IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA, A.D.2012

CORAM: ATUGUBA, AG .C.J (PRESIDING)

DR. DATE-BAH, J.S.C
ANSAH, J.S.C.
OWUSU (MS.),J.S.C
ANIN-YEBOAH, J.S.C.
GBADEGBE, J.S.C.
AKOTO-BAMFO (MRS.) J.S.C

WRIT No. J1/25/ 2012

24TH OCTOBER, 2012

JAMES AMARH AMARTEY ... PLAINTIFF

AND

1. ELECTORAL COMMISSION OF GHANA ... DEFENDANTS
2. HON. ATTORNEY-GENERAL

J U D G M E N T

OWUSU (MS.) JSC.

By his writ issued on 22/812, the plaintiff, a citizen of Ghana and in his capacity as such, claims the following reliefs:

(a) "A declaration that the Local Government (creation of New District Electoral Areas and Designation of Units Instrument, L. I. 1983 of 2010, laid in parliament by the Minister responsible for Local Government, and which came into force after twenty-one (21) days from the day it was gazetted, **was made by the minister responsible for Local Government in contravention of Article 45(b) of the constitution 1992**.

(b) An order declaring the said Local Government (creation of New District, Electoral Areas and Designation of Units). Instrument L. I. 1983 of 2010 null and void and of no legal effect.

(c) A further declaration that the Representation of people (parliamentary constituencies) Instrument 2012, C. I. 73 seeking to create forty five (45) new constituencies, thereby increasing the existing constituencies from 230 to 275, which has incorporated in it, by virtue of Regulation (2) thereof, the Electoral Areas unconstitutionally created by the Minister responsible for Local Government is equally null and void and of no legal effect and therefore no national elections (presidential & parliamentary), ought to be held in reference to those Electoral Areas as provided for under the said C. I. 78 of 2012".

By a motion filed on 28-09-2012, the plaintiff on 04-10-1012 sought for leave per counsel to amend the writ and having been granted the leave, the writ was amended to read as follows:

(a) "A declaration that the Local Government (creation of New District Electoral Areas and Designation of Units Instrument, L. I. 1983 of 2010, laid in parliament by the Minister responsible

for Local Government, and which came into force after twenty-one (21) days from the day it was gazetted, **was made by the minister responsible for Local Government in contravention of Article 45(b) of the constitution 1992**.

(b) An order declaring the said Local Government (creation of New District, Electoral Areas and Designation of Units). Instrument L. I. 1983 of 2010 null and void and of no legal effect.

(c) A further declaration that the Representation of people (parliamentary constituencies) Instrument 2012, C. I. 78 seeking to create forty five (45) new constituencies, thereby increasing the existing constituencies from 230 to 275, which has incorporated in it, by virtue of Regulation (2) thereof, the Electoral Areas unconstitutionally created by the Minister responsible for Local Government **is equally null and void and of no legal effect and therefore no national elections (presidential & parliamentary), ought to be held in reference to those Electoral Areas as provided for under the said C. I. 78 of 2012".**

Thus in relief (C), " C. I. 78 was substituted in place of the original C. I. 73 anywhere it appears in plaintiff's statement of case and three new paragraphs 16, 17, and 18 added to the amended statement of case.

In short, the plaintiff is challenging the authority with which the Minister of Local Government created Electoral Areas (in Districts) under the Local Government Act of 1993 (Act 462) in contravention of Article 45(b) of the constitution.

Under the said Article,

"The Electoral commission shall have the following functions –

(a) to complete the register of voters and revise it at such periods as may be determined by law.

(b) to demarcate the electoral boundaries for both national and local government elections;

(c) to conduct and supervise all public elections and referenda;

(d) to educate the people on the electoral processes and its purpose;

(e) to undertake programmes for the expansion of the registration of voters; and

(f) to perform such other functions as may be prescribed by law.

The minister has purported to create the Electoral Areas under section 3 subsections (3) and (4) of the Local Government Act of 1993 (Act 462).

The sub-sections read as follows:

"(3) The minister may by legislative instrument and with the prior approved in writing of the cabinet establish within the area of authority of the District Assembly;

(a) Sub-metropolitan district councils

(b) Urban or zonal councils

(c) Town or area councils and

(d) Unit committees

4. A legislative instrument under subsection (3) shall specify;

(a) the Jurisdiction, membership functions and responsibilities of the sub-metropolitan, district council, urban or zonal council, town or area council or unit committee, and

(b) any other matters connected with the sub-metropolitan, district council, urban or zonal council, town or area council or unit committee as may be considered necessary."

The creation of Electoral Areas is the exclusive preserve of the Electoral commission under Article 45 (b) of the constitution. I will touch on this again when I come to consider the defence of the 2nd Defendant.

The plaintiff is therefore before the court in the exercise of the power conferred upon him under Article 2 (1) of the constitution and is calling upon us to declare as unconstitutional L. I. 1983 as same is inconsistent with or is in contravention of Article 45 (b) of the constitution.

Article 2 (1) of the constitution states thus:

A person who alleges that –

(a) An enactment or anything contained in or done, under the authority or that or any other enactment; or

(b) Any act or omission of any person is inconsistent with, or is in contravention of a provision of this constitution, may bring an action in the Supreme Court for a declaration to that effect.

By his amendment, the plaintiff is also inviting the court to declare the Representation of People (Parliamentary constituencies) Instrument 2012, C. I.78 seeking to create forty-five (45) new constituencies, thereby increasing the existing constituencies from 230 to 275, which has incorporated in it, by virtue of Regulation (2) thereof, the Electoral Areas unconstitutionally created by the Minister responsible for Local Government equally null and void and of no legal effect and therefore no national elections (presidential and parliamentary), ought to be held in reference to those Electoral Areas as provided for under the said C. I. 78 of 2012.

The 1st Defendant is a constitutional body charged under the constitution with the responsibility of organizing elections throughout Ghana including the demarcation of Electoral boundaries for National and Local Government Elections among others.

The 2nd Defendant, the Attorney-General of the Republic of Ghana, is the principal Legal Advisor of the Government who by law is to be served with all processes involving the invocation of the original Jurisdiction of this court under the constitution.

The 1st Defendant virtually admitted the plaintiff's claim as set out in his (plaintiff's) statement of case with regard to the Minister of Local Government's authority as set out under section 3 subsections (3) and (4) and conceded that the Minister has no authority to create Electoral Areas as he purported to do under L. I. 1983.

He however contends that only the parts of L. I. 1983 that purport to deal with "Electoral Areas" should be declared ultra vires as decided by this Honourable court in three previous cases. I will say four now, this court having reached the same decision in the case of DR. CLEMENT APAAK VRS. THE ELECTORAL COMMISSION and THE ATTORNEY-GENERAL in suit No. J1/27/2012 per my esteemed brother Dr. Date-Bah J.S.C.

With regard to C. I. 78, counsel for the 1st Defendant submitted that the Instrument stands on its own as there is no reference in it to L. I. 1983. The Electoral Areas specified therein have been properly "demarcated" by the 1st Defendant who is mandated under the constitution to do so.

Unlike the 1st Defendant, the 2nd Defendant argued that the Minister responsible for Local Government did not usurp the authority of the 1st Defendant set out under the constitution in Article 45 (b) in that the Minister has not at any material time attempted to create or created any Electoral Boundaries under Article 45 (b). Recognizing that it is the duty of the 1st Defendant to demarcate Electoral

Boundaries, counsel sought to draw a distinction between demarcating Electoral Boundaries and creating Electoral Areas. It is counsel's submission that creating Electoral Areas is different from where in Article 242, in the composition of the District Assembly, a member is drawn from each local government "electoral area". Art. 242 (a) reads as follows:

"One person from each local government electoral area within the district elected by universal adult suffrage."

It is counsel's further submission that though there might be an interface between the phrases "Electoral boundaries and "electoral areas" in Articles 45 and 242 of the constitution, "they are different legal categories" (sic). Electoral Boundaries, according to him is used in Article 45 as a mechanism for the representation of the people in the exercise of the functions of the 1st defendant; while Electoral Areas is used in Article 242 as part of the Decentralisation and Local Government constitutional frame work.

Counsel referred to the cases of CHARLES MATE-KORLE & ANOR VRS. ELECTORAL COMMISSION & ANOR and NENE TEYE TIKRIKU & Anor [writ No. J1/4/2011 of 13/6/12 unreported and OKANE and 4 others VRS ELECTORAL COMMISSION and ATTORNEY-GENERAL [2011] SCGLR 1136 and submitted that this court has in these and other cases upheld the legality and constitutionality of L. I. 1983.

Lastly, counsel called upon the court to sever the impugned portions of the Instrument and declare same ultra vires on the principle of severability if the argument of 1st Defendant finds favour with the court.

The plaintiff on 10-10-12 for himself filed 10 issues as contained in the Memorandum of issues. These issues are:

1. "Whether or not exclusive Authority is granted the Electoral Commission to demarcate Electoral Areas for both Local and

National Elections by virtue Article 45 (b) of the Constitution 1992.

2. Whether or not since, democratic elections commenced in Ghana during this 4th Republic, Electoral Areas have been demarcated by either the Interim National Electoral Commission or by the Electoral commission of Ghana established under the Constitution 1992.

3. Whether or not section 3 subsections 3&4 of the Local Government Act 1993 (Act 462) mandates the Minister responsible for Local Government to establish Sub-metropolitan, Urban, Zonal, Town & Area Councils as well as Unit Committees within the area of authority of District Assemblies only and no more…

4. Whether or not the Minister responsible for Local Government indeed established the sub-metropolitan, Urban, Zonal, Town & Area Councils and Unit Committee within the area of authority of District Assemblies by L. I. 1967 pursuant to section 3 subsection 3&4 of the Local Government Act 1993 (Act 462) which came into force on 7th July 2010.

5. Whether or not after the Minister responsible for Local Government had used his authority under section 3 subsections 3 &4 of the Local Authority Act 1993 (Act 462) by preparing and laying before Parliament L. I. 1967 which came into force on 7th July 2010, he still possessed any authority to have used the same sections and subsections of the Local Government Act, 1993 (Act 462) to have demarcated Electoral Areas by L. I. 1983 (Local Government(Creation of New District Electoral Areas and Designation of Units) Instrument, 2010.

6. Whether or not all the Electoral Areas demarcated under the Local Government (Creation of New District Electoral Areas and Designation of Units) Instrument, 2010 ought to be declared ultra vires" the powers of the Minister responsible for Local Government and therefore null and void and of no legal effect.

7. Whether the Electoral Commission of Ghana prepared and laid before parliament the Representation of the People (parliamentary Constituencies) Instrument; 2012 C. I. 78 and incorporated into the said C.I., the Electoral Areas demarcated by the Minister responsible for Local Government by L. I. 1983.

8. Whether or not electoral Areas are demarcated for the purposes of both Local and National Elections only.

9. Whether or not the electoral areas unconstitutionally demarcated by the Minister responsible for Local Government per L. I. 1983 and incorporated into the Representation of the People (Parliamentary Constituencies) Instrument, 2012, C.I. 78 can be used to conduct the December 7th 2012 national elections.

10. Whether or not the Supreme Court by virtue of Article 2(2) of the Constitution 1992, can make orders and give directions including that the December 7th 2012 National Elections, be held under the Representation of the People (Parliamentary Constituencies) Instrument 2004; C. I. 46 which is the Law immediately in force before the Representation of the People (Parliamentary Constituencies) Instrument, 2012, C. I. 78 was passed by Parliament.

The 1st and 2nd Defendants did not see the need to file any.

The 1st Defendant conceded that the Minister of Local Government in so far as he purported to create Electoral Areas under L. I. 1983 acted ultra vires under the Local Government Act, and thereby acted in contravention of the express provision of Article 45 (b) which mandates the Electoral Commission to demarcate Electoral Boundaries. Article 1 (2) of the constitution states that –

"This constitution shall be the Supreme law of Ghana and any other law found to be inconsistent with any provision of this constitution shall, to the extent of the inconsistency be void.

The creation of "those Electoral Areas by the minister is not only ultra vires but inconsistent with Article 45 (b) of the constitution. For this reason, the Local Government (creation of New Electoral Areas and Designation of Units Instrument of 2010, L. I. 1983 is to the extent of the inconsistency declared null and void.

Unfortunately, because the plaintiff set out to impugn the whole legislation, the specific Electoral Areas have not been named but I think it would not be difficult to identify them.

This is in line with both Defendants call to the court to save that which has properly been done in accordance with the constitution. See the case of ASARE BAAH IIIVRS THE ATTORNEY-GENERAL & ELECTORAL COMMISSION [2010] SCGLR 463.

Coming now to the case of the 2nd Defendant, I am unable to appreciate the difference he sought to draw between Electoral Boundary and Electoral Area as stipulated under Article 242 (a) of the constitution. His argument that the 1st Defendant only creates Electoral Boundaries and therefore the creation of Electoral Areas by the Minister in L. I. 1983 does not constitute usurpation of power is difficult to apprehend. When the 1st Defendant demarcates the electoral boundaries, what becomes of the Area within the boundaries? Of course these Areas are the Electoral Areas. Section

3(3) of the Local Government Act, 1993, sets out the functions of the Minister. The section reads as follows:

"The minister may, by legislative Instrument, and with the prior approval in writing of the cabinet establish within the area of authority of the District Assembly.

(a) Sub-metropolitan district councils,
(b) Urban or zonal councils,
(c) Town or area councils, and
(d) Unit committees.

No where under the sub-section is he given power to create Electoral Area. This is so because the mandate to do that has been given to the Electoral Commission under Art. 45(b) of the constitution. I find counsel's argument rather naïve and dismiss it as such.

On the issue of the legality and constitutionality of L.I. 1983 counsel referred to the cases of (1) CHARLES MATE KOLE & Anor VRS ELECTORAL COMMISSION & Anor and NENE TEYE TITRIKU & Another and (2) OKANE & Others VRS ELECTORAL COMMISSION OF GHANA & ATTORNEY-GENERAL already referred to and submitted that this court in these and other cases upheld its constitutionality.

Counsel did not refer to the facts and what came up before the court for determination. It is too sweeping therefore for him to submit that these cases overly upheld the legality and constitutionality of L. I. 1983.

The facts of these cases are not on all fours with the instant case and I do not think that on the issue of constitutionality of L. I. 1983 in its entirety, counsel can find solace in these cases.

The second limb of the plaintiff's case is challenging the legality and constitutionality of the Representation of the People (Parliamentary Constituencies) Instrument 2012 C. I. 78.

It is his case that the 1st Defendant in seeking to create forty-five (45) new constituencies, thereby increasing the existing constituencies from 230 to 275, did incorporate in the said instrument, by virtue of Regulation (2) there of, the Electoral Areas unconstitutionally created by the Minister responsible for Local Government in L. I. 1983. Counsel for the plaintiff, did not provide any evidence of the incorporation apart from the bare assertion made by him. Attached to his amended statement of case is a letter from the 1st Defendant to – the chairman,

The Chairman
Subsidiary Legislation Committee
Parliament House
Accra

FOR THE ATTENTION OF: ERIC OWUSU-MENSAH ESQ.

I reproduce below the letter as follows:

"REPRESENTATION OF THE PEOPLE
(PARLIAMENTARY CONSTITUENCIES 2012)

The Electoral Commission had detected some misplacements and non-placement of certain electoral area in the proposed Instrument. These errors have all been corrected as a result of the meetings that the Commission has held with Subsidiary Legislation Committee.

The errors occurred as a result of the use of a latter version of L. I. 1983 which version was subsequently nullified by decision of the Supreme Court.

The Commission recommends that the subsidiary Legislation Committee incorporates in the Instrument all the corrections effected.

Signed

K. SARFO-KANTANKA
DEPUTY CHAIRMAN (OPS)
for: CHAIRMAN"
It is from this that counsel attempted to link the Electoral Areas in C. I.78 to L. I. 1983. With due deference to counsel, the inference is far fetched and cannot be supported. Indeed, there is no reference in C. I. 78 to L. I. 1983. Counsel for the Defendants argued that C. I.78 stands on its own and has no linkage to L. I. 1983.

Assuming even for the purposes of argument that the 1st Defendant has incorporated the Electoral Areas which have been unconstitutionally created by the Minister into C. I. 78, will that nullify his act which he is mandated under the constitution to carry out? I do not think so.

In any case, the constitutionality of C. I. 78 has been declared by the court in the recent case of WRIT No. J1/19/2012 RANSFORD FRANCE VRS. THE ELECTORAL COMMISSION & THE ATTORNEY-GENERAL .

I hope I have sufficiently addressed the issues set out in the memorandum of issues filed by the plaintiff.

In the end, the plaintiff's action as it seeks to impugn L. I. 1983 in its entirety fails and same is dismissed.

Clearly regulations 1, 5 and 7 of LI 1983 do show that the instrument does validly deal also with the creation of District Assemblies.

To the extent that LI 1983 purports to create electoral areas the same is inconsistent with Acticle 45 (b) and void.

His relief (c) as amended also fails and is hereby dismissed.

(SGD) R. C. OWUSU (MS.)

JUSTICE OF THE SUPREME COURT

(SGD) W. A. ATUGUBA

ACTING CHIEF JUSTICE

(SGD) DR. S. K. DATE-BAH

JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT

(SGD) ANIN -YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO – BAMFO (MRS.)

JUSTICE OF THE SUPREME COURT

COUNSEL

AYIKOI OTOO WITH HIM FRANK DAVIES FOR THE PLAINTIFF.

JAMES QUARSHIE-IDUN (WITH HIM ANTHONY DABI) FOR THE 1ST DEFENANT.

SYLVESTER WILLIAMS (PRINCIPAL STATE ATTORNEY) FOR THE 2ND DEFENDANT.