dIN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: BROBBEY, JSC (PRESIDING)
ANSAH, JSC
OWUSU (MS) JSC
DOTSE, JSC
YEBOAH, JSC
BONNIE, JSC
ARYEETEY, JSC
GBADEGBE, JSC
A BAMFO (MRS), JSC

WRIT NO J1/2/10
DATE: 4TH JULY, 2011

SUMAILA BIELBIEL **PLAINTIFF/RESPONDENT/RESPONDENT**

Vs

ADAMU DARAMANI & OR **DEFENDANT/APPELLANT/APPELLANT**

R U L I N G

GBADEGBE JSC:

On 30 March 2010 the plaintiff caused the writ herein to issue claiming the following reliefs:

> **"1. A declaration that on a true and proper interpretation of articles 97(1) and 94(2)(a) ADAMU DARAMANI, also known as ADAMU DARAMANI-SAKANDE; ADAMU DARAMANI SAKANDE; ADAMU SAKANDE, who holds a British Passport and therefore "owes allegiance to a country other than Ghana" is acting in contravention and in continuous violation of the 1992 Constitution for as long as he continues to sit in the Parliament of Ghana.**
>
> **2. Any consequential orders the Supreme Court may deem meet**."

In the statement of case filed by the plaintiff, he raised by himself without waiting for the defendant to be served with the processes initiating the action herein what he described as an anticipatory legal objection to the jurisdiction of this court to inquire into the claims contained in the writ. Although the procedure adopted by the plaintiff was quite unusual; for it is the defendant who ordinarily raises an objection to the jurisdiction of the court, we allowed the parties to address us on the said question of jurisdiction. Indeed, as was anticipated by the plaintiff, the defendant did subsequently file an objection to the jurisdiction of the court. The parties having submitted to us their respective positions on the question whether or not the Supreme Court has jurisdiction to determine the action herein, the matter was adjourned for us to pronounce on the said question.

We are called upon in this ruling to determine the jurisdictional question. It is settled that when the question of jurisdiction is raised before any court, the court must proceed to determine it before proceeding to inquire into the claim and or any other matter before it including pleas that may result in the disposal of the action without it being heard on the merits. One such plea is res judicata. So fundamental is the plea of the absence of jurisdiction that once it is raised the court is disabled from exercising its jurisdiction in the matter except to pronounce on whether it has jurisdiction in the matter. This has often been described as "the jurisdiction to determine the question of jurisdiction" or simply the jurisdictional question. In the case of Bimpong Buta v General Legal Council [2003-2004] SCGLR 1200, at page 1215 Sophia Akuffo JSC made the following statement on the question of jurisdiction:

> **"Since by his suit the plaintiff has sought to invoke the original jurisdiction of the court, we must, of necessity, ascertain whether or not our jurisdiction under articles 2(1) and 130(1)(a) has been properly invoked, even though the fourth defendant (at the time in the person of Hon Papa Owusu Ankumah per his counsel, Hon Mr. Ambrose Dery, the Deputy Attorney General) withdrew at the hearing of the action on 20 January 2004 (with the approval of the court), a notice of preliminary objection to our jurisdiction, which he had earlier on filed. In other words, does the plaintiff's writ properly raise any real issues of interpretation or enforcement of the Constitution that can only be resolved by this court exercising its original jurisdiction? Jurisdiction is always a fundamental issue in every matter that comes before any court and, even if it is not questioned by any of the parties, it is crucial for a court to advert its mind to it to assure a valid outcome. This is more so**

in respect of the Supreme Court's original jurisdiction, which has been described as special."

See**:** Wilkinson v Barking Corporation **[1948]1KB 721 at 725.**

In my opinion, having had the said question of jurisdiction proceed to argument, the only issue that we now have to determine is whether the plaintiff's writ and the accompanying processes disclose any issue that turns on the provisions of articles 2(1) and 130(1) of the 1992 Constitution such as to invoke the original jurisdiction of this court. I commence the consideration of this question with a reference to the said articles of the Constitution.

"2. (1) A person who alleges that-

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

(b) an 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.

130 (1)(a)Subject to the jurisdiction of the High Court in enforcement of the fundamental Human Rights and Freedoms as provided in article 133 of this Constitution, the Supreme Court shall have exclusive jurisdiction in-all matters relating to the enforcement or interpretation of this Constitution..."

In the case before us the plaintiff's complaint appears to be that the defendant holds a British passport and accordingly by virtue of article 94(2) of the 1992 Constitution though having been elected as such his continuing membership of Parliament is in violation of the provisions of the Constitution. The plaintiff also relies on article 97(e) of the Constitution. The two constitutional provisions on which the plaintiff bases his claim are as follows:

"94(2) A person shall not be qualified to be a Member of Parliament if he-

(a) owes allegiance to a country other than Ghana……"

97(1) A Member of Parliament shall vacate his seat in Parliament-

(e) if any circumstances arise such that, if he were not a member of Parliament, would cause him to be disqualified or ineligible for election, under article 94 of this Constitution…."

In the facts on which the plaintiff relies to sustain his claim he exhibited a passport that is said to bear the name "ADAMU DARAMANI SAKANDE", which is one of the names that he alleges the defendant is known by. As at the date that the parties concluded their oral arguments in support of their respective positions on the fundamental question of the jurisdiction of the court, the defendant had not filed any process that would have the effect of contradicting the crucial facts contained in the plaintiff's statement of the facts. In my thinking, the consequence is that the defendant may be likened to a defendant in an action before the High Court who raises an objection to the pleadings and applies that the action against him be dismissed as disclosing no reasonable cause of action. In his statement of case at page 3 under the heading "THE FACTS", the defendant made the following submission:

"As required by the rules of this Court, we have duly noted that the Plaintiff has recounted the facts that provided the cause of action for this suit. Plaintiff's narration of the facts is exhaustive. For this reason, although 1st Defendant is also required under Rule 48(2)(a) of the facts is exhaustive. For this reason, although 1st Defendant is also required under Rule 48(2)(a) of CI 16 to state the facts, we would crave the indulgence of this Court to permit us to avoid duplicating Plaintiff's efforts by virtually repeating all that Plaintiff has stated in his narration of the facts of this case……."

The position appears to constitute an admission of the facts as narrated by the plaintiff and leaves the court with no other version of the matter in so far as the allegations of facts averred by the plaintiff are concerned. Therefore, in my opinion the issue to be decided on the said undisputed facts is whether they raise a fair case for the invocation of the original jurisdiction of the court in ensuring that no person conducts himself in such a manner as to be in clear breach of the provisions of the Constitution namely articles 94(2) and 97(1) (e)? At this point we need not inquire into whether or not the case of the plaintiff is weak or one that is likely to succeed. It is sufficient if it raises a case though weak that might proceed to trial. In answering this question, we have to assume that the facts averred to by the plaintiff are true. Jurisdictional questions have never been used to determine whether claim before a court is doomed to a failure; that

is the province of a court properly clothed with jurisdiction in the matter, a stage that we are yet to reach in these proceedings .Accordingly, I desire not to enter into any consideration of the claim herein on the merits.

Since the defendant has not denied the allegations of fact on which the plaintiff relies in support of his case, in my view they tend to create the impression at least as at now that there is in the Parliament of Ghana a person who goes by one of the names that the defendant is known by and it being so his continued membership of the legislature is a continuing breach of articles 94 and 97 of the Constitution. I must say that this is an impression which a trial may erode but as at now it is reasonable on the processes before us to take this view of the matter. This, in my view calls for the court in the absence of any lawful objection to the exercise of its jurisdiction to inquire into the allegations. In his objection to the jurisdiction of the Supreme Court, the defendant enumerated his reasons as follows:

(A) The Court of Appeal being the final Court in so far as matters of this kind before this Court are concerned, this Court has no jurisdiction to entertain the suit before this Court which in essence seeks to question the judgment of the Court of Appeal but not by way of an appeal or otherwise but in the exercise of the original jurisdiction of this Court.

(B) Second, the original jurisdiction of this Court is not to be resorted to just because a party feels helpless.

(C) Third, this matter does not lie within the exclusive original jurisdiction of this Court.

I have carefully examined the undisputed facts averred to by the plaintiff and have come to the conclusion without any disrespect to learned counsel for the defendant who has made considerable submissions on these grounds that what was before the High Court and appealed to the Court of Appeal is different in scope than what is now before us. The plaintiff in any event is contending that the defendant continues to breach the provisions of the Constitution even after the decision of the Court of Appeal. In my view, the facts urged by the plaintiff are of a continuing nature like a nuisance therefore every moment that the defendant continues to take his seat in Parliament, or exercises the functions of that office, he is in breach of the constitutional provisions and as such there is a new cause of action consequent upon any such breach. This being the case, I do not see any force in the contentions on this ground.

Regarding the second jurisdictional ground that speaks to the allegation by the plaintiff of his apparent "helplessness", I think it is just a mere description by him of what he perceives to be a continuing constitutional infraction that to date neither the High Court nor the Court of Appeal appear to be able within their jurisdictional limits to determine such that the defendant continues to be seated in Parliament notwithstanding what he thinks is a disability in his eligibility.

I now turn to the last ground, which raises the issue whether the subject-matter of the dispute is properly within the jurisdiction of this Court. In support of this objection learned counsel for the defendant has argued that by virtue of the language of article 130(1) the question in respect of which the enforcement jurisdiction of the court is sought must; to be good, also involve interpretation of the Constitution. I think that the said contention is not borne out by a careful reading of both articles 2(1) and 130 (1) of the 1992 Constitution. The provision in article 130(1) is concerned with the enforcement jurisdiction of the Supreme Court in relation to the High court's enforcement jurisdiction in cases of alleged violation of fundamental human rights. A careful reading of article 130(1) reveals that the word "and" is used in respect of the two special or exclusive jurisdictions of the Supreme Court that are not available to the High Court and is not intended to mean that for this Court to have jurisdiction in cases of enforcement, the question for decision must also involve the question whether an enactment was made in excess of the powers conferred on Parliament or any other person by law or under this Constitution. A contrary interpretation of article 130(1) would render article 2(1) of the Constitution superfluous.

In my opinion the jurisdiction conferred on the court in making declarations under article 130.1 coupled with the ancillary power conferred on it under article 2(2) to "make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made" is an effective tool in ensuring and or compelling observance of the constitution. These provisions require us to measure acts of the legislative and executive branches against the constitution and where there is a violation to declare such acts unconstitutional provided the act in question does not come within the designation of a "political question". It is worthy of note that article 2(1) confers the right to seek a declaration that an act or omission of any person is inconsistent with or in contravention of a provision of the constitution while article 130(1) provides the means by which a person may exercise the right conferred on

him to seek relief in cases which provisions of the constitution have been breached. The special jurisdiction that this Court exercises in such cases is described by the constitution as original in contradistinction to the appellate or supervisory jurisdiction. I think articles 2(1) and 130(1) confer on us the jurisdiction of judicial review although there are no specific words in the constitution to that effect. In my opinion, a preference of the meaning placed on the relevant constitutional provisions by the defendant would result in our shutting the door to the opportunity provided by the constitution to persons to give reality to its provisions by compelling observance with its carefully drafted provisions and rather unfortunately open the door to unchecked violations of its provisions.

It is observed that the respect that the citizenry have for the constitution is derived from the belief that the Supreme Court has the jurisdiction to enforce the sanctions provided by the constitution against those who violate its provisions. In my view, it is important that we do nothing to undermine the confidence that the ordinary person thus has in our ability to compel observance of the Constitution by invalidating in appropriate cases not only enactments that are in breach of it but also acts of among others constitutional office holders that do not derive their legitimacy from the Constitution in terms of article 2(1).

If I may give a hypothetical example: Assuming the Electoral Commissioner fails to take steps under article 45 of the constitution " to compile the register of voters and revise it for such periods as may be determined by law" and an action is brought before this Court under article 2(1) of the Constitution can such an action be resisted on the ground that the article is expressed in unequivocal language that does not require any interpretation and therefore our jurisdiction under article 130(1) is wrongly invoked? Whiles the instance given here may seem unlikely to occur, the effect of the arguments being urged on us to decline jurisdiction in this case is substantially to the same effect- by blinding us to the onerous obligation on us in the nature of judicial review to shape and keep within bounds actions of among others constitutional office holders. When this obligation is properly discharged by us the Constitution then becomes a living document and not merely a collection of fine phrases, which may be seen only as aspirations. The jurisdiction conferred on us by articles 2(1) and 130(1) is to make pronouncements that would contribute to making our country not only a democracy but one governed by law, a country in which the rights of citizens are respected. I ask myself whether the invitation urged on us by the defendant seeks to achieve the valuable goal that the makers of the constitution placed on us to enforce the

provisions of the Constitution, and I have unhesitatingly come to the view that it does not. In my thinking, it is unreasonable to say that whenever a particular statute violates the constitution, it is our duty to adhere to the constitution by disregarding the statute and yet whenever acts of constitutional office holders which are, to be good, subject to certain limitations and restraints expressed sometimes as qualifications are breached because these acts do not involve issues of interpretation, we should decline to invalidate them. This would result in absurd consequences and have the effect not of upholding the constitution but undermining it. Accordingly, I have great difficulty in acceding to the invitation urged on us to deny jurisdiction in the matter herein. In my opinion, the action herein is properly before us.

My Lords, I think I have said that which is sufficient for the purposes of this ruling and desire to end by saying that for these reasons I dismiss the preliminary objection to our jurisdiction.

[SGD] N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

[SGD] S. A. BROBBEY
JUSTICE OF THE SUPREME COURT

[SGD] J. ANSAH
JUSTICE OF THE SUPREME COURT

[SGD] R. C. OWUSU (MS)
JUSTICE OF THE SUPREME COURT

[SGD] B. T. ARYEETEY
JUSTICE OF THE SUPREME COURT

[SGD] V. AKOTO-BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

JONES DOTSE JSC:

The plaintiff seeks from this court the following reliefs:-

1. A declaration that on a true and proper interpretation of articles 97 (1) (e) and 94 (2) (a) Adamu Daramani, also known as Adamu Daramani-Sakande, Adamou Daramani Sakande, Adamou Sakande, who holds a British passport and therefore " owes allegiance to a country other than Ghana," is acting in contravention and in continuous violation of the 1992 Constitution for as long as he continues to sit in the Parliament of Ghana. (2) Any consequential orders the Supreme Court may deem meet.

The capacity in which the plaintiff has initiated this action is that he is a citizen of Ghana, and a native of Bawku in the Upper East Region of the Republic of Ghana, and that he carries on business as a cattle dealer in the Bawku market.

The 1st defendant was elected in the December 7th, 2008 Parliamentary elections and has duly taken his seat as the Member of Parliament representing the Bawku Central Constituency after having been sworn into office as such.

FACTS

In view of the antecedents of this case, it is necessary and indeed desirable to recount the genesis of the facts of the case from its foundations up to and including the "Box in stage" until it has reached this court. That is the only way in which the ruling about to be given on preliminary objection at the instance of the 1st defendant/applicant, hereinafter referred to as the 1st defendant will be understood.

In support of the instant writ, the plaintiff/respondent hereafter referred to as the plaintiff attached exhibits A, B and C to support his contention that the 1st defendant is indeed a holder of a British Passport.

According to the plaintiff, on the 5th of February, 2009 the Consular section of the British High Commission confirmed in a letter to the Deputy National Security Co-

ordinator that Passport Number 094442659 is a British Citizen Passport. This is what is contained in exhibit A.

Further to exhibit A, the Deputy National Security Co-ordinator in a letter dated 9th February, 2009 to the Consular Section of the British High Commission provided the Applicant's name "Adamou Daramani Sakande" as the person holding the British Passport Number 094442659 and this letter is Exhibit B.

In a further letter dated, 11th February, 2009, the Consular Section of the British High Commission confirmed that the name provided by the Deputy National Security Co-ordinator "Adamou Daramani Sakande" the 1st defendant is the holder of the British Passport number 094442659 and this is the exhibit C attached to these proceedings.

Based upon information provided per exhibit A, the letter dated 5th February, 2009 from the office of the Consular Section of the British High Commission, the plaintiff herein immediately caused a writ of summons intituled, ***Sumaila Bielbiel vrs Adamu Sakande, Suit No. AHR35/09*** to be issued against the 1st Defendant herein in the Fast Track Division of the High Court, claiming the following reliefs:-

i. **A declaration that the defendant is a holder of a British Passport and therefore owes allegiance to a country other than Ghana and is therefore disqualified from holding the office of Member of Parliament of the Republic of Ghana.**

ii. An injunction against the defendant restraining him from holding himself out as a Member of Parliament and compelling him to vacate his seat in Parliament.

iii. Costs

iv. Any other reliefs as to this Honourable Court may deem meet.

The 1st defendant herein, raised objection challenging the High Court's jurisdiction to entertain the said suit at the instance of the plaintiff herein.

The grounds of the 1st Defendant's objection to the jurisdiction of the High Court to entertain the suit are the following:-

1. That the suit before the High Court was a disguised election petition brought in the manner in which the writ was couched. It was contended by the 1st

defendant herein, that the plaintiff herein initiated the action the way he did, in order to avoid the procedural obstacles he would need to clear if he had brought it as an election petition.

2. The second ground of objection was that, if as the plaintiff contended it was not an election petition that he had brought, then the plaintiff had no capacity to proceed against the defendant in the High Court. The reason for the above contention was that in a High Court action, a plaintiff was required to show interest in a given state of facts in order to personally clothe the plaintiff with a cause of action against the defendant. In the absence of any such interest, the plaintiff had no capacity to proceed against the 1st defendant in the High Court.

3. The third ground of objection was that the only court with jurisdiction to entertain suits in which parties are not required to show direct interest in the case is the Supreme Court wherein the original jurisdiction of this court must be invoked.

Despite the fact that these objections were quite weighty and raise serious legal issues, the plaintiff herein resisted the objections and curiously, the learned High Court judge dismissed the objections whereupon the 1st defendant appealed against all the decisions of the High Court to the Court of Appeal.

In the interim, pending the determination of the appeals, the 1st defendant out of abundance of caution filed a stay of proceedings in the High Court, which was dismissed.

Upon the failure of the High Court to stay proceedings, the 1st defendant successfully obtained an order of stay of proceedings in the matter at the Court of Appeal.

It has to be noted that, in view of the nature of the objections that the 1st defendant had taken to the propriety of the writ against him in the High Court, it was indeed imprudent to have filed a defence to the suit whilst the appeals were pending.

It was therefore under these prevailing circumstances that the plaintiff applied for and was granted a default judgment against the 1st defendant, declaring that "***the defendant is a holder of a British Passport and therefore owes allegiance to a country other than Ghana and is therefore disqualified from holding the office of Member of Parliament of the Republic of Ghana."***

It is interesting to note the desire of the plaintiff herein to proceed with the case despite the pendency of the appeal. ***It is a basic principle of procedure that where an objection has been taken to the propriety of an action in a trial court, and an appeal is pending against a decision in the matter, then it means that the objections taken against the originating process of the action are still alive. Experience and reality dictate that no steps should be taken until the appeal is determined.***

I have also observed that in this court, learned Counsel for the plaintiff in his reactions to the notice of preliminary legal objection filed by learned counsel for the 1st Defendant without being served with any further process, save the Notice of objection, filed a response in anticipation of the arguments to be canvassed therein by the 1st defendant. In this respect, learned Counsel for the plaintiff, stated in his paragraph 29 of the statement of case as follows:

> ***"My Lords, we anticipate a preliminary objection by the defendant on the authority of Yeboah vrs J. H. Mensah [1998-99] SC GLR 492****, or any of the* ***cousins*** *and* ***children*** *of that case, to the effect that the jurisdiction of this Honourable Court to enforce the provisions of article 97 and 94 of the Constitution is ousted by article 99.* ***In order to expedite this action, and in the spirit of judicial case management, we would respectfully seek to address that matter right now and invite the defendant to respond appropriately to the points of law herein canvassed, rather than resort to a preliminary objection".***

Yet indeed when learned Counsel for the Plaintiff appeared before this court to argue in response to the preliminary legal objection, he stated that he was not given sufficient days notice after service on him of the statement of case of the 1st Defendant herein in respect of the preliminary legal objection. ***Having resorted to the unorthodox procedure, it is unheard of for Counsel to complain about being short served. In any case, it should be noted that Rules of procedure for this court and for all the other courts have not been provided for nothing. They are meant to be complied with. In addition, there are valued reasonable policy considerations behind the said Rules such that any attempt to circumvent them will lead to incongruous results as indeed the various Court of Appeal decisions, have shown in the instant case.***

As a result, the Court of Appeal on the 18th of March decided the Interlocutory appeal filed by 1st Defendant, thereby setting aside the writ of the plaintiff herein, in

the High Court, ***on the basis that the claims made therein constituted an election dispute and that the action should have been commenced by a petition and not by a writ of summons.*** The court also held that the said petition should have been presented to the trial court (21) twenty one days after the date of the publication in the Gazette of the results of the election to which it related.

Subsequent to the judgment of the Court of Appeal dated 18/3/2010 referred to supra, the Court of Appeal again on the 25th day of March set aside the default judgment which was wrongly granted by the High Court on 15th July, 2009. Following the above decisions of the Court of Appeal, the plaintiff now invokes the original jurisdiction of this court seeking the reliefs already referred to supra.

The plaintiff states in paragraph 14 of his statement of case on page 7 as follows:-

> *"In the light of this Honourable court's decision in* ***Re Parliamentary Election for Wulensi Constituency, Zakaria vrs Nyimakan [2003-2004] SCGLR I, we are boxed in and extremely constrained****. We cannot appeal to this court on the matter because, that case decided that there is no right of further appeal from the court of Appeal to this Honourable Court in matters under article 99 of the Constitution. That article deals with the determination of any question whether a person has been validly elected as a Member of Parliament and the vacancy of a seat in Parliament."*

Continuing further, the plaintiff states in paragraph 15 as follows:-

> *"Yet we cannot allow the contravention of the 1992 Constitution to continue. In the firm believe that it would be unconstitutional to foreclose any action against the defendant and to encourage him to continue to contravene the Constitution by virtue of his allegiance to a country other than Ghana and his continues stay in the Parliament of Ghana: we are finally resorting to this Honourable Court (the one and only court with exclusive jurisdiction to enforce all the provisions of the Constitution), to invoke that exclusive jurisdiction to enforce the provisions of the Constitution by seeking a declaration that on a true and proper interpretation of articles 97 (1) (e) and 94 (2) (a) Adamu Daramani, also known as Adamu Daramani - Sakande; Adamou Daramani Sakande; Adamou Sakande who holds a British Passport and therefore "owes allegiance to a country other than Ghana' is acting in contravention and in continues violation of the 1992 Constitution for as long as he continues to sit in the Parliament of Ghana"*

All these statements have been categorically made as if the issue of the applicant holding a British Passport and therefore owing allegiance to a country other than Ghana has already been determined in the affirmative. There is as yet no such determination. The plaintiff in paragraph 6 of the statement of case states and I quote:

> *"If the defendant is presumed to have been properly elected and sworn into office as the Member of Parliament for Bawku Central, basing ourselves on Exhibits A, B and C, and in the absence of* ***contrary evidence****, the defendant subsequently acquired a British Passport after 7th January, 2009, when he was sworn into office, and before 11th February, 2009 when he was confirmed to hold a British Passport. Again,* ***in the absence of contrary evidence,*** *the defendant still remains a holder of a British Passport."*

All these are general and sweeping statements based on assumptions which because of the applications made for the default judgment by the plaintiff, as at now there is no version of the 1st defendant's story for this court to consider as the contrary evidence that the plaintiff himself has postulated in his statement of case.

In my opinion, whenever a party invokes the original jurisdiction of this court and bases his declarations on factual statements as if those statements of fact have been determined by a court of competent jurisdiction whereas there has infact been no such determination, then there is a lacuna which should be filled by the adduction of evidence to establish the veracity of such statements.

Even though this court has jurisdiction to call for evidence in appropriate circumstances when the original jurisdiction of the court has been invoked, it remains to be seen whether in view of the preliminary legal objection that has been raised this case qualifies for such a treatment.

Before proceeding any further, it is necessary to state how the plaintiff considers himself as having been *"Boxed in"* and cannot operate.

If indeed, the plaintiff and his legal team believe that they have a grounding in their case, in that it is not an election petition which has been so couched and therefore the litany of cases that have been listed supra, will not apply, then he ought to have tested the Court of Appeal judgment, in view of his original conviction that the suit is not election related. See cases of:

1. ***Republic vrs High Court, (Fast Track Division) Ex-parte Electoral Commission, Mettle Nunoo & others (Interested Parties) [2005-2006] SCGLR 514.***

2. ***Republic vrs High Court, Sunyani, Ex-parte Collins Dauda, Boakye Boateng – Interested Parties [2009] SCGLR 447 and***

3. ***Republic vrs High Court, Koforidua Ex-parte Asare, Baba Jamal and others – Interested Parties, [2009] SCGLR 460***

If the plaintiff genuinely believed in his resistance to the 1st Defendant's objection, then nothing prevented him from appealing against the Court of Appeal decisions. This would then mean that the Supreme Court decision in ***In Re Parliamentary Election for Wulensi Constituency, Zakaria vrs Nyimakan [2003-2004] SCGLR 1***, will not apply to the circumstances of that case.

From the responses of the plaintiff to the objections raised by the 1st defendant to the High court writ of summons, it is very surprising that the plaintiff has conceded to the conclusion that what he initiated in the High Court was an election petition couched differently.

On the basis of the above analysis, I am of the firm view that it is the plaintiff himself who has elected to be Boxed in and not the 1st defendant nor indeed the decided cases that he has referred to.

The reason for this conclusion (to repeat for the sake of emphasis) is that, the plaintiff could have appealed against the Court of Appeal decision instead of resting his case there, inside his self created box.

NATURE OF NOTICE OF PRELIMINARY LEGAL OBJECTION

Learned Counsel for the applicants in a notice filed on 30/3/2010, indicated that he will raise a preliminary legal objection in the following terms:-

> *"The Supreme Court lacks jurisdiction to entertain the suit presently before it in the exercise of its exclusive original jurisdiction."*

Learned Counsel for the 1st defendant, Youny Kulendi, in his introductory remarks to his submissions, raised pertinent procedural issues which he considered germane to the Notice of Preliminary objection. Even though the procedure he adopted has not been questioned, I will deal with it at the tail end of my opinion.

In his brief but incisive submissions, learned Counsel for the 1st defendant, Mr. Yonny Kulendi in his arguments in support of the contention that this court lacks the jurisdiction to entertain the suit presently before it in the exercise of its exclusive original jurisdiction sub-divided this omnibus ground into the following:-

1. The Court of Appeal being the final court in so far as matters of the kind before this court are concerned, this court has no jurisdiction to entertain the suit. This is because, if the plaintiff genuinely felt that his case does not belong to those class of cases which demand that they end at the Court of Appeal, then the proper remedy is for him to appeal against the Court of Appeal decision and not resort to the instant writ before this court.

ii. That the original jurisdiction of this court is not to be resorted to because a party feels helpless, or "boxed in". It must be noted that there are clearly well defined grounds upon which the jurisdiction of this court is invoked. These are clearly stated in the Constitution 1992 and the Supreme Court Rules C. I. 16. The situation in which the plaintiff found himself "boxed in" is certainly not one of the grounds to invoke the jurisdiction of this court.

iii. That, the present suit does not lie within the exclusive original jurisdiction of this court.

On the part of the plaintiff, as was stated earlier, Learned Counsel for the plaintiff, Dr. Raymond Atuguba, in paragraph 29 of his submissions stated that he anticipated a preliminary objection to be filed by the defendant.

Under the circumstances, the response to the objection did not follow the pattern of argument raised by 1st defendant. Learned Counsel for the plaintiff appears to have marshaled all his arsenal against the 1st defendant on the basis of the decision of the Supreme Court in the case of ***Yeboah vrs J. H. Mensah [1998-99] SCGLR 492*** and its cousins and children.

The submission of learned Counsel for the 1st defendant is that following the Court of Appeal judgment of 18/3/2010 in suit No. HI/84/2010 intitutled ***Sumailia Bielbiel vrs Adamu Daramani*** the options open to the plaintiff are either to nonetheless appeal against the said judgment or invoke supervisory jurisdiction of the Supreme Court to quash the decision of the Court of Appeal. This submission has been premised on the fact that the reliefs in the High Court case which went to the Court of Appeal on appeal and the reliefs in the instant case are similar.

As a matter of fact, there is no doubt that relief one in the High Court suit and the instant case are similar. The only difference is that, the plaintiff has cleverly deleted the magic words *"and is therefore disqualified from holding the office of member of Parliament of the Republic of Ghana".*

Out of abundance of caution, let me recast the relief one of the plaintiff in this court and the High Court for the necessary linkages and similarities to be drawn. In this court, the plaintiff seeks

> "*A declaration that on a true and proper interpretation of articles 97 (1) (e) and 94 (2) (a) Adamu Daramani, aka Adamou Daramani Sakande, Adamu Daramani-Sakande and Adamou Sakande etc who holds a British Passport and therefore owes allegiance to a country other than Ghana, is acting in contravention and in continuous violation of the 1992 Constitution for as long as he continues to sit in the Parliament of Ghana"* .

In the High Court, plaintiff claimed thus:-

> *"A declaration that defendant is a holder of a British Passport and therefore owes allegiance to a country other than Ghana and is therefore disqualified from holding the office of Member of Parliament of the Republic of Ghana."*

As I stated earlier, the only difference is the deletion of the words *"and is therefore disqualify from holding the office of Member of Parliament."*

In real terms, the deletion of the said magic words does not make any real change to the contents, nature, and effect of the writ in the High Court from that of the relief in the instant suit.

The issue then arises whether the plaintiff is estopped per rem judicatam by reiterating the very issues that were decided by the Court of Appeal. My candid opinion on the matter is that, the plaintiff could have appealed the decision of the Court of Appeal because ***he had contended all along that the suit he had filed in the High Court was not an election suit***. He should therefore have contested that suit at Supreme Court, and perhaps the decision of this Court In Re Parliamentary Elections for Wulensi Constituency, Zakaria vrs Nyimakan already referred to supra will not apply.

Similarly, the cases of *ex-parte Asare* and *ex-parte Collins Dauda* both Supreme Court cases already referred to will then not apply. In my mind therefore, it is the early

capitulation of the plaintiff to the decisions of the Court of Appeal that has led to his "Box in" or helpless situation as it now seems.

It is in the light of all these daunting difficulties that plaintiff appears to be making a passionate plea to this court not to allow the 1st defendant who holds a British passport from continuing to be a Member of Parliament. To allow him to continue to be a Member of Parliament will contravene article 94 (20 (a) of the Constitution 1992.

However, it has to be noted that since there has as yet been no definitive pronouncement on the status of the 1st defendant as to whether he owes allegiance to a country other than Ghana and is in fact the holder of the British Passport that allegation remains an allegation which has to be proven in court.

In a ruling delivered by the High Court, Accra dated 8/7/2010 in case No. ACC 45/2009 intitutled ***The Republic v Adamu Daramani***, presided over by Quist J on a submission of no case in respect of nine (9) counts of offences under the Criminal Offences Act, 1960 Act 29 and other electoral offences that the applicant herein is standing trial for and is currently pending.

The learned trial judge, in his ruling referred to supra held as follows:

> ***"Having regard to the fact that I have ruled that the accused person is a Ghanaian I am unable to support the charges contained in counts 6-9 against the accused person.*** *The prosecution failed to establish the ingredients of the offences as enumerated in counts 6-9 against the accused person. Under Section 8 (1) of the Representation of the People (Amendment) Act, 2006:*
>
> > ***"A person who is a citizen of Ghana resident outside the Republic is entitled to be registered as a voter if the person satisfied the requirements for registration prescribed by law other than those relating to residence in a polling station."***
> >
> > ***The accused person is acquitted on counts 1, 2 and 6-9 of the charges leveled against him." emphasis supplied***

It is provided in Section 174 (1) of the Criminal and other Offences (Procedure) Act 1960, Act 30 that:

"174 (1) At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused sufficiently to require him to make a defence , the court shall call upon him to enter his defence."

From the evidence led by the prosecution at the close of its case, I am satisfied that the prosecution has led sufficient evidence on counts 3, 4 and 5 against the accused person. He is therefore called upon to open his defence on counts 3, 4 and 5 of the charges levelled against him."

The offences in respect of which the Applicant has been requested to open his defence are as follows:

Count 3: False declaration for office or voting contrary to section 248 of the Criminal Offences, Act 1960, Act 29.

Count 4: Perjury, contrary to section 210 of the Criminal Offences, Act, 1960 Act 29 and

Count 5: Deceiving a public officer contrary to section 251 of the Criminal Offences Act, 1960 Act 29

The issue is therefore clear that there is yet to be a determination as to whether the 1st defendant is really a holder of a valid British Passport and therefore his continued presence in Parliament as Member of Parliament is in contravention of the constitutional provisions.

As far as the parallel trial of the 1st defendant for the same issue of holding a British Passport and therefore owing allegiance to a foreign country other than Ghana and in contravention of article 94 (2) (a) of the Constitution is proceeding apace in a court of competent jurisdiction, the commencement of this civil suit on the same facts on a matter that there has been no definitive judicial pronouncement upon, this court should be very slow and hesitant in acceding to the requests of the plaintiff.

It is my candid opinion that the present suit is a surplusage and should be aborted on grounds as shall be presently shown.

FACTS IN YEBOAH VRS MENSAH CASE

Mr. J.H.Mensah, the defendant was elected as the Member of Parliament for Sunyani East Constituency in the December 1996 Parliamentary elections.

A suit filed against him in the High Court Sunyani challenging the validity of his election was dismissed for having been filed outside the statutory period of 21 days as prescribed by law.

On 25th February, 1997 the plaintiff, a registered voter in the constituency filed another suit, this time in the Supreme Court, invoking the court's enforcement jurisdiction under articles 2 and 130 of the 1992 Constitution for a declaration inter alia, that under article 94 (1) (b) of the Constitution 1992 the defendant was not qualified to be a Member of Parliament. The defendant denied the claim. He also raised a preliminary objection challenging the propriety of the action on the ground that the plaintiff's action was, in substance and in reality, an election petition determinable only by the High Court under article 99 (1) (b) of the Constitution and sections 16 (1) and (2) and 20 (1) (d) of PNDC Law 284. He therefore invited the court to decline jurisdiction and strike out the action as incompetent.

It will be seen here that, there are several similarities between the facts in the ***Yeboah vrs Mensah*** case and the instant one.

1. Firstly, they both relate to challenging the election of a Member of Parliament.

2. Secondly, objections had been raised by the defendants to the writ.

3. The only point of difference was that, whilst in the instant case the suit against the defendant has been premised upon a non proven allegation of him owing allegiance to a country other than Ghana, that of the former case was founded upon the defendant not satisfying the residence criteria or requirement of a Member of Parliament.

The Supreme Court, by a majority decision of 4 – 1, per Charles Hayfron Benjamin, Ampiah, Acquah and Atuguba JJSC with Kpegah JSC dissenting as follows:

> *"The High Court, and not the Supreme Court, was the proper forum under article 99 (1) (a) of the Constitution and Part IV of PNDCL 284 for determining the plaintiff's action, which was, in substance, an election petition to challenge the validity of the defendants election to Parliament. The plaintiff could therefore not ignore the provisions of article 99 (1) (a) of the 1992 Constitution, which had provided for a specific remedy at the High Court for determining challenges to the validity of a person's election to Parliament, and resort to the enforcement jurisdiction of the Supreme Court under articles 2 (1) and 130 (1) of the Constitution."*

By this decision, the majority of the court followed an earlier decision of the Supreme Court in the case of ***Edusei vrs Attorney-General [1996-97] SCGLR 1*** and upon review see [1998-99] SCGLR 753, whilst the court criticized and departed from the decision in ***Gbedemah vrs Awoonor-Williams [1970] 2 G & G 438 S C.***

Charles Hayfron Benjamin JSC put the matter beyond per adventure in these glowing statements at page 498 thus:

> *"As I have said, quite apart from my view that the matter of the defendant's membership of Parliament having been concluded for all time by the judgment of the High Court, Sunyani, on 12th May 1997, the matter raised by the preliminary objection is covered by authority and the Practice Direction contained in [1981] GLR 1 S.C. Two principles may be deduced from the authorities. First, that when a remedy is given by the Constitution and a forum is given by either the Constitution itself or statute for ventilating that grievance, then it is to that forum that the plaintiff may present his petition. Secondly, if the Supreme Court has concurrent jurisdiction in any matter with any other court, then it is to that other court that the party may initially resort."*

Continuing further, Charles Hayfron Benjamin authoritatively stated on page 499 as follows:

> *"Within our municipality, I would refer to the Supreme Court case of* ***Edusei vrs Attorney-General*** *decided on 13/2/1996 and reported in [1996-97] SCGLR 1 and affirmed on a review by its judgment delivered on 22 April 1998 and also reported in [1998-99] SCGLR 753 where the majority of my learned and respected brethren refused to reach the merits of the case on the ground that the case was a human rights issue which the Constitution had specifically consigned to the High Court". Emphasis supplied*

There are many useful lessons to be drawn from this decision and why it should be preferred to the dicta of Kpegah JSC in the same case.

It is for the above reasons that I am of the considered opinion that the preliminary objection raised by learned Counsel for the 1st defendant should be upheld. That is, this court has no jurisdiction to entertain the suit in the way in which it has been presented to the court taking into account the antecedents of the case.

Being a parliamentary election matter, the case should have terminated at the Court of Appeal, however if the plaintiff strongly believes it is not an election related matter, then he should have appealed the Court of Appeal decision.

The preliminary objection is thus successful.

[SGD] **J. V. M DOTSE**
JUSTICE OF THE SUPREME COURT

[SGD] **ANIN - YEBOAH**
JUSTICE OF THE SUPREME COURT

[SGD] **P. BAFFOE - BONNIE**
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