**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE SUPREME COURT OF JUSTICE**

**ACCRA – A.D. 2021**

***Writ No. J1/5/2021***

**ARTICLE 64 OF THE 1992 CONSTITUTION AND SUPREME COURT RULES, 1996 (C.I. 16) (AS AMENDED BY C.I. 74 AND C.I. 99) AMENDED PRESIDENTIAL ELECTION PETITION PURSUANT TO LEAVE GRANTED BY THE SUPREME COURT DATED 14TH JANUARY 2021**

Presidential Election held on the 7th day of December, 2020

BETWEEN

**JOHN DRAMANI MAHAMA** Petitioner

No. 33 Chain Homes,

Airport Valley Drive, Accra.

GL-128-5622

AND

1. **ELECTORAL COMMISSION** 1st Respondent
   National Headquarters, Accra
2. **NANA ADDO DANKWA AKUFO-ADDO** 2nd Respondent
   H/No. 2, Onyaa Crescent,
   Nima, Accra

**CLOSING ADDRESS OF 2ND RESPONDENT**

**PURSUANT TO ORDER OF THE COURT DATED 11/02/21**

My Lords, at the heart of this petition are two (2) main issues to be determined:



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(i) Can a party to an election dispute under Article 63 (3) of the 1992 Constitution make out his case without providing factual evidence of the actual valid votes cast in favour of all the contesting candidates in the election?

(ii) Can petitioner ground his claim for a re-run of the election on the plea that none of the candidates obtained more than 50% of the total valid votes cast by determining the percentage of valid votes obtained by each candidate using the total votes cast (i.e. the total valid votes + the total number of rejected votes) as the denominator in calculating the percentage of valid votes obtained by each candidate?

My Lords, we submit that it is self-evident that the answer to these two questions is a resounding NO. Yet, my Lords, this is precisely what petitioner in the instant petition seeks to do and to invite the Court to endorse the manifest falsehood and unconstitutionality.

We are convinced this Honourable Court will forcefully reject this invitation to uphold this egregious unconstitutionality and dismiss the instant petition as misconceived and wholly unmeritorious.

**INTRODUCTION**

RESPECTFULLY MY LORDS,

1) We deem it necessary to preface our closing address with the importance of elections in a democratic system such as that which we have chosen for ourselves in Ghana. It is axiomatic that elections by

secret ballot of an all-inclusive electorate of eligible citizens, restricted only by limitations of age and *compos mentis*, are the gold standard for the authorization of the subsequently elected and duly inaugurated officials to administer political power for a constitutionally-mandated period of four (4) years. National elections, therefore represent a pre-eminent opportunity for the electorate (here the people) to exercise real power over how they are governed and by whom.

As a distinguished son of Ghana, the former UN Secretary General Kofi Annan, noted in a speech at the *CDD Kronti ne Akwamu Lecture* in June 2016:

> *"Ghana has thrived under democracy since it was reintroduced [under the Fourth Republic], and our society, as well as our economy, has thrived as a result. We must never stop reminding ourselves of that fact. Yes, our country has its problems, but all countries have problems."*

Indeed, it is trite that democracy and all its associated systems are not perfect. It is however generally agreed that it is the best form of system by which a people may be governed. As the British statesman, Sir Winston Churchill, once famously said, in an address to the UK Parliament in November 1947:

> *"No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government, except for all those other forms that have been tried from time to time."*

For additional attestation to the imperfections of democracy, we need look no further than recent events in the modern age's self-declared preceptor and exporter of democracy around the world, the United States of America. For all the robustness of the constitutional and

democratic structures and frameworks conceived, tweaked and nurtured painstakingly in the years since the nation's founding almost 245 years ago, it has itself only recently emerged from a close encounter with the spectre of political anarchy and the veritable insurrection. We in Ghana have, under the Fourth Republican Democratic dispensation, striven to maintain the sanctity of our democratic system, including the judiciary and the other organs of state, through our resolve not to waiver in our adherence to fidelity to the constitution and the other laws of the country. The growing assurance that, when people are aggrieved by the results of a declaration made pursuant to the conduct of an election, they would not resort to brute force but submit to the courts and their civilised and peaceful regime for resolution of such grievances gives much comfort to all Ghanaians.

The Courts have, however, maintained that before a person invokes their election dispute jurisdiction, they must be absolutely clear in their minds that the matter is not frivolous and that it raises a serious reasonable cause of action. This is because there is a presumption that once the Electoral Commission has, pursuant to the conduct of an election declared a person to have been elected as president, "***the Judiciary in Ghana, like its counterparts in other jurisdictions,*** often *strives in the public interest, to sustain the will of the people as declared*". This was poignantly articulated by Atuguba JSC in ***In Re Presidential Election Petition, Akufo-Addo, Bawumia & Obetsebi-Lamptey*** **(the Akufo-Addo case) (No. 4) [2013] SCGLR (Special Edition)** 73.

My Lords at the end of this trial petitioner should therefore clearly and decisively show whether the conduct of the election was so devoid of merits, and so, distorted as not to reflect the expression of the people's electoral intent. My Lords Atuguba JSC endorsed this broad test as a guide to the Court in deciding whether it should disturb the outcome of a presidential election in the presidential election of December 2012. We respectfully invite Your Lordships to be so guided by this test.

My Lords, to ensure a coherent presentation of 2nd respondent's case and to assist in a determination of the issues before the Court, this closing address will be presented in the following order:

I. Background
II. Issues for determination
III. Burden of proof
IV. Analysis of issues
V. Conclusion

## I. **BACKGROUND**

2) By an amended petition filed on 14/01/21, petitioner herein claimed the following reliefs:

a. *A declaration that Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Elections held on 7th December, 2020 was in breach of Article 63(3) of the 1992 Constitution in the declaration she made on 9th December 2020 in respect of the Presidential Election that was held on 7th December 2020;*

b. *A declaration that, based on the data contained in the declaration made by Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Elections held on 7th December 2020, no candidate satisfied the requirement of Article 63(3) of the 1992 Constitution to be declared President-elect;*

c. *A declaration that the purported declaration made on 9thDecember 2020 of the results of the Presidential Election by Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Elections held on 7thDecember 2020 is unconstitutional, null and void and of no effect whatsoever;*

d. *An order annulling the* ***Declaration of President-Elect Instrument, 2020 (C.I. 135)*** *dated 9th December 2020, issued under the hand of Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Elections held 7th December 2020 and gazetted on 10thDecember, 2020;*

e. *An order of injunction restraining the 2nd Respondent from holding himself out as President-elect;*

f. *An order of mandatory injunction directing the 1st Respondent to proceed to conduct a second election with Petitioner and 2ndRespondent as the candidates as required under Articles 63(4) and (5) of the 1992 Constitution.*

3) The grounds for the petition are as follows;

*a. That the purported declaration made on 9th December 2020 by Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Election held on 7th December 2020 violated Article 63(3) of the 1992 Constitution, and is therefore unconstitutional, null and void and of no effect whatsoever.*

*b. That in making the said declaration, Mrs. Jean Adukwei Mensa Chairperson of 1st Respondent and the Returning Officer for the Presidential Election, violated the constitutional duty imposed on her by Articles 23 and 296(a) of the 1992 Constitution to be fair, candid and reasonable.*

*c. That the said declaration was made arbitrarily, capriciously, and with bias in favour of 2nd respondent, contrary to Article 296(b) of the 1992 Constitution.*

*d. That the said declaration was made without regard to due process of law as required under Articles 23 and 296(b) of the 1992 Constitution.*

4) My lords, we wish from the onset to set out the relevant paragraphs of the amended petition for ease of reference thus:

The case of petitioner as set out in the amended petition in essence is that because the Chairperson of 1st respondent in her declaration of 9/12/20 mistakenly stated 13,434,574 as the total number of valid votes cast, the total valid votes obtained by 2nd respondent as a percentage of this mistaken figure did not meet the constitutional threshold of more than 50% of the total number of valid votes cast, in accordance with article 63 (3) of the Constitution 1992. It is also the case of petitioner that if all the registered voters in the Techiman South

Constituency were added to his votes as stated by the chairperson of 1st respondent at the Press Conference of 9/12/20, none of the candidates will secure more than 50% of the total valid votes cast. Petitioner also alleged that 2nd respondent's votes had been padded (by some 5,662 votes).

5) 1st respondent filed answer an 14/01/21 and refuted petitioner's claims and raised a preliminary legal objection to the amended petition on the basis that the petition was incompetent and did not, as required by Article 64(1) of the Constitution 1992 and Rule 68(1) of the Supreme Court Rules, 1996 (C.I. 16) as amended, amount to a challenge to the validity of the Presidential Election conducted by 1st respondent Commission on 7th December 2020.

6) On 15/01/21, 2nd respondent filed an amended answer in which he resisted the petition on the basis inter alia that petitioner does not indicate the number of valid votes or percentage thereof that he obtained in the election, or the number of votes or percentage thereof that 2nd respondent also obtained in the elections to support his allegations and request for the so-called " second election between petitioner and 2nd respondent as the candidates", and further that the petition is incompetent, frivolous, vexatious, and discloses no reasonable cause of action in terms of article 64(1) of the Constitution 1992.

7) At paragraph 38 of the amended answer, 2nd respondent raised a preliminary objection to the instant action, pursuant to **rule 3** of the **Supreme Court (Amendment) (No.2) Rules, 2016, C. I. 99**. At the pre-

trial hearing on 20/01/21, this Honourable Court ordered the 1st and 2nd respondents to file submissions in support of their preliminary objection by 12 noon on Friday, 22/01/21 and for petitioner to file his written submissions on the preliminary objection by 25/01/21. The Court further directed that it would incorporate its decision on the preliminary objection in the final Judgment.

8) In compliance with the Court order, 1st and 2nd respondents filed their submissions on the preliminary objection on 22/01/21. Petitioner predictably refused to comply with the orders of the Court to file his response to respondents' submissions on the preliminary objection as well as file his witness statements. Your Lordships, however, graciously exercised their discretion in favour of petitioner by extending time for petitioner to comply with the orders, failing which the Court would invoke its undoubted jurisdiction to dismiss the petition. Petitioner then complied therewith.

## II. **ISSUES FOR DETERMINATION**

9) My Lords, on 20/01/21, the Court set down the following issues for determination;

1. *Whether or not the Petition discloses any reasonable cause of action.*
2. *Whether or not based on the data contained in the declaration of the 1st Respondent of the 2nd Respondent as President-elect no candidate obtained more than 50% of the valid votes cast as required by Article 63 (3) of the 1992 Constitution.*

3. *Whether or not the 2nd Respondent still met the Article 63 (3) of the 1992 Constitution threshold by the exclusion or inclusion of the Techiman South Constituency Presidential Election results.*
4. *Whether or not the declaration by the 1st Respondent dated the 9th of December, 2020 of the results of the Presidential Election conducted on the 7th December, 2020 was in violation of Article 63 (3) of the 1992 Constitution.*
5. *Whether or not the alleged vote padding and other errors complained of by the petitioner affected the outcome of the Presidential Election Results of 2020.*

## III. **BURDEN OF PROOF**

10) It is clear that all the issues set down for trial relate to article 63 (3) of the Constitution, 1992, which provides as follows:

> *"**(3) A person shall not be elected as President of Ghana unless at the presidential election the number of votes cast in his favour is more than fifty per cent of the total number of valid votes cast at the election.**"*

Petitioner accordingly bears the burden of proving the truth of the facts pleaded in paragraphs 11, 15,16,17, 18 and 22 of the amended petition, as that was his case.

This is in consonance with sections 10, 11, 12, 14 and 17 of the Evidence Act, 1973 (NRCD 323) which provides as follows:

*Section 10:*

*"(1) for the purpose of this Decree burden of persuasion means the obligation of a party to establish the requisite degree of belief concerning a fact in the mind of a tribunal of fact or 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 the preponderance of probabilities proof beyond a reasonable doubt.*

*Section 11:*

*"(1) For the purpose 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.*

*(2) In a criminal action, the burden of producing evidence, when it is on the prosecution as to a fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt.*

*(3) In a criminal action, the burden of producing evidence, when it is on the accused as to a fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on the totality of the evidence a reasonable mind could have a reasonable doubt as to guilt.*

*(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of a fact is more probable than its non-existence.*

*Section12:*

*(1) Except as otherwise by law, the burden of persuasion requires proof by a preponderance of probabilities.*

*(2) 'Preponderance of probabilities' means that degree of certainty of belief in the mind of a tribunal of fact or the Court by which it is convince that the existence of a fact is more probable than its non-existence.*

*Section 14:*

*14. Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence.*

*Section 17*

*(1) Except as otherwise provided by law, the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence.*

*(2). Except as otherwise provided by law, the burden of production a particular fact is initially on the party with the burden of persuasion as to that fact.*

Accordingly, we submit that for petitioner to prove his case as pleaded and resolve the five (5) issues set down for trial in his favour, he has to discharge the burden of persuasion by proving on the preponderance of probabilities the issues set down for trial. At the same time petitioner bears the duty to produce sufficient evidence on a particular fact to shift that burden, otherwise a finding will be made against him on that fact.

My Lords we submit that the above sections of the Evidence Act mean that in this petition, it is petitioner who bears both the burden of proof and the burden of producing evidence on a particular fact, and his case falls if he fails to meet that evidential burden.

Clearly, my Lords, for the Court to arrive at a definite resolution of the

issues in favour of petitioner, he ought to have placed before the Court clear facts and uncontroverted evidence to discharge the burden imposed on him by law. This position was sanctioned by this court in ***In Re Presidential Election Petition, Akufo-Addo, Bawumia & Obetsebi-Lamptey*** (the Akufo-Addo case) **(No. 4)** [2013] SCGLR (Special Edition) 73. Gbadegbe JSC on the subject @ page **464** held thus:

> *"At the close of evidence in the matter herein, the questions for our determination turning on the issues that were set down for trial on 2 April 2013 require us to patiently inquire into the allegations submitted by the petitioners and the answers thereto by the respondents, and if proved, determine their effect on the results declared at the various polling stations to which they relate. As the case herein was fought on the evidence placed before us, our task in keeping with a long and settled line of authorities is to reach our decision on all the evidence on a balance of probabilities. See: Sections, 10, 11, 12, 13 and 14 of the Evidence Act, NRCD 323 of 1975.* ***This being a civil case, the petitioners bear the burden of leading evidence on a balance of probabilities.*** *At this point, I venture to say that the effect of the acts on which the petitioners rely to sustain their action is one that must turn on a careful consideration of the applicable statutory provisions and so stated it would appear that our decision turns not solely on facts but a mixed question of facts and law. Our courts have over the years determined several cases in which decisions are based on a consideration of mixed questions of fact and law and as such this case does not present to us a challenge that is historical in terms of the evaluation of evidence. While the cause of action in the matter herein as previously indicated in the*

*course of this delivery is historic, the approach to decision making is no different from what we have been doing all the time."*

11) His Lordship further engaged in a comparative analysis of the subject of burden of proof and said @ page **464** that *"the burden of proof in an election petition was recently considered in the Nigerian case of Buhari v Obasanjo (2005) CLR 7K, in which the Supreme Court said:*

> *"The burden is on petitioners to prove that non-compliance has not only taken place but also has substantially affected the result……There must be clear evidence of non-compliance, then that the non-compliance has substantially affected the election."*

12) In relying further on the *Buhari* case, His Lordship quoted further @ page 465:

> *"He who asserts must prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence could not on the preponderance of evidence result in the Court giving judgment in favour of the party"*

13) The true position of the burden imposed on a person who commences an action in a civil matter before the Supreme Court to invoke its

original jurisdiction is a heavy one indeed. He must satisfy the Court that he has discharged the rather heavy burden cast on him by law. His Lordship Ansah JSC also stated the true position of the law in reference to the burden of proof relating to election petition in the *Akufo-Addo* case @ page **161** of the said Special Report thus:

> *"It is needless to repeat that this is an election petition which was a civil suit and therefore partook of all the incidents known to it; flowing from these provisions (quoted supra) and backed by the well-known principles governing civil procedure and practice in civil trials like the present case before this court, the burden of proof is on the petitioner to prove the facts alleged against the respondents. This is because, the law is well settled that... the burden of proof in election petition lies on the petitioner; and a petitioner who sought to annul an election bears the legal burden of proof throughout the proceedings. In other words, he who asserts is required to prove such facts by adducing credible evidence in support and if he fails to do so his case must fail.* On these general principles of burden of proof, *see Yorkwa v Duah [1992-93] GBR 280, CA; Buhari v INEC (2008)12 SC 1; Ackah v Pergah Transport Ltd. [2010] SCGLR 728; GIHOC Refrigeration v Jean Hanna Assi [2005-2006] SCGLR 198; Dr. Kwame Appiah Poku & ors v Kojo Nsafuah Poku ors. [2001-2002] SCGLR 162."*

14) Again, in the *Akufo-Addo* case, Her Ladyship Sophia Adinyira JSC @ page **216** delivered herself on the sub-topic "**Burden or *Standard of Proof*"** by first asking a fundamental question thus:

> ***"What is the standard of proof required in an election petition brought under constitutional provisions that would impact***

***upon the governance of the nation and the deployment of the constitutional power and authority?"***

15) Her ladyship then set out to resolve the above issue by referring to the **Evidence Act, 1975 (NRCD 323)**, section 10 (1) and (2) thereof which provides:

***"Section 10***

*(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 establishes the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt."*

***"Section 11***

*(1) 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.*

*(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence."*

16) At pages **216-217** Her Ladyship then referred to her dictum in ***Ackah v. Pergah Transport Limited and Others*****, [2010] SCGLR 728** @ page 736:

*"It is a basic principle of the 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. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things(often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the Court or tribunal of fact such as a jury.* ***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 the fact is more reasonable than its non-existence. This is a requirement of the law on evidence under sections 10 and 11 of the Evidence Decree."***

17) Her Ladyship, @ page **217** also embarked on a comparative analysis of the concept of burden of proof thus:

*"Comparative judicial practice on the burden of proof informs this Court's perceptions, in a case which rests, to a significant degree, on fact. In the Nigerian election case of* ***Abu-Bakr v. Yar'Adua [2009] All FWLR (Pt. 457)1 SC;*** *the Supreme Court of Nigeria held "that the burden is on the petitioner to prove, not only non-compliance with the electoral law, but also that the non-compliance affected the results of the election. The same jurisprudence was enunciated in* ***Buhari v. Obasanjo (2005) CLR 7(k) (SC)****, also cited by the Attorney-General; the various components of burden of proof were distinguished, in their shifting pattern: the burden is on the petitioner to prove non-compliance with the electoral law; and it then shifts*

*to the respondent, or the electoral board, to prove that such non-compliance did not affect the results of the election."*

18) Her Ladyship then summed up her position on the law on burden of proof @ page **216** thus;

*"Accordingly, the petitioners bear the burden to establish not only that there were violations, omissions, malpractices and irregularities in the conduct of the presidential election held on 7th and 8th December 2012 but also that the said violations, omissions, malpractices and irregularities, if any, affected the results of the election. It is after the petitioners have established the foregoing that the burden shifts to the respondents, to establish that the results were not affected. The threshold of proof should, in principle, be above the balance of probability"*

19) In **Takoradi Flour Mills v Samir Faris [2005-2006] 882**, His Lordship Ansah JSC said @ page 896 of the report that:

*"A great deal of the submissions made on behalf of the second defendant in support of the grounds of appeal centered on the burden of proof, or the onus probandi, by which it is the duty of the party who asserts the affirmative to prove the point in issue. This was expressed in classical terms 'ei incumbit probatio qui dicit, non qui negat'. As it was the plaintiff who made a claim and asserted the positive, he had to adduce evidence sufficient to establish a prima facie case a required by section 14 of the Evidence Decree, 1975, because in law a fact is essential to a claim, the party who asserts the claim has the burden to persuade the Court of the existence of that fact. The standard of proof is by a preponderance of the probabilities: see section 12 (1) of the Decree. Section 17(1) states that the burden of producing any particular fact is on the party against whom a*

*finding on that issue would be required in the absence of further proof."*

20) Brobbey JSC's erudite opinion in **IN RE ASHALLEY BOTWE LANDS; ADJETEY AGBOSU & OTHERS v KOTEY & OTHERS [2003-2004] SCGLR 420 @ 732** is worth reproducing here:

*"The effect of sections 11(1) and 14 and similar sections in the Evidence Decree, 1975 may be described as follows: A litigant who is a defendant in a civil case does not need to prove anything; the plaintiff who took the defendant to court has to prove what he claims he is entitled to from the defendant. At the same time, if the Court has to make a determination of a fact or of an issue, and that determination depends on evaluation of facts and evidence, the defendant must realize that the determination cannot be made on nothing. If the defendant desires the determination to be made in his favour, then he has the duty to help his own cause or case by adducing before the Court such facts or evidence, the Court will be left with no choice but to evaluate the entire case on the basis of the evidence before the Court, which may turn out to be only the evidence of the plaintiff. If the Court chooses to believe the only evidence on record, the plaintiff may win and the defendant may lose. Such lose may be brought about by default on the part of the defendant. In the light of the statutory provisions, literally relying on the common law principle that the defendant does not need to prove any defence and therefore does not need to lead any evidence may not always serve the best interest of the litigant even if he is a defendant."*

21) Again, in **NATIONAL DEMOCRATIC CONGRESS v ELECTORAL COMMISSION [2001-2002] 2 GLR 340** Ampiah JSC had this to say:

> "*To allege that a person has breached a constitutional provision requires the production of sufficient, cogent and clear evidence to support the allegation. Unfortunately, what we have before us from both sides cannot be said to be sufficient, clear and cogent. In the statement of case for the plaintiff, it alleges that certain letters were written. These letters were the source of its allegation. Yet, these letters were not produced before us. No dates were given of these letters and they were not even mentioned as some of the documents relied on. The defendant on its part referred to notices for the conduct of the elections, dates for such elections and the list of persons nominated for the electoral college elections. Yet, these notices were neither produced before us, nor were they referred to in the list of documents relied on.* ***Of course, generally, the plaintiff who seeks the declaration or claim and who must succeed on the strength of his own case and not on the weakness of the defendant, must fail in such a situation. In such paucity of evidence.***"

22) My Lords, we wish further to refer the Court to Hoffman LJ's opinion in the English case of ***Re B,*** [2008] UKHL, 35 wherein he delivered himself using a mathematical analogy thus:

> "*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 in doubt, the doubt is resolved by a rule that one*

*party or the other carries the burden of proof. If the party who has the burden of proof fails to discharge it, a 0 value 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.*"

## IV .ANALYSIS OF ISSUES

### *ISSUE 1 WHETHER OR NOT THE PETITION DISCLOSES ANY REASONABLE CAUSE OF ACTION.*

23) My Lords, we have sufficiently addressed the Court on **Issue 1** by our submissions on the preliminary objection filed on 22nd January, 2021. We therefore pray that Your Lordships dismiss the petition in its entirety as it **discloses no reasonable cause of action**. Indeed, we respectfully maintain our conviction expressed in the said submissions that the petition is frivolous and discloses no reasonable cause of action remains unshaken, notwithstanding the evidence led in aid of the petition. In fact, the woeful performance of petitioner's witnesses during their respective cross-examination has further buttressed our position that the instant petition, with all due respect, ought not to have proceeded to trial. Be that as it may, it has rather exposed further the malaise that afflicted the petition at the time of its filing and which has, even after the trial, clearly decayed to become incurable. We therefore humbly pray Your Lordships to dismiss the petition on the basis of the submissions on the preliminary objection.

We however, wish my Lords, to discuss the rest of the issues ex *abundanti cautela.*

**JURISDICTIONAL ISSUE**

24) My Lords, before we proceed to discuss the other issues set down for determination by the Court, we wish to highlight a very important issue that we addressed in the preliminary objection but has become even more pronounced from the trial and goes to the root of the instant suit, it relates to the jurisdiction of this Court to determine the instant petition. It is crystal clear, My Lords, that the instant matter does not meet the threshold established by law for the invocation of the special jurisdiction of the Court to entertain an election petition. The issue is this:

*Whether or not this Honorable Court's special presidential election petition jurisdiction has been properly invoked in view of the nature of the petitioner's pleadings and the evidence adduced by witnesses of the petitioner in the course of the trial.*

With respect to a petition properly challenging the validity of election of a person as President, the applicable constitutional provision is Article 64(1) which provides:

***"64 (1). The validity of the election of the President may be challenged only by a citizen of Ghana who may present a petition for the purpose to the Supreme Court within twenty-one days after the declaration of the result of the election in respect of which the petition is presented."***

25) My Lords, the law is settled that a party may at any time raise the issue of jurisdiction, even for the first time on appeal, especially as in this case where 2nd respondent's pleadings support it, before the Supreme Court. The jurisdictional point and its fatality on a party's case has been adequately established in a plethora of cases. We start with the unreported decision of this Court in ***BENJAMIN KOMLA KPODO, MP RICHARD QUASHIGAH, MP VRS THE ATTORNEY-GENERAL*** WRIT NO. J1/03/201812TH JUNE, 2019.

In that case, the Supreme Court made it abundantly clear that its original jurisdiction (and we must dare say election dispute jurisdiction is also a special one) whenever being invoked, must be circumscribed by the *parameters* set by the Constitution and as clarified in several decisions of the Court. In this regard, their Lordships seized the opportunity to reiterate the settled ***"practice that in all actions to invoke our original jurisdiction, whether or not a Defendant takes objection to our jurisdiction, or even expressly agrees with the Plaintiff that our jurisdiction is properly invoked, we take a pause to determine the question of the competence of the invocation of our jurisdiction, before proceeding with the adjudication of the matter or otherwise."***

It is further noted that this hackneyed principle has been the subject of a sea of cases including: Ghana Bar Association v Attorney General and Another [2003-2004] 1 SCGLR 250, *Bimpong Buta v General Legal Council* [2003-2004] 2 SCGLR 1200, 2SCGLR 1038 and *Abu Ramadan v Electoral Commission* Writ No.J1/14/2016.

Clearly my Lords, an election petition properly so called, is one which, in all shape and form, relates to an attack on the processes for the conduct of the presidential election itself, as stated. In this matter however, petitioner is only fixated on the final declaration by 1st respondent. This Honourable Court in ***Mettle-Nunoo v. Electoral Commission [2007-2008] 2 SCGLR 1250 @ 1258*** emphasised this point. In that case, the Plaintiff sought to challenge the declaration of President Kufour as winner of the 2004 Presidential Election on the grounds that the declaration did not include the details of the total valid votes cast in favour of all the candidates from each constituency. This Court at page 1258 per Date-Bah JSC said as follows:

> *"If the Plaintiffs were to succeed in their contention on the first issue, although it would result in a declaration which in effect will mean that no President had been declared elected, it will not mean that the election itself of the President was invalid. The underlying election results could still be perfectly valid and the Defendant's (EC) responsibility will be to declare them in the proper form. The declaration would mean merely that a President had not yet been properly declared elected, without prejudice to the validity of the substantive election result themselves.* ***In our view therefore the Plaintiffs' action is not an election petition.****"*

In the instant matter, it is very clear on the face of the petition and indeed the evidence of Mr Asiedu Nketia in particular that petitioner is not in court to challenge the validity of the election but rather that the case concerns the performance of the functions of 1st respondent and its Chairperson pertaining to the declaration of the presidential

elections of December 2020 shows that the petition is not an election petition properly so called. In fact, from the reliefs of petitioner, he does not contest the propriety of the conduct of the elections hence his call for another election to be held between him and the 2nd respondent as in his view the 2nd respondent did not obtain more than 50% of the total number of valid votes cast as required by article 63 of the Constitution 1992.

26) Your Lordships would no doubt note that even though petitioner, from the reliefs sought, contends that no candidate obtained more than 50% of the total number of valid votes cast in the election, and therefore seeks a "*second election with Petitioner and 2nd Respondent as the candidates…*", petitioner does **not,** as already stated, indicate any number of valid votes or percentage thereof that he obtained in the election, or the number of votes or percentage thereof that 2nd respondent also obtained in the election or the total number of valid votes cast in the 7thDecember, 2020 Presidential Election, to support the allegations and request for the so-called "*second election with Petitioner and 2nd Respondent as the candidates*". Not having pleaded these fundamental material facts and no evidence having been led on same, it is our humble submission that this petition does not qualify to be an election petition.

The election involves the process of voting, counting of votes, declaration of the results at the polling stations, collation of results from polling stations in every constituency, transmission of results from the constituency collation centres to the regional collation centres, collation of results from the various constituency collation

centres at the regional collation centres, transmission of results from the regional collation centres to the national office of 1st respondent and collation of all the regional collation centres before declaration. Incidentally, petitioner has not contested any of these processes save inconsequential and largely unmeritorious protests/complaints.

It is our further submission therefore that the instant petition properly belongs to the class of actions which can best be described as "suits challenging the declaration" rather than the validity of the election itself. A close scrutiny of the facts relied on by petitioner make this more than apparent. Paragraphs 1 through to 30 of the petition merely recount allegations of arithmetical errors contained in parts of the declaration of 2nd respondent as President and the subsequent correction by the 1st respondent on 10/12/20. There is no challenge mounted by petitioner about the conduct of the election at the **38,622** polling stations and **311** special voting centres in the country. The Court is invited to hold that no challenge of the conduct of the election is stated from paragraphs 1 through to 30 of petitioner's petition.

26) As already vividly articulated, **article 64(1)** of the **Constitution, 1992,** lays down the essential criteria for the invocation of this Court's original jurisdiction consequent on the conduct of a presidential election. The action must firmly constitute **a challenge to the validity of a presidential election** and nothing more. Thus, it is not every petition anchored on a presidential election or filed in relation to the

presidential election which is competent to be characterised as a "presidential election petition". A challenge to the declaration of a person as President *ipso facto* is not an election petition. This is because, a declaration as President can be set aside or voided and the person declared elected will still have been duly elected as President. The only result from an action challenging the declaration of a person as President if successful, may be an annulment of the declaration and a new declaration ordered, but not voiding of the election conducted throughout the country. This is because a voided declaration without more does not affect the validity of the election at the various polling stations across the country.

27) The Supreme Court therefore is not, respectfully, clothed with jurisdiction to entertain any matter craftily clothed with the apparel of presidential election petition when in fact it is not. In this regard your Lordships on 11th February, 2021 made it abundantly clear that where a party seeks to invoke its jurisdiction under article 64 (1) of the constitution 1992, as petitioner in the instant matter purports to do, the Court would fiercely resist any invitation to entertain such a matter or aspects that cannot be properly said to be within the remit of its jurisdiction under article 64 (1).

Your Lordships in the said 11th February 2021 ruling rejected the contention of counsel for petitioner that because 1st Respondent's Chairperson performs a very important Constitutional function she must be made to adduce evidence in this petition as a way of accounting to the people of Ghana. Speaking through His Lordship

Justice Anin Yeboah, the Chief Justice, this Court stated poignantly as follows:

> *"We are minded to state that our jurisdiction invoked in this election petition is a limited jurisdiction clearly circumscribed by law. We do not intend to extend our mandate beyond what the law requires of us in such petitions brought under article 64(1) challenging the validity of the election of a President."*

28) My Lords, apart from petitioner's pleadings, which substantially concern matters relating to the declaration of the presidential election of 2020, relevant part of the evidence of Mr. Johnson Asiedu Nketia, petitioner's first witness in particular, under cross-examination on 29th January 2021 can also, no doubt, be said to underscore the true essence and object of the instant suit, as conceived by petitioner and his witnesses. My Lords, this is what transpired between him and lawyer for 1st respondent which we wish to quote copiously for full effect:

> *Q: Now what was the source from which you obtained information to draw up your Exhibit "E" for this Honourable Court?*
>
> *A: My Lords, Exhibit "E" was based on the 1st respondent's own data.*
>
> *Q: But you have gracefully brought it to the attention of the Court, you want to rely on it. Is that not so?*
>
> *A: Yes, we want to rely on it to the extent that we want to prove a case against the 1st respondent.*
>
> *Q: In Exhibit "E" there are votes assigned to the petitioner, the 2nd respondent and all the other Presidential candidates. Is that not so, that is on the last page of Exhibit "E".*

*A: By the 1st Respondent, Yes.*

*Q: Now what we have here is 6,776,066 for the 2nd respondent. Is that correct?*

*A: 6,776.066.*

*Q: That is what is on it. Is that correct?*

*A: I don't know, it is in this statement.*

*Q: Yes.*

*A: Yes.*

*Q: And then also for the petitioner we have 6,265,276. Is that correct?*

*A: According to this document submitted by the 1st respondent.*

*Q: It is your document that we are looking at please, now look below the figures we have just gone through for 2nd respondent, there is a percentage of 0.512614731. Is that correct?*

*A: That is correct.*

*Q: I am suggesting to you that this works to a percentage of 51.2614.*

*A: A percentage of what?*

*Q: A percentage of the total valid votes also on this sheet.*

*A: It's 51.263%.*

*Q: That is correct?*

*A: Yes.*

*Q: Now for the petitioner we have 47.397 assigned to him by your sheet. Is that correct?*

*A:47.397, yes.*

*Q:That is correct, now deduct the number assigned to petitioner from that assigned to the 2nd respondent and tell this Court the difference?*

*A:Which of the numbers, you asked about percentage and you are now asking me …*

*Q:Yes I have moved from the percentage, 6,776,606 minus 6,265,276. What did you get?*

*A:510,790.*

*Q:You got 510,790?*

*A:Yes my Lords.*

*Q:It is not true that the 1st respondent padded any votes as you alleged. I am putting it to you?*

*A:My Lords, I decline to that assertion.*

*Q:Now in your Exhibit "F" you alleged that 4693 votes were added in favour of the 2nd respondent. That is your allegation.*

*A:My Lords, if you look at my statement, I indicated that I will bring a sample of the Constituencies and the Polling Stations where padding took place, I did not indicate that, that is an exhaustive list of all the places where the padding took place.*

*Q:We are using the numbers you have brought to the Court to assist. I am saying that the total of 4693, is what you have put down there. Is that correct?*

*A:I brought it as a sample. I did it in my statement and actually indicate that this is from a sample of this particular Constituency. I don't understand sample to mean the total of the population.*

*Q:Deduct the 4693 from 510790. What do you get?*

*A:With all due respect I don't see the point of the question.*

*Counsel for 1st respondent:With the greatest respect you are being rude to the Court and not me.*

*A:Yes, please come again.*

*Q:I am saying that deduct 4693 from 510,790. What do you get?*

*A:I got 506,097*

*Q:I am suggesting to you that even if this your number as alleged which is denied, even if it is deducted from the total valid votes of the 2nd Respondent, he still has won by your own sheet by 51.246%.*

*A:My Lords, I deny that because now you are subtracting apples from mangoes. This is a sample, you want to take a sample from a population of another group. I don't see where the calculation is coming from.*

*Q:I am suggesting to you that you will have no evidence to support the allegations and that is why you have brought only what you have.*

*A:**We are not in Court to try to declare another Presidential results by us. We are in Court to challenge the performance of Constitutional duty of the 1st Respondent and to see whether that duty has been discharged faithfully.***

***Q.If that is so then I am suggesting to you that you are not, by your own showing that you are not in the right forum?***

29) Then also my Lords, on 1st February 2020, the Court through His Lordship Justice Yaw Appau asked Mr Asiedu Nketia a few questions based on his evidence before the Court. Let us observe the highly insightful interaction between the Court and Mr Asiedu Nketia:

*Q. Then I want to be very clear on these issues too. In all the figures that were mentioned as the valid votes cast and all those things, you were saying if the figures were correct and that there were inconsistencies in the figures. In your own calculations what were the total valid votes cast in the presidential election on 7th December 2020?*

*Q. Witness:My Lords those calculations are reserved for a meeting for us to reconcile the figures because the 1stRespondent herself kept changing the figures.*

*By Court:Mr. Asiedu Nketia, help the Court. When you started giving evidence, you said you had representatives across the 275 constituencies. You said you put agents and they were to collate the figures. Then he is asking you that from that, what figure did you get, you?*
*Witness:* ***My Lords I have not brought that figure to court***
*By Court:Then from your own calculations what were the valid votes cast in favour of the petitioner, to your knowledge?*
*Witness:When we discovered this discrepancy, it was difficult to even know which figures are correct.*
*By Court:You do not know?*
*Witness:I do not have them here.*
*By Court:What figures from your own calculations, did the 2nd Respondent get as the total valid votes cast in his favour?*
*Witness:My Lords I do not have those figures here.*

30) Again, the proceedings of 1st February, 2021 in which Mr. Asiedu Nketia was cross- examined by counsel for the 2nd respondent also clearly reveals the true intent of petitioner in commencing the instant suit. This is what transpired;

*Q. As you know, all the documents that the EC was using to collate the results from the Polling Station right up to the Regional Centre, you had carbon copies of them, didn't you?*
*A.Yes we do.*

*Q.And I am saying that you have not put together your carbon copies to show that indeed nobody won the elections?*

*A.**Yes my Lords because that is not the purpose of our petition**. We did not come to court to take over the work of the Electoral Commission. But we are entitled if we see the results are flawed, they are not borne out of the data, we are entitled to challenge and insist that we must have a credible results and a declaration that is based on the votes that were cast at the polling stations.*

*Q.I am saying that you have not provided any basis of your own for your call for a runoff?*

*A.**No my Lords, we have not brought that data here, we did not consider it necessary to bring any such data here**.*

*Q.Do you know why you have not brought any such document; it is because all the authentic documents on the election that you have show that the 2nd Respondent had won the election, so you cannot bring it out?*

*A.That is not so my Lords because we produced documents that will support the case we brought to this court. And if the case we have brought to this court is not about coming to re-tabulate figures the way NPP chose to do in 2013, we do not need to bring those figures here. We are judging the 1st Respondent by her own Bible, the figures that she claimed were the figures that were generated and the conclusions that were drawn. We are saying that the conclusions are not borne out of the figures that she herself has presented.*

*Q.I am saying that indeed your claim for a re-run between the 2nd respondent and the petitioner is based on the verbal slip made by the Chairperson of the 1st respondent in mentioning the total votes cast rather than the total valid votes cast as the basis for determining the percentages.*

*A.My Lords we disagree that it is a verbal slip because a verbal slip in reading out figures would have meant that you will read one figure instead of the other but from subsequent corrections that the 1st Respondent sought to bring out, the figure she mentioned and the correction that was made was not related through the figures of the day at all. Because if you have total votes cast in one column and then total valid votes in another column, it is possible that you read total valid votes for total votes cast but they will be same. So, when you come back to allege that it was a verbal slip, we expect that the correction that you made will relate to the figure which you thought you were reading but the so-called corrected figure that they claim were made did not relate to any figure that was on the face of the declaration in the first place. So, it was a new figure also introduced, so it could not have been any verbal slip.*

31) My Lords, when this interaction is juxtaposed with a revealing declaration by counsel for petitioner on 3rd February 2021 no doubt will be left in the minds of even a cursory assessor of the true import of the instant suit. It would be recalled that in the course of the proceedings of that day, counsel for petitioner made an intervention which has been deemed by many as invidious but which for us is significant as it confirms our position that the instant suit is not in fact and in law a petition properly so called challenging the validity of the presidential elections of 2020 as dictated by Article 64 (1). Below is Counsel for petitioner's said invidious submissions:

*By Court: But you do not see the need to tell us what you have as your valid votes?*

*Counsel for Petitioner: No, we do not have the need because we are not the Returning Officer, with the greatest respect. This is quite important because his Lordship Justice Appau did ask certain questions in relation to PW 1 and* ***in our respectful submissions those questions are really irrelevant to the issues that have to be dealt with...***"

32) The law is settled that where questions or statements made by a lawyer in the course of a trial contain admissions, those admissions would be imputed to the party on whose behalf they were made. Please see ***NARTEY v. MECHANICAL LLOYD ASSEMBLY PLANT LIMITED*** [1987-88] 2 GLR 314 where his Lordship Adade J.S.C @ page 331 had this to say:

"*In other words, by the admissions and concessions necessarily implicit in the questions put by Nii Odoi Annan, the lands are Frafraha family lands; and "the only persons entitled to sell [these Frafraha family lands] are the Atofotse and [Nii Okpoti Commey]"; no one else. The La Mantse has no role whatever.* ***Let it be repeated for emphasis that this line of cross-examination based no doubt on counsel's instructions (at least we are entitled to assume this), taken together with counsel's cross-examination of the plaintiff reproduced earlier, is a clear admission by the defendants*** *that Frafraha lands are Agbawe family lands, and that valid grants of Frafraha lands are made, not by or with the La Mantse but by the Frafraha Mantse, Nii Okpoti, and the Atofotse, acting together.*"

My Lords, even though the matter in which this profound statement of law was made related to questions asked in cross-examination by lawyer for a party, we hold the firm view that it can, by parity of reasoning, be

applied to declarations made by Counsel of a party on the position of their case before the Court.

33) The point being made is that the cumulative effect of the above-quoted declaration by Mr. Asiedu Nketia that "we are in court to challenge the performance of constitutional duty of 1st respondent" and the revelation by lawyer for Petitioner that the questions from the Court "are really not relevant" all go to show the true import of the instant petition which is that it is not a petition challenging the validity of election of a President. We say so because the said questions from the Court which sought to elicit from Mr. Asiedu Nketia the exact votes obtained by Petitioner and 2nd Respondent are extremely germane as they touch on the fundamental issue of whether or not 2nd respondent obtained more than 50% of the total number of valid votes cast which is at the heart of any election petition.

Indeed my Lords, a party seeking to invoke the Supreme Court's jurisdiction under Article 64 (1) of the Constitution 1992, must not only place before the Court sufficient facts and compelling evidence that clearly demonstrate that he/she is challenging the validity of the election as canvassed above, but even more importantly, there must be sufficient facts and cogent evidence from which relevant issues in controversy arise for determination by the Court.

In the instant suit, not only have the witnesses of petitioner also made substantial admissions that go to the root of the matter but also, as demonstrated, lawyer for petitioner has on more than one occasion made

clear the true import of the petition which does not in any way even remotely suggest that in the mind of petitioner and his witnesses the instant suit is a presidential election petition worthy of invoking the special jurisdiction of this Court to determine any issue in controversy which relates to any challenge that goes to the validity of the presidential election of 2020.

On the basis of the foregoing, we humbly pray your Lordships to dismiss the instant suit as an evaluation of the facts and the law clearly points to an irrefutable conclusion that the Court's jurisdiction to entertain the suit has not been properly invoked as there is no petition properly so called before the Court in the first place.

34) My Lords we now proceed to address the other issues set down for determination. Before then however, we shall address Your Lordships on the burden of proof in election petitions.

35) My Lords now on **issue 2,** which is stated as follows:

> **2.** ***"WHETHER OR NOT BASED ON THE DATA CONTAINED IN THE DECLARATION OF THE 1ST RESPONDENT FOR THE 2ND RESPONDENT AS PRESIDENT-ELECT NO CANDIDATE OBTAINED MORE THAN 50% OF THE VALID VOTES CAST AS REQUIRED BY ARTICLE 63 (3) OF THE 1992 CONSTITUTION."***

Our first point of call will be a consideration of the place of pleadings in civil litigation.

## THE ROLE OF PLEADINGS

Respectfully My Lords, a discussion of the significance of pleadings in relation to the instant case cannot proceed without the need to highlight the duty of a party who decides to commence an action in a Court of law.

Order 11, r. 7 (1) of C.I. 47 provides as follows;

> ***"Subject to this rule, and rules 10 -12, every pleading shall contain only a statement in summary form of the material facts on which the party pleading relies for his claim or defence but not the evidence by which these facts are to be proved, and the statement shall be as brief as the nature of the case admits."***

In Atkins Court Forms, Second Edition, Vol. 32 (1992 Issue), the learned authors state as follows;

> *"**Basic rules of pleading.** Every pleading must contain and contain only a statement in summary form of the material facts on which the party's pleading relies for his claim or defence as the case may be but not the evidence by which those facts are to be proved and the statement must be as brief as the nature of the case admits."*

In Odgers on Civil Court Actions, 24th Edition, the learned authors at page 151 emphasise the fundamental importance of pleadings thus;

> "The fundamental rule of the present system of pleadings is this: *Every pleading must contain and contain only a statement in summary form of the material facts on which the party's pleading relies for his claim or defence as the case may be but not the evidence by which those facts are to be proved and the statement must be as brief as the nature of the case admits."*

37) It is trite law that a party's pleadings form the basis of his reliefs and a party must plead all material facts upon which the reliefs sought are based. Failure to do so is fatal for his cause of action. A party therefore may not plead facts that do not ground his reliefs. The importance of pleadings and its function is eloquently espoused in ***Hammond v. Odoi (1982-83) 2 GLR 1215 @ 1234- 1235 SC***, wherein Crabbe JSC explicated the importance and essence of pleadings by relying fully on the ground breaking authoritative book, by Master I.H. Jacob entitled: "*The Present Importance of Pleadings"* in Current Legal Problems (1960) PP. 171-174 and 175-176, which we wish to reproduce *ad longum* thus*:*

> "*As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without (due amendment properly made). Each party thus knows the case he has to meet and cannot be taken by surprise at trial. The Court itself is as*

*much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court will be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so will be to enter the realms of speculation…Moreover, in such event, the parties themselves or at any rate one of them, might well feel aggrieved, for a decision given on a claim or defence not made, or raised, by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda there is no room for an item called 'Any other business' in the sense that points other than those specified may be raised without notice.*

*Pleadings do not only define the issues between the parties for the final decision of the Court at the trial; they manifest and exert their importance throughout the whole process of the litigation. They contain the particulars of the allegations of which further and better particulars may be requested or ordered, which help still further to narrow the issues or reveal more clearly what case each party is*

*making. They contain the particulars of the allegations of which further and better particulars may be requested or ordered, which help still further to narrow the issues or reveal more clearly what case each party is making. They limit the ambit and range of the discovery of documents and the interrogations that may be ordered. They show on their face whether a reasonable cause of action or defence is disclosed. They provide a guide for the proper mode of trial and particularly for the trial of preliminary issues of law or of fact.*

*They demonstrate upon which the burden of proof lies, and who has the right to open the case. They act as a measure for comparing the evidence of a party with the case which he had pleaded. They determine the range of admissible evidence which the parties should be prepared to adduce at the trial. They provide the basis for the defence of res judicata in subsequent proceedings by reference to the record in the earlier proceedings...*

*Pleadings are the nucleus around which the case–the whole case-revolves. Their very nature and character thus demonstrate their importance in actions, as for the benefit of the Court as well as for the parties. A trial judge can only consider the evidence of the parties in the light of their pleadings. The pleadings form the basis of the respective case of each of the contestants. The pleadings bind and circumscribe the parties and place fetters on the evidence that they would lead. Amendment is the course to free them from such fetters. The pleadings thus manifest the true and substantive merits of the case"*

38) In ***Whitaker v. Nanka-Bruce (1994-95) GBR 784,*** the Supreme Court per Brobbey JA sought to distinguish between material facts and evidence by holding as follows:

> "***Material facts have been defined to mean facts necessary for the purpose of formulating a complete cause of action***.''

39) Again, in ***Barclays Bank Ltd***. V ***Sakari*** **(1996-97) SCGLR 639 @ 650**, Acquah JSC as he then was stated thus:

> *"The importance of pleadings in circumscribing the scope and nature of the party's case cannot be underestimated. The function of pleadings is to give notice of the case which has to be met and to define the issues in which the Court has to adjudicate in order to determine the matters in dispute between the parties. For this reason a party is not permitted to set up a case inconsistent with his pleadings. Neither is the Court competent to decide the claims of the parties in a manner inconsistent with what the parties themselves have out forward in their pleadings. If the claim of the parties give rise to a pertinent not averted to by the parties, it is the duty of the Court to draw attention of the parties to it and invite their response to it"*

## THE DECLARATION OF 9TH DECEMBER, 2020.

**40)** Petitioner alleges in paragraphs 5-11 of his Amended Petition as follows:

> *"5. On 9th December 2020, Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Election,*

*held a press conference at which she purported to declare 2nd Respondent duly elected as President. The purported declaration was broadcast live on radio, television and other electronic media. Attached and marked as* ***Exhibit "A"*** *is a video and audio recording of the purported declaration.*

*6. Purporting to declare the results, Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Election, said: "****At the end of the transparent, fair, orderly, timely and peaceful Presidential Elections the total number of valid votes cast was 13,434, 574 representing 79% of the total registered voters.****"*

*7. In the declaration, Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Election, further said that 2nd Respondent of the NPP obtained 6,730,413 votes, being 51.595% of the total valid votes cast.*

*8. The claim that the percentage of votes obtained by 2ndRespondent was 51.595% of the total valid votes that she herself distinctly stated to have been 13,434,574, was manifest error, as votes cast for 2nd Respondent would amount to 50.09% and not the 51.595% erroneously declared.*

*9. Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Election, further declared that: "****John Dramani Mahama of the NDC obtained 6,214,889 votes, being 47.366% of the total valid votes cast****."*

*10. From the total valid votes cast of 13,434,574, Petitioner's percentage would be 46.260% and not the 47.366% erroneously declared.*

*11. The percentage attributed to all but one of the other candidates by Mrs. Jean Adukwei Mensa were also incorrect."*

**41)** One would have thought that for such serious allegations petitioner would adduce cogent evidence to establish same, rather unsurprisingly, these allegations were repeated verbatim in paragraphs 8,9,10 and 11 of the witness statement of petitioner's first Witness, Mr. Johnson Asiedu Nketia (PW1).

**42)** 1st respondent addressed the above allegations in Paragraphs 20 -22 of its amended answer to the petition as follows:

*"20. 1st respondent admits paragraph 5 of the Petition, only to the extent that it declared results at a press conference on 9th December 2020, and that it declared that the winner of the 7th December 2020 presidential election was Nana Addo Dankwa Akufo-Addo, 2nd respondent herein.*

*21. 1st respondent in further answer to paragraphs 5, 6 and 7 of the Petition, admits that in reading out results on 9th December 2020, its Chairperson inadvertently read out the figure representing the* ***total number of votes****, as the figure representing the* ***total number of valid votes*** *and the percentage of 2nd respondents as 51.59% instead of 51.295%.*

*22. 1st respondent states that on the 10th December 2020, it made a correction and clarification of the results declared on the 9th December 2020 through a press release, but adds that, that correction and clarification did not affect the overall results as declared and captured on the Form 13."*

**43)** 2nd respondent also responded to petitioner's aforementioned allegations in paragraphs 12-15 of his answer to the petition as follows:

> *"12. In specific answer to paragraphs 6,7,8,9 and 10 of the Petition, 2nd Respondent says that Petitioner has no reasonable cause of action based on the statement annexed by Petitioner as Exhibit "A", as same is not an instrument made by 1st Respondent under article 63(9) of the Constitution.*
>
> *13. 2nd Respondent adds that corrections of the errors by 1stRespondent in its statement on 9th December 2020, annexed by Petitioner as Exhibit A, were made within the authority of 1st Respondent and do not infringe any law.*
>
> *14. 2nd Respondent further says that the correction effected by 1st Respondent on 10th December, 2020 provides a proper reckoning of the percentage of votes obtained by 2ndRespondent using the "valid votes cast" rather than "total votes cast" and shows that 2nd Respondent obtained more than 50% of valid votes cast, as required under article 63(3) of the Constitution.*
>
> *15. 2nd Respondent adds that the persistent reliance by Petitioner on errors contained in the 9th December 2020 statement by 1st Respondent further confirms the lack of any cause of action in the Petition*."

**43)** Respectfully, the import of petitioner's assertions is that when all the figures in the 9th December 2020 declaration in favour of each of the 12 Presidential candidates are reduced into their respective percentages, then no candidate obtained more than 50% of the total number of valid votes cast to be deemed elected.

**44)** In petitioner's view, to resolve the above issue therefore, the total valid votes cast and the total valid votes obtained by each candidate, in particular the 2nd Respondent must be ascertained from the data contained in the declaration of 9th December 2020. Strangely, petitioner has refused to produce any contrary data but has rather sought to rely on those of 1st respondent.

**45)** A recording of the declaration has been produced both as an exhibit to the Amended Petition (which clearly sins against the rules of pleading) and an attachment to the witness statement of petitioner's first witness, Mr. Johnson Asiedu Nketiah, marked **EXHIBIT A .** Exhibit A showed the 1st respondent announcing the total valid votes obtained by each Presidential candidate from the 16 regions of the Country without the Presidential Results from the Techiman South Constituency. For ease of reference the candidates and their respective valid votes as declared by 1st respondent on 9th December, 2020, are reproduced below:

| NAME OF CANDIDATE | VOTES OBTAINED |
|---|---|
| Nana Addo Dankwa Akufo-Addo | 6,730,413 |
| John Dramani Mahama | 6,214,889 |
| | |

| | |
|---|---|
| Christian Kwabena Andrews | 105,565 |
| Ivor Kobina Greenstreet | 12,215 |
| Akua Donkor | 5,575 |
| Henry Herbet Lartey | 3,574 |
| Hassan Ayariga | 7,690 |
| Kofi Percival Akpaloo | 7,690 |
| David Apasera | 10,887 |
| Brigitte Dzogbenuku | 6,848 |
| Nana Konadu Agyeman-Rawlings | 6,612 |
| Alfred Kwame Aseidu Walker | 9,703 |
| **AGGREGATE OF VALID VOTES CAST FOR ALL 12 CANDIDATES** | **13,121,111** |

The summation of the total valid votes cast in favour of all the candidates yields 13,121,111 as the total number of valid votes cast.

46) In paragraph 12 of the amended petition, petitioner alleged that:

> *"If the total number of valid votes standing to the names of each of the Presidential Candidates is summed up, this would yield a total number of valid votes cast of 13,121,111, a figure that is completely missing from the purported declaration by Mrs. Jean Adukwei Mensa on 9thDecember 2020 and the purported rectification on 10thDecember 2020."*

47) The above assertion is correct. It must however be noted that a straightforward and simple computation of the valid votes declared in favour of 2nd respondent as a percentage of the total valid votes of 13,121,111 yields a percentage of 51.295%. Consequently, on the data contained in **EXHIBIT A**, 2nd respondent obtained more than 50% of the total valid votes cast as required by Article 63(3) of the Constitution, 1992. This is supported by evidence elicited through cross examination of PW1, Mr. Johnson Asiedu Nketiah on 1/02/21 at page 32 to 33 of the proceedings as follows:

> *Q.**I am saying that from the video attached to your Witness Statement as Exhibit 'A', the total number of valid votes cast in favour of the 2nd respondent is 6,730,413, is that correct?***
>
> *A.I would like to take the question again.*

*Q.I am saying that from the declaration in the video clip that we just saw, which really is the basis of all your case, and you should know what is in it, the total number of valid votes that 2nd respondent obtained is 6,730,413?*

*A.That is correct my Lords.*

*Q.The total number of valid votes that the petitioner obtained from the declaration announcement, your Exhibit 'A', is 6,214,889?*

*A.That is so my Lords.*

*Q.And I am also putting it to you that if you do a sum of all these valid votes…*

*By Court:You asked this question about an hour ago more than once or twice and it has been answered.*

***Q.Can you tell the court what is 6,730,413 as a percentage of 13,121,111?***

***A.My Lords is 51.29453 ad infinitum. So it can be rounded up to 51.295%***

***Q.So 51.295%, not so?***

*A.Yes.*

***Q.What about the petitioner, his total valid votes are 6,214,889. What is this sum as a percentage of 13,121,111?***

***A.It is 47.365569 ad infinitum. So it can be rounded up to 47.366.***

*Q.So you admit that from the Chairperson of 1st respondent's declaration on 9th December, 2nd respondent crossed the more than 50% threshold?*

*A.From the declaration as announced.…*

*Q.From the figures that we just calculated, these figures which were announced, if you do them as a percentage of the actual total valid votes, these are the percentages you get for the petitioner and the 2ndRespondent. That is what I am putting to you?*

***Q.I am saying that from the calculation of the figures of petitioner and 2nd respondent, 2nd respondent clearly crossed more than 50% threshold?***

***A.Well, if the figures are correct, yes.***

***Q.Again, you see that when you calculated the percentage for the 2nd Respondent you came to a figure of 51.295%?***

*A.Yes my Lords.*

*Q.You noticed that when the Chair of the EC was orally proclaiming this, she said 51.592, not so?*

*A.I cannot remember what she actually said. Can we play it back?*

*Q.But you used that argument to arrive at your more than 100%, so you know it?*

*A.I want it played back.*

***EXHIBIT 'A' REPLAYED IN OPEN COURT***

*Q:So you can see from the announcement from the percentage that an obvious error was made by the Chairperson of the 1st respondent. Is that not so?*

*A:My Lords, your question was for me to admit that the 1st respondent announced 51.592 instead of 51.295.*

*Q:It is 51.595.*

*A:It is wrong, she actually mentioned 51.595 not 51.295.*

*Q:So I am saying that from the actual calculation of the percentage which you just did before this court, that was an error. You agree?*

***A:Yes, the percentage announced was an error.***

***Q:But the correct percentage shows that the 2ndRespondent had crossed the 50+ percentage threshold?***

***A:Well, if all the figures are to be believed.***

**48)** Petitioner has made much ado about nothing of the fact that in announcing the total valid votes cast, the Chairperson of 1st respondent stated a wrong figure of 13,434,574 instead of the actual total of 13,121,111. This error and the effect thereof have been resolved by the cross-examination of PW1, supra.

**49)** Further evidence elicited from PW1, Mr. Johnson Asiedu Nketiah by Counsel for 2nd respondent on 01/02/20 at page **22-24** of the proceedings unveils the various admissions in support of accurate computations as presented by 1st and 2nd respondents:

*Q.You also know that if you listen to your Exhibit 'A', that is, the press conference declaring who won the election, if you tabulate the total of all the votes obtained by the 12 candidates, you will get 13,121,111 votes, is that not correct?*

*A.My Lords that figure was nowhere in any declaration.*

***Q.I am saying that if you tabulate the results by each of the 12 candidates and sum them up, you will get a total of 13,121,111, is that not correct?***

***A.My Lords as per the figures released by the Electoral Commission, that is correct.***

***Q.Therefore, that being the case, you are not permitted to use any other number to calculate the percentages?***

***A.My Lords I was not involved in the calculation leading to the declaration.***

***Q.So you admit that it is completely wrong for anybody to use the total votes cast as a basis for determining the percentages of the votes obtained by the different candidates?***

***A.Yes.***

***Q.And anybody who does that his position cannot be accepted anywhere in Ghana?***

***A.Yes my Lords.***

***Q.That is precisely what the petitioner did in his paragraph 16 of his petition, if you can check it and read it out to the court?***

*A.Witness Reads Out*

*Q.And you are saying in paragraph 15 that?*

*A.Witness Reads Out*

***Q.I am putting it to you that the figure 13,434,574 does not represent the total valid votes obtained by the 12 candidates if you do the addition from the declaration in your Exhibit 'A'?***

*A.**My Lords yes, it is not the total valid votes** but we are not claiming that that was the total valid votes, this is a response to the statement made by the 1stRespondent herself as the basis for the declaration of the results before taking into account Techiman South votes. So, we are again judging her by her own Bible.*

*Q.Therefore you cannot use what you know is factually incorrect and not permitted by the rules governing our election as the total valid votes cast, even if the EC made that mistake?*

*A.**My Lords as I sit here I do not know the total valid votes really cast**. All the figures are coming from the 1st respondent and that 1st respondent keep changing those figures.*

*Q.Your answer being the case that the 13,434,574 is not the total valid votes, you have admitted that. I am putting it to you that you cannot use that as a basis, a denominator for checking the percentages, even if it was used by the EC chair to determine the percentages?*

*A.Please come again.*

**50)** It is not in dispute that a summation of the total valid votes announced by the Chairperson of 1st respondent as having been obtained by the 12 candidates yields a total of 13,121,111. Apart from the fact that this figure is incontrovertible, petitioner failed and/or refused to provide any contrary evidence that would establish or at least suggest that the valid votes declared for the 12 candidates were erroneous. Petitioner failed to do so in spite of the fact that all of petitioner's witnesses admitted that their agents across all the polling stations had been furnished with carbonized copies of the results

collated from the polling stations, the constituency collation centres, the regional collation centres and the national collation centre.

**51)** The above is supported by further evidence elicited by counsel for 2nd respondent through further cross examination of PW1 on 1st February 2021 from pages **17-21** of the proceedings as follows:

> ***Q.I believe that you had admitted during cross-examination on Friday that you had trained agents at all the various polling stations and constituency collation centers and the regional collation centers?***
>
> ***A.That is correct.***
>
> ***Q.They are all entitled to carbon copies of all the official election documents of the results?***
>
> ***A.Yes my Lords, they are entitled but in some cases they were denied.***
>
> ***Q.You know that you have not stated this important factor in your Witness Statement?***
>
> ***A.Yes I have not mentioned****.*
>
> *Q.And the petitioner also has not mentioned it in his petition?*
>
> *A.My Lords, we indicated that that was what it ought to be but as to whether what ought to be was what happened was another matter. I indicated it clearly in my…….*
>
> ***Q.I am saying that if you look at the petition, nowhere does the petitioner say what you are alleging?***
>
> ***A.Yes, but I said it in response to an answer last Friday.***

***Q.I am putting it to you that the only evidence of election results that you have attached is your Exhibit 'A' the Declaration Form, Exhibit 'B' the Press Release, Exhibit 'C' the 11 Constituency Summary Sheet, Exhibit 'D' the Summary Sheet of Eastern Region, Exhibit 'E' the 275 Constituency Summary Sheet which you described as the spreadsheet of the constituency summary sheet released by 1stRespondent on its website?***

***A.Yes my Lords, <u>I indicated that we chose to rely on the 1st Respondent's own figures thereby judging them by their own Bible</u>.***

*Q.It means that you accept the information in those documents of the 1st Respondent?*

*A:The information suggests ...*

***Q.No, no, no. I have asked you a simple question. You are saying that you accept the information in those documents as the document of the election?***

***A.As per 1st Respondent account.***

*By Court:Do you accept or not, that is the question you are being asked.*

*A.I have been advised by my lawyers that that is the information. No matter how flawed it is.*

*Q.We are not talking about what your lawyers advise you on, we are talking about you?*

*A.My Lords because we disagree with the data, that is why we are here.*

*Q.But you are using the same data in support of your claim?*

*A.The data must be internally consistent such that the declaration must be seen to the product of aggregation of the data. And we are entitled as a participating party* ***to look at the data available to us from which the 1st Respondent drew her conclusion****. We are saying that the data they have submitted does not support the conclusions that have been drawn and that is why we are here.*

*Q.You have not provided any document of your own showing that neither party won the elections?*

*A.My Lords the information we are working with is the results that has been declared by …*

*Q.I am saying that as a matter of fact that you, the General Secretary, who was directing and coordinating the presidential election, you have not produced a single piece of independent evidence supporting your claim that neither party won the election?*

*A.My Lords I need to understand what independent means so that I can proceed to answer the question.*

***Q.As you know, all the documents that the EC was using to collate the results from the Polling Station right up to the Regional Centre, you had carbon copies of them, didn't you?***

***A.Yes we do.***

***Q.And I am saying that you have not put together your carbon copies to show that indeed nobody won the elections?***

***A.Yes my Lords because that is not the purpose of our petition. We did not come to court to take over the work of the Electoral Commission****. But we are entitled if we see the results are flawed, they are not borne out of the data, we are entitled to challenge and insist that*

*we must have a credible results and a declaration that is based on the votes that were cast at the polling stations.*

***Q.I am saying that you have not provided any basis of your own for your call for a runoff?***

***A.No my Lords, we have not brought that data here, we did not consider it necessary to bring any such data here.***

*Q.Do you know why you have not brought any such document; it is because all the authentic documents on the election that you have show that the 2nd respondent had won the election, so you cannot bring it out?*

*A.That is not so my Lords because we produced documents that will support the case we brought to this court. And if the case we have brought to this court is not about coming to re-tabulate figures the way NPP chose to do in 2013, we do not need to bring those figures here. We are judging the 1stRespondent by her own Bible, the figures that she claimed were the figures that were generated and the conclusions that were drawn. We are saying that the conclusions are not borne out of the figures that she herself has presented.*

**52**) Your lordships will note from the answers of this witness that on the one hand he says that he is not in court to challenge the results of the election and they did not come to court to take over the functions of 1st respondent; when pressed to produce his carbon copies of the results, he says they are simply holding the chair of 1st respondent to account. On the other hand, when asked whether he accepts the actual figures declared by the 1st respondent, on occasion he says they are entitled as a participating party "***to look***

***at the data available to us from which the 1st Respondent drew her conclusion, thereby suggesting that they are using their carbon copies of the election results to verify the results declared by the EC; and yet on other occasions, they chose to rely on the 1st Respondent's own figures thereby judging them by their own Bible."***

My lords, this is clearly an evasive witness to whom truth is anathema. Nevertheless, he admitted under cross-examination that the total number of valid votes declared by EC in favour of 2nd respondent was more than 50% of the 13,121, 111, and that the total number of valid votes cast for 2nd respondent as a percentage of total number of valid votes cast was 51.295%, thereby meeting the constitutional threshold 63 (3).

What is even more significant, is that the witness' duplicity and evasiveness, he was forced to admit the obvious during cross-examination by Counsel for 2nd respondent at pages 24 and 25 of the record of proceedings of 01/02/21 thus:

At page 23:

*Q; So you admit that it is completely wrong for anybody to use the total votes cast as a basis for determining the percentage of votes obtained by different candidates?*

*A: Yes,*

*Q: Anybody who does that, he cannot be accepted anywhere in Ghana.*

*A: Yes, my lord.*

*Q: That is precisely what the petitioner did in his paragraph 16, if you can check it and read out to the court.*

*A: Witness reads out*

…….

……..

represent the total valid votes obtained by the 12 candidates if you do the addition from the declaration in your Exhibit "Exhibit A".

*A: My lord yes it is not the total valid votes but we are not claiming that that was the total valid votes; this is a response to the statement made by 1st respondent herself as the basis for the declaration of the results before taking into account Techiman South votes, So we are her by her own Bible.*

At page 25 the following cross-examination ensued:

*Q: I am putting it to you that you used this erroneous figure as a basis for calling for your re-run?*

*A: The question again, I want to get the question again so I can answer*

*Q: You cannot use that wrong figure as a bass for your claim that there should be a rerun between the the 2nd respondent and the petitioner.*

*A: Yes my lord'*

My lord, this answer effectively sounds the death knell into the heart of the petitioner's claim. It is an admission that destroys that empty foundation of the case of the petitioner, affirms the correctness of our preliminary legal objection to the petition as showing no reasonable cause of action.

**53)** Although Mr. Johnson Aside Nketiah, PW1 made a feeble attempt during cross examination to allege that some of their agents were denied some of the carbonized copies, it was a rather belated allegation made on the spur of the moment without any proof and further contradicting the testimony of the other Witnesses of petitioner. The position of the law is clear on repetitive bare assertions. This Court in the case **DZAISU v GHANA BREWERIES LTD. [2007-2008] SCGLR 539** at holding (1) as follows:

> *"It is trite law that a bare assertion by a party of his pleadings in the witness box without proof did not shift the evidential burden onto the other party. Furthermore … it is an art of cross-examination for a counsel to know when it is wise to be terse in cross-examination so that the person being cross-examined is not given the chance to fill in the "pot holes" in the evidence he/she gave during examination in chief."*

It has also been held in **AKUFO-ADDO V CATHLINE [1992] 1 GLR 377 at page 400** that:

> *"I have searched the record of proceedings and I have found no evidence, of course, apart from the evidence of the alleged admission by him which we know is any evidence, to support the plaintiff's claim. I am not prepared to make any speculation in the plaintiff's favour. No court is permitted by the rules of evidence to speculate the existence of a state of fact or facts in favour of a party who has the burden to prove same. If a court is tempted to undertake such a benevolent venture on behalf of a party who has the burden of proof, then it must ponder and reflect, as*

*the likelihood is that the burden has not been discharged by the said party."*

**54)** The bottom line is that apart from reproducing the figures declared by the chairperson of the 1st Respondent and making fanciful analogies based on her innocuous errors, Petitioner failed to provide his own data or any independently attained figures to controvert what was declared as the valid votes obtained by each of the 12 candidates in the 7th December 2020 Presidential Elections. So glaring was this omission on the part of the Petitioner that after an exhaustive cross examination of Petitioner's First Witness by counsel for the 2nd respondent, the Court was compelled to enquire further at pages **71-72** of the proceedings as follows:

*By Court:So they gave it to you and you exhibited it as part of your evidence?*

*Counsel for Petitioner: No my Lords, respectfully he did not exhibit it. That document was attached as part of the petition.*

*By Court: He exhibited it to his Witness Statement as Exhibit 'F' and he brought it to us.*

*By Court:So it means your Election Directorate generated it, gave it to you and you exhibited it without seeing it?*

*Witness:I read all the hard copies of the document because of the time pressure. I was discovering this thing today that is why I indicated that I have not seen it.*

*By Court:Then I want to be very clear on these issues too. In all the figures that were mentioned as the valid votes cast and all those things,*

*you were saying if the figures were correct and that there were inconsistencies in the figures. In your own calculations what were the total valid votes cast in the presidential election on 7th December 2020?*

*Witness:My Lords those calculations are reserved for a meeting for us to reconcile the figures because the 1st respondent herself kept changing the figures.*

*By Court:Mr. Asiedu Nketiah, help the court. When you started giving evidence, you said you had representatives across the 275 constituencies. You said you put agents and they were to collate the figures. Then he is asking you that from that, what figure did you get, you?*

*WitnessMy Lords I have not brought that figure to court*

*By Court:Then from your own calculations what were the valid votes cast in favour of the petitioner, to your knowledge?*

*Witness:When we discovered this discrepancy, it was difficult to even know which figures are correct.*

*By Court:You do not know?*

*Witness:I do not have them here.*

*By Court: What figures from your own calculations, did the 2nd respondent get as the total valid votes cast in his favour?*

*Witness: My Lords I do not have those figures here.*

55) My Lords, it is a matter of notorious public record that consistent with the requirements of article 69(3) of the Constitution, 1992, 1st respondent duly issued and executed an Instrument referred to as Presidential Declaration of Results Instrument, CI 135. The

legal essence and consequence of the said instrument was vividly expressed by Atuguba JSC in the *Akufo-Addo* case @ pages **123-124** of the Special Report as follows:

"*It is said that election petitions are peculiar in character hence the question of burden of proof has evoked various judicial opinions in the common law world. However, upon full reflection on the matter I have taken the position that the provisions of the Evidence Act, 1975 (N.R.C.D 323) with the appropriate modifications, where necessary, suffice.*

***Presumptive effect of the Instrument of Declaration of Presidential Results***

*Article 63(9) of the Constitution provides thus:*

*"(9)An instrument which,*

*(a) is executed under the hand of the Chairman of the Electoral Commission and under the seal of the Commission; and*

*(b) states that person named in the instrument was declared elected as the President of Ghana at the election of the President, shall be prima facie evidence that the person named was so elected."*

*This means that unless the contrary is proved the president is presumed to haven been validly elected. The legal effect of this is governed by ss. 18-21 of Evidence Act, 1975 (NRCD 323). On the facts of this case the relevant provision are sections 20 and 21 (a), this not being a jury trial. The cardinal question therefore is whether the petitioners have been*

*able to rebut the presumption of validity created by the presidential Declaration of Results Instrument.*

It is therefore our firm position that petitioner has woefully failed to plead relevant facts and lead cogent evidence to, inter alia, rebut this very crucial presumption. He must therefore fail on this issue and it must be resolved against him.

**ISSUE (3): WHETHER OR NOT THE 2ND RESPONDENT STILL MET THE ARTICLE 63 (3) OF THE 1992 CONSTITUTION THRESHOLD BY THE EXCLUSION OR INCLUSION OF THE TECHIMAN SOUTH CONSTITUENCY PRESIDENTIAL ELECTION RESULTS.**

**56)** In declaring the 7th December 2020 Presidential Elections in favour of 2nd respondent, Exhibit A attached to the witness statement of PW1 and played to the Court shows that the results of the Techiman South Constituency was not included in the 1st respondent's declaration of 9th December 2020 as stated at paragraph 14 of his witness statement:

"*14. I say further that the declaration on 9th December, 2020 was made without the results from the Techiman South Constituency which had a total of 128,018 registered voters. This declaration was made on the basis that even if the total votes in the said Constituency being 128,018 were allocated to the Candidate with the second highest votes (the petitioner), it would not change the more than 50% of the Valid Votes obtained by the 2nd respondent. The 2nd respondent under these circumstances would have obtained 50.799 of the Valid Votes*".

**57)** On the above admission therefore, the issue 3 can be broken down into two parts. The first part deals with whether the 2nd respondent still met the Article 63(3) requirement by the exclusion of the Techiman South Constituency Presidential Election Results would be answered in the affirmative as declared by the Chairperson of 1st respondent Commission. We have already addressed the first part in the immediately preceding paragraphs. On the other hand, to answer the question whether 2nd respondent still met the Article 63(3) requirement by the inclusion of the Techiman South Constituency Presidential Election Results would require mathematical computations. This was revealed through Cross-Examination of PW1, Mr. Johnson Asiedu Nketia by counsel for 2nd respondent at pages **37-40** of the record of proceedings dated **01/02/21**. The evidence is as follows:

*Q:You noticed that these figures on your Exhibit "B" (the 10th December 2020 Press release) do not contain the Techiman South figures. Not so?*

*A:Yes, my Lords.*

*Q:So what the Chairperson of 1st Respondent said on 9th December, 2020 was that "if you were to add the whole registered voter population of Techiman South to your Petitioner's total valid votes, will still not make a difference to as in who has crossed the threshold. Is that not so?*

*A: Yes my Lords.*

*Q: Is that not correct?*

*A: She said so.*

*Q: But is that calculation not correct?*

*A: Not until I recalculate.*

*Q:I will take you through. You are invited to add the total register voter population of Techiman South, which is 128,018 to the 13,119,460?*

*A: My Lords, when you add the population of Techiman South to the 13,119,460, I got the figure 13,247,478.*

*Q:Can you tell the Court what is the percentage of the 2nd Respondent's 6,730,587 of that figure?*

*A:My Lords it comes up to 50.806%*

*Q:If you add the whole of Techiman South votes to the Petitioner's valid votes as at that time. Tell the court how much?*

*A:Petitioners valid votes as per these figures.*

*Q:That is 6,213,000 + 128,018*

*A: 47.867, let me recalculate.*

*Q: 47.867?*

*A: No I am getting another figure; 47.867 I do not know whether that is it. Give me a minute to cross-check something.*

*Q: It is 47.867, not so?*

*A: Yes, my Lords.*

*Q: So you can see that if you add the whole of Techiman South register voter population to the Petitioner's total valid votes and calculated the percentage, you will get 47.867 for the Petitioner?*

*A: If the figures are correct, yes. But the problem is with the changing figures, at every point new figures so we do not know which one you are using.*

*Q: If you go to the 9th December, 2020 declaration and you add the whole register voter population to the total number of valid votes, what total will you have?*

*.....*

*A: You will get 49%.*

*Q: Subsequent to all these things the results of Techiman South were declared. Is that not so?*

*A: Yes, my Lords.*

*Q: And the total number of valid votes cast in Techiman South was known?*

*A: Yes, my Lords.*

There is no doubt my Lords that petitioner has woefully failed to discharge the burden imposed on him by law to establish that if the whole of Techiman South voter population was given to petitioner, 2nd respondent still obtained more than 50% of the number of total valid votes cast. More importantly, My Lords, as has been adequately demonstrated in these proceedings, the valid votes cast in the presidential election of 2020 is now known and indeed, if the various valid votes cast for each of the parties 2nd respondent obtained more than 50% of the total number of valid votes cast and thus met the article 63 (3) threshold.

**ISSUE (4): WHETHER OR NOT THE DECLARATION BY THE 1ST RESPONDENT DATED THE 9TH OF DECEMBER, 2020 OF THE RESULTS OF THE PRESIDENTIAL ELECTION CONDUCTED ON**

**7TH DECEMBER 2020 WAS IN VIOLATION OF ARTICLE 63 (3) OF THE 1992 CONSTITUTION**.

**58)** A violation of Article 63(3) of the 1992 Constitution, would entail a situation where the Chairperson of 1st respondent and Returning Officer of the 7th December 2020 Presidential Election declares a Candidate who stood the election as having been validly elected President when the votes cast in the individual's favour did not exceed 50% of the total valid votes cast. 2nd respondent herein has demonstrated in this petition through cogent testimony elicited through PW1, that this was not indeed the case with respect to the declaration made by the Chairperson of 1st respondent on 9th December 2020.

**59)** The evidence, gathered from petitioner's own PW1, has shown that except for the innocuous errors made in the declaration, the figures on the basis of which the declaration was made, were correct as having been gathered through strict compliance with the electoral laws governing the conduct of the 7thDecember 2020 Presidential Election. Evidence abounds that notwithstanding the innocuous mistake of 1st respondent, the underlying election results are correct. Petitioner has adduced no evidence to establish that indeed *the more than 50% constitutional threshold* was not attained by 2nd respondent. Petitioner rather sought to rely on 2nd respondent's figures as presented and thereby to "**Judge them by their bible**". During cross-examination, this very same witness rather provided testimony that corroborated 2nd respondent's position that not only was *the more than*

*50% threshold* attained but that the accurate representations as corrected by the Chairperson of 1st respondent is exactly what they are.

In **BARCLAYS BANK GHANA LTD v SAKARI [1996-97] SCGLR 639** this Honourable Court held as follows:

> *"We think the principle is well established that where the first defendant witness's evidence on an issue supports that of the plaintiff's, and the defendant's version stands unsupported,* ***the court is bound to accept the corroborated version unless there are compelling reasons to the contrary****."* [Our Emphasis].

In holding (2) of its decision in **ASANTE v. BOGYABI AND OTHERS [1966] GLR 232**, the Supreme Court had the following to say on the inference to be drawn by the Court when the evidence of a party on an issue is corroborated by the opposing party's evidence:

> *"Holding (2)*
>
> ***Where the evidence of one party on an issue in a suit was corroborated by witnesses of his opponent, whilst that of his opponent on the same issue stood uncorroborated even by his own witnesses, a court ought not to accept the uncorroborated version in preference to the corroborated one unless for some good reason (which must appear on the face of the judgment) the court found the corroborated version incredible or impossible****."*

**60)** This position of the law was again cited with approval by the Supreme Court in **AGYEIWAA v P&T CORPORATION [2007-2008] SCGLR 985** where the Court held as follows:

*"Per curiam: … The rule is that where the evidence of an opponent corroborates the evidence of the opposite party, and that opponent's remains uncorroborated, the court is bound to accept the corroborated evidence "unless for some good and apparent reason the court finds the corroborated version incredible, impossible and unacceptable*."

**61)** It therefore goes without saying that, in the absence of any real and convincing testimony from petitioner with respect a violation of Article 63(3) of the Constitution of the Republic of Ghana,1992, and 2nd respondent's evidence elicited during cross-examination of petitioner's stands. The principle that if an election was held at the proper time and place, and under the supervision of competent persons then a complaint of any irregularities which concern merely the form of conducting it will not suffice; it must be shown that legal votes have been rejected, or illegal votes have been received, and that because of the one or the other, or both, the result does not conform to the will of the voters, or uncertainty has been cast upon the result **( PYRON V. JOINER 381 SO 2D 627 (MISS 1980) (EN BANC).**

**62**) My Lords, in respect of elections and mistakes, Baffoe-Bonnie JSC stated @ page **439** of the special report, in the *Akufo-Addo* case, thus:

*"Elections are complex systems designed and run by fallible human beings. Thus, it is not surprising that mistakes, errors, or some other imperfection occur during an election. Because absolute electoral perfection is unlikely and because finality and stability are important values, not every error, imperfection, or combination of problems found in an election contest, voids the election or changes its outcome……."*.

**63)** My Lords, at page 133 of the special report in the *Akufo-Addo* case, Atuguba JSC underscored the right of a defaulting electoral officer to administratively correct an error that arises in the declaration of the results of an action thus;

*"The certification of the results by the polling agents as required by article 49(3) of the 1992 Constitution, without any complaint at the polling station or by evidence before this Court shows that certain recordings on the pink sheets should not readily be taken as detracting from the soundness of the results declared but rather* ***point to the direction of administrative errors which, at the worst, as demonstrated (supra), can be corrected by the defaulting officials****."*

**64**) At page 137, His Lordship continued thus;

*"The administrative error of the presiding officers in not signing the pink sheets was not only properly corrected at the collation centres in some instances but can still be corrected by order of this Court by way of relief against administrative lapses under article 23 of the Constitution or pursuant to section 22 of the Interpretation Act, 2009 (Act 792), which provides thus:*

*"22(1) Where an enactment confers a power or imposes a duty on a person to do an act or a thing of an administrative or executive character or to make an appointment, the power or duty may be exercised or performed in order to correct an error or omission."*

The 1st respondent was thus entitled to administratively correct the innocuous mistakes in the Declaration of the Presidential elections on 9th December 2020. There was nothing unconstitutional about her correction.

Her Ladyship Adinyira JSC at page 237 of the special report in the *Akufo-Addo* case on compliance issues in elections stated thus;

> *"I find these authorities persuasive. Compliance failures do not automatically void an election; unless explicit statutory language specifies the election is voided because of the failure. There is no such explicit language in article 49 of the Constitution or the Public Elections Regulations, 2012 (CI 75). In election jurisprudence, as in Canada, when election officials fail to comply with election codes, the statutes are evaluated ad directory unless the officials committed fraud, the statute expressly declares non-compliance fatal, or the non- compliance changed or muddied the result."*

Her Ladyship's reference to Canada led her to rely heavily on the now famous case of ***Opitz*** *v.* ***Wrzensnewskyj*** 2012 SCC 55-2012-10- in which the Court said as follows:

> "***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." (Rothsterin and Moldaver JJ)."*

***Woodward** v **Sarsons*** (1875) 32L.T(N.s.) 867 @ pp.870-871 also illuminates the true position of the law on errors, mishaps, infractions and the like and the duty of the court in such situations thus:

> ***"if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reason to believe that a majority might have been prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament."***

My Lords, the Chairperson of the 1st respondent was therefore entitled to correct the innocuous mistakes she made and that did not change the outcome of the elections for same to be unconstitutional. My Lords respectfully, may we add that the 7th December 2020 presidential elections having been duly conducted in accordance with the relevant laws, any issue with the error in the declaration in and of itself cannot suffice the conclusion of a constitutional violation as envisaged under Article 63(3) of the Constitution of the Republic of Ghana 1992.

We therefore humbly pray your Lordships that like the issues 1 to 3, the petition must fail on issue 4 also.

**ISSUE (5): WHETHER OR NOT THE ALLEGED VOTE PADDING AND OTHER ERRORS COMPLAINED OF BY THE PETITIONER AFFECTED THE OUTCOME OF THE PRESIDENTIAL ELECTION RESULTS OF 2020.**

**65)** Petitioner alleges vote padding by 1st respondent in favour of 2nd respondent. This is what he says at paragraph 32 of his amended petition:

> *"32. Exhibit "F" is a spreadsheet covering sample results from 32 constituencies showing vote padding by 1st respondent in favour of 2nd respondent. When the votes 2nd respondent obtained in all polling stations as shown on their respective pink sheets in these 32 constituencies are aggregated, the resultant figure differs from the figure that was declared by 1st respondent for 2nd respondent as captured on the summary sheets of the respective constituencies. They show that more votes were added to those of 2nd respondent than he had obtained."*

**66)** In the witness statement of PW1, Mr. Johnson Asiedu Nketia, he repeated the above allegation, adducing no documentary evidence except the reproduction of Exhibit F. The Exhibit F attached to Mr. Nketia's witness statement related to 26 constituencies. He said in paragraph 36 of his witness statement thus:

> *"36. Exhibit "F" is a spreadsheet covering sample details from 26 constituencies showing vote padding by certain officials of 1st respondent in favour of 2nd respondent. When the votes 2nd respondent obtained in all polling stations as shown on their respective pink sheets in these 26 constituencies are aggregated, the resultant figure differs*

*from the figure that was declared by 1st respondent for 2nd respondent as captured on the summary sheets of the respective constituencies. They show that more votes were added to those of 2nd respondent than he had, in fact, obtained.*

*37. This conduct of certain officials of 1st respondent in padding the votes of 2nd respondent, is in fact, indicative of a well-hatched and sustained pattern of manufacturing numbers, unrelated to the actual votes collated at the various collation centres, with the sole aim of achieving the pre-determined goal of the Chairperson of the 1st respondent, and a number of officials of the 1st respondent, to have 2nd Respondent unconstitutionally and unlawfully installed as President of Ghana."*

**67)** 2nd respondent's answer to the above allegations in his amended answer is as follows:

"*33. 2nd respondent denies paragraphs 3, 32, 33, 34 and 35 of the Petition, puts petitioner to strict proof thereof and says that, on the face of petitioner's own "EXHIBIT E", the difference between the National Democratic Congress (NDC)'s calculation and 1st respondent's calculation, as per the allegation of "wrong aggregation" of votes, is a paltry 960 votes. A careful scrutiny of the petitioner's Exhibit E shows that the 960 votes was not credited to any of the candidates in the election and thus, did not affect the results of the election."* In any event Exhibit E was struck out by this Court in its ruling of …….

*34. 2nd Respondent states that the total number of votes involved in Petitioner's wild claim of "vote padding" in Exhibit F is a negligible 5662 votes."*

**68) It is to be noted that** from the evidence elicited from PW1 by Counsel for 2nd respondent on 01/02/21 that the discrepancies in the alleged number of padded votes had been reduced from 5,662 to. 4693. The fact that the alleged vote padding was not only in respect of 2nd respondent but also petitioner; and finally that should these alleged padded votes be established as actual padded votes, their exclusion from the total number of valid votes cast in favour of 2nd respondent does not affect the result of the declaration as was made by the Chairperson of 1st respondent on 09/12/20. The proceedings may be found at pages **56–62** of 01/02/20 of show as follows:

*Q:In your Exhibit "F" you claimed that there has been voter padding in the total sum of 4,693. Not so?*
*A:My Lord, that is not our claim, our claim is that there has been voter padding and we have samples to show that there was voter padding and that was what we demonstrated.*
*By Court:Please, please respond to the question and then you can add.*
*A:The figure stated there is the total number of votes that were padded.*
*Q:So I am saying that in respect of your allegation of padding, the only document before this Court is your Exhibit "F". Is that correct?*
*A:That is correct.*

*Q:And I am saying that if you go to Exhibit "F", you will discover that the total figure that you alleged were padded is 4,693. That is what I am saying.*

*A:That is not correct, we said that is a sample, so the totals in the sample is what we have mentioned.*

*By Court:Please he is referring you to the Exhibit before the Court, so respond to it.*

*A:The Exhibit was attached to a Witness Statement and the purpose of the Exhibit was clearly stated in the Witness Statement.*

*Q:The figure that we have here is 4,693?*

*A:Yes, my Lords.*

*Q:So when you attached this figure, did you do it with the consent of the Petitioner?*

*A:My Lords, I was to testify about matters in my personal knowledge.*

*Q:But you said here that you have come to support the case of the Petitioner. Is that not so?*

*A:That is so.*

*Q:So my question is, it is the case of the Petitioner that 4,693 votes were padded. Is that what the Petitioner said in his petition?*

*A:The Petitioner said it was a sample.*

*Counsel for 2nd Respondent:No, no, please answer my question.*

*By Court:Please let him answer the question, and if the answers appear not to satisfy the Court, the Court will certainly raise issues. So you let him answer.*

*Counsel for Petitioner:It is the case of the Petitioner that so and so, and he started with an answer, so he should be allowed to answer.*

*Q:Your Petitioner mentioned a figure in his petition. Is that not so?*

*A:My Lords, the figure mentioned by the Petitioner as vote padding is a sample and the vote padding is to demonstrate that indeed there was a widespread of vote padding.*

*Q:What was that figure?*

*A:I see 5,662.*

*Q:So when you stated in your Witness Statement a lesser figure, was it with the consent of the Petitioner?*

*A:Yes, my Lords, because each of the two figures are mere sample just to demonstrate a fact that is not supposed to be any absolute figure, so some samples could be selected, under time pressure if you look at the Petition and my Witness Statement where we were talking about the samples of constituencies or so, the Petition mentioned 31 or so constituencies but we ended up bringing the samples of 26 constituencies, because of the time pressure that we needed to submit our Witness Statement. But since they were all samples it did not matter to us very much.*

*Q:If you were to claim that there was vote padding in favour of the 2nd Respondent and the figure that you have supplied is 4,693, you will see that the Petitioner himself attached documents claiming that the vote padding was in the figure of over 5,600,062 in Exhibit 'F'. Do you agree?*

*By Court:We have passed that.*

*Q:I am putting it to you that the reason why you have revised that figure from the 32 constituencies to 26 is that you have realized that those other consistencies the figures were in your favour (the so-called vote padding), so when you were filing your Witness Statement you took them out?*

*A:I disagree my Lords.*

*Q:You will see that your Exhibit "F" has a pen drive copy, not so?*

*A:Yes, my Lords, I have seen it.*

*Q:You will see that in that pen drive copy which we will ask the court to play, you will see that there are columns where you indicated padding for NDC that is not shown on the hardcopy. But in the pen drive that gives us a fuller picture, there are other columns where you indicated padding for NDC and there are other columns you indicated that padding for NDC and NPP and other columns you indicated padding for NPP, is that correct?*

*A:That will go to the heart of the credibility of the figures as declared by the respondent. The question again.*

*Q:I am saying that the pen drive information is different from the hardcopy you have attached. Is that correct?*

*A:A pen drive attached to the Petition?*

*Counsel for 2nd Respondent:Yes, Exhibit "F" of your Witness Statement of which you created a hardcopy. You will notice that what is in the pen drive is not fully what you have here as Exhibit "F" the hardcopy?*

*A:The hardcopy of Exhibit "F" and the pen drive?*

*Counsel for 2nd Respondent:Yes.*

*A:I have not discovered any such discrepancy.*

*Q:Have you looked at the pen drive?*

*A:Myself?*

*Counsel for 2nd Respondent:Yes, you.*

*A:I looked at the hardcopy.*

*Q:Have you looked at the pen drive? Don't answer questions you have not been asked.*

*A:No I have not looked at the pen drive.*

*Q:You haven't looked at the pen drive?*

*A:No I haven't.*

*Counsel for 2nd Respondent:Good. My Lords if it is possible for us to show it to the Witness.*

*By Court:Can the document be expanded? Mr. Akoto Ampaw the document has been opened to the Witness.*

*Q:If you go to Ashanti Akyem North that is the fourth entry, you will see by it padded both.*

*By Court:Mr. Akoto Ampaw how be when we looked at it we couldn't find it. There is nothing.*

*Counsel for 2nd Respondent:Mr. Technician the name of the folder is padded.*

*Q:I am putting it to you that in Ashanti Akyem North, your own document admits that it is padded on both sides?*

*A:My Lords, I can't see what he wants us to read where it is indicated that it is padded for both sides and all that.*

*Counsel for 2nd Respondent:My Lords, is it possible to get someone to assist the technician because he is to open the folder and he is not able to do so. Because this is their Exhibit, it is not ours. And we are saying that when we opened it, we noticed these observations.*

*By Court:Those observations that you saw are not appearing here, is that not what you are saying?*

*Counsel for 2nd Respondent:Yes, my Lords, because they have not yet opened the folder correctly, that is the point we are making. My lords, that folder is named 26 Constituencies.*

*By Court: Mr. Akoto Ampaw which file should he open within the folder called 26 Constituencies, within it are several files, which file do you want him to open?*

*Counsel for 2nd Respondent: We will like him to open the 26 Constituencies folder.*

*By Court: And all the files in there will just reflect as files?*

*Counsel for 2nd Respondent: We believe so.*

*Counsel for 1st Respondent: Your Lordships, the particular folder with the sub-title padded, there are about 26 constituencies with names in there, for example at the top Ablekuma West it is written padded beside it, Efigya KwabreSouth - padded, Ashanti Akyem North - padded both, Nwabiagya North padded, Ayawaso East – padded, Ayawaso North both – padded, Cape-Coast North – padded, Ejisu – padded, etc.*

**69)** Further cross examination by counsel for 2nd respondent elicited further admissions from PW1 at pages **62-67** of the proceedings of 1st February, 2021 as follows:

*Q.The pen drive that you have attached as Exhibit 'F', there are certain constituencies that you simply say vote padded and there you mean padded in favour of NPP but there are some constituencies where you say both padded. You mean both padded for NDC and NPP?*

*A.My Lords as I indicated, this is my first time of seeing this*

*Q.But it is your evidence?*

*A.There is a hard copy and there is this electronic copy and I was frank to tell the Court I have not seen it. And you are showing it and I do not see any padded NDC or NPP on the screen.*

*Q.I am putting it to you in the exhibit you have these markings padded, both padded, padded for NDC and NPP?*

*A.Well you have seen. So I am unable to admit or deny because I honestly told you that the electronic copy, I have not seen it and that is the reason why it was displayed and from where I sit, I do not see padded for NDC or padded for NPP on the screen.*

*Q.I am putting it to you that these so-called padding and non-padding or both padding occurred at different constituencies, you agree?*

*A.Well, if you say so my Lords.*

*Q.I am putting it to you that it could not have been a grand plan of the EC to pad for both NDC and NPP?*

*A.I disagree.*

*Q.You think they were padded for both?*

*A.My Lords if I may elaborate further. If 10,000 votes are added to one tally or the tally of one person and 200 is added to the tally of another candidate to create the false impression that the two candidate's tallies have been padded, but the impact is completely different. So if we talk about padding in favour of a candidate, that is precisely what will happen. And so the fact that on the face of the numbers, it could happen that in one party strong hold, if there is a grand plan to pad for its opponent, it could artificially add some votes to the tally in his stronghold and add more votes to the opponent and it would create the desired impact that they intend to achieve. So padding cannot be established nearly by comparison of those total figures at the end. If in*

*the Ashanti Region the NPP leads by one million votes, and you add five hundred thousand votes to NDC's tally, NPP will still be in the lead but then you have reduced the impact of that lead by adding votes. So once you see that the figures are not reconciling, then we go back to the table and then look at what is wrong together.*

*Q.The figures that are played are only 4,693. I am putting it to you that if you were to deduct the 4,693 alleged padded votes from the 2nd Respondent's votes as declared on 9th December, that is 6,730 413, you will get 6,725,720?*

*A.My Lords that is so but that arithmetic is meaningless.*

*Q.And if you calculate 6,725,720 as a percentage of 13,121,111, you will get a percentage of 51.259. I am putting it to you?*

*A.My Lords arithmetically correct but it is meaningless.*

*Q.What is 6,725,720 as a percentage of 13,121,111 which was the number declared for 2nd Respondent on 9th December 2020?*

*A.My Lords I would like to hear the figures again and do the calculation.*

*Q.The original figure is 6,730,413 subtract from that the 4,693, what do you get?*

*A.You get 6,725,720.*

*Q.What is that figure as a percentage of 13,121,111?*

*A.51,259%*

*Q.So you see, that even if you were to deduct your alleged padded votes from the vote of the 2ndRespondent, he still crosses the 50+ threshold?*

*A.I disagree because samples cannot be subtracted from another population figure.*

*Q.On 10th December in the press release the total valid votes obtained by the 12 candidates is 13,119,460, that is correct?*

*A.Yes.*

*Q.If you subtract 4,693 from the total votes obtained by 2nd Respondent that is on 10th December which is 6,730,587, you get 6,725,894?*

*A.You get 6,725,894.*

*Q.What is 6,725,894 as a percentage of 13,119,460?*

*A.51.287%.*

*Q.So there again, 2nd Respondent crosses the critical threshold?*

*A.I cannot tell my Lords.*

*Q.If you add the total of Techiman South total population to the valid votes of 13,119,468, that is if you add 128,028*

*By Court:Mr. Akoto Ampaw, I thought you had left Techiman South long ago and you are taking us back.*

*Counsel for 2nd Respondent:Yes my Lords there are different stages and I am demonstrating that even when you take out this alleged figure….*

*Q.I am putting it to that when you withdraw or subtract the 4,693 from the total valid votes obtained by 2nd Respondent whether as announced in the declaration on 9th December or in the press release of 10th December or when you add the total, in all these occasions, the 2nd Respondent still obtained over 50% plus?*

70) With respect, petitioner and PW1 have no proof of the alleged vote padding beyond their say so. This is because the impugned additional votes attributed to both parties could very well have

been a result of arithmetical errors in the summation of votes in the affected constituency.

Other complaints of errors/irregularities and arbitrariness and lack of transparency raised in the petition relate to complaints in respect of two summary of sheet from Eastern Region, one signed by the agents of the petitioner, 2nd respondents and of other candidates, another signed by agents of 2nd respondent and other candidates, but not the agent of petitioner, the one with the blue ink.

71) During cross-examination of Mr. Nketia by Counsel for 1st respondent at pages 15 to 17 of the record of proceeding of 29/01/21 explained thoroughly how the difference in figures between the two Eastern Region Summary sheets occurred.

Mr. Nketia admitted at page 16 thus:

> *A:I've done the additions and I have realized that the totals of both are the same figures but the the figures that add up to the totals are different and the one marked blue is actual accurate.*

Counsel proceeded to demonstrate how when one deducts the sum of the votes on the summary sheet signed by petitioner's agent from the sum of votes on the summary sheet without the signature of the agent of petitioner, the remaining votes are 40,189, and that this number of votes corresponds exactly to the total number of valid votes cast at Ayensuano which was not accounted for in the summary sheet signed by petitioner's agent.

72) There was also the issue of a letter dated 9th December, 2020, written on behalf of the General secretary of NDC to the Chair of the EC.,

complaining about the two regional summary sheets from Eastern Region and allegations of massive differences some in tens thousands more between the votes of 2nd respondent and those of NPP parliamentary candidates in some constituencies in Ashanti.

The first matter to note is that the allegation in respect of Ashanti region was never part of the petition when subsequently filed on 30th December over three weeks after the purported letter or after the witness statements were filed in February, 2021. Thirdly the 1st respondent through its chairperson has denied receiving any such letter Exhibit "D" through any official of the 1st respondent.

73) There were also allegations of arbitrariness and lack of transparency in the National Collation Centre. The evidence, my lords, on these allegations are of little probative value and we will respectfully invite this Honourable Court to ignore it as such. They center around the alleged experiences of Dr. Kpessa-Whyte and Mr. Mettle-Nunoo in the National Collation Centre (strong room). Mr. Mettle-Nunoo, for example, stated in paragraph 14 of his witness statement that at the time Kpessa-Whyte and he were leaving the National Collation Centre on their purported mission to see the petitioner Bono East regional summary sheet was yet to arrive. During cross examination, by Counsel for 1st respondent on 08/02/21 at page 56 of the record of proceeding however, Mettle Nunoo said that all the 16 regional summary sheets had arrived and he had signed 12 of them before he left on his mission to see the petitioner.

74) My lords, the story of Kpessa White PW2 about how they were instructed by the EC Chair to send a message to the petitioner is too incredible to be true. As we now know, this was the period when all the regional summary sheets had arrived. From Mettle Nunoo witness statement, specially paragraphs 9, 10 and 17, it seemed they would leave the National Collation Centre to consult with the petitioner over a matter that was too important to make a call on at that critical time in the Collation Centre. What was this message that necessitated the two of them abandoning the strong room at that critical time? Why could Mettle-Nunoo, whose mobile phone was functioning at the time, not have used it to communicate with petitioner in the midst of the alleged irregularities?. Eventually, when Mettle-Nunoo was asked during cross-examination on 08/02/21 @ page 46 of the record of proceedings the untruth stood exposed:

*Q: Now just for the education of the Court and myself, what exactly was the information you were taking to former president Mahahma, the petitioner? The substantive information you were taking?*

*A: The specific message?*

*Q: Mr. Mettle-Nunoo, I am not saying what message someone gave you. I'm saying what was information that you were going to give the petitioner on that day?*

*A: The information I was going to give related to the anomalies that we had detected in the processing of summary sheets from the regions and how the collation process was taking place in the strong room. Anomalies in strong room, anomalies in total.*

My lords, we submit it is a fare inference to make that what actually happened was that when Mettle-Nunoo and Kpessa-Whyte saw from the results that their candidate the petitioner had lost the election, they left the battleground,

75) It is of utmost importance to emphasise the clear position of the law that where a person makes allegation against another before a court of law he is duty-bound to specifically prove those allegations as re-echoed in the famous case of ***Okudzeto Ablakwa (No. 2) vs. Attorney General & Another*** **[2012] 2 SCGLR 845 @ 867** where Brobbey JSC had this to say:

> "*If a person goes to court to make an allegation, the onus is on him to lead evidence to prove that allegation, unless the allegation is admitted. If he fails to do that, the ruling on that allegation will go against him. Stated more explicitly, a party cannot win a case in court if the case is based on an allegation which he fails to prove or establish. This rule is further buttressed by section 17 (b) which, emphasizes on the party on whom lies the duty to start leading evidence…*"

We humbly urge My Lords to resolve issue 5, against petitioner as he has clearly failed to discharge the heavy burden imposed on him to lead cogent evidence to prove his allegations that there were some instances of vote padding and other errors in the course of the conduct of the 2020 presidential election.

## THE ELECTORAL COMMISSION (1ST RESPONDENT)

76) My Lords, Article 43 provided for the establishment of the Electoral Commission, Article 46 the Electoral Commission provides thus:
"*46. Except as provided in this Constitution or any other law not inconsistent with this Constitution, in the performance of its functions the Electoral Commission shall be shall not be subject to the direction and control of any person or authority*"

My Lords, with respect, this article is critical for performance of its functions under the Constitution, and evaluating of same, given the important neutral role it must play as an umpire in managing and directing the competing political parties and social groups in accordance with the Constitution and its establishment Act, the Electoral Commission Act, 1993 (Act 451).

We submit my Lords that the Republic would be at great risk should 1st respondent surrender or lose its independence and autonomy of action on the altar of consultation with legitimate stakeholders. We submit that while taking optimum steps to promote consultation, engagement and consensus building and cooperation with legitimate stakeholders, especially the political parties and civil society organisations, 1st respondent is under a constitutional obligation to guard its autonomy jealously. Thus, while the Commission should consult broadly no party, person or authority should direct it in the performance of its functions and it has the final say after all the consultations,

77) My Lords, this means that where a party engages 1st respondent over a matter and it is the Commission that has the final decision subject to its duty to comply with the Constitution and other laws not inconsistent with the Constitution. Then within this ambit, it cannot be charged with arbitrariness, prejudice or lack of fairness. Thus, the fact that a party is not satisfied with a decision 1st respondent takes, does not mean it is arbitrary or not transparent. In consequence, 1st respondent is not for instance obliged to wait for petitioner for a discussion if it adjudges that it should proceed to perform its constitutional functions without further delay. But this does not however mean that 1st respondent is law onto itself.

Indeed, by its own establishing Act, 1st respondent is subject to the Constitution and any other law not inconsistent with the Constitution. Of particular relevance is article 294 (6) of the Constitution, 1992, which provides thus:

> "*294 (6). No provision of this Constitution or any other law to the effect that a person or authority shall not be subject to the direction or control of any other person or authority in the performance of its functions under the Constitution or that law shall preclude a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with the Constitution or the law*".

78) Indeed, on the question of transparency, we submit that the provisions of Public Elections Regulations, 2020, (C. I. 127)

which provides for active participation by the parties and general public in all the stages of the electoral process, from the polling station, to the constituency collation centre, through to the regional collation centre and then the National Collation Centre at each stage of which agents of candidates are actively involved in the electoral process, endorsing the various results forms, Form 8B, Form 9, Form 10, Form 11 and Form 12 results and Form 13. At each stage of this transparent and accountable process, candidates or their agents have a right to raise concerns for the consideration of officials of 1st respondent. Where satisfied with the legitimacy of the concern raised, the EC official will take remedial action. Where however, he is not satisfied with the resolution the party suggests, always in accordance with law and due process, the officials of 1st respondent cannot be compelled to comply with the wishes of petitioner, any person or authority.

79) Petitioner has sought to make a meal out of what it describes as "ever changing figures of the results" of the 7th December presidential election. The explanation is simple and not uncommon. Thus, it is a matter of public record that in 2016, the Electoral Commission, declared the results in favour of Nana Addo Dankwa Akufo-Addo, notwithstanding the fact that the results of four constituencies, Afram Plains North, Upper West Akyem, Sawla Tuna Kaba, and Tamale Central were not yet known. This was because given the margin of victory, the EC concluded, and rightly so, that in the hypothetical situation

where all the registered voter population of these four constituencies were to be added to the candidate with the second highest votes, Nana Akufo-Addo would still cross the more than fifty per cent of the total number of valid votes threshold. Notwithstanding this, as the results from the four constituencies were received the total results kept changing. The recent presidential elections in the USA, is another example. Once the candidate of the Democratic Party, Joe Biden, had obtained 270 of the electoral college votes, he had mathematically won the presidential race, even though as the results of the electoral college of the remaining states were received the actual results kept changing. So it is, my Lords, that even though at the time of the declaration of the results in Ghana's 2020 presidential election on 09/12/20, the results of Techiman South had not been received, because, as the chairperson of 1st respondent, stated, 2nd respondent would still pass the more than fifty percent threshold of article 63 (3), even if she were to add votes of the total registered voter population of Techiman South of 128,018 to the valid votes of petitioner, 2nd respondent would still have met the more than fifty percent of the total valid votes cast, the chairperson of 1st respondent, declared 2nd respondent president elect. Subsequently, the actual results of Techiman South were received, and once same were added to the valid votes obtained by each candidate, naturally both the total valid votes obtained by each candidate and the total number of valid votes cast, generally, in the December, 2020, presidential election will equally change.

would change. Further, and to the point, there is therefore nothing mysterious about the so-called changing votes.

## V. CONCLUSION:

80) My Lords, in concluding, we wish to highlight the principles underpinning elections globally. Elections allow people to select leaders and to hold those leaders accountable. The results of elections are, therefore, meant to reflect the true, sovereign will of citizens of the country. The processes of voter registration, voting, counting, collating, tallying and declaration, and the transparency and accountability checks that are intrinsically linked to every stage of the electoral process are meant to achieve a common purpose: to make elections, free, fair and credible. And, that common purpose is designed to achieve an overarching objective: that, election results, when declared, must reflect the true will of Ghanaian voters as manifested in the choices they make on voting day.

That is why Article 63(9) of the 1992 Constitution, which deals with the Instrument of Declaration of Presidential Results, provides that unless the contrary is proved, the President is presumed to having been validly elected as held by Atuguba JSC in the *Akufo-Addo* case, at page 124 of the Special Report.

The Constitution provides in Article 64 that the validity of the election of the President may be challenged by filing an election petition at the Supreme Court. The fundamental grounds for

such an election challenge, which is filed only after results are declared, is that the declaration did not reflect the true will of the people who, as in this case, queued on Monday, 07/12/20 to vote for one of the 12 presidential candidates on the ballot paper.

However, the election petition before this Court rather seeks to completely overturn this sacred constitutional principle. This petition is an industry in futility. It has been designed, built and furnished with a lazy labour of facts and evidence that seek to attack the electoral choices of the people of Ghana. This is because the petitioner is in Court, praying for a rerun between himself and the second respondent with a claim that no candidate received more than fifty per cent of the total number of valid votes cast at the election, as provided for in Article 63(3). Yet, as shown by the petitioner's own case, the only way the Court can grant him this relief is if the Court chooses to completely ignore what the people voted for on December 7 and substitute that for a results scenario fabricated on two purely artificial grounds. Based on (1) a hypothetical generosity of assuming every voter in Techiman South voted for petitioner and (2) using, erroneously, total votes cast rather than valid votes cast as the foundation for determining the 50% constitutional threshold, after adding the hypothesis of Techiman South to the votes obtained by petitioner. Thus, the petitioner is simply inviting the Supreme Court of Ghana to commit the supreme error of substituting the true will of the people as clearly reflected in the majority of valid votes cast,

counted and declared in the 2020 presidential election for a phantom result based on an inconsequential error and a hypothetical scenario. An election petition is to seek to protect the true will of voters and not to attack it.

81) It is important to remind ourselves of the reliefs for which petitioner is in this Honourable Court, make a final comment on each of them and then invite the court to dismiss each of them. They are:

a. *A declaration that Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Elections held on 7th December, 2020 was in breach of Article 63(3) of the 1992 Constitution in the declaration she made on 9th December 2020 in respect of the Presidential Election that was held on 7th December 2020;*

My Lords, from the pleadings of petitioner and evidence adduced by his witnesses which is discussed above, Mrs. Jean Adukwei Mensa was not in breach of Article 63(3) of the Constitution, 1992, as 2nd respondent had satisfied the conditions of article 63(3) of the Constitution 1992, prior to being declared President-elect.

b. *A declaration that, based on the data contained in the declaration made by Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Elections held on 7th December 2020, no candidate satisfied the requirement of Article 63(3) of the 1992 Constitution to be declared President-elect.*

Contrary to the above relief, the admitted facts in the pleadings and the evidence of the witnesses of petitioner demonstrated in the foregoing clearly show that, the data as contained in the declaration of 1st respondent which was based on the summation of the regional collation forms in the possession of the petitioner and attached as Exhibits by him and his witnesses, confirm that 2nd respondent obtained over 51% of the total number of valid votes cast in the 2020 election and thus far exceeds the threshold of more than 50% of the total number of valid votes cast as dictated by article 63(3) of the Constitution, 1992.

c. *A declaration that the purported declaration made on 9thDecember 2020 of the results of the Presidential Election by Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Elections held on 7thDecember 2020 is unconstitutional, null and void and of no effect whatsoever.*

Again, contrary to the terms of the above relief, the declaration by the Chairperson of 1st respondent was in accordance with relevant provisions of the Constitution 1992, same was thus lawfully made and therefore not unconstitutional or unlawful nor is it null and void.

d. *An order annulling the* ***Declaration of President-Elect Instrument, 2020 (C.I. 135)*** *dated 9th December 2020, issued*

*under the hand of Mrs. Jean Adukwei Mensa, Chairperson of 1st Respondent and the Returning Officer for the Presidential Elections held 7th December 2020 and gazetted on 10thDecember, 2020.*

My Lords, since, as clearly shown in this submission and reflected in the proceedings before the Court, the declaration of ***President-Elect Instrument, 2020 (C.I. 135)*** *dated 9th December 2020* was duly issued and executed in accordance with all the applicable laws and the uncontroverted data derived from the presidential election of 2020 respectfully, same ought to not be annulled by the Court. We therefore pray your Lordships to affirm the propriety of the said C.I. 135.

e. *An order of injunction restraining the 2nd Respondent from holding himself out as President-elect;*

Respectfully, the above relief has no basis in law owing to the express provisions of Article 64(2) of the Cconstitution, 1992.

*An order of mandatory injunction directing the 1st respondent to proceed to conduct a second election with petitioner and 2nd respondent as the candidates as required under Articles 63(4) and (5) of the 1992 Constitution.*

81) It is our respectful submission that from the above analysis, the presidential election of 2020 having been duly conducted in accordance with the relevant laws and 2nd respondent having been duly declared to have been elected as President and the witnesses of the petitioner not having been able to aver facts and adduce credible evidence to discharge the heavy burden

imposed by law on him, we firmly hold that there is no basis for the Court to countenance relief(f) above.

We therefore pray Your Lordships to dismiss the petition in its entirety. My Lords we cannot end this final address without repeating the profound declaration made by his Lordship Baffoe-Bonnie JSC in the Akufo-Addo case @ page 439 thus:

**EPILOGUE**

*"Elections are complex systems designed and run by fallible human beings. Thus, it is not surprising that mistakes, errors, or some other imperfection occur during an election. Because absolute electoral perfection is unlikely and because finality and stability are important values, not every error, imperfection, or combination of problems found in an election contest, voids the election or changes its outcome…"*

Respectfully submitted, My Lords.

**DATED AT KWAKWADUAM CHAMBERS,**

**THIS 15TH DAY OF FEBRUARY, 2021**


**AKOTO AMPAW ESQ**

Akufo-Addo, Prempeh & Co.

Lawyers for 2nd Respondent

**License No. eGAR-01391/21**

**AND FOR SERVICE ON:**

1. **PETITIONER OR HIS LAWYER, TONY LITHUR ESQ., LITHUR BREW & CO., NO. 110B, 1ST KANDA CLOSE, KANDA, ACCRA.**

2. **1ST RESPONDENT OR ITS LAWYER, JUSTIN AMENUVOR ESQ., AMENUVOR & ASSOCIATES, NO. 8 II ODARTEY OSRO STREET, KUKU HILL, OSU, ACCRA.**

**LIST OF AUTHORITIES**

**LAWS**

1.Constitution of the Republic of Ghana,1992.

2. Evidence Act 1973 (NRCD 323)

3. Supreme Court (Amendment) (No.2) Rules, 2016, C. I. 99.

4. Electoral Commission Act, 1993 (Act 451)

5. Public Elections Regulations, 2020 (C.I. 127)

6. Presidential Declaration of Results Instruments (C.I 135) 2020.

7.High Court Civil (Procedure Rules), 2004 (CI 47)

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1. Whitaker v Nanka-Bruce (1994-95) GBR 784

2. Hammond v Odoi (1982-83) 2GLR 1215

3. Nartey v Mechanical Lloyd Assembly Plant Ltd (1987-88) 2GLR 33

4. Okudzeto Ablakwa (No 2 ) v Attorney General & Anor [2012] 2 SCGLR 845

5. Barclays Bank Ghana Ltd v Sakari [1996-97] SCGLR 639.

6. Asante Bogyabi & Ors [1996] GLR 232

7. Agyeiwaa v P & T Corporation [2007-2008] SCGLR 985

8. Akufo Addo v Cathline [1992] 1GLR.

9.Benjamin Komla Kpodo, MP Richard Quashigah MP v The Attorney - General

10. In Re Presidential Election Petition, Akufo-Addo, Bawumiah& Obetsebi-Lamptey No 4 [2013] SCGLR [Special Edition] 73

11. Ackah v Kpegah Transport Limited & Ors [2010] SCGLR 728

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13. Takoradi Flour Mills v Samir Faris [2005-2006] 882

14.Yorkwa v Duah [1992-93] GBR 280, CA;

15. National Democratic Congress V Electoral Commission [2001-2002] 2 GLR 340

16. Nigerian case of Buhari v Obasanjo (2005) CLR 7K

17. Dzaisu V Ghana Breweries Ltd. [2007-2008] SCGLR 539

18. Barclays Bank Ghana Ltd V Sakari [1996-97] SCGLR 639

19. Asante V Bogyabi And Others [1966] GLR 232

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21. Pyron V Joiner 381 So 2d 627 (Miss 1980) ( En Banc)

22. Woodward v Sarsons (1875) 32 L.T (N.S) 867

23. Okudzeto Ablakwa (No. 2) Vs Attorney General & Another [2012] 2SCGLR 845

24. Ackah v Pergah Transport Ltd. [2010] SCGLR 728

GIHOC Refrigeration v Jean Hanna Assi [2005-2006] SCGLR 198

25. Kwame Appiah Poku & ors v Kojo Nsafuah Poku ors. [2001-2002] SCGLR 162.

26. Buhari v. Obasanjo (2005) CLR 7(k) (SC)

27. In Re Ashalley Botwe Lands; Adjetey Agbosu & Others V Kotey & Others [2003-2004] SCGLR 420

28. Re B, [2008] UKHL, 35

29. Ghana Bar Association v Attorney General and Another [2003-2004] 1 SCGLR 250

30.Bimpong Buta v General Legal Council [2003-2004] 2 SCGLR 1200, 2SCGLR 1038

31.Abu Ramadan v Electoral Commission Writ No.J1/14/2016.

Mettle-Nunoo v. Electoral Commission [2007-2008] 2 SCGLR 1250 @ 1258

32. Opitz v Wrzensnewskyj 2012 SCC 55-2012-10.

33. Raila Amolo Odinga & Anor v Independent Electoral Commission and Boundaries Commission & 2 Ors (Presidential Petition No1 of 2017).

**LEGAL TEXTS**

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2. Atkins Court Forms 2nd Edition Vol 32 (1992 Issue).
3.Black's Law Dictionary 2010.