IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: ATUGUBA, AG. C J (PRESIDING)
AKUFFO (MS), JSC
BROBBEY, JSC
ANSAH, JSC
ADINYIRA (MRS), JSC
YEBOAH, JSC
BONNIE, JSC
GBADEGBE, JSC
BAMFO (MRS), JSC

WRIT
No. J1 / 4 / 2009

22ND MAY, 2012

1. NANA KWARTENG PANIN AKOSA II

2. NANA ACHEAPONG- KONTIHENE -

3. YAW KUSI

4. HAYFORD APPIAH-KUBI ..... PLAINTIFFS

Vs.

THE ATTORNEY-GENERAL ..... DEFENDANT

JUDGMENT

GBADEGBE JSC:

The question for our decision in this case turns on the law making power of Parliament in relation to the bringing into being of subsidiary legislation under article 11(7) of the 1992 Constitution by which it is provided thus:

> **"Any Order, Rule or Regulation made by a person or authority under a power conferred by this Constitution or any other law shall-**
>
> **(a) be laid before Parliament;**
> **(b) be published in the *Gazette* on the day it is laid before Parliament; and**
> **(c) come into force at the expiration of twenty-one sitting days after being so laid unless Parliament, before the expiration of twenty-one days, annuls the Order, Rule or Regulation by the votes of not less than two-thirds of all the members of Parliament."**

The scope of the power conferred on Parliament under article 11 (7) of the Constitution has been the subject of previous determinations of this court in the unreported cases of *Stephen Nii Bortey Okane v The Attorney General*, numbered as J1/2/2011 dated23 June 2011 and *Nii Tetteh Opremeh v the Attorney-General and Others, Suit No J1/3/2010 dated 07 December 2011.* By the said decisions, this court held that there is no authority in Parliament in the course of considering any Order, Rule or Regulation so laid before it under the said article to purport toamend the instrument. By amendment, we meant the doing of any act by Parliament that has the effect of effecting any change whatsoever in the instrument so laid before it in terms of the content as

there is no such authority discernible from a fair reading of article 11(7) of the Constitution by which the power is conferred on the legislature in regard to the making of subsidiary legislation. The restricted scope of Parliament's authority is inherent in the fact of the instrument that subsequently comes into law bearing the same number as that which was laid before it. The practice of the instrument that subsequently becomes law bearing the same title and number is clearly supportive of the constitutional intendment of the legislature not making any changes and or additions to what is laid before it although it does not take away Parliament's authority to annul it. The instrument can thus be said to have been made by the minister or other authority and submitted to Parliament as the law making body to give its assent to it as it is the sole body constitutionally charged under article 93(2) of the 1992 Constitution with the exercise of legislative power. The circumstances in which our jurisdiction was invoked in the matter herein follow shortly.

On 16 November 2007, the Minister for Local Government in the exercise of the powers conferred on him under section 3(1) of the *Local Government Act, 1993(Act 462*) caused to be laid before Parliament an instrument numbered as LI1853. In compliance with legal requirements, the instrument was published in the Gazette on the same date. The said instrument was headed *Local Government (Atwima Kwanwoma District Assembly)(Establishment) Instrument, 2007* and by its designation dealt with the creation of a new District Assembly and related matters. In particular, by regulation 6 of the instrument so laid, it was provided as follows:

> **"The Assembly shall have its principal offices at *Twedie* where meetings of the Assembly shall be held".**

At the expiration of the twenty-one days provided in article 11(7) of the Constitution when by operation of law, the instrument acquired the attribute of law there was a noticeable change in regulation 6 as laid before Parliament by the substitution of *Foase* for *Twedie.* Basing themselves on the said change in the location of the principal offices of the Assembly, the plaintiffs took out the instant writ herein seeking the following reliefs:

(a) ***A declaration that the Local Government (Atwima Kwanwoma District Assembly (Establishment) Instrument LI 1853 which came into force on 29 February 2007 was made in contravention of Article 11(7) of the 1992 Constitution.***

(b)An order declaring the said Local Government (Atwima District Assembly (Establishment) Instrument LI 1853 which came into force on 29 February 2008 to the extent that it amended the district capital or the principal offices of the Atwima District Assembly from Twedie to Foase as null and void and of no effect.

(c)A declaration that the District capital or the principal offices of the Atwima District Assembly is Twedie as contained in LI 1853 which was published in the Gazette on 16 November 2007 and not Foase as contained in Local Government (Atwima District Assembly Establishment) Instrument, LI 1853 of 2007 which came into force on 29 February 2008."

In our view having regard to the nature of the dispute, the question for our decision is simply whether the instrument which was laid before Parliament on 16 November 2007 and published on the same date in the

Gazette as required by law is the same instrument that came into force after the expiry of the twenty-one working days of Parliament on 29 February 2008 as LI 1853? Whiles the plaintiffs contended the negative of the question, the defendant on the other hand contended that although there was a change in the instrument that became law on 29 February 2008 in terms of the location of the district capital or to use the words of the instrument the " principal office", this was as a result of the withdrawal of the instrument by which *Twedie* was designated as the capital and the substitution of a new one namely *Foase* therefor as appears in the instrument that came into force in February 2008.

For the defendant's contention in the matter to be good, there must be evidence that indeed the original instrument was withdrawn by the maker- the Minister for Local Government and that subsequently a new one containing Foase as the district capital was laid before Parliament on a different date and published in the Gazette on the same date that it is laid. Unfortunately, in the course of these proceedings, learned counsel for the defendant was unable to call in aid of his contentions any evidence that would tend to give his submissions legitimacy. In an apparent attempt to extricate himself from thisdifficulty, by an amended statement of case that was filed on 8 March 2012, the defendant sought to assert that the date which appears on the instrument that came into force on 29 February 2008 as the date of the notification in the gazette is not 16 November as indicated thereon at page 10 but a different date - 30 November 2007. As the date of the instrument is the effective date from which the twenty-one days provided in article 11(7) for it to mature into law, the said submission is not in keeping with the practice of the bringing into being subsidiary legislation, it looks quite surprising that this contention should be urged on the court but as said earlier this must

have been an attempt by the defendant to be wiser after the event.But unfortunately, the rules of evidence constrain us from giving consideration to this assertion. Reference is made in this regard to section 154 of the Evidence Act, NRCD 323 as follows:

> **“** ***All proclamations, Acts of State, whether legislative or executive, nominations, appointments, and other official documents, and other official communications appearing in the Ghana Gazette are prima facie evidence of any fact of a public nature which they are intended to notify.”***

By section 19 of the Evidence Act, the fact of the said notification in the Ghana Gazette created a rebuttable presumption and therefore it placed a burden on the defendant to introduce evidence that would persuade us that the presumed fact-16 November 2007 does not exist. But unfortunately, the defendant did not lead any contradictory evidence to defeat the effect of the date appearing on the instrument as the effective date of its publication. For a better understanding of the effect of the presumption created under section 19 of the Evidence Act, we refer to sections 19-21 (a) of the Evidence Act:

> ***“19. An enactment providing that a fact or group of facts is prima facie evidence of another fact creates a rebuttable presumption.***
>
> ***20. A rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact.***
>
> ***21(a) In an action where proof by a preponderance of probabilities is required a rebuttable presumption requires the***

tribunal of fact to assume the existence of the presumed fact unless and until the party against whom the presumption operates proves the non-existence of the presumed fact is more probable than its non-existence."

The cumulative effect of the above sections of the Evidence Act is that the instrument was indeed made on 16 November 2007.

The case of the defendant having thus crumbled, the instrument which came into force on 29 February 2008 as LI 1853contained an offending provision, which is the substitution for *Twedie* with *Foase* as the location of the principal offices or district capital of the Assembly. The said substitution was in excess of the powers conferred on Parliament under article 11 (7) of the Constitution. It being so, there is no discretion in us than to expunge it from LI 1853-exhibit AKDA 5 in accordance with article 2(1) of the 1992 Constitution. The said change was illegal and we refuse to sanction it. In view of the illegality of that insertion, it is annulled with the result that we have no discretion in the matter than to yield to all the reliefs claimed by the plaintiffs in the action herein.

[SGD] N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

[SGD] W. A. ATUGUBA

ACTING CHIEF JUSTICE

[SGD] S. A. B. AKUFFO (MS.)

JUSTICE OF THE SUPREME COURT

[SGD] S. A. BROBBEY

JUSTICE OF THE SUPREME COURT

[SGD] J. ANSAH

JUSTICE OF THE SUPREME COURT

[SGD] S. O. A. ADINYIRA (MRS.)

JUSTICE OF THE SUPREME COURT

[SGD] ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

[SGD] P. BAFFOE BONNIE

JUSTICE OF THE SUPREME COURT

[SGD] V. AKOTO- BAMFO (MRS)

JUSTICE OF THE SUPREME COURT

COUNSEL:

AYIKOI OTOO (WITH HIM WILSON JONES) FOR THE PLAINTIFFS.

SYLVESTER WILLIAMS (PRINCIPAL STATE ATTORNEY) FOR THE DEFENDANT.