IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - AD 2021

CORAM: APPAU, JSC (PRESIDING)
MARFUL-SAU, JSC
LOVELACE-JOHNSON (MS.), JSC
TORKORNOO, JSC
AMADU, JSC
PROF. MENSA-BONSU (MRS.), JSC
KULENDI, JSC

CIVIL MOTION
NO. J7/07/2021

30TH MARCH, 2021

THE REPUBLIC

VRS

HIGH COURT HO

EX PARTE: ATTORNEY GENERAL ---- APPLICANT/RESPONDENT

AND

1. PROF. MARGARET KWAKU
2. SIMON ALAN OPOKU MINTAH
3. JOHN KWAME OBIMPEH } **INTERESTED PARTIES/APPLICANTS**
4. GODFRED KOKU FOFIE
5. FELIX QUARSHIE

RULING

TORKORNOO (MRS.) JSC:-

Background to the current application

On 23rd of December 2020, the Applicants herein commenced an action in the High Court, Ho. They sought to invoke the jurisdiction of the High Court under **Article 33**

of the 1992 Constitution and **Order 67** of the **High Court (Civil Procedure) Rules 2004 (CI 47)** by the issue of an Originating Motion against *The Electoral Commission* (1st Respondent), *Wisdom Kofi Akpakli, the Regional Electoral officer,* (2nd Respondent) (3) *John Peter Amewu* (3rd Respondent) *and* (4) *The Attorney General* (4th Respondent)

Chapter 5 of the 1992 Constitution provides in **Article 33(1)** and **(3)** that

33(1) *Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the high court for redress*

33(3) *A person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court*

Order 67 of CI 47 provides:
Application for redress under Article 33 of the Constitution

1. *A person who seeks redress in respect of the enforcement of any fundamental human right in relation to the person under article 33(1) of the Constitution shall submit an application to the High Court*

Included in the reliefs sought by Applicants from the High Court were the following prayers:

Relief 1(f) *A declaration that as a result of the numerous deficiencies in the conduct of the elections by the 1st and 2nd respondents as set out above, the 3rd respondent was not duly elected as the person to represent the people of Hohoe Constituency (including the applicants and all registered voters in the subject-areas) in Parliament from 7th January 2021 to 6th January 2025*

(2) *An order of mandamus to compel the 1st and 2nd respondents, to organize and conduct the parliamentary election in respect of the Hohoe Constituency including the Santrokofi and the other three traditional areas to enable all registered voters there to have the opportunity to vote for the determination of the member of parliament*

(3) An order to restrain:

a. *the 1st and 2nd respondents from seeking to gazette the 3rd respondent as the duly elected MP for the Hohoe Constituency from January 7th 2021 to January 6, 2025*

b*. the 1st and 2nd respondents from in any way, presenting the 3rd respondent as duly elected to represent the people of Hohoe Constituency in Parliament; and*

c. *the 3rd respondent from presenting himself to be sworn in as the Member of Parliament for the Hohoe Constituency or otherwise holding himself out as such*

On the same 23rd December 2020 that the originating motion was filed, the Ho High Court granted the Applicants the following interlocutory orders restraining:

1. *The 1st Respondent from seeking to gazette 3rd respondent as duly elected to be member of parliament for Hohoe Constituency from January 7 2021 to January 6, 2025*
2. *The 1st and 2nd respondents from in any way, presenting the 3rd respondent as duly elected to represent the people of the Hohoe Constituency in parliament from January 7 2021 to January 6, 2025 or holding the 3rd respondent out as such*
3. *The 3rd respondent from presenting himself to be sworn in as the member of parliament for the Hohoe constituency or otherwise holding himself out as such*

It is these orders that precipitated the application by the Attorney General for Certiorari to quash the orders of the Ho High Court pursuant to **Article 132.** It reads:

132. *The Supreme Court shall have supervisory jurisdiction over all courts and over any adjudicating authority and may, in the exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory power*.

The Attorney General had been made the 4th Respondent to the action and served with the Originating Motion as required by **Order 67 (2)**. The Attorney General also sought an order of Prohibition to stop the presiding Judge from the further hearing or conduct of the suit that led to the proceedings and orders described above.

Application for Certiorari

The grounds for the application for Certiorari were that

a. the High Court has no jurisdiction under Article 33 of the Constitution to entertain a matter in the nature of a parliamentary election petition and to grant any relief(s), interim, interlocutory or final, available in a parliamentary election commenced under **Article 99** and **Section 16** of the **Representation of the People's Law, 1992 (PNDCL 284)**
b. the proceedings of the court below and the orders emanating therefrom dated 23rd December 2020 were void as same were in violation of **Article 99** of the **1992 Constitution**
c. the orders of the court below dated 23rd December 2020 constituted a patent error on the face of the record to the extent that they purported to confer on the applicants (interested parties herein), non-existent voting rights in respect of the Hohoe Constituency in the Volta Region

The Applicants herein and Interested parties in the Certiorari application resisted the application by the Attorney General. On 5th January 2021, this Court agreed with the Attorney General on grounds (a) and (b) above, and also that the orders granted by the High Court Ho, constituted a patent error on the face of the record to the extent that it sought to injunct the gazetting and swearing in of the person declared as a Member of Parliament.

Consequently, this Court granted the application for certiorari to quash the orders of the High Court Ho, including the reliefs that related to the completed Parliamentary election.

The ratio of this Court's decision on 5th January 2021 can be found on pages 10 and 11 of the ruling in these terms:

'*The law as constitutionally and statutorily provided and judicially considered by this apex court in a plethora of decisions, does not permit the interested parties to include reliefs 1 (f), 2 and 3 in the reliefs sought in their apparent human rights action when these reliefs were purporting to challenge the due election of John Peter Amewu as the Member of Parliament elect for the Hohoe Constituency*'. (Page 10)

'*Substantively therefore, the jurisdiction of the High Court conferred by article 99 of the Constitution, 1992 and Section 16 of PNDCL 284 of 1992, for the determination of a parliamentary dispute, is fundamentally different from a human right action pursued under article 33 (1) of the Constitution, 1992*' (page 11)

On 12th January 2021, the Applicants applied for a review of the ruling of 5th January 2021 pursuant to **Article 133 of the 1992 Constitution** and **Rule 54** of the **Supreme Court Rules 1996, CI 16**, as amended.

Rule 54 of the Supreme Court Rules 1996 CI 16 provides two grounds that must exist for invocation of the Review jurisdiction of the court. The application before us is brought pursuant to **Rule 54 (a)**. It reads:

54. *The court may review any decision made or given by it on any of the following grounds –*
a. the exceptional circumstances which have resulted in miscarriage of justice

Citing various decisions of the Supreme Court in **Afranie 11 v Quarcoo 1992 2 GLR 561**, **Koglex Ltd No 2 v Field 2000 SCGLR 175**, **Republic v Tetteh 2003 – 2004**

SCGLR 140 and other unreported cases where the Supreme Court reviewed its decisions on account of fundamental errors that would lead to miscarriage of justice, the applicant is urging that in the decision of 5th January 2021, the Court fell into a range of fundamental errors that have resulted in miscarriage of justice to the applicants.

Grounds for Application for Review

The eighteen grounds on which the review is sought are:

a. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it said, per incuriam, that there is a determination for the High Court to make as to "*whether or not the right to vote, which is not a provision under Chapter 5 of the Constitution on fundamental human rights but under Chapter 7 on the Directive Principles of State Policy, is a human right or not*."
b. This Honourable Court committed a fundamental error of law in invoking its supervisory powers and granting the discretionary order of certiorari against the High Court, Ho, which had jurisdiction to embark on the application to enforce fundamental human rights of the Interested Parties. This fundamental error occasioned a miscarriage of justice.
c. In this Honourable Court claiming "[o]ur jurisdiction in the instant case does not extend to the determination of the constitutionality or otherwise of CI 128. The Interested parties have not invoked the jurisdiction of this Court to challenge the constitutionality or otherwise of CI 128", it committed a fundamental error of law that has occasioned a miscarriage of justice by not recognizing that it was the Applicant that put forward CI 128 to contest the insistence of the Interested Parties that CI 95 had not been repealed.
d. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its complete misapprehension of the case the Interested Parties presented to the High Court, Ho.
e. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in stating what is to be determined by the

High Court, Ho, as if it was already determined or could be determined by the Supreme Court: "The fact is that, Mr. John Peter Amewu has nothing to do with the denial by the Electoral Commission of the right of the people in the SALL Area to vote".

f. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in determining that because the Interested Parties stated in an affidavit that "the announcement of the Electoral Commission on 6th December 2020 that the voters in the SALL area could not vote in Parliamentary elections on 7th December 2020 and the resultant denial of the right to representation in the 8th Parliament of Ghana **are at the heart** of the action for the enforcement of the fundamental human rights that we have initiated at the High Court, Ho", "John Peter Amewu has nothing to do with the denial by the Electoral Commission of the people in the SALL Area to vote.

g. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in prejudging in the very opening paragraph of the ruling the alleged status of John Peter Amewu as "the NPP M.P Elect for Hohoe Constituency".

h. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its claim that "the Interested Parties did not say anything in justification of the interim orders made by the High Court" and that "the interested parties' affidavit in opposition did not provide any answer to applicant's submissions against the propriety of the interim orders made by the trial High Court on 23rd December 2020."

i. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it deprived the Interested Party of constitutionally protected fundamental human rights by recourse to a provision in a statute.

j. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it claimed that the "Constitution per article 99, clothes only the High Court with jurisdiction to hear and determine any question as to whether or not a person has been validly elected as a Member of Parliament."

k. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it claimed that "In the wake of these two provisions; that is article 99 of the Constitution, 1992 and section 16 of PNDCL 284 of 1992, a person cannot sidestep this procedure and commence an action in the High Court invoking any of the High Court's other jurisdiction to ventilate a grievance that border (sic) on the validity of an election to Parliament."

l. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its claim that the interim orders "are in the nature of orders made in an election petition".

m. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it claimed "The only time that the High Court has power to make orders affecting the validity of any parliamentary election is when an election dispute is initiated under article 99 of the Constitution."

n. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it purported to "order that the entire proceedings of the High Court, Ho dated 23rd December, 2020, which led to the making of the void orders of mandamus and injunction, be brought to this court for the purpose of same being quashed and they are hereby quashed".

o. This Honourable Court acted without jurisdiction when it purported to strike out certain reliefs sought in the originating motion on notice

p. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in failing to take into consideration in its ruling earlier binding decisions of the court which Counsel for the Interested Parties had cited before the court in both written and oral submissions.

q. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its ruling in respect of the objection raised against the participation of Justice Honyenugah in a determination of his own eligibility after an objection on the real likelihood of bias and actual bias arising from the Justice's long-standing close relationship with Amewu and the

"unbreakable bond" between them was raised with the indication of witnesses being available to testify.

r. This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its ruling in respect of the objection raised against the participation of Justice Honyenugah when it claimed that the action in the High Court, Ho, was not about Amewu.

We would first state that the settled position of the law that allows the Supreme Court to review its decisions under Article 133 is as stated in **Quartey v Central Services 1996-97 SCGLR 398 at 399**, *'A review of a judgment is a special jurisdiction and not an appellate jurisdiction conferred on the court; and the court would exercise that special jurisdiction in favor of an applicant only in exceptional circumstances. This implies that such an applicant should satisfy the court that there has been some fundamental or basic error which the court inadvertently committed in the course of considering its judgment; and which fundamental error has thereby resulted in gross miscarriage of justice. ....Consequently, a losing party is not entitled to use the review process ....to prevail upon the court to have another or a second look at his case.*'

The eighteen grounds in this application point to a range of aspects of the ruling that the Applicant submits are fundamental errors that the decision turns on, and constitute exceptional circumstances that have occasioned grave injustice to the applicants, such that this Court ought to reverse its decision.

Consideration of submissions

Ground a - Error in Description of Chapter 7 of the Constitution

It is conceded that a description of Chapter 7 of the 1992 Constitution as the chapter on Directive Principles of State Policy is erroneous. This is not an error of law, and definitely not a fundamental legal error that can constitute an exceptional circumstance for reviewing a judgment. The statement that Chapter 7 of the 1992 Constitution, which is the chapter on '**Representation of The People**,' deals with the right to vote is absolutely correct.

Also, the observation in the ruling that the core of the case before the High Court is for the High Court to determine whether 'the right to vote' forms part of the human rights provided for under Article 33 or part of the representation rights provided for under Chapter 7 cannot be per incuriam any Constitutional provision, statute or decided position in law.

This is because even if the ruling made an observation that the right to vote was not a human right (which is a position it did not even consider or express a view on), the decision under review took no account of that observation regarding whether the right to vote was a human right or constitutional right under Chapter 7 of the 1992 Constitution. The case considered solely dealt with the jurisdiction of the High Court when it came to parliamentary elections. And the decision in the ruling under review was that the challenging of a parliamentary election or its outcome was a special right provided for under Article 99 of the Constitution and for which a special procedure requiring commencement by Petition had been set by PNDC Law 284. For that reason, the High Court could not consider a challenge to parliamentary elections as a consequential relief or order when adjudicating a claim to human rights under Article 33 of the 1992 Constitution.

And the fact that PNDC Law 284 predated the 1992 Constitution did not create an incongruity or absurdity because the existing law of Ghana was continued in force through **Article 11(1) (d)** of the **1992 Constitution.**

The premise of ground (a) for this review therefore, was only an observation, and did not constitute a decision, nor did it even feed into the decision of the court on 5th January 2021.

Grounds **b, d, e, f, i, j, k, l, m, o - Due Process**

Grounds **b, d, e, f, i, j, k, l, m, o** will be addressed together because they all compel the same consideration. This is the position urged by the Applicant that to the extent that the High Court is seised with jurisdiction under Article 33 of the Constitution to enforce fundamental human rights that include the right to vote, the High Court has jurisdiction to consider whether the conduct of an election is part of the denial and

violation of the human rights complained of. And when the High Court makes consequential orders that pronounce on elections during such a case, it would be doing so within the totality of its jurisdiction under Article 33.

The Applicant counsel has submitted that this Court was therefore in error in its decision that the right to vote was a separate cause of action from the validity of parliamentary elections and its outcome, and they could only be ventilated under separate procedures and within separate jurisdictions of the High Court. To use the language of the ruling found on page 11 thereof, '*the jurisdiction of the High Court conferred by Article 99 of the Constitution, 1992 and Section 16 of PNDCL 284 of 1992, for the determination of a parliamentary dispute, is fundamentally different from a human right action pursued under article 33 (1) of the Constitution, 1992*'

The submission of learned counsel cannot be upheld because jurisdiction is always conferred by statute, and exercised within the rules of procedure set for the exercise of that jurisdiction. In that regard, it is to be appreciated that all judicial processes ought to be conducted within the ambit of procedures regulated by statute. And these statutes must be harmoniously interpreted to achieve the purposes intended by the legislature and to avoid absurdity.

Article 140 (1) of the 1992 Constitution provides:

> **140 (1)** *The High Court shall, subject to the provisions of this Constitution, have jurisdiction in all matters and in particular, in civil and criminal matters and such original, appellate and other jurisdictions as may be conferred on it by this Constitution or any other law.*

Section 15 (1) (a) of the Courts Act, 1993 Act 459 also gives original jurisdiction to the High Court in all matters, and immediately follows it with distinct contexts of specific jurisdictions.

15(1) *The High Court shall, subject to the provisions of the Constitution have –*

a. original jurisdiction in all matters and in particular, in civil and criminal matters;

b. *jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by the Constitution;*
c. *appellate jurisdiction from a decision of a Community Tribunal in civil matters;*
d. *any other jurisdiction conferred by the Constitution or by any other enactment*

Notwithstanding this seemingly blanket grant of jurisdiction to the High Court, it is the trite and well understood position of the law that this provision does not confer unfettered jurisdiction on the High Court, and the jurisdictional reach of the High Court is always interpreted to ensure harmony with other statutes that confer various jurisdiction on other bodies or adjudicating forums. Further, for each matter that any court has jurisdiction to consider, that jurisdiction must be exercised within the framework of the law regulating the relevant procedure.

The holdings of this court in the **Edusei v Attorney - General** cases **1996-97 SCGLR 1**, **1997-1998 2 GLR 1, (also reported in 1998-99 SCGLR 753)** on the severance of the constitutionally created jurisdictions of the Supreme Court in its interpretation and enforcement jurisdiction, and the High Court over the enforcement of human rights are apposite to this instant suit.

They help to settle the firm position in our constitutional jurisprudence that in construing the 1992 Constitution and statutes on jurisdiction, the courts have to ensure harmonious co-existence of the various jurisdictions conferred on every court by the Constitution, no matter its place in the hierarchy of courts, and where a claim is couched to sound as invoking a particular court's jurisdiction, it is the duty of the court to look at the claim and identify its true call, before assuming jurisdiction over it.

In the first proceeding reported in **Edusei v Attorney - General 1996-97 SCGLR 1**, the plaintiff sought the interpretative and enforcement jurisdiction of the Supreme Court in Article 130 (1) on his fundamental human rights under Article 17 of the Constitution. This Court in its majority decision was firm that the effect of reading **articles 33(1), 130(1) and 140(2)** together was to vest the High court with exclusive jurisdiction in the enforcement of fundamental human rights and freedoms,

and this jurisdiction is completely excluded from the jurisdiction granted to the Supreme Court in all matters relating to the enforcement or interpretation of the Constitution. The Supreme Court could therefore not assume jurisdiction to sit on the claims brought to it dressed in the garb of a claim for interpretation and enforcement of the constitution.

On an application for review of the decision, the court dismissed the application in **Edusei v Attorney General and Another 1997-1998 2 GLR 1,** on the ground inter alia, and per Bamford Addo JSC, that the provisions that the applicant purported to seek interpretation for were absolutely clear and did '*not need to be interpreted by the court at all*'. (Page 8) The claim was a claim for enforcement of a fundamental human right and freedom in Chapter 5 of the Constitution and the jurisdiction to consider that lay in the High Court.

On page 6, Bamford Addo JSC said: `*Since jurisdiction is a fundamental issue, the absence of which would render any decision of a court null and void, it is of utmost importance for a court to ensure that in any case brought before it, it has the requisite jurisdiction to hear and determine that case. Where there is lack of jurisdiction, a court ought to decline jurisdiction*'.

Kpegah JSC, in support of the decision to dismiss the application reiterated the view that *'After examining the reliefs sought in the writ and the statement of case as amended, the plaintiff's claim was in essence and substance a claim for the enforcement of his fundamental human rights but dressed up as a constitutional issue; and that such a claim is cognisable by the High Court as a court of first instance*' (page 22)

Acquah JSC (as he then was), said of the matter on hand at page 31: *'An objection on grounds of lack of jurisdiction is not one of technicality. It is a fundamental objection which questions the very foundation and authority of a court to sit and adjudicate on the matter before it. Jurisdiction is the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control*

over the subject-matter and the parties. Jurisdiction defines the powers of court to inquire into facts, apply the law, make decisions and declare judgment.'

So it is that the High Court, although seised with jurisdiction over both fundamental human rights and parliamentary elections, cannot assume jurisdiction to make declarations regarding parliamentary elections, so long as there is no Petition specifically invoking its jurisdiction under Article 99 before the court.

And this is so, even if the claims for reliefs on a parliamentary election are dressed up as consequential to the right to vote. Despite the fact that the High Court has jurisdiction over fundamental human rights and freedoms under Article 33, and parliamentary elections under Article 99, the 1992 Constitution that created the two jurisdictions designed for them to be exercised under fundamentally different procedures, and this is why the High Court's jurisdiction over parliamentary elections under Article 99, is a special jurisdiction that cannot be invoked and exercised within its other jurisdictions.

In the instant case, this court did not fail to recognize the general overarching jurisdiction of the High Court in all matters, and in particular it's specific jurisdiction in the enforcement of human rights, as well as the specific jurisdiction of the High Court over parliamentary elections. What this court did was look at the orders made on 23rd December 2020 and the reliefs 1(f), 2, and 3(a), (b), and (c) endorsed on the case presented to the High Court, and as in the Edusei case, recognize them for what they were - claims relating to the validity and outcome of a parliamentary election. Having recognized them in their plain words, this court identified that the High Court had no jurisdiction to deal with a parliamentary election in a suit commenced by originating motion pursuant to Article 33 of the Constitution.

And this is simply because the Constitution created a special jurisdiction for their consideration in Article 99, enforceable by procedures catered for under Section 16 of PNDC Law 284.

As referred to by Appau JSC on page 7 of the decision under review, this Court has settled through cases such as **Yeboah v JH Mensah 1998-99 SC GLR 492**, and In **Re Parliamentary Election for Wulensi Constituency Zakaria v Nyimakan 2003-2004 1 SCGLR 1**, that the effect of **Section 16 (1) of PNDC Law 284**, (continued in force through **Article 11(1) (d) of the Constitution)** and **Article 99**, is that any cause of action that is in substance and reality one that questions the validity of a parliamentary election and its outcomes, must necessarily be prosecuted through a parliamentary election petition in the High Court. And neither the Supreme Court in its several jurisdictions, and the High Court in its various jurisdictions, have jurisdiction to grant reliefs relating to a parliamentary election without a hearing conducted via Petition to question that election in the High Court.

In **Zakaria v Nyimakan** cited supra, the maxim *generalia specialibus non derogant* (*general words do not derogate from special*) was applied to determine that the special jurisdiction created by Article 99 should supersede the general jurisdiction of the High Court, including the distinct jurisdiction over human rights created under Article 33 of the Constitution and Section 15 (1) (b) of the Act 459.

In our view, the maxim *expressio unius est exclusion alterius* (*the express mention of one or more things of a particular class may be regarded as silently or inferentially excluding all other members of the class*) is also applicable in the manner that the two provisions have been interpreted and applied to ensure the integrity of the legislative intent behind these two distinct jurisdictions of the High Court.

Articles 99 (1), 99 (1) (a) and 99(2) of the 1992 Constitution read

99(1) The High Court shall have jurisdiction to hear and determine any question whether –

a. a person has been validly elected as a member of Parliament or the seat of a member has become vacant;

99(2) A person aggrieved by the determination of the High Court under this article may appeal to the ***Court of Appeal*** (emphasis mine)

Article 33 (3) also provides:

> **33(3)** *A person aggrieved by a determination of the High Court may appeal to the Court of Appeal with* ***the right of a further appeal to the Supreme Court*** (emphasis mine)

It is the Constitution's truncation of appeals in cases commenced pursuant to Article 99 that formed the basis for this Court holding in **Zakaria v Nyimakan** cited supra that in order for the clear intention of the framers of the Constitution not to be aborted, the prosecution of parliamentary elections must be treated as belonging to a special jurisdiction distinct from other jurisdictions of the High Court where appeals can climb up to the Supreme Court. By the direction of the 1992 Constitution, appeals in decisions that pronounce on the validity or outcomes of parliamentary elections must end in the Court of Appeal.

And yet, when the High Court considers human rights actions commenced pursuant to Article 33, the decisions emanating therefrom must be inherently capable of travelling up to the Supreme Court. Under what condition then can a High Court mix its jurisdiction to pronounce on the validity of parliamentary elections conferred under Article 99, with the exercise of its jurisdiction under Article 33, when the processes set by the Constitution and statute for their commencement and appeals are different?

To allow this would lead to the untenable situation where final orders relating to the validity of the parliamentary election (as was quashed in the decision of 5th January 2021), may not be questioned beyond the Court of Appeal, while those relating to the human rights questions (as were left untouched in the decision of 5th January 2021) may be questioned up to the Supreme Court.

It must also not be forgotten that when an action is commenced by originating motion, as happened in the suit that provoked the application and ruling on review now, the

motion can only be responded to with affidavits. On the other hand, a Petition is responded to with an Answer. The Petition and Answer form pleadings pursuant to which a trial can be conducted, while an originating motion is a process that is determined on the strength of arguments backed by affidavit evidence. By providing that the validity of elections is questioned only through a process that allows for a trial, the situation of deciding the validity of an election on the strength of a motion and affidavit evidence, has been disallowed by statute and judicial interpretation on Articles 33 and 99 cited above.

Again, Article 33 allows a person who complains that their fundamental human rights have been violated to activate the action '*without prejudice to any other action that is lawfully available*'.

This way, if the nature of the controversy over an alleged human right violation cannot be settled through affidavit evidence, the party is entitled to invoke the jurisdiction of the High Court through other forms such as a Writ.

To quote Akuffo JSC (as she then was), on page 510 of **Awuni v WAEC 2003 – 2004 SCGLR 471**, *'When fundamental human rights have been, are being or likely to be contravened, access to judicial redress must be as swift and timely as feasible to ensure that such rights or freedoms are not lost or irremediably damaged forever. Hence, in the light of the objective of article 33(1) (as hereinbefore mentioned), it is clear to me that what article 33(1) seeks to assure, by making provision for access by an application rather than a writ of summons (a relatively sluggish process), is that such a complaint be disposed of by the High Court with optimum dispatch…we have to view the High Court's jurisdiction under article 33 (1) as a special one; and by clear constitutional stipulation, it may be invoked by an application*.'

Thus when it comes to controversies over the validity of an election, Article 99 of **the 1992 Constitution** read together with **PNDC Law 284** allows only one door to the High Court – by Petition. This is not the case with human rights actions under Article 33. When it comes to human rights violations, the 1992 Constitution provides multiple

doors to the court's jurisdiction. This is another important distinction that dictates that the High Court's jurisdictions over Article 33 court actions and Article 99 court actions cannot be mixed up and exercised together in one action.

The severance of the High Court's jurisdiction in Article 33 from its jurisdiction in Article 99 and Section 16 (1) of PNDC Law 284 does not contradict the holdings of **Awuni v WAEC** cited supra and **Edusei (No 2) v The Attorney-General 1998- 99 SCGLR 753** as submitted by Applicant. This court also upheld the invocation of the jurisdiction of the High Court over human rights under Article 33 by the Applicants, by leaving the claims relating to human rights violations untouched. And indeed, the Applicants were also not estopped from commencing an action under Article 99 challenging the validity of the elections if they so desired.

In summary, this court did not err when it ruled that '*the jurisdiction of the High Court conferred by Article 99 of the Constitution, 1992 and Section 16 of PNDCL 284 of 1992, for the determination of a parliamentary dispute, is fundamentally different from a human right action pursued under article 33 (1) of the Constitution, 1992*'

This decision reiterates the position that the High Court does not have jurisdiction to make orders or consider any issue regarding the validity of parliamentary elections as provided for under Article 99 of the Constitution, unless its jurisdiction has been invoked by the issue of a Petition under section 16 of PNDC Law 284. And especially, the High Court cannot, under the guise of adjudicating human rights and freedoms, consider reliefs and issue orders that essentially contest the validity of parliamentary elections, because its jurisdiction under Article 33 is exercised under a different regime from its jurisdiction under Article 99 of the 1992 Constitution. Grounds **b, d, e, f, i, j, k, l, m, o** of this application therefore cannot be upheld.

Non-Consideration of constitutionality of CI 128

Applicant counsel urges underground (c) that in the decision under review herein, the Supreme court was bound to address the constitutionality of the **Representation of the People (Parliamentary Constituencies) Instrument, 2020**, **CI 128** after

the Attorney General presented that it was the statutory basis for the elections in Hohoe. This is because in rebuttal, Counsel for Applicant herein had disputed its constitutionality.

It is his submission that by reason of settled decisions of the Supreme Court from cases such as **Attorney General v Faroe Atlantic Ltd 2005-2006 SCGLR 271**, **Attorney General v Balkan Energy Ghana Ltd 2012 2 SCGLR 998 and Awuni v West African Examinations Council 2003 – 2004 SCGLR 471,** all courts, including the Supreme Court are bound to address the issue of constitutionality of actions and statutes when it is raised in any suit.

This submission fails to appreciate the position of the law that when a court is considering a preliminary issue such as jurisdiction, which is fundamental to the very capacity of a court to even hear a suit before it, the court is bound in law not to consider any other issue that goes to the merits of the controversy in the suit until it has resolved the preliminary question.

This Court in the exercise of its supervisory jurisdiction over the High Court would grant an order of certiorari only against errors of law that are so fundamental and clear on the face of the ruling, or an error which amounts to lack of jurisdiction in the court so as to make the decision a nullity. This is because errors made in the course of exercising the court's legitimate jurisdiction may only be corrected within the appellate jurisdictions of the court hierarchy.

This landscape has become well settled and the decisions of this Court in **Republic v High Court, Accra, Ex Parte Industrialization Fund for Developing Countries and Another 2003-2004 348**; **Republic v High Court, Ex parte CHRAJ (Addo Interested Party) 2003-2004 1 SCGLR 312,** and **Republic v Court of Appeal Ex-Parte Tsatsu Tsikata 2005 – 2006 SCGLR 612** are referred to.

In **Republic v High Court, Accra Ex-Parte CHRAJ, 2003 – 2004 SCGLR 312 at page 345** this Court, speaking through Date-Bah JSC in what the Court describes as

a re-statement of the law governing the exercise of the Supreme Court's supervisory powers had this to say: `*The re-statement of the law may be summarized as follows: where the High Court (or for that matter the Court of Appeal) makes a non-jurisdictional error of law which is not patent on the face of the record (within the meaning already discussed), the avenue for redress open to an aggrieved party is an appeal, not judicial review. In this regard, an error of law made by the High Court or the Court of Appeal is not to be regarded as taking the judge outside the court's jurisdiction, unless the court had acted ultra vires the Constitution or an express statutory restriction validly imposed on it*'

Of significant note also is the decision in **Republic v Court of Appeal Ex Parte Tsatsu Tsikata** cited supra, where Wood JSC (as she then was), stated thus at page 619 `*the clear thinking of this court is that, our supervisory jurisdiction under Article 132 of the 1992, should be exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which errors either go to jurisdiction or are so plain as to make the impugned decision a complete nullity*'

Consequent to the above position, this court, while exercising its jurisdiction under Article 132 where the matter under consideration is whether a lower court has jurisdiction to act or not, would be acting per incuriam if it digressed into consideration of the constitutionality of CI 128, a question of law that is only relevant for determining the merits of the challenge to the parliamentary election.

As already explained in the first analysis in this decision, the different jurisdictions of a court must be exercised within the right procedures directed by statute supporting the law creating the jurisdiction. And this is why on page 9 of the Ruling, the Court stated per Appau JSC that *'Our jurisdiction in the instant application before us does not extend to the determination of the constitutionality or otherwise of CI 128. The interested parties have not invoked the jurisdiction of this court to challenge the constitutionality or otherwise of CI 128'*.

May I also add that no court's considerations are done in a vacuum. Considerations of any issue by a court must occur only with a view to feeding into the decision the court is called upon to make. What would be the reason for this court to admit an off the cuff consideration of the constitutionality of CI 128, if the matter that the Court's jurisdiction had been invoked to consider, did not go beyond the preliminary and fundamental point of the High Court's jurisdiction to even consider the parliamentary elections that were allegedly premised on CI 128?

The case before the Court in the ruling under review was solely against the High Court and its capacity to assume jurisdiction over the parliamentary election it had purported to pronounce on, and not the 'right to vote' action that was still pending in the High Court after the orders made by this court.

The position of the law is that it is only after fundamental issues such as jurisdiction have been settled and therefore not in controversy, that a court and parties before it can be free to adjudicate any matters that go to the merit of the actual subject matter in dispute and related issues.

All the cases cited by Applicant in support of this ground of review are distinguishable. In **Attorney General v. Faroe Atlantic 2005-2006 SCGLR 271**, this Court was sitting in its appellate jurisdiction over the subject matter in controversy, and it was in the exercise of that appellate jurisdiction, that the Supreme Court held per Akuffo JSC (as she then was) that, the Constitution is applicable at all times and all acts and things, particularly those done for and on behalf of the Republic, must always be tested against its provisions. In the case on review, the applicability of the Constitution was required only in relation to the issue of jurisdiction, and that matter was adequately considered.

Similarly, in the decisions of the Supreme Court in ***New Patriotic Party v Inspector General of Police*** 1993-94 2 GLR 459, ***New Patriotic Party v Attorney General 31st December Case*** 1993-94 2 GLR 35, and **Attorney General v Balkan Energy Ghana Ltd 2012 2 SCGLR 998** cited by Applicant, the Supreme Court was sitting in

its original enforcement jurisdiction when it dilated on the constitutionality of various actions.

Those jurisdictions are clinically different from that exercised in the decision under review. The supervisory jurisdiction that was invoked to quash orders relating to the validity of a parliamentary election and the outcomes of the election when the High Court's jurisdiction had not been invoked under Article 99, required that this court focus only on the jurisdictional error submitted to us to remove from the records of the courts.

In **Ebusuapayin Yaw Stephens v Kwesi Apoh**, the Court of Appeal per Anin Yeboah JA (as he then was), HI/252/04 (5th February 2009), held that *'A defence of estoppel, statute of limitation, lack of locus standi, etc are all pleaded to show that the cause of action is wanting in a legal manner. This is the rational for determining such preliminary matters first in the course of proceedings. It is therefore the law that if an action succeeds on a plea of statute of limitation, **lack of jurisdiction** or lack of locus standi, the trial court and for that matter an appellate court should not proceed to determine the merits of the case, irrespective of the evidence. See Graves v. Oyewoo [1967] GLR 803 SC, Akrong v Bulley [1965] GLR 469 SC and Sarkodie I v Boateng II [1982-83] 715 GLR SC*. (emphasis mine)

Because of the above legal positions, ground (c) is misconceived.

Quashing of Void Orders

To the extent that the 23rd December 2020 proceedings to grant an injunction to restrain the gazetting of parliamentary election outcome and a winner of a parliamentary election from taking their place in parliament, were undertaken without the jurisdiction to pronounce on a parliamentary election conferred by the commencement of an election petition, the proceedings in issue and the reliefs they flowed from constituted a jurisdictional error and had to be quashed. To quote the language of Date-Bah JSC in **Ex Parte CHRAJ** cited supra, *'the court had acted ultra vires the Constitution or an express statutory restriction validly imposed on it'.*

The High Court had acted ultra vires Article 99 and PNDCL 284. An order that is fundamentally defective by reason of being made without proper jurisdiction ought to be removed from the body of proceedings to which it does not belong. This is the duty that the Supreme Court implemented by removing the entire proceedings and orders made by the Ho High Court on 23rd December 2020 including the reliefs endorsed within the human rights action that were in substance and reality, an action protesting the validity of a parliamentary election.

In **Republic v The High Court (General Jurisdiction), Accra, Exparte Nii Agyemankese 111**, **Civil Motion No J5/11/2019 of 6th February 2019**, this court similarly quashed orders that emanated from a jurisdiction that the High Court was not allowed to assume - settling matters that related to a cause of action in chieftaincy. In several other decisions prior to the order by Abodakpi J directed at one Nii Dodoo Nsaki to purge himself of contempt, the High Court had issued orders that essentially affected chieftaincy matters. The order of contempt was built on these decisions.

Even though the High Court has jurisdiction to make orders regarding contempt, the quashing of its orders on contempt along with the premise of the order, was derived from the want of the High Court's foundational jurisdiction over chieftaincy matters. Similarly, where no jurisdiction to act exists, this court is bound to exercise its supervisory jurisdiction to prevent the occurrence of further nullities. The quashing of the lapsed orders of 23rd December 2020 and Reliefs 1(d), 2 and 3 constituted the removal of matters over which the High Court had no jurisdiction from the proceedings before it.

Dismissal of Objection to Panel Member

We must note that this matter is moot to the extent that the court that gave the decision under review comprised all five members of the panel that heard the application. The court had dismissed the preliminary objection to the panel member, exercised the supervisory jurisdiction of the Supreme Court, and completed its work

with a ruling. With the completion of its work, grounds (q) and (r) are moot. They have no foundation within the application that was heard, and the decision that is under review.

On account of the analysis set out above, we do not find that the application for review of this court's decision of 5th January 2021 is sustainable. The decision was not erroneous so as to invite the description of such grounds as exceptional circumstances, neither did it in any way lead to miscarriage of justice. Indeed, the Applicant's right to ventilate the human right questions before the High Court were left untouched, and this allows the dispute that properly invoked the jurisdiction of the High Court in an originating motion to be ventilated. The parties were also not precluded from settling any questions as to the validity of the parliamentary election by the proper procedure directed by statute and the structure of the Constitutional provisions in Article 99. The application is refused and consequently, dismissed.

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

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

I. O. TANKO AMADU
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TSATSU TSIKATA FOR THE INTERESTED PARTIES/APPLICANTS WITH EMILE ATSU AGBAKPE.