling stations which are in the list of 1545 is one thing, but

the use of an identified polling station in support of a particular claim of a violation requires the pink sheet from that identified polling station to be an exhibit in one of the categories specified in paragraphs 44 to 67 of the 2<sup>nd</sup> Petitioner's affidavit. It is clear from the KPMG Report that, in that list of 1545, there are missing or unclear exhibit numbers in respect of many of the identified polling stations (Volume 5 of the KPMG Report, Appendix E.5, at page 203, column for Exhibit numbers).

33. There are, in some cases, numbers on the exhibit but no letter to show in what category of alleged irregularities, violations etc the exhibit is to be placed. Thirty-eight times in Appendix E.5 there is an Exhibit MB-C, an incomplete and meaningless number as far as paragraph 44, dealing with the C category, is concerned. There can be only one Exhibit MB-C, MB-C being the first of the expected 320 exhibits in the C series according to the scheme of numbering in paragraph 44 of the 2<sup>nd</sup> Petitioner's affidavit. Clearly also, each numbered exhibit must correspond to one and only one polling station. It is, respectfully, not for the Court to assign exhibit numbers to clarify a party's case, nor is it the responsibility of the Court to determine which of many polling stations bearing the same exhibit number is what Petitioners really intended. This situation, again entirely the making of the Petitioners, should also not open the way for them to disregard orders of the Court regarding the provision of further and better particulars to enable the Respondents to know what exactly is the case that they are required to answer.

#### **F. UNUSABLE EXHIBITS AND EFFECT ON POLLING STATIONS IN ISSUE**

34. It is striking in respect of exhibits in the P-series that large numbers of them are simply unusable for the purposes of determining the identity and/or number of polling stations in respect of which allegations are being made. In Appendix A.2.13 where data is captured in respect of the P-series, there is a glaring anomaly revealed whereby, for instance, (on pages 145 to 149), the first 171 sheets relate to MB-P, MB-P 000001-000170 and are followed by another 171 sheets (on pages 149 to 154) also with Exhibit numbers MB-P, MB-P 1-170 but with different polling stations in each case. On pages 162 to 175, data is captured for Exhibits MB-P 476 -1234 and followed by MB-P 476 -814 (pages 175-184) which

have different polling stations from the earlier MB-P 476-814 exhibits. On pages 190 - 199, there are exhibits in the range MB-P 2314 - 2632 with different polling stations from a subsequent set that goes from MB-P 2314 on page 225 to MB-P 2613 on page 227. There are more instances of such confusion in relation to the exhibits, but the above should suffice to demonstrate that, in all these instances, the polling station to which reference is being made in the provision of evidence cannot be identified without a resolution of the contradictory sets of exhibits.

35. There are 2120 instances in the P-series of exhibits identified and counted in the KPMG Report where the same exhibit number is repeated in another exhibit but with a different polling station. In Appendix 1 attached to these submissions we list these 2120 exhibits with their exhibit numbers. Each of those 2120 exhibits is, simply, unusable as the pairs of exhibits with the same exhibit number, but different polling stations, contradict each other. The polling stations in these exhibits cannot be counted in determining which polling stations are in issue. This further reduces the 8675 number. A party putting forward its case cannot throw into Court contradictory sets of exhibits and expect the Court to sort out and choose among them. The Petitioners have created the situation for themselves and as they have the responsibility to present their own case, they cannot escape the consequences of the confused state of their exhibits.
36. The P-series is the worst in terms of the confusion of exhibits, a clear result of how this ill-considered claim became the centrepiece of the case of the Petitioners and got out of control as it took on a life of its own. It should be obvious how self-defeating and, indeed, time wasting, it has been for the Petitioners to be tilting at this particular windmill, particularly when 2<sup>nd</sup> Petitioner admitted that he could not refer to any particular legal or constitutional provision for this allegation.
37. We also submit that there is no basis for any of the exhibits counted in the Registrar's set of exhibits, but which had only one copy supplied to the Registry of the Court, to be counted as exhibits in this Petition since their being available to be counted means that the single copy remained with the Registrar and neither the judges nor the Respondents could have been served with them. Indeed, wherever less than the required

minimum of exhibit copies was made available to the Court even after the Registrar made known the shortfalls, the Petitioners cannot expect these exhibits to be used for the case. However, for the purposes of this initial issue of the evidential burden, no further deduction of polling stations has been made on this basis.

38. As further elaborated below, the above and other irregularities and violations of Court requirements regarding exhibits make it impossible for the documents to facilitate proof of the case of the Petitioners. The reality that emerges from the KPMG Report is that the exhibits filed by the Petitioners were “a jumble of paper with mislabellings, duplications and sometimes even quadruplications” (as Counsel for the 3<sup>rd</sup> Respondent put it to 2<sup>nd</sup> Petitioner in cross-examination - see page 11 of the transcripts of the proceedings of 6<sup>th</sup> May 2013). It is impossible to derive legally acceptable support for the allegations of the Petitioners and the reliefs they seek from this jumbled heap in which (i) the identities and numbers of the polling stations where Petitioners seek to have all votes annulled are in such disarray; and (ii) according to the authoritative count of the Referee, affirmed by all the parties, a significantly lower number of polling station pink sheets than what Petitioners claimed they had filed are in evidence.
39. In seeking to annul votes, it needs to be clear which polling stations are being called into question. The confusions about exhibits and the failure of the Petitioners, in filing their exhibits, to do so consistently with the affidavit of the 2<sup>nd</sup> Petitioner and in conformity with court practice, has undermined their case. As there is insufficient clarity on the polling stations in question, the attempt to annul certain votes cannot even get off the starting blocks.
40. Indeed, even adding the total number of polling stations identified to the 8675 polling stations indicated by the referee, less the 2120 unusable polling stations in the P-series, (Appendix 1 attached hereto), and the exhibits with only one set supplied to the court (Appendix 1A attached hereto) still leaves a huge shortfall in polling stations. The extent of the difference in numbers of polling stations from what the Petitioners claimed they were presenting to this Court is serious,

especially when it is recalled that the original Petition filed on 28<sup>th</sup> December 2012 had put forward a case based on 4709 polling stations. Petitioners subsequently obtained leave from Your Lordships to amend their case to increase the number of polling stations to 11,916. Yet they have failed to produce the evidence to support anything close to the number of polling stations that they obtained leave to put across in their 2<sup>nd</sup> Amended Petition.

41. There is also severe damage to the credibility of the 2<sup>nd</sup> Petitioner from the above issues relating to the exhibits and the number of polling stations. He insisted, under cross-examination, that 11,842 polling stations were reflected in the exhibits filed by the Petitioners and claimed to have been present when the Commissioner of Oaths was going through the process of stamping the exhibits accompanying his affidavit.

“Q. But according to you, you deposed to the affidavit and these exhibits were attached in your presence?

A. That is what I am saying I am surprised, some have been photocopies and I do not know, may be in the process of photocopying and exhibit number may have been deleted from the top but I do not know why they do not have exhibit numbers, they should.

Q. In that case, apart from the top there was also no exhibit number where the commissioner of oath is supposed to identify the exhibit?

A. That is correct my lord.

Q. So you can confirm that this happened in your presence?

A. That is why I am saying I do not know where the photocopying took place. These sheets appear to have been photocopied, they are identical and I do not know whether the photocopy took place from our end or any other end.



Q: You just said when the commissioner for oaths was signing, you were there?

A: Yes I think I said I was there, he was stamping which is essentially what is signature is in terms of putting the exhibit number in the column. I was there when he was signing.” (See pages 5, 6 and 9 of the transcripts of the proceedings of 6<sup>th</sup> May 2013).

42. The centrality of the pink sheets filed to the case of the Petitioners makes the issue of the actual pink sheets in evidence and the confusion about them quite critical issues in this Petition. If evidence that Petitioners have sworn to, stating they have provided exhibits involving votes at so many polling stations, is exposed as inaccurate from the report of the Referee, and what has in fact been supplied to the Court involves far less polling stations, this is fatal to their case because there is no other evidence available to discharge the evidential burden.

#### **G. EXHIBITS OUTSIDE RANGE OF AFFIDAVIT**

43. The figure of 8675 polling stations given by the referee has to be reduced by reference to the exhibits that are out of the number ranges referred to in paragraphs 44 to 67 of the affidavit of the 2<sup>nd</sup> Petitioner. Since, for instance, in paragraph 56 of the affidavit, the exhibits relied on are stated as MB-P, MB-P 1 –P 6822, every exhibit in the P-series listed in the KPMG Report beyond MB-P 6822 must be discounted. Appendix E.4 of the KPMG Report shows that in the P–series alone, there are 339 exhibits out of the range of the relevant paragraph of the affidavit. In respect of other paragraphs also, there are 13 out of range exhibits in the MB-K series as listed in Appendix A.2.8 on pages 81-82 of the KPMG Report. In the MB- H series (Appendix A.2.6 in KPMG Report Volume 1 at pages 47 to 69), there are 12 exhibits outside the range stated in paragraph 49 of the affidavit of 2<sup>nd</sup> Petitioner.

In the exhibits within the 1219 unclear or illegible exhibits that have been identified from their polling station codes, the out of range exhibits number 23 as listed in Appendix 2 attached hereto. These out of range exhibits and the polling stations they refer to cannot be part of the case of the Petitioners.

#### **H. EXHIBITS FEATURING POLLING STATIONS NOT IN FURTHER AND BETTER PARTICULARS**

44. The Petitioners have sought to put in evidence as attachments to the affidavit of the 2<sup>nd</sup> Petitioner pink sheets of polling stations not included in the further and better particulars supplied by them pursuant to the order of the Court. A list of these exhibits, numbering 93, is attached hereto as Appendix 3. Not having submitted the polling stations on this list as part of their further and better particulars, the Petitioners cannot use exhibits referring to them in evidence. The point of orders of the Court for the provision of further and better particulars is to ensure that the pleadings of the parties have sufficient particularity to enable the other party to respond to the allegation in question. The Petitioners resisted the request of the Respondents to supply further and better particulars, thus necessitating the application to the Court to order the provision of such particulars. Essentially, the Petitioners were seeking to embark on a process whereby, without the Respondents knowing which polling stations these allegations were in respect of, they would nonetheless have to answer the Petitioners' allegations. Such blindfolding of the Respondents was not accepted by the Court and Petitioners were ordered to furnish the particulars of the polling stations in respect of which the allegations were being made.
45. In our submission, it is not open to a party to supply further and better particulars and then seek to put in evidence exhibits that go outside those particulars. (see Odgers on Pleading and Practice, 20<sup>th</sup> Edition at page 157 -“if a party serves particulars, he is bound by them”). We respectfully submit that exhibits with polling stations not disclosed in the further and better particulars are not legally permissible as evidence for the purposes of this Petition.

#### **I. USE OF SAME POLLING STATION IN DIFFERENT CATEGORIES OF AFFIDAVIT OF 2<sup>nd</sup> PETITIONER**

46. In paragraph 43 of the affidavit of the 2<sup>nd</sup> Petitioner, it is stated that “the constitutional and statutory violations, irregularities and malpractices which constitute the basis of this petition have been classified into

**twenty-four (24) distinct and mutually exclusive categories in which no polling station can belong to more than one category,** thereby avoiding double counting.” (Emphasis the Petitioners’). Yet it is clear from the KPMG Report that there are numerous instances of the same polling station being used in different categories. In Appendix E.3 (Volume 5 pages 5 to 191) of the KPMG Report, a summary of polling station codes appearing more than once in the count of exhibits is provided, with the different exhibit numbers. Data captured in this list shows how throughout the exhibits, the same polling station is used in more than one of the categories referred to in the 2<sup>nd</sup> Petitioner’s affidavit. The objective of avoiding double counting that was expressed in paragraph 43 of the affidavit is, thus, not achieved since the numbers of votes sought to be annulled in each of paragraphs 44 to 67 are derived from the polling stations in all the exhibits referred to in each paragraph. We further illustrate the nature of this problem of exhibits with polling stations used in two or sometimes three categories in Appendix 4 attached hereto.

47. Confronted under cross-examination with examples of these exhibits repeated in different categories, the 2<sup>nd</sup> Petitioner admitted the repetitions but asserted that the polling station “was used only once in the analysis.” This bare assertion of use only once is decisively contradicted by the evidence in the respective paragraphs of the affidavit where specific numbers of votes are sought to be annulled at a specified number of polling stations in each of the twenty-four categories of the affidavit. There was no indication by the 2<sup>nd</sup> Petitioner about how the use only once was consistent with the various paragraphs in his own affidavit where votes to be annulled are counted on the basis of the exhibits specified in each paragraph. Having admitted that certain polling stations were used more than once, 2<sup>nd</sup> Petitioner simply resorts to “used only once in the analysis” as a deflection that exposes his lack of truthfulness. For his claim about “used only once in the analysis” to be credible, he needed to explain, for instance, how a polling station repeated in various categories was only counted in the totals of one particular paragraph only but not in other paragraphs where the same polling station is used.

**J. EFFECT OF ADMISSIONS OF 2<sup>ND</sup> PETITIONER CONCERNING EXHIBITS**

48. In the course of cross-examination by Counsel for the Respondents, the 2<sup>nd</sup> Petitioner was compelled to admit many instances in which the allegations of the Petitioners were not borne out by the Exhibits they had filed.

Realizing during the cross-examination of Counsel for the 1<sup>st</sup> Respondent that the admissions he was compelled to make undermined the basis claimed in the Petition, the 2<sup>nd</sup> Petitioner attempted to repair the damage done by providing a list of 83 polling stations which the Petitioners claimed they had deleted from their updated analysis. Subsequent to the list of 83 polling stations, a list of 704 polling stations which the Petitioners claimed they were no longer relying on was also provided which further undermines the figures in the affidavit of 2<sup>nd</sup> Petitioner.

49. These admissions by 2<sup>nd</sup> Petitioner make it impossible to sustain the case put forward in his own affidavit. Furthermore, without substituting new polling stations for those deleted, it is, again, simply impossible to arrive at the same numbers of votes to be annulled as were stated in either the 2<sup>nd</sup> Amended Petition and the verifying affidavit of 1<sup>st</sup> Petitioner, or in the affidavit of 2<sup>nd</sup> Petitioner. Without an amendment to the pleadings, new claims about, for example, numbers of votes to be annulled and new pink sheets with polling station results to support the new numbers cannot be entertained and the case of the Petitioners, as it stands, must simply, fail. The admissions of 2<sup>nd</sup> Petitioner, under cross-examination, confirmed by the tendering of lists of deleted polling stations, thus decisively disable the Petitioners from discharging the evidential burden in respect of the case they brought to this Court. It must be emphasized that the deletions only occurred after the start of cross-examination and were based on an update that he claimed to have made the night before.

**K. RESULTS CERTIFICATION BY CANDIDATES' AGENTS**

50. Another most significant set of admissions made by the Petitioners consists of the testimony of polling agents that represented the

1<sup>st</sup> Petitioner at each of the polling stations throughout the country. Their testimony was in the form of their certification of the results declaration form on the pink sheet. The specific legal significance of this admission of regularity of the election is addressed below. Significantly, it is the results declaration part of the pink sheet that involves not merely the Presiding Officer but also the candidates themselves, acting through their agents. 2<sup>nd</sup> Petitioner was, indeed, not himself at the various polling stations around the country in respect of which the exhibits were filed. However, agents of the 1<sup>st</sup> Petitioner (and, by extension, 2<sup>nd</sup> Petitioner) were there. “You and I were not there” was, therefore, in fact, not an accurate statement. The agents were there and had personal knowledge of what took place at the polling station. They were not “mere observers” as claimed by 2<sup>nd</sup> Petitioner in examination-in-chief, nor even “exalted observers” as he claimed under cross-examination. Their role is constitutionally and statutorily recognized.

51. Article 49 of the Constitution clearly articulates the constitutional roles of polling agents alongside presiding officers at public elections.

“49. (1) At any public election or referendum, voting shall be by secret ballot.

(2) Immediately after the close of the poll, the presiding officer shall, in the presence of such of the candidates or their representatives and their polling agents as are present, proceed to count, at that polling station, the ballot papers of that station and record the votes cast in favour of each candidate or question.

(3) The presiding officer, the candidates or their representatives 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 result of the voting at the polling station before communicating them to the returning officer.”

The certification of votes cast, along with the Presiding Officer, is here underlined as an important part of the function of the polling agent.

52. Regulation 19 of C.I. 75 provides for the role of polling agents as follows:

- “19. (1) A candidate for parliamentary election may appoint one polling agent to attend at each polling station in the constituency for which the candidate is seeking election.
- (2) A candidate for presidential election may appoint one polling agent in every polling station nationwide.
- (3) An appointment under sub-regulations (1) and (2) is for the purpose of detecting impersonation and multiple voting and certifying that the poll was conducted in accordance with the laws and regulations governing the conduct of elections.”

Regulations 35 and 36 of C.I. 75 also stipulate the role of a candidate’s agent after the poll and these provisions include the swearing in of the counting agent who attends at the counting of votes at the polling station “upon penalty of perjury that the counting agent:

(a) shall abide by the laws and regulations governing the conduct of elections; and will sign the declaration of results following the count of the ballot, or state in writing to the presiding officer the reason for failing to do so.” [Regulation 35(4)]

It is also worth noting that Regulation 36(2)(a) indicates that one aspect of the ballot accounting part of the pink sheet that has to do with “the total number of persons entitled to vote at that polling station” is included among the matters that the declaration signed by the Presiding Officer, as well as the counting agent, is related to. This underlines the

important role of the counting agents in ensuring that those who vote at that polling station do not exceed that total.

53. It is worth emphasizing that what is certified by the candidate's agents includes "certifying that the poll was conducted in accordance with the laws and regulations governing the conduct of the elections." In almost all of the exhibits filed as attachments to the affidavit of the 2<sup>nd</sup> Petitioner, the agents of the 1<sup>st</sup> Petitioner were present and their signatures on the pink sheets on which Petitioners rely constitute admissions of regularity of the election results. On the face of their own documentary evidence, therefore, the Petitioners are confronted starkly by these admissions made on their behalf at the polling stations. There is also evidence that these admissions were repeated at the constituency collation centres where these results were entered on the collation sheets and signed off again by representatives of candidates.

54. In that regard, Dr. Afari-Gyan testified as follows:

"That is where the person is located and the returning officer is the person who is going to put together on what we call the collation form, all the results from the various polling stations in the constituency and at the collation center, they have the agents of the candidates. And ideally, those agents will have the results of the various polling stations in their possession." (page 67 of the transcripts of the proceedings of 30<sup>th</sup> May 2013).

He continued:

".....so the party representatives see the results before I see the results and that is why I keep saying all the time that even though I am the returning officer for the Presidential Election am the last person to see the results. The results have been seen at the polling stations, they have been seen at the collation center and they have been seen at the Regional center before being sent to me and there are party agents who sign the results before I see them, so this is the process they will sign unto the results that arrive in the room before they send them to me for

my signature as the returning officer of the election.”(see pages 75 and 76 of the transcripts of proceedings of 30<sup>th</sup> May 2013).

In effect, the agents of the 1<sup>st</sup> Petitioner signed off the results at the polling stations, collation centres, the regional headquarters and headquarters of the 2<sup>nd</sup> Respondent.

55. The admissions of the 1<sup>st</sup> Petitioner’s agents at the polling stations cannot be lightly set aside, as 2<sup>nd</sup> Petitioner sought to do under cross-examination, by depicting these agents as “mere observers”, nor by claiming, falsely, that the signature of the agent was to affirm the irregularities alleged on the pink sheet and related to the ballot accounting part as well as the results.

“Q. And you are able to confirm are you not that the polling agent of the NPP signed the pink sheet that you have gone through?

A: Yes the pink sheet showed that the NPP agent signed.

Q: The NPP agent signed without any indication of a protest in respect of those results. Is that not correct?

A: No he signed to affirm the irregularities on the face of the pink sheet.”

(Cross-examination of Dr. Mahamudu Bawumia by Counsel for 3<sup>rd</sup> Respondent, see page 51 of the transcripts of proceedings of 2<sup>nd</sup> May 2013).

The signatures of the polling agents rather certify the regularity of the process, as Regulation 19(3) of C.I. 75 makes clear. They also have evidential value, with all the hallmarks of contemporaneous authenticity and truthfulness unaffected by memory lapse or ex post facto contrivance. The nationwide consistency of these admissions by the agents of 1<sup>st</sup> Petitioner is also striking and contradicts the claims of irregularities, violations etc that Petitioners sought to derive from the pink sheets.



56. These admissions, documented in their own exhibits, mean that far from discharging their evidential burden, the Petitioners rather provide valuable testimony in support of the case of the Respondents. Going “on the face of the pink sheet”, these admissions of the agents of the 1<sup>st</sup> Petitioner stand uncontested. Nor have the Petitioners attempted to have any of their agents who certified the results provide testimony that can justify overriding the legal effect of their admissions. Further, the fact that, on the other hand, there is also before this Court affidavit evidence from agents of the 1<sup>st</sup> Respondent at various polling stations who confirm the absence of any irregularities, violations etc in the conduct of the election, evidence consistent with their own certification at the polling station as well as the certification of the agents of the 1<sup>st</sup> Petitioner, makes the testimony of 2<sup>nd</sup> Petitioner (who has no personal knowledge of the matters in issue, according to his own confession) on the pink sheet a wholly unreliable basis for annulling the votes of citizens of Ghana who exercised their constitutional right to vote in the 2012 Presidential elections.
57. The significance of the certifications of polling agents of candidates as admissions will be taken up further in the context of submissions below on specific heads of irregularities, violations, etc alleged by the Petitioners.

**L. SPECIFIC HEADS OF IRREGULARITY, VIOLATIONS ETC ALLEGED BY PETITIONERS**

58. Without prejudice to our submissions above regarding the inability of the Petitioners to discharge the evidential burden on them in this case, we proceed to consider the various heads of irregularity, violations etc that Petitioners allege. We start with the allegations in respect of duplicate serial numbers since these relate to the largest number by far of votes being sought to be annulled.

**L. (i) Duplicate Serial Number**

59. The evidence before this Court from Dr. Afari-Gyan was that the number at the top right hand corner on the pink sheets, which Petitioners call a serial number, was not a number generated by the Electoral Commission

but rather a number put in by the printers. He further testified that this number has no significance in the identification of polling stations. According to the witness, polling stations are identified by the polling station name and a code which relates to the region and district in which the polling station is located. There is no recourse to the serial number for the purposes of giving a unique identity to the particular polling station and its pink sheet, as claimed by 2<sup>nd</sup> Petitioner. Dr. Afari-Gyan indicated that pink sheets were randomly distributed to polling stations.

60. The evidence of Mr. Johnson Asiedu Nketia, General Secretary of the 3<sup>rd</sup> Respondent, who testified on behalf of 1<sup>st</sup> and 3<sup>rd</sup> Respondents, was also to similar effect. According to him, while ballot papers have serial numbers that are important identifying marks tracked by representatives of the parties who are involved in the surveillance of the printing and distribution of the ballot papers right down to the polling station level, this is not the case with pink sheets the printing of which is not even monitored by the parties. He also insisted that it is the name and code of the polling station that identifies it. He could not even tell whether the number alleged to be a serial number was really a serial number since he could not tell what series these numbers were in. The witness also pointed out that pink sheets for the different polling stations have different results, different Presiding Officers and different polling agents certifying the results on behalf of their respective candidates.
61. The testimony of the witnesses of the Respondents on the difference between a ballot paper and a pink sheet is borne out by the provision in Regulation 26 (2) of C.I.75 that:

“Each ballot paper shall ....

- (c) have a number printed on it; and
- (d) have attached to it a counterfoil with the same number printed on the ballot paper.”

There is no equivalent provision, either in statute or in the practice of elections in Ghana, in respect of pink sheets.

62. The claims of the Petitioners about serial numbers being security features on pink sheets were not substantiated in any way either in the affidavit of the 2<sup>nd</sup> Petitioner or in his oral testimony. They were also not originally a significant part of the case of the Petitioners as, according to the evidence of 2<sup>nd</sup> Petitioner, it was when they resorted to electronic labelling of their exhibits that this claim gained more significance. This was, unwittingly, an admission that before and during the elections and even soon after, little attention was paid even by the Petitioners themselves to serial numbers as having significance for the conduct of the elections. Essentially, the escalation of this claim to such significance was computer-generated long after the elections were over! Petitioners now latched on to the serial number issue to find the largest number of votes to be annulled. Apart from baldly alleging that the use of duplicate serial numbers gave opportunity for malpractice, Petitioners have not provided any evidence as to how the serial number on a pink sheet affected the actual recording of results at any polling station, nor of how the alleged opportunity for malpractice actually got exploited so as to result in any wrong record on the pink sheet of the results at a polling station.
63. Though being the basis for seeking the annulment of the largest number of votes, the 2<sup>nd</sup> Petitioner testified that there was neither Constitutional nor statutory ground for the claim about this alleged irregularity.

“Q: Now by the way this serial numbers thing you are talking about is it covered by any law or constitutional provision to your knowledge?

A: That is why we say it is an irregularity. Am not aware that is covered by a law or constitution, but you expect that if I take two cheques to a bank and there are duplicates the same serial number you can be sure they will be dishonored.

Q: I am suggesting to you that this idea of serial numbers was conjured by you by the petitioners in order to beef up the non-existent case?

A: Definitely not, the case of highly irregular use of duplicate serial numbers is a serious one in my opinion.” (See pages 27 and 28 of the transcripts of proceedings of 24<sup>th</sup> April 2013).

Indeed, there is no basis whatsoever for a number printed on the pink sheet which was not generated by the Electoral Commission and which was not known to the political parties as a distinguishing mark of polling stations, to be used retroactively to disenfranchise millions of innocent voters.

#### **L. (ii) Over-voting**

64. The case of the Petitioners in respect of over-voting is that whenever the ballot accounting portion of the pink sheet shows that the figure in B1, representing the number of registered voters at the polling station, or the figure in C1, representing the number of ballots issued at the polling station, is exceeded by the total number of votes in the ballot box, the votes of all those who voted in that polling station must be annulled. This includes, according to the evidence of 2<sup>nd</sup> Petitioner, where A1 or B1 has a blank since “blank means zero.”

“Q: Exhibit MBC218 EP Primary Church, my lords, the last name is not clear and the polling station code is H121702. Now I am suggesting to you Doc. that there is no over voting on that exhibit.

A: My lords, there is clearly over voting in this exhibit.

Q: By what number by your calculation?

A: This is over voting by 1.

Q: I am suggesting to you that to that number you are finding C1, if you added C2 you will not have over voting. C2 represents proxy voting.

A: You are right counsel, C2 represents proxy voting and it should be added to C1 in determining over voting. As we speak, I am still not sure if this is still part of our evidence but that you are right.

Q: Exhibit MB-C20 and the polling station's name is St. Peter's RC Primary Lower and the polling station's code is F180301. Now I am suggesting to you that on that sheet there is no basis.., well, there are no numbers indicated in D column, are there?

A: No, or C for that matter.

Q: So there really is no basis for saying there is over voting, isn't it.

A: My lords there is every basis for saying there is over voting, C is blank, D is also blank in this case, even though something is put there in the bottom of section B of the results section, so when you are hiding over voting leaving C blank is the best way to do it and so we are classifying it as over voting.

Q: Exhibit MBC90 and the name is Hope Prep. School, and the polling station code is E041501. I will treat the next three as one. The next one is Exhibit MBC7 and the polling station name Baba J.J Base, Aboabo No. 2 and the polling station

code is F210507A. The next one is Exhibit MBC114 and the name is Air Force Experi. Sch. 1C and the polling station code is C111011C, and the last one is MBC, is quite unclear, I would have said is 110 but half of it is gone and the name is Pan African Writers Association and the polling station code is C061306. Doc, in all of these 4 stations if you added the proxy vote you will not have over voting by your definition.

A: Agreed, my lords.

Q: My lords, the next one is Exhibit MBC147, the name is Presby Primary School B and the polling station code is C131408. Doc, there is no over voting on this exhibit, is there?

A: Yes there is, because the voters' register of the polling station B1 is blank and that is another classic way of hiding over voting because you cannot check the difference between the ballots in the ballot box and the voters' register.

Q: But the total votes in the ballot box have been recorded also in C1, is that correct?

A: My lords that is correct but we have two definitions of over voting.

Q: The next exhibit is Exhibit MBC202 and the polling station is Pagazaa Islamic Primary School and the polling code is H190101. Now I am suggesting to you Doc, that under D

which represents rejected votes, there is no data whatsoever. Is that correct?

A: Yes my lords, D has been left empty but has been filled in as 2 so the total votes in the ballot box is 251. The total ballot issued to voters is 249 and so there is over voting my lords.

Q: You have seen an instance in which total under D6 is not supported by any data in D. You have seen one.

A: Well if there is a conflict...

Q: Have you seen one then you can explain. You have seen one at least D6 does not reflect anything from D1 to D5, you have seen one?

A: Yes, this is what I am saying that there is no entry from D1 to D5 and therefore no entry for D6 but the presiding officer has entered 2 as the total number of rejected ballots. This makes the number of votes in the ballot box more than what has been issued. And so it is clearly over voting.

Q: I am suggesting to you that what you say is over voting is clearly an error.

A: I am saying that you are wrong."

(See pages 12 to 15 of transcripts of the proceedings of 24<sup>th</sup> April 2013)

“Q. You mentioned that anytime one saw a blank space in the collation form and on the pink sheet, the declaration form that meant zero?

A. In the contest of over voting, when you look at B1 and C1 and what I said my lords if you are trying to hide over voting. The easiest way to do it is to leave B1 blank or C1 blank and so if it is blank there is no basis for accounting for those ballots. That is why we have classified them as over voting.

ATUGUBA: What was your question?

QUASHIE-IDUN I am asking him whether anytime he sees a blank space on a pink sheet he is saying that is equivalent to zero.

ATUGUBA: I think this was asked by the 1<sup>st</sup> Respondent. He said yes, he regards blank space as zero. I remember this.

WITNESS: In the context of over voting.

Q. I am suggesting to you that the blank space means an omission had been made in completing the form. A clerical error has been made in completing the form?

A. An omission which has resulted in over voting.”

(See page 80 of the transcripts of proceedings of 25<sup>th</sup> April 2013).

65. In paragraph 44 of the affidavit of 2<sup>nd</sup> Petitioner, he claims that “there were 320 polling stations where exclusive instances of the constitutional and statutory violation of over-voting occurred, and can be found on the same pink sheets.” As earlier pointed out, based on the opening



sentence of paragraph 37 of the affidavit of the 2<sup>nd</sup> Petitioner, and according to his evidence, under cross-examination by Counsel for the 3<sup>rd</sup> Respondent, that figure of 320 should have been 310, even though the exhibits listed in Appendix A.2.1 of the KPMG Report (as also pointed out earlier) are 318. Some of those exhibits would, therefore, be out of the range of the affidavit of 2<sup>nd</sup> Petitioner. 2<sup>nd</sup> Petitioner indicates in paragraph 44 of his affidavit that he is attaching to his affidavit exhibits marked Exhibits MB-C, MB-C-1 to MB-C-319, being photocopies of the pink sheets of the polling stations in question. He also gives 130,136 as the number of votes that he alleges to be “completely vitiated”, a total that differs from the total of 128,262 given in the 2<sup>nd</sup> Amended Petition and in the verifying affidavit of 1<sup>st</sup> Petitioner for this category.

66. As earlier noted, 2<sup>nd</sup> Petitioner tendered two lists of polling stations to be deleted from the claims of the Petitioners. The first (Exhibit C, C1 TO C11), of 83 polling stations, included 44 polling stations in this MB-C category. Checking the list against exhibits listed in the KPMG Report (Appendix A.2.1 at page 11) reveals that the exhibit numbers provided in this list of deleted polling stations are different from exhibit numbers in the KPMG Report as shown in Appendix 5. There are some exhibits that are not in the KPMG Report, once more illustrating inconsistencies in different sets of exhibits. However, most of the polling stations are recorded in the KPMG Report, and their deletion, as indicated by 2<sup>nd</sup> Petitioner, reduces the number of polling stations on which the Petitioners still rely, with a consequent impact on the number of votes that could be annulled if the irregularities, violations etc were established.
67. The second list of deleted polling stations (Exhibit D.) did not even have Exhibit numbers attached to the polling stations. Nor were the polling stations to be deleted made referable to the various paragraphs of the affidavit of 2<sup>nd</sup> Petitioner. In order to have clarity on how these deletions of polling stations by 2<sup>nd</sup> Petitioner impact the specific categories in the affidavit, we attach herewith as Appendix 6 a list of polling stations in the list of 704 with the exhibit numbers captured in the KPMG Report. Forty-eight more polling stations in the C series are included in this list

which also includes deletions in the D to K categories (paragraphs 45 to 51 of affidavit of 2<sup>nd</sup> Petitioner)-also featuring over-voting allegations alongside other alleged irregularities violations etc. The deletions of all these polling stations mean that the numbers of votes to be annulled in these categories cannot be the same as in either the Petition or the affidavit of 2<sup>nd</sup> Petitioner.

68. Article 42 of the Constitution, to which 2<sup>nd</sup> Petitioner refers in paragraph 23 (i) of his affidavit as one of the two bases for the proposed vote annulment for over-voting, states as follows:

“42. The right to vote

***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.”***

Regulation 24(1) of C.I. 75, which is the other legal provision on which 2<sup>nd</sup> Petitioner relies, also provides as follows:

“A voter shall not cast more than one vote when a poll is taken.”

It is absolutely clear, therefore, that an allegation of a voter casting more than one vote is of the essence of what Petitioners are seeking to rely on here. In paragraph 20 Ground 2 (1)(a) of the 2<sup>nd</sup> Amended Petition, over-voting is claimed to have occurred “in flagrant breach of the fundamental constitutional principle of universal adult suffrage, to wit, one man, one vote.” Yet, significantly, nowhere in the Petition or in the affidavit of the 2<sup>nd</sup> Petitioner is it alleged that any voter voted more than once, thus infringing the one man, one vote principle.

In paragraph 28 of his affidavit, 2<sup>nd</sup> Petitioner states that prior to the 2012 elections the Electoral Commission and its Chairman “emphasized to the general public that any polling station where over-voting occurred would have its results annulled.” He proceeds to name two polling stations where he alleges results were annulled because of over-voting.

69. In the 2<sup>nd</sup> Amended Answer of the 2<sup>nd</sup> Respondent, the Electoral Commission, the claim of over-voting is denied (paragraph 18) and it is

also stated that: “...there was not one single instance where the total votes cast exceeded the number of voters on the register of the polling station.”

In the affidavit of Mr. Asiedu Nketia for and on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, at paragraph 15A, it is stated that:

- “(i) in respect of all the pink sheets exhibited on overvoting, in no instance are the Petitioners alleging that the valid votes cast exceed number of registered voters at the polling station.
- (ii) What the Petitioners are alleging to be instances of overvoting are in reality patent clerical, and sometimes, arithmetic errors in recording, which have no material effect on the actual votes publicly cast, sorted, counted and recorded.
- (iii) A number of the pink sheets do not support in any manner the allegation of overvoting.”

70. Under cross examination, 2nd Petitioner, on page 23 of proceedings of the 7<sup>th</sup> day of May, 2013, responded to a question as follows:-

Q: Is there any evidence on the face of the pink sheet of any person who attempted to vote more than once

A: No we have not seen specific report about any person who voted more than once, we only have over voting.

Further on, at page 24:

Q: Was there any evidence of misconduct provided to you by any of your polling agents at that polling station.

A: The only evidence we have we brought to court is the over voting on the face of the pink sheet.

Q: In that polling station was there any evidence that somebody whose name was not on the register had come and been issued a ballot paper. Is there any.

A: We don't see any information provided on the pink sheet, we are only going by the information that is on the pink sheet and it is information which leads to the conclusion of over voting.

Q: Was there any evidence that somebody whose name was not on the register was issued with a ballot paper to vote

A: There is no evidence specifically on any pink sheet, you will not see the question that is to be answered all we know is that there were 10 ballots issued to this polling station and you have 470 votes in the ballot box.

Q: To your knowledge there was no irregularity form or complaint made at that polling station

Page 25

A; Not to my knowledge

At page 26

Q: And you not aware of any irregularity form or complaint form that filed in by your polling agent at that polling station.

A: No

Q: I just suggest to you that the number 2 was obviously entered in error.

A: You and I were not there, the evidence is on the face of the pink which is the primary record of the election.

On page 29

Q: These results as declared were based on counting that took place in full public view.

A: They were.

Q: And they were based on all those present observing how votes were taken out of the ballot box and put in bunches against each candidate. Were they not.

A: Yes they were.

Q: And your supporters, your polling agents were present .

A: Largely so.

Q: And after the votes had been put in the different categories, they were physically counted in full view of the public, were they not.

A: Supposedly so.

On page 30

Q: And not only was counting done in full view of everybody, but when the record of the final results was entered, your polling agents signed that record.

A: Our polling agents signed to attest every piece of information on this pink sheet.

Q: I am suggesting to you that in the face of this obvious situation, your current allegation of over voting are clearly unwarranted.

A: My lords, what is obvious on the face of the pink sheet is a clear case of over voting.

71. Petitioner fails to appreciate that in the absence of any person being even alleged to have voted twice or illegally, or any person having been identified as having made a complaint of over-voting, whether formally or informally, merely invoking entries on the administrative portion of pink sheets which have been shown to contain errors cannot meet the burden of proof on the Petitioners. His testimony continues to dwell exclusively on these administrative entries.

Page 35

“Q: You also have number 51

A: Yes my lords. Number 51 C1 is blank as we saw for some of the other. This is D/A Primary School, Kankye-Akura. The exhibit number is MB-H 223, the polling station code is D242106.

Q: And according to you the blank means zero.

A: In the contest of over voting and ballot accounting, yes. It serves as a good way to hide over voting.

Page 36

Q: There is no evidence of any protest on the pink sheet.

A: No, there is no evidence of any protest on the pink sheet.

Q: And to your knowledge, there is no complaint forms signed.

A: I am not aware of that.

Q: And those votes were tallied and declared in the manner indicated on that pink sheet.

A: Supposedly, I was not there. But this is what the pink sheet indicated that there was no record for C1.

Q: What was the record on the pink sheet for the results.

A: WITNESS READS OUT

Q: And those are the votes that you are seeking to have annulled in this court.

A: Those are the votes that we are seeking to be annulled on the basis of over voting. So there is an illegality.

On page 40

Q: But if you use the words which you use directly stated against that column, there will be no allegation of over voting on your part. Will that be correct.

A: It is the figures that go to each candidate not the words.

72. The cavalier approach of the 2<sup>nd</sup> Petitioner towards the votes of citizens, which makes him eager, for instance, to have votes cancelled because of his dogmatic view that it is figures on the pink sheet that should be taken and not words, is totally at odds with the significance that Your Lordships have given in many cases before this court to the importance of protecting the right to vote of the citizens of Ghana. (See for instance, Tehn-Addy V Attorney-General And Electoral Commission, [1997-98] 1 GLR47, Apaloo V. Electoral Commission Of Ghana[2001-2002] 1 SCGLR at page 10 and Ahumah-Ocansey V. Electoral Commission and Centre For Human Rights & Civil Liberties(Churcil) V. Attorney-General &Anor.[2010] SCGLR 575.

It is our submission that the testimony of the witnesses of the Respondents expressed a position more in accord with the clear outlook

of Your Lordships in these and other cases. Mr. Johnson Asiedu Nketia, who gave evidence for and on behalf of 1<sup>st</sup> and 3<sup>rd</sup> Respondents, testified as follows on over-voting: (proceedings of the 23<sup>rd</sup> day of May, 2013).

On page 28

Q: You have heard 2<sup>nd</sup> Petitioner also indicate that over voting is where the ballots that are tallied at the end of voting for each candidate where those exceed the number of ballots issued in a polling station.

A: I have heard about it but that was my first time of hearing over voting being defined that way in all my 34 years experience in election in this country.

Q: In respect of the over voting allegation, you also heard the 2<sup>nd</sup> Petitioner testified in relation to pink sheets where no number has been entered in the column about ballots issued at a particular polling station, where no number was present, it was blank. What you have to say to that.

A: Yes my lords, This must be as a result of some clerical error because ballot papers are issued and then voting takes place, then the box is opened at the close of voting, counting takes place, sorting takes place, the tallies are made and the agents of the parties attest to the results that are obtained, they certify the results that are obtained and my lords I think that if no papers were issued then the election could not have taken place at all. So I think that must be a clerical error and at all materials times, there are processes where people who are dissatisfied or parties who are dissatisfied with the outcome can lodge a specific complaint about what they are dissatisfied with on the spot and action is taken subsequently on those complaints. And I am not aware of any polling stations where such complaints have been



lodged besides what were tendered about five or so polling station by the 2<sup>nd</sup> Petitioner.

73. Regulation 36(2)(a) of C.I.75, (referred to earlier), which indicates that one aspect of the ballot accounting part of the pink sheet that has to do with “the total number of persons entitled to vote at that polling station” is included among the matters that the declaration signed by the Presiding Officer as well as the counting agent is related to, gives weight to the evidence above, corroborated by Dr. Afari-Gyan, that it is where the votes in the ballot box exceed the total number of people entitled to vote at the polling station that there is annulment of votes cast at that station.

On pages 75 to 79 of the transcripts of the proceedings of 23<sup>rd</sup> May 2013, Mr. Asiedu Nketia also said the following:

Q: You heard that Dr. Bawumia in his evidence said wherever there is a blank in A1 or a blank in B1, and then they have figures at the bottom, that according to him is over voting. What do you have to say to that.

A: My lord, I disagree with that assertion, indeed I heard him make that assertion that whenever there is a blank, it is equal to 0. My lord, a blank is a blank so the figure there is unknown, it cannot be equal to 0 or any other number, it is an unknown number. So again it strengthens my argument that this is a clerical omission or an error and it tells you if these figures are supposed to have all been entered before counting and they are blank, it tells you that are indeed not entered before counting. But my Lord, again the results have been certified by the polling agents of all the polling stations and there is no indication that the complaint procedure had been invoked. And as far as I can remember, the figures certified for each of the presidential candidates are those that were collated and the declaration was based on them.

He reiterated a number of times that there was no over voting and that the very basis of Petitioners' allegation to over voting is erroneous.

74. On page 23 of the proceedings of the 29th day of May, 2013 he said as follows:-

“Q: I am saying that votes have been sorted out and the relevant information entered on the pink sheet.

A: Yes, sorting happens before declaration but I am insisting that the entries in the ballot account section are wrong, they are clearly wrong because if you look at the declaration, nobody is challenging the validity of the declaration because these votes are sorted and counted out publicly and there is no indication that any polling agent has any problem either with results as declared. And I have demonstrated in my testimony in chief that what happens practically on the ground is that sorting and counting takes place and this is what is of prime importance to all polling agents. The entries in the ballot accounting which do not affect the results are done after counting.”

75. Dr. Afari-Gyan, testifying on behalf of 2<sup>nd</sup> Respondent also stated in evidence in chief, that he did not know about an incident of cancellation of result on the basis of over-voting in some polling stations until it was stated in the Petition. He indicated that if his attention had been drawn to it, he would not have cancelled the result. He stated, contrary to the evidence of 2<sup>nd</sup> Petitioner, that when the votes in the box exceed the issued ballots some checks would have to be done before a decision is taken. On page 35 of the proceedings of the 3<sup>rd</sup> day of June, 2013 his evidence was as follows:

“Q: In situations like that, can you tell the court whether there is a procedure that should be followed.

A: The annulment or you are talking about when there was an excess

Q: Yes

A: If they had been reported to us, that would have been a different issue. We would have taken certain steps to ascertain whether in fact those things constitute excess. There are all kinds of things that you would do, because we are dealing with a very sensitive situation so you must be sure of what you are doing. It is gone over by the claim one and may be in some places the votes involved are huge. So what do we do to make sure whether it is really gone over by 1. I will first carry out a very careful examination of the pink sheet, that will be the starting point, a very careful analyses of the pink sheet. You have seen that somebody says that I was given 4 ballot papers when in fact he was given 325 and in some cases when you check the difference, there could a mistake in the addition of the figures. So that is a starting point check whether the pink sheets have been properly executed. In addition to that as the returning officer, I will recheck whether all ballots in contention fall within the serial range of the ballots that were allocated to the station. I would also cause are check of whether every ballot paper in contention has the validating stamp of the polling station. And because our law says that when you vote your name must be ticked I would cause a count.

Q: Ticked where.

A: In the register. Your name must be ticked in the register. I would cause a count of the ticks in the register and all these things would have to be done before I take a decision on what to do.”

76. The evidence of Dr Afari-Gyan is very instructive and corroborates the evidence given by Johnson Asiedu Nketia for and on behalf of 1<sup>st</sup> and 3<sup>rd</sup> Respondent. It shatters the very foundation of the case of Petitioners in

making it clear that this is not an issue to be resolved simply and entirely **“on the face of the pink sheet”**. There are primary sources in relation to ballot accounting matters to which recourse must be had before a decision is taken as to whether it is right to annul votes cast on grounds of over-voting.

Indeed, it is significant that, in the cross-examination of the 2<sup>nd</sup> Petitioner, he was compelled to concede, on further review of many pink sheets, that there were, for instance, arithmetical errors on some pink sheets and that no over-voting had actually occurred. In a number of instances, 2<sup>nd</sup> Petitioner admitted that there was actually no over-voting on the pink sheet based on a closer examination.

“ Q: My lords my question is that, is there a basis on this sheet based on which over voting could be ascertained?

A: There is no basis, and this is why I want to refresh my memory to let the court know whether this is been counted, I don’t think so.

Q: My lord, I have here Exhibit MBC 196, there is absolutely no other detail that is discernible from this sheet but was labelled in proof of over voting.

A: This again is the same as what you just showed me and there is no really no basis and that is why I am telling you that I don’t think it is part of our case, which definitely I am sure should be one of those that we have deleted.”(See page 9 of the transcripts of proceedings of 23<sup>rd</sup> April 2013).

“Q: Can you check on the face of the pink sheet(MBE 205-District Assembly Hall, Adidome)] which was an attachment to your affidavit whether there is overvoting here?

A: No, I don't see overvoting and I am not sure we are still relying on it."

(See page 56 of transcripts of the proceedings of the 6<sup>th</sup> May 2013).

77. In certain cases also 2<sup>nd</sup> Petitioner admitted, upon calculating figures on the pink sheet himself, that there was actually no over-voting though arithmetically wrong entries had been made. Polling stations which are not appropriately to be regarded as showing over-voting because of such miscalculations are listed in Appendix 7.

In certain other cases 2<sup>nd</sup> Petitioner admitted that there was no basis to ascertain that there was over-voting. Cases of this situation, including those admitted explicitly by 2<sup>nd</sup> Petitioner, are listed and attached herewith as Appendix 8 2<sup>nd</sup> Petitioner admitted certain exhibits not to be proper cases of over-voting because the proxy vote had not been taken into account. During the cross-examination of the 2<sup>nd</sup> Petitioner by Counsel for the 3<sup>rd</sup> Respondent, the following exchanges took place:

"Q. I suggest to you that on each of those pink sheets, there is no basis to ascertain whether there is over voting or not?

A: My lords I have examined 74 pink sheets. Of all these 74 pink sheets, two of them are no longer in our classification of over voting. These are numbers 12 and 70. The other 72 are firmly in our category and the basis has been that for almost all of them, if not all of them, the C1 is blank and in fact all of C is blank. So we have a firm basis for classifying them as over voting." (See page 16 of transcripts of proceedings of 8<sup>th</sup> May 2013).

Instances of pink sheets where the over-voting allegation is disproved on this ground, including those explicitly admitted by 2<sup>nd</sup> Petitioner, are listed as Appendix 9 and further exhibits which do not show over-voting

are listed as Appendix 10. It is, therefore, again impossible to reach the tally of votes to be annulled alleged by Petitioners when these polling stations, earlier wrongly alleged to have this violation, are taken out.

78. The fact that agents of 1<sup>st</sup> Petitioner certified the results without complaint is particularly relevant because Regulation 19(3) of C.I. 75 makes it clear that among the key responsibilities of polling agents is the detection of impersonation and multiple voting. There were no complaints by polling agents, as would be expected in any polling station where an attempt was made by anyone to infringe the one man, one vote principle. Rather, according to almost all the pink sheets filed by the Petitioners, their own agents certified the poll as having been “conducted in accordance with the laws and regulations governing the conduct of elections”. This makes it necessary to dismiss the allegations of over-voting in the Petition. Indeed, the evidence about the voting process, including the use of indelible ink as well as the use of the biometric register and the biometric verification device make it absolutely unjustified to make the allegations of over-voting simply based on interpretations of the ballot accounting parts of the pink sheet without regard to the certification of the polling agents of 1<sup>st</sup> Petitioner as well as agents of other candidates.

#### **L(iv) Voting Without Biometric Verification**

79. As part of the process of improving transparency in the election process in Ghana and to eliminate opportunities for multiple voting the 2<sup>nd</sup> Respondent introduced a biometric registration process through which a new register was created for the 2012 elections. Among steps that the 2<sup>nd</sup> Respondent had taken in this regard was the procurement of biometric verification devices that would assist in identification of registered voters. Provision was made in C.I. 75 for identification and verification of voters as follows:

“30. (1) 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 recognition that the person is the registered voter whose name and voter identification number and particulars appear in the register.

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

80. In paragraph 20 of the 2<sup>nd</sup> Amended Petition, the allegation about voting without biometric registration is stated as one of the particulars of Ground 1 as follows:

“(a) That 2<sup>nd</sup> Respondent permitted voting to take place in many polling stations across the country without prior biometric verification by the Presiding officers of 2<sup>nd</sup> Respondent or their assistants, contrary to Regulation 30(2) of C.I. 75.

(b) That the voting in polling stations where voting took place without prior biometric verification were unlawfully taken into account in the declaration of results by 2<sup>nd</sup> Respondent in the presidential election held on 7<sup>th</sup> and 8<sup>th</sup> December 2012.”

81. The affidavit of the 2<sup>nd</sup> Petitioner states in paragraph 52 that “there were 379 polling stations where exclusive instances of voting without biometric verification occurred and can be found on pink sheets.” In the 2<sup>nd</sup> Amended Petition the Table of Particulars states 137,112 as the number of votes to be annulled as a result of the exclusive instances of this category while in paragraph 52 the number of votes to be annulled is given as 134,289. As pointed out earlier, the 379 figure does not tally with the statement in paragraph 38 of the same affidavit that “while voting without biometric verification occurred in 2,279 polling stations, in 1891 of these stations... overvoting [sic] took place along with DS, NS and DP.” Based on that statement, the right number should be 388. However, the error may also be in respect of the figures in paragraph 38, especially as in the listing in the KPMG Report of the exhibits corresponding to this paragraph 52 –the L series, data is captured in respect of 382 sheets and the exhibit numbering gets to Exhibit MB-L 378 and there are two Exhibits numbered MB-L 374 which have different

polling stations and two exhibits numbered MB-L 147 which also have two different polling stations. The Petitioners have not sought to clear up the matter since it was raised.

82. Apart from paragraph 52, voting without biometric verification features in paragraphs 53 to 55 with other alleged irregularities, violations etc. Appendix 6 hereto, in which polling stations deleted by Petitioners are put in the affidavit categories, lists thirteen exhibits in this series that are among the polling stations that were deleted by the Petitioners during the cross-examination of 2<sup>nd</sup> Petitioner. In the oral testimony of the 2<sup>nd</sup> Petitioner he made it abundantly clear that the case of the Petitioners was founded entirely on the pink sheets. At page 25 and 26 of the proceedings of 17<sup>th</sup> April, 2013, he testified as follows:

“Q. Dr. Bawumia how were you able to find out the people who voted without biometric verification?

A. My lords the evidence is on the face of the pink sheet[.] [S]ection C3 of the pink sheet ask[s] the question how many voters voted with the use of form 1C were verified to vote by the use of form 1C and not by the biometric verification device that is filled in section C 3 and so my lords what we did was to aggregate for each polling station where voting without biometric verification took place. We aggregated all the numbers in section C3 and my lords if I may refer to my tables we have a total of 535,723 people who were voted without biometric verification in the polling stations under contention.”

83. Under cross-examination by Counsel for 1<sup>st</sup> Respondent, he maintained this position and would not answer direct questions about whether anybody voted whose name was not in the register or whether the polling agents of 1<sup>st</sup> Petitioner made any complaints that some people voted without biometric verification. See the proceedings of April 24,2013):

“Q In all the instances that you alleged people voted without biometric verification you are not suggesting for a moment



that somebody voted whose name was not in the voting register. Are you?

A. We are suggesting that the face of the pink sheet indicates a number of people who voted without biometric verification.

Q. This is a direct question, you cannot evade it and I am asking you a direct question. Are you alleging that anybody voted who was not qualified to vote?

A. I wasn't at the polling station so I can only go by what is on the face of the pink sheet.

Q. Did any of your agents tell you that anybody came to vote at any particular station whose name and biometric data was not in the register?

A. We have not received formal complains, we had many complains across the country. But the evidence is on the face of the pink sheet.

Q. You mean you received oral complains from your agents?

A. As I said the evidence is on the face of the pink sheet. The pink sheet tells you how many people at the polling station voted without biometric verification. This is not a complicated matter.

Q. For a moment just move the obsession from the pink sheet. I am asking you that are you saying the report you received was oral[ly] that people whose names were not on the polling register came to vote?

A. We received all sorts of reports, but we only investigated for evidence you can't just go and bring a case here without evidence and the evidence my lords is on the face of the pink sheet. It is very clear my lords section C3 tells you the number of people who voted without biometric verification.

Again,

“Q. I am suggesting to you that nobody in the 2012 election [voted] whose name and identity has not been checked through the biometric verification?

A. My lords I was not at those polling stations all we can say is on the face of the pink sheet this number of people voted without biometric verification

84. Cross-examined further on pink sheets where the same number in C1 appeared repeated in C3, 2<sup>nd</sup> Petitioner said;

“Q. Are you saying that there are polling stations where everybody voted without biometric verification?

A. No I am not saying that. Where there is voting without biometric verification is on the pink sheet my lords that is the evidence we have brought before this court.

Cross-examined by Counsel for 3<sup>rd</sup> Respondent on whether pink sheets on which one or two voters in the C3column could not represent persons entitled as FOs to vote without going through the device, 2<sup>nd</sup> Petitioner eventually conceded that this had to be determined by going outside the pink sheet.

Q. ....Your case on that is that in these polling stations, where there is an indication on C3 that one person or two people voted, verified by form C1 but not by the fingerprint verification device, your case is that that is a basis for annulling those votes, that is your case?

A: It is the case my lords of the 2<sup>nd</sup> respondent. They have said that nobody...

Q: No, no, no, I don't want to hear about the case of the 2<sup>nd</sup> respondent, because you are not in a position to give the case of the 2<sup>nd</sup> respondent. They are there in their own right, I am asking you about your case as one of the

petitioners, your case is that those votes in that polling station where one person according to you voted without being verified, those votes should be annulled. Isn't that your case, is that your case or is that not your case?

A: Yes my lord, you and I were not at the polling station, the vote was organized by the 2<sup>nd</sup> respondent, the 2<sup>nd</sup> respondent says nobody voted."

ATUGUBA: Have you understood the question?

WITNESS: Yes my lord.

ATUGUBA: Yes so, is it yes or no?

WITNESS: Yes it is our case that wherever voting without biometric verification took place as inconsistent with the voters register for FOs, those particular votes should be annulled in accordance with the law.

CROSS-EXAMINATION CONTINUES

Q: And you say so even in respect of polling stations where on the face of the pink sheet you are not able to tell this court whether there were people who were FOs or not, on the face of the pink sheet?

A: We don't make that decision on the face of the pink sheet, we check with the voters register to see if they are actually allowed to vote without verification.

Q: But on the face of the pink sheet you do admit in these two that I just put to you, on the face of the pink sheet?

A: You don't make a decision whether to come here and ask for an identification on the face of the pink sheet. In this case we look at the voters register to see if they are actually allowed to vote without verification, how many people in that polling station.

Q: Dr. Bawumia, you have been telling this court persistently that your case is based on the pink sheet?

A: Yes my lords.

Q: But what you are saying now is that in certain situations you also make reference to the biometric register is that correct?

A: Yes my lords.

Q: And your polling agents at each of these polling stations also had available the biometric register?

A: To the extent possible, my lords, I am not quite sure how many had available the biometric register.

Q: So your polling's agents before signing any of these sheets that I am putting before you, were in a position to determine, you, as you said, you were not there I was not there certainly but your polling agents were there and they were in a position to determine whether indeed those people were qualified to vote on the register or not, were they not?

A: Well I cannot tell you in what position they were in at the time but the evidence is there.

Q: But if they had the biometric register available to them, they could tell at that polling station, could they not?

A: My lord I am not sure the 2<sup>nd</sup> respondent says this section was filled in error, that it should never have been filled so this attempt to rationalize why people filled this particular form I am not quite sure because the one who organized the election, the 2nd respondent tells us that this section should not have been filled, it was filled in error, another time it was transposition error, so you and I were not there, so

we cannot really read into why people filled this or what they were using in that sense, all we can say is that they voted without biometric verification.

Q: Dr. Bawumia, you and I were not there, but your polling agents were there?

A: Yes my lord.

Q. And your polling agents had a responsibility to verify whether somebody who was not qualified to vote was been allowed to vote. Your polling agents had that responsibility, did they not?

A: My lords our polling agents signed the pink sheets to attest to what actually happened at the polling station.” (Pages 60-64 of the proceedings of 29<sup>th</sup> May 2013).

85. The refusal of 2<sup>nd</sup> Petitioner to acknowledge the responsibilities of polling agents is evidently because of his realization of the damage that the certification of the polling agents of the results and the conduct of the elections does to the case of Petitioners. However, his admission that in order to determine whether or not certain entries made in C3 were correct, one had to resort to the polling station register, is a crucial admission of the fact that “the face of the pink sheet” does not tell the whole story of an election.
86. The witnesses for the Respondents denied that the entries on the pink sheets in respect of C3 were evidence of voting without biometric registration. They insisted that many of those entries were clerical errors. The most decisive testimony in relation to this head of claim was that given by Dr. Afari-Gyan, the Chairman of 2<sup>nd</sup> Respondent in evidence-in-chief. He stated that the column C1 was not required to be filled in at all by Presiding Officers. According to him, that column was created to take care of those voters who had been registered by 2<sup>nd</sup> Respondent during the biometric registration exercise that preceded

voting, but whose biometric data had, unfortunately, been lost as a result of some difficulties that 2<sup>nd</sup> Respondent had encountered.

87. As an election administrator, he thought his duty was to give every such person the chance to cast his ballot. 2<sup>nd</sup> Respondent therefore devised this facility to allow such persons to vote without going through biometric verification. They would be required to fill in Form 1C before voting. When the idea was mooted to the political parties, they all rejected it. He therefore gave instructions that the Form 1C should not be sent to the polling stations. The C3 column was therefore not supposed to be filled.

“...C3 was put there in an attempt to take care of those people who through no fault of theirs would have valid voter ID cards in their possession but whose names will not appear on the register and therefore could not vote. But let me add that when we discussed this with the political parties, some of them vehemently said no, that we will not allow any persons to be verified other than by the use of verification machine. I am just explaining why the C3 came there. The parties said no and we could understand that argument that this facility is not given to one person, it is being given to every presiding officer. So you are given this facility to 26,002 and it is possible to abuse it. So we do not want it and we agreed that that facility would not be used. Unfortunately, the forms had already printed, these are offshore items, so we could not take off the C3. And what we said, and we have already said this in an earlier communication, was that we will tell all the presiding officers to leave that space blank because they had already been printed and there was no way that we could take it off. And that explains the origin of C3 on the pink sheet. It was a very serious problem.”

This account of the origin of the column C3 on the pink sheet was not challenged by any Counsel in cross-examination.

Figures in the C3 column of the pink sheet, such as the same figure in C1 being found in C3, also showed the difficulties that occurred with this

column as it was filled in according to how a Presiding Officer interpreted it. 2<sup>nd</sup> Petitioner who did not fill in the pink sheets was in no position to testify about the understanding of the Presiding Officers which went into filling that part of the pink sheet.

88. It is our submission that on the unchallenged evidence about how this column came to be on the pink sheet, it does not provide a reliable basis for annulling votes of citizens. We rely on the views that Your Lordships have expressed regarding the constitutional right to vote which were earlier referred to in our submissions on over-voting. To disenfranchise citizens on the basis of these problematic entries, especially when the agents of the 1<sup>st</sup> Petitioner and other candidates have certified the results without complaint, thereby acknowledging that the elections were conducted in accordance with laws governing them would be to do an injustice to the innocent citizens who exercised their constitutional right. In any case the evidence is that the numbers the Petitioners sought to annul on this ground do not hold, especially in the light of admissions in cross-examination that some of the pink sheets exhibited did not support the claims and the deletions of polling stations in the L. M.N and O series. No basis has been established for any new numbers in these categories, especially also in the light of the double counting that is shown in Appendix 4.

#### **M. UNKNOWN POLLING STATIONS**

89. In respect of this allegation also it is worth recalling that Petitioners originally claimed there were 28 unknown polling stations. In the end they elected to proceed with 22 such polling stations. In the face of testimony from the 2<sup>nd</sup> Respondent that shows that the party of the Petitioners appointed polling agents to these polling stations, it is surprising that Petitioners still maintain this claim at all. Exhibit EC3, a letter signed by 1<sup>st</sup> Petitioner, is among the items of evidence put forward by the 2<sup>nd</sup> Respondent that conclusively debunks this allegation.

#### **N. SAME POLLING STATION CODE ON DIFFERENT PINK SHEETS**

90. This claim also cannot stand in the face of the testimony from 2<sup>nd</sup> Respondent that: (1) polling stations have been divided into A and B

where increases in voter population have warranted such adjustments; and (2) special voting when held at an existing polling station adopts the code of that polling station.

The Petitioners again have not called a single one of the polling agents that represented them and signed the pink sheets in order to enable the court to have the benefit of a person with personal knowledge of the elections at these locations. Petitioners appear transfixed on the idea that the whole election story is to be told from the face of the pink sheet in the face of the obvious reality that 2<sup>nd</sup> Petitioner was compelled on occasion to admit.

#### **O. OTHER ALLEGATIONS BY PETITIONERS**

91. In the course of cross-examination by Counsel for the 2<sup>nd</sup> Respondent, the 2<sup>nd</sup> Petitioner admitted that certain allegations that had been made in the Petition could not be sustained, specifically, the allegations in paragraph 24, of votes of the 1<sup>st</sup> Petitioner being “unlawfully reduced ” while those of the 1<sup>st</sup> Respondent were “illegally padded”. The allegation had been made at large in paragraph 24 of the 2<sup>nd</sup> Amended Petition. As a result of the orders of the Court for further and better particulars to be supplied, the Petitioners named three polling stations as those where these allegations could be substantiated but did not pursue the allegations further in respect of two of the three cases after the Answer of the 2<sup>nd</sup> Respondent. The third case was described by the 2<sup>nd</sup> Respondent as involving a “transpositional error” at the collation centre with the figure 97 at the polling station being mistakenly transposed as 17. It is ironic that Petitioners, while rightly concerned about these 80 votes, are asking this Honourable Court to annul almost five million votes that have equal claims to constitutional protection.
92. The 2<sup>nd</sup> Petitioner, under cross-examination also indicated Petitioners were no longer pursuing allegations in their Petition about a company, STL, which Petitioners had alleged was receiving and transmitting election results unjustifiably.

2<sup>nd</sup> Petitioner also indicated that allegations in a letter dated 9<sup>th</sup> December 2012 from 3<sup>rd</sup> Petitioner to the Chairman of the 2<sup>nd</sup>



Respondent in which allegations of fraud, conspiracy between 1<sup>st</sup> and 2<sup>nd</sup> Respondents, as well as alteration of results at the collation centres were made were no longer part of their case as they had not found evidence to back them.

93. However, having indicated this position, Counsel for the Petitioners, in the closing stages of his cross-examination of Dr. Afari-Gyan, resurrected one of the claims made in the letter of their Party to the Chairman of 2<sup>nd</sup> Respondent. It was suggested to Dr. Afari-Gyan that a number of constituencies, including Ledzokuku, did not have accurate tallies of votes. Significantly, Petitioners, at that late stage in the case, still sought to prevail on their Lordships to have collation sheets produced by 2<sup>nd</sup> Respondent. The application was declined.
94. It is conduct such as the resort to allegations which they have no evidence to back, withdrawal of an allegation and then attempting to go back to that allegation, together with the shifting sands of their case, which provide evidence of bad faith on the part of the Petitioners. By recourse also to a gratuitous allegation of criminal conduct against Dr, Afari-Gyan –causing financial loss – and even an attack on the court-appointed referee, Counsel for the Petitioners has often exceeded reasonable bounds in the conduct of the case. These behaviours, however, cannot be allowed to distract attention from the weakness of the case of the Petitioners.

## **P. CONCLUDING SUBMISSIONS**

95. We respectfully commend to Your Lordships the following words of Lord Hoffman in the House of Lords in the case of ***Re B [2008] UKHL 3***:

“If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one

party or the other carried the burden of proof. If the party who bears the burden of proof fails to discharge it, a value 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.”

96. In this case the Petitioners have not even crossed the threshold of discharging the evidential burden. As a result of their inability to produce material that they claimed they were supplying as evidence and because of the confused state of the material they supplied, a value of 0 is the necessary outcome for the Petitioners.

Their claims have been founded on the false premise that by a desk analysis of pink sheets (not even covering all 26,002 polling stations of the country but limited initially to a maximum of 24,000 polling stations and selectively focusing on what could yield the pre-ordained intended outcome of the Petitioners), as distinct from the living reality of the election, the votes of almost 5 million Ghanaians should not be allowed to count. This is the flawed perspective to which Petitioners have doggedly clung.

This Honourable Court that administers justice emanating from the people under a Constitution that is rooted in the sovereignty of the people cannot accede to such perspectives.

97. We finally and respectfully commend to Your Lordships three judicial decisions – one of the erstwhile Court of Appeal under the 1969 Constitution of Ghana, another, fairly recently, of the Canadian Supreme Court and the last, very recently, of the Supreme Court of Kenya.

In ***Re: Election of First President –Appiah v. Attorney-General [1970]***, reported at pp. 1423 – 1436 of ***A Sourcebook of Constitutional Law of***

**Ghana**, a case in which the election of the late Edward Akufo-Addo as the President-elect of the second Republic of Ghana was challenged by a lawyer, Joe Appiah, the Court of Appeal dismissed the petition, Bannerman, Ag CJ in his judgment relying on the following passage in the English case of **Medhurst v. Lough & Casquet (1901) 17 TLR 210**, where Kennedy, J, at p. 230 said:

‘An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinate in the conduct of the election where the court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, that is, the success of the one candidate over the other was not and could not have been affected by those transgressions.’

98. In the Canadian case of **Opitz v. Wrzesnewskyj 2012 SCC 55-2012-10-256**, the Canadian Supreme Court made the following significant observations:

“The practical realities of election administration are such that imperfections in the conduct of elections are inevitable....A federal election is only possible with the work 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... The current system of electoral administration in Canada is not designed

to achieve perfection, but to come as close to the ideal of enfranchising all entitled voters as possible. Since the system and the Act are not designed for certainty alone, courts cannot demand perfect certainty. Rather, courts must be concerned with the integrity of the electoral system. This overarching concern informs our interpretation of the phrase “irregularities ...that affected the result.” (Rothstein and Moldaver JJ).

99. Finally, the Kenyan Supreme Court Case of ***Raila Odinga v. Uhuru Kenyatta [2013]*** at paragraphs 303, 304, 306 and 307 of its Judgment:

‘[303]... by no means can the conduct of this election be said to have been perfect...

[304] Did the Petitioner clearly and decisively show that the conduct of the election to have been *so devoid of merits, and so distorted, as not to reflect the expression of the people’s electoral intent?* It is this broad test that should guide us in this kind of case, in deciding whether we should disturb the outcome of the Presidential election.

[306] ... In summary, the evidence, in our opinion, *does not disclose any profound irregularity* in the management of the electoral process, nor does it gravely impeach the *mode of participation* in the electoral process by any of the candidates who offered himself or herself before the voting public. It is not evident, on the facts of this case, that the candidate declared as the President-elect had not obtained the basic vote-threshold justifying his being declared as such.

[307] We will, therefore, *disallow* the Petition, and uphold the Presidential election results as declared by IEBC on 9<sup>th</sup> March, 2013.’ (Willy Mutunga C.J).

100. Our case is a fortiori the above cases as there is, here, no evidence of transgressions of the law by any voter, but simply some administrative errors in entries in the filling of forms. No credible evidence of violations of substantive rules regarding the conduct of voting has been provided to Your Lordships. We respectfully ask this Honourable Court to dismiss the Petition and uphold the declaration made by the Chairman of the Electoral Commission on 9<sup>th</sup> December 2012.

RESPECTFULLY SUBMITTED.

.....  
SAMUEL CODJOE  
SOLICITOR FOR 3<sup>RD</sup> RESPONDENT

The Registrar  
Supreme Court  
Accra

And to the:

Petitioners or their Solicitors, Akufo-Addo, Prempeh & Co., 167 Kojo Thompson Road, Adabraka, Accra.

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