

**IN THE HIGH COURT OF JUSTICE, HELD AT ACCRA, COMMERCIAL
DIVISION ON FRIDAY, THE 28TH DAY OF OCTOBER, 2016 BEFORE HIS
LORDSHIP, ERIC KYEI BAFFOUR, ESQ., JUSTICE OF THE HIGH COURT**

SUIT NO. GT/1401/2016

THE REPUBLIC

VRS

1. MRS CHARLOTTE OSEI

2. THE ELECTORAL COMMISSION

EX PARTE DR. PAPA KWESI NDUOM

RULING

I have before me an application in the nature of judicial review seeking the following reliefs:

One, certiorari to bring to the court the decision of the Respondents dated the 10th of October, 2016 which disqualified the Applicant as a presidential candidate for the 2016 general elections for the purpose of having same quashed.

Two, an order of prohibition to be directed at the Respondents from proceeding with balloting for positions in the presidential elections.

And three for further orders directed against the 1st Respondent in her capacity as Returning Officer for Presidential election to grant the Applicant the opportunity to

amend and alter the one anomaly found in his nomination papers as well as accept his nomination papers as amended or altered to enable him contest as a presidential candidate for the 7th of December, 2016 elections.

The grounds upon which the Applicant mounts this application has been stated by him to be anchored on:

1. Breach of the rules of natural justice (*audi alteram partem*)
2. Error apparent on the face of the record.

As an application of this nature launched under Order 55 of the High Court (Civil Procedure) Rules C. I. 47 must of necessity be supported by an affidavit deposed to by or on behalf of the Applicant, the factual basis upon which this application has been made has fully been set out in the Applicant's affidavit of 14th October, 2016.

I find it necessary to state the essential matters relied on by the Applicant in his thirty-three (33) paragraph affidavit in support. Applicant states that he was elected at the convention of the Progressive Peoples Party (PPP) as its Presidential candidate to contest for the upcoming elections for 2016. That the Respondents, who are mandated by law with the responsibility for the conduct of the elections opened nominations for which he duly picked nomination forms to contest for the office of the President of the Republic.

Applicant notes that the Respondents announced that it would receive the completed nomination papers on the 29th and 30th of September, 2016 and included the specific hours that persons who had evinced an intentions of contesting for the office of President were to submit the nominations papers. Applicant further claim that he dutifully followed

the instructions of the Respondents and submitted his forms on the 30th of September, 2016 only to hear ten clear days later on the 10th of October, 2016 at a press conference organized by the Respondents, that he has been disqualified as a presidential candidate on the basis that his nomination papers had one subscriber endorsing Applicant's forms in two different districts; making the Respondents to conclude that Applicant did not have the requisite number of subscribers required by law to support the nomination.

To Applicant the action of the Respondent to receive the forms only within the last two days of the nomination period meant that the Respondents have denied him the right afforded him by the law to have been given a hearing before a decision was taken regarding the competence of his nomination papers and hence the prayer for the invocation of the supervisory jurisdiction of the High Court.

The Respondents have ardently resisted the application of the Applicant on the ground that it is baseless and undeserving of the reliefs he seeks from the court. In her affidavit in opposition deposed to by the 1st Respondent, she claims that by law she was to provide an opportunity for amendment to forms within the nomination period and that she concedes that the Commission indicated that it would receive the nomination forms on the 29th and 30th of September, 2016; nonetheless the rules regulating the conduct of the elections states that the processes of nomination is concluded by close of day for nomination. And that the Applicant, if it was desirous of taking advantage of the rules, by having the errors on his forms pointed out to him to amend, should have disregarded the notice the Commission gave for the submission of the forms on the 29th and 30th of September and instead submit his forms earlier enough for his errors to have been pointed to him.

And besides, even if the Applicant purported to have relied on the notice issued regarding the two specific dates of 29th and 30th for the submission of his forms, then the Applicant

voluntarily assumed the risk associated with the late submission of forms.

1st Respondent, again, claim that Applicant by his own showing has admitted that one subscriber subscribed in more than one district and the nomination forms of the Applicant accordingly did not comply with the law and the decision to declare as invalid the forms of the Applicant was proper and in accordance with the rules. To Respondents, the Applicant had duly been given a proper hearing which came after his disqualification wherein the Applicant admitted knowledge of the criminal subscription to his nomination form and concludes, therefore, that the Applicant had not acted fairly to deserve the exercise of the discretionary power of the court in his favour.

PRELIMINARY LEGAL OBJECTIONS

The 1st Respondent in paragraph 6 of her affidavit in opposition gave indication that the application was incompetent and had preliminary legal objections to raise. Learned counsel, in his statement of case and in his vova voce submission before the court, has raised what I deem to be a hydra headed preliminary legal objections to the propriety of the application before the court. The court can proceed to the merits of this application only after it has determined the preliminary legal objections.

The first preliminary objection raised is to the effect that the Applicant has invoked the jurisdiction of the court by the wrong process, as to counsel for Respondents, the correct process for the Applicant to have approached the court was a petition and not an application for judicial review. Counsel support his submission by Regulation 9(3) and (4) of the Public Elections Regulations, 2016 (C.I.94) which states that:

“Where candidate fails to comply with sub regulation (2), the Returning Officer shall consider the nomination paper of the candidate as invalid and shall

(a) Endorse and sign on the nomination paper the reasons for that decision; and

(b) Inform the Commission”.

And it is after that the Commission shall take a decision on the matter within seven days. Counsel for Respondent argues that the option available to a candidate who is aggrieved by the decision of the Commission is to be found in Regulation 9(5) which states that:

“This regulation shall not prevent the validity of a nomination to be questioned on an election petition”.

One needs a careful reading of the basis for the Applicant being in court in order to appreciate whether the Applicant falls within Regulation 9(5) of C. I 94 as to compel him to commence his action by petition. Respondent claim that Applicant has only invoked the jurisdiction of the court because 2nd Respondent invalidated his nomination paper, thereby disqualifying him. To appreciate the nature of this application in this manner, with respect, is to harbour a limited appreciation of the entire reasons why the Applicant has ran to the court. Applicant claim or question, as far as I understand his application, that Respondent is enjoined to have given him a fair hearing before the close of nomination period, if there was one, to make any amendment or alteration necessary, to his nomination forms before any decision to disqualify him was made. If the Applicant was not alleging any procedural impropriety but only that the decision for his disqualification on the merits was wrong, then, I think, the correct procedure would have been by the mode spelt out under Regulation 9(5) of C. I. 94, that is through a petition.

It is, therefore, my view that commencing an action by way of petition spelt out in

regulation 9(5) of C.I 94 is when an applicant challenges the grounds of his disqualification on the merits and not when a disqualified candidate seeks to invoke the supervisory jurisdiction because of a procedural impropriety. See the following cases: **REPUBLIC v HIGH COURT (CRIMINAL DIVISION); EX PARTE FRANCIS ARTHUR** (Unreported) judgment of the Supreme Court dated 28th July, 2016; J5/29/16; **AWUNI v WEST AFRICAN EXAMINATION COUNCIL [2003-2004] SCGLR 471.**

Whiles writing this ruling, my attention was drawn to the case of **REPUBLIC v NATIONAL ELECTORAL COMMISSION & REBECCA ADOTEY; EX PARTE GEORGE AMOO** [13/7/2000] where the Court Appeal per Twumasi JA noted at page 5 of the judgment that where the legislature has provided a special procedure one cannot by pass it to litigate election results by prerogative writs. That case dealt with a party who had commenced an action by petition from the High Court all the way to the Supreme Court and whiles the final appeal was pending at the Supreme Court he decided to take the alternative route of invoking the prerogative writs of the High Court. The learned Judge correctly appreciated the issue in that case, when he stated as follows, that it was not opened to a Judge to assume fresh jurisdiction under the cloak of an application for prerogative orders in a disputed election results for which an election petition had previously been filed. That in itself amounted to an abuse of the judicial process. Ex Parte Amoo, is therefore, not an omnibus authority, to argue that this court is restrained from proceeding to examine this application as not being the right procedure for approaching the court.

The second preliminary legal objection, I glean, is that even if the Applicant had come by way of petition, his cause of action would still not have accrued, and that having recourse to the court by way of petition is available only after the conduct of the elections. Counsel supports his submission with the cases of **REPUBLIC HIGH COURT, SUNYANI, EX**

PARTE COLLINS DAUDA (BOAKYE-BOATENG INTERESTED PARTY) [2009] SCGLR 447; REPUBLIC v HIGH COURT, KOFORIDUA, EX PARTE ASARE (BABA JAMAL, INTERESTED PARTY) [2009] SCGLR 460.

I think, again with deep respect, counsel's submission is gravely misconceived. The cases cited deals with the challenge to the validity of an election to Parliament under section 16 of the Representation of the Peoples Law, 1992 (PNDCL 284) which can only be questioned by a petition. The time for the presentation of a petition has been stated under section 18 of the said Law to be within 21 days after the publication in the Gazette of the results of the election. Counsel cannot stretch the time period given by the law under PNDCL 284 to mount a challenge questioning the validity of the election of a candidate as a member of Parliament to encompass an allegation of a challenge of a person regarding a breach of a procedural rule under C.I 94. In any case, I have found that approaching the court, as in this case as the Applicant did, is not by way of petition and the subsequent argument of needing to wait until after the elections is a non sequitor.

The third in the trilogy of the preliminary legal objections launched by counsel for the Respondents is founded on an alleged non-compliance with the formal requirements for judicial review. Counsel for respondent relies on what the Rules say an application for judicial review should comply with under Rule 4 of Order 55 of the High Court (Civil Procedure) Rules, C.I. 47 which states as follows:

“Mode of Application

(1)An application for judicial review shall be made to the High Court by motion

(2)The motion shall be supported by an affidavit by or on behalf of the applicant which

shall contain the following particulars:

(a) The full name, description and address for service of the applicant

(b) The facts upon which the applicant relies;

(c) The relief or remedy sought by the applicant and the grounds on which he seeks the relief or remedy; and

(d) The full name, description and address for service of the person directly affected by the application”.

Counsel’s submission is that the above detailed information were found in the motion paper of the applicant but not in the affidavit, and this to him is fatal as the rules mandates that the information should rather be contained in the affidavit and not the motion paper as the Applicant had done.

I concede that the rules mandates an applicant to state the particulars required under Rule 4 of order 55 of C. I. 47 in the affidavit. Having put those particulars not in the affidavit but in the motion paper; what then is the net effect. Counsel for Respondent argues that this slip should lead to the dismissal of Applicant’s application before the court. I am unable to accede to this invitation by counsel for Respondent for the dismissal of the application and the reasons of the court are as follows:

It is trite that where a step taken by a party to a proceedings is fundamentally defective such a defect or error is beyond the curative and redemptive powers of the court. **See REPUBLIC v HIGH COURT, KUMASI; EX PARTE ATUMFUWA [2000] SCGLR** Beyond that the failure to strictly comply with a procedural rule will not lead to an

automatic dismissal of a suit due to the saving grace of Order 81(1) of C. I. 47 which notes that the failure to comply with the requirements of the Rules, whether in respect of time, place, manner, form or content shall not nullify the proceedings. I understand the authoritative pronouncement of Dr. Date-Bah JSC in the case of **REPUBLIC v HIGH COURT; EX PARTE ALLGATE CO LTD (AMALGAMATED BANK LTD) INTERESTED PARTY [2007-2008] SCGLR 1041** to mean this: that all breaches of the Rules of court are curable and may be waived by the court in the exercise of its discretion except three main irregularities that cannot be waived. These are:

- i. A breach or a violation that borders on want of jurisdiction of the court.
- ii. A breach of a statutory provision or an enactment other than a breach of the rules of court
- iii. A breach of any of the constitutional provisions. See page 1050 of the Ex Parte Allgate case supra.

The question I ask myself is does the violation that counsel for the Respondent raises fall within any of the three categories of exceptions that are beyond the curative powers of the court? The answer is a big no. Following Ex Parte Allgate the decision in Ex Parte Dr. Kofi Asare, supra followed the same jurisprudential thought. And even before the advent of the C.I 47 the Supreme Court had exercised similar functions in the case of **NIKOI OLAI AMONTIA IV (SUBSTITUTED BY TAFO AMON II v AKOTIA OWORSIKA III (SUBSTITUTED BY LARYEA AYIKU III [2005-2006] SCGLR 637** where the court cited with admiration the dictum of Apaloo J.A (as he then was) in the case of **ABDILMASIN v AMARFI [1972] 2 GLR 414 at 422** as follows:

“Nobody has a vested right in procedure and modern notions of justice require that a court should do substantial justice between parties unhampered by technical

procedural rules”.

I cannot rest this point without making reference to the case of **HALLE & SONS v BANK OF GHANA & ANOR** [2011] 1 SCGLR 378I wherein their Lordships noted in emphatic terms that:

“Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of a handmaid rather than a mistress, and the court ought not be so far bound and tied by rules, which are after all only intended as a general rules of procedure, as to be compelled to do what would cause injustice in the particular case”.

See also cases of **OPOKU & ANOR (NO 2) v AXES CO LTD.** [2012] 2 SCGLR 1214; **BOAKYE v TUTUYEHENE** [2007-2008] SCGLR; **REPUBLIC v HIGH COURT, ACCRA; EX PARTE GHANA MEDICAL ASSOCIATION (ARCMANN-AKUMMEY INTERESTED PARTY)** [2012] SCGLR 768.

I will hold and conclude on this point that the contention of counsel for the Respondents is an anaemic technical legal point bereft of any merit or substance and same is accordingly dismissed.

THE SCOPE OF THE SUPERVISORY JURISDICTION OF THE HIGH COURT

It is necessary for the purposes of clarifying the perimeters for the invocation of certiorari and prohibition that I set out the law on applications of this nature before dealing with whether the Applicant has made a good case for the reliefs he seeks from the court.

The Supreme Court in defining the ambit and scope of certiorari application in the case of **REPUBLIC V HIGH COURT, SEKONDI, EX-PARTE AMPONG AKA AKRUFA KRUKOKO I (KYEREFU III AND OTHERS – INTERESTED PARTIES) [2011] 2 SCGLR, 716 AT 722** noted as follows on the remit of certiorari applications:

“An order of certiorari, it is trite learning, is a discretionary remedy granted on grounds of excess or want of jurisdiction and or some breach of a rule of natural justice”.

In the case of **REPUBLIC v CAPE COAST DISTRICT MAGISTRATE GRADE II; EX PARTE AMOO** [1979] GLR 150 CA Apaloo CJ noted as follows on certiorari applications:

“As is well known, the remedy of certiorari is a useful tool in aid of justice and ought to be used to correct defects of justice whether they arise from illegality, fraud, breach of the rules of natural justice, error on the face of the record and the like. I am not even prepared to say that the category of cases in which this useful remedy can or should be used is closed. There is no reason why I should stifle the development of the law by any such assertion”

Another better rendition of the scope of certiorari was spelt out by the Supreme Court in its recent decision of **REPUBLIC v HIGH COURT, ACCRA; EX PARTE THE CHARGE D’AFFAIRS, BULGARIAN EMBASSY;** (Unreported) Suit No J5/34/2015 dated the 24th Feb., 2016; wherein the court noted as follows:

“It is well-settled that certiorari will be granted to quash a decision of a court that has been made without jurisdiction or in excess of jurisdiction or where there is an error of law apparent on the record that makes the decision a nullity. Certiorari

will also be granted to quash a decision given in breach of a rule of natural justice”.

In the case of **TEMA DEVELOPMENT CORPORATION & MUSAH v. ATTA BAFFOUR [2005-2006] SCGLR 121**, the Supreme Court held, per Wood JSC (as she then was) quoting from the judgment of Lord Diplock at page 949 of the report in the case of **COUNCIL OF CIVIL SERVICE UNIONS AND OTHERS v. MINISTER FOR THE CIVIL SERVICE [1984] 3 All. ER 935** of the ambit of judicial review noted as follows that:

“To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn....

For a decision to be susceptible to judicial review the decision-maker must be empowered by public law ... to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law

with executive powers, which have one or other of the consequences mentioned in the preceding paragraph’.

In the English case referred to by the Supreme Court in the TDC case, Lord Diplock identified three broad categories of acts amenable to judicial review. The first is illegality. That is the person who takes a decision in the performance of his public function must understand correctly the law that regulates his decision making power and be careful to give effect to the law.

The second is irrationality otherwise now referred to as the Wednesbury unreasonableness. This is in respect of a decision taken of a public nature and is so outrageous in its defiance of logic or of accepted moral standards that no reasonable person would have arrived at the decision.

The third comes under the rubric of procedural impropriety or failure to act with procedural fairness towards a person who is affected by the decision taken. These principles can also clearly be found in page 15 of the work “**Judicial Review of Administrative Actions**” (5th Ed) S & M London. See also the unreported ruling of my brother Asiedu J. sitting at the Fast Track Division of the High Court in **ALBERT ANTHONY AMPONG v ATTORNEY – GENERAL** AP 95/2009 dated 2nd December, 2009.

The Applicant no doubt has triggered the supervisory jurisdiction of the High Court under article 141 of the Constitution, where the Constitution grants power to the High Court over all lower courts and lower adjudicatory bodies in the exercise of that jurisdiction to issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory powers. Section 16 of the Courts Act, 1993, Act 459 echoes this powers granted to the High Court under article 141 of the Constitution. The powers of the court is given a comprehensive boost under article 23 of the Constitution which states as follows:

“Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other Tribunal”

That the actions of the Respondents in the performance of their official functions is amenable and within the scope and remit of the exercise of the supervisory jurisdiction of the High Court if the acts violates any of the known principles I have distilled supra. See **ENEKWA & ANOR v KWAME NKUMAH UNIVERSITY OF SCIENCE & TECHNOLOGY (KNUST) [2009] SCGLR 242.**

Having set down the perimeters of the law, does the grounds of complaint of the Applicant meet the standard set by law? The reliefs Applicant seeks is based on the grounds of breach of natural justice (*audi alteram partem* rule) and two, error apparent on the face of the record. Has the Applicant demonstrated any of these grounds to the court to be entitled to the issuance of certiorari and prohibition? I will prefer to deal with the ground of error apparent on the face of the record first before turning to the *audi alteram partem* rule of natural justice.

ERROR APPARENT ON THE FACE OF THE RECORD

What precisely is an error apparent on the face of the record? There seems not to be an authoritative pronouncement yet from our courts, at least, my research did not yield one. But it does appear that the phrase does not lend itself to easy definition and error apparent on the face of the record cannot be established with a degree of certainty and mathematical precision. There is some degree of latitude to be determined on case by case basis on what will constitute an error apparent on the face of the record. What is clear,

however, is that an error cannot be deemed to be apparent on the face of the record, if one needs to journey beyond the scope of the record to determine whether the decision impugned is correct or not. The record, upon examination at first glance, must strike one and need no long arguments and submissions to establish it. The error must be blatant and visible. I am persuaded by the position given in the Indian case of **BATUK VYAS v SURAT MUNICIPALITY AIR** [1953] BAM 133 where Chagla CJ noted as follows:

“No error can be said to be apparent on the face of the record if it is not manifest or self-evident and require an examination or argument to establish it”.

The second case I find that determined what an error apparent on the face of the record mean is from a decision of the House of Lords in the case of **BALDWIN & FRANCIS LTD V PATENTS APPEAL TRIBUNAL [1959] A.C. 663**, which dealt with patent action under section 9 of the Patent Act of UK, 1949 stripping the right of appeal against the decision of the Patent Appeals Tribunal except in the invocation of certiorari. The owner of a prior invention brought an application to quash the decision of the Patent Appeal Tribunal which had reversed the call of a superintendent examiner, that an application of a new invention would involve the reference to a prior invention. The owner of the prior invention invoked the supervisory jurisdiction of the House of Lords, that there was an error apparent on the face of the record and invited their Lordships to compare the two specifications. The court in rejecting this invitation noted at page 674 that:

“Here error cannot be detected simply by comparing two phrases in the judgment of the tribunal. Before error could be found the House of Lords would have to construe the relevant specification, a document addressed to technical experts,

which cannot be construed without explanations from technical experts. If in order to detect the error the House of Lords would require the help of technical experts, it is a contradiction in terms to say that an error of law appears on the face of the judgment.... In considering what is the record the matter must be looked at quite strictly ...”

It further noted that:

“The court should take care that on an application for certiorari it does not go behind the face of the record and decide a point of mixed fact and law. The error on the face of the record must be palpable and apparent. The record, according to Blackstone's definition, is what the inferior tribunal keeps "for a perpetual memorial and testimony" of its proceedings”

The final case on this point is the case of **ACIT v SAURASHTRA KUTCH STOCK EXCHANGE LTD C/A NO. 1171 OF 2004** dated September, 15, 2008 the same Indian Court described an error apparent on the face of the record in the following terms:

“A patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it can be said to be an error apparent on the face of the record...”

The record that Applicant complains about and seek to be quashed is Ex DPKN3, dated the 10th of October, 2016 and perhaps that part of page 11 of Ex DPKN2 that relates to the disqualification of the Applicant. Exhibit DPKN3 is a letter written to the Applicant by 1st Respondent in her capacity as the Returning Officer for the 2016 presidential elections. She informs the applicant of the regret of 2nd Respondent's inability to accept

the nomination paper of Applicant because one subscriber, Richard Aseda endorsed Applicant's form in two different districts.

Taking Ex DPKN3, it would be difficult to conclude, without admitting further evidence and arguments that there is something palpably wrong with Ex DPKN2. And as there is the need for admission of further evidence and arguments to determine error, if any, I find and I am persuaded that the second leg of Applicant's challenge to the decision of the Respondents that there was an error apparent on the face of the record has not been made out.

***AUDI ALTERAM PARTEM* RULE OF NATURAL JUSTICE**

I now turn to the first and main ground that Applicant anchors his application to invoke the supervisory jurisdiction of the court. That is the denial by the Respondents to the Applicant of a fair hearing before the announcement that he has been disqualified as a presidential candidate on the ticket of the PPP. Applicant's arguments oscillate from non-provision by Respondents of a nomination period through one where he argues that even if a nomination period was provided the time allotted the Applicant was unreasonable and breached Regulation 9(3) of C. I. 94 to one that the failure by Respondents to grant him a hearing before disqualification before the closure of the nomination period was bad in law and sinned against the *audi alteram partem* rule.

I think Regulation 9(1)(2)(3) and (4) of C. I. 94 would be very relevant and I find it useful to reproduce same here. It states as follows:

“9. (1) Whenever the nomination paper and the statutory declaration of a candidate are delivered and the deposit is paid in accordance with these Regulations, the candidate

shall be considered to stand nominated, unless proof is given to the satisfaction of the Returning Officer of the candidate's death, withdrawal or disqualification.

(3) The returning officer shall inform a candidate that the candidate's nomination is invalid where

(a) The particulars of the candidate or the persons subscribing to the nomination paper are not as required by law; or

(b) The nomination paper is not subscribed to as required by law, and

*shall give the candidate the opportunity to make amendments or any alteration necessary, **within the stipulated nomination period**".[emphasis mine]*

The 9(3) deals with the steps that the Respondents would have to take after scaling 9(1) and (2).

The Regulation 9 must be read in tandem with the prior provision founded under Regulation 7 of the same C.I 94 that spell out the details that should be contained in the nomination paper of a candidate vying for the highest office of the land. It states that:

"7. (1) A candidate for election as President shall be nominated on a separate nomination form in a manner determined by the Commission.

(2) The nomination form for each candidate in an election for President shall

a) be signed by the candidate;

- b) *be signed by not less than two persons who are registered voters in the area of authority of each district assembly;*
- c) *designate a person to serve as Vice President; and*
- d) *be delivered to the Commission on or before the **day appointed as nomination day** in relation to the election*

(4) A person shall not nominate more than one candidate in a presidential election.

(3) The nomination form shall be in quadruplicate and shall be delivered personally by

(a) the presidential candidate or

*(b) any of the persons specified under sub regulation (2) (b) between the hours of nine in the morning and twelve noon and the hours of two and five in the afternoon on or before the **nomination day***

It is worthy of note in Regulation 7(2)(d) and & 7(3)(b) of the use of the phrase “*nomination day*” and in Regulation 9(2)(b) the use of the phrase “*nomination period*” within whose span a candidate is provided the chance to make amendments to his form.

I cannot make a definitive determination of whether there was a breach of the *audi alteram partem* rule of natural justice without embarking upon an interpretation of the relevant provisions of C.I. 94 in relation to this dispute. And in doing so I am mindful of the basic rule that when a text is plain it needs no interpretation but effect must be given to it and it is only when there is ambiguity that a court needs to interpret. That statement itself is not free from controversy as Aharon Barak, the former President of the Israeli Supreme Court states that even plain text needs interpretation as it is through interpretation that the court can conclude that the meaning of a text or word is plain. He

states that:

“Even plain text requires interpretation, and only interpretation allows us to conclude that its meaning is plain. That does not, however, mean that no text is plain”.

The better way of constructing statutes is to interpret it as whole in a journey of discovering the intent of Parliament.

Such that in the interpretative work of the Judge he ought to view the statute as a whole and it is out of this holistic appreciation that the necessary connections and inferences could be drawn from the various parts, provisions, clauses, words, phrases etc in an attempt to discover the intent and purpose of Parliament. This has been echoed time and again and in the words of Viscount Simmonds that:

“the elementary rule must be observed that no one should profess to understand any part of ... any document before he had read it as a whole”.

See also **OSEI v AUSTRALIAN GOLDFIELDS LTD.** [2003-2004] SCGLR 69.

The Applicant argues that where the 1st Respondent upon presentation of nomination papers, on the day appointed by the Respondents, as nomination day, Respondents finds that the persons that subscribed to the nomination paper are not as required by law or the nomination paper does not meet the standard required by law, a candidate still stood nominated after the nomination day until the 1st Respondent had afforded an opportunity for amendment within the nomination period. And it was only when the opportunity had been offered within the nomination period for the amendment and the candidate was still

unable to effect the amendment that the 1st Respondent shall consider the nomination paper as invalid and inform the 2nd Respondent with a decision being taken on it within seven days.

The principle of natural justice that Applicant relies on has been stated by the learned authors of Halbury's Laws of England (4th Ed Vol 1 @ 78) that no man shall be condemned unless he has been given prior notice of the allegation made against him and offered the opportunity to be heard. The Supreme Court touched on what it meant an opportunity to be heard in the case of **AWUNI v WEST AFRICAN EXAMINATIONS COUNCIL** [2003-2004] SCGLR 471; where the court speaking through Sophia Akuffo JSC noted as follows:

“I will not venture to give a comprehensive definition of what is fair and reasonable, since these qualities are dictated by the circumstances in which the administrative function is performed. At the very least, however, it includes probity, transparency, objectivity, opportunity to be heard, legal competence and absence of bias, caprice or ill-will”.

The question for my determination is was the Applicant afforded the opportunity required by the provisions of the Rules under Regulation 9 of C. I 94, as dictated by the *‘audi alteram partem’* rule of natural justice, to be heard and to effect whatever anomaly that the 1st Respondent discovered within the nomination period before a decision was taken to invalidate his nomination paper?

What is nomination period and what is nomination day have not defined by the C.I 94. However, what is nomination day has been defined for the purposes of the Representation of the Peoples Law, PNDCL 284 and in relation to elections as *“the day appointed for the*

nomination of candidates”. It would then mean that nomination period under C.I 94 will be the period appointed for the nomination of candidates who have manifested an intention of contesting as candidates for both the presidential and parliamentary elections. And it would further mean, that nomination period would be longer than the nomination day or days considering the import of Regulations 7 and 9 of C. I. 94.

What then was the time appointed by the 2nd Respondent as the day and period for the nomination of candidates in compliance with Regulations 7 and 9 respectively? The only guide I have is Ex “DPKN1” captioned ***“Immediate Release [Thursday September, 08, 2016] Update on Preparations For December 7 Elections”***. The relevant portion for now is the following:

“The Electoral Commission has briefed the political parties on its preparation so far towards conducting the 2016 elections. At the Inter-Party Advisory Committee meeting held on Thursday September 8, 2016, the Commission advised as follows:

1. The Commission will be accepting nominations from Presidential and Parliamentary candidates on 29th and 30th September, 2016...”

It is therefore clear to me that the day(s) that the Commission was to receive the nomination papers from candidates was set to be the 29th and 30th of September and that to my mind will satisfy what is nomination day(s) within the contemplation of Regulation 7 (2)(d) of C. I 94. But the nomination period as contemplated by Regulations 9(3) of C. I. 94 was conspicuously not set by the Commission. Though the Rules clearly affords a candidate to present his nomination papers on or before the nomination day but it seems that per Ex ‘DPKN1’ the EC signaled its preparedness to receive nomination papers only on the 29th and 30th of September, 2016. The Applicant dutifully in compliance with the

directions provided by 2nd Respondent appears to have presented his forms on the 30th of September, the last of the two nomination days set by the Commission for receipt of the nomination papers.

It is after the receipt of the nomination papers on the nomination day, and within the nomination period; that Respondents were under duty by law to inform the Applicant of any anomaly detected on his form. The Respondents purporting and proceeding under the erroneous assumption that the two days set for the presentation of the nomination papers coincided with the end of the nomination period, failed to afford any opportunity to the Applicant to amend his form. Granted that even the nomination period ended on the 30th of September, 2016 the denial of an opportunity to the Applicant to amend his form will be wrong. And if the nomination period did not end on 30th September, as I seek to posit *supra* that EC did not set any nomination period, the denial of an opportunity to the Applicant is even more fatal and incurably bad.

I am fortified in my view that “*nomination day*” as it appears in Regulation 7(2)(d) of C. I. 94 is different from “*nomination period*” appearing in Regulation 9(2)(b) of C.I 94 due to one of the presumptions of interpretation. That is presumption of consistent expression or meaning. This presumption is to the effect that different words or phrases used in an Act or Rule are presumed to have different meanings placed on them by Parliament. After all Parliament in an Act does not use words and phrases in vain. I have not found anything from C.I 94 that displaces this presumption.

On the contrary it would be absurd from a clear reading of Regulations 7 and 9 of C.I 94 that the framers of the Rules will vest in the hands of the 1st Respondent to provide an opportunity to candidates to amend within the nomination period and expect that the day the acceptance of the nomination papers ends is the day the nomination period closes. If

one were to interpret the Rules that the end of the day(s) of acceptance of nomination papers ended the nomination period, it would be tantamount to the rules providing a right to a party in one breath and taking the same right away when there seems to be no claw back clause.

I think, in my respectful opinion, that it is contemplated within Regulations 9(2) of C. I 94 that a right is provided a candidate to amend or alter his forms after acceptance of same by the Returning Officer. And that the time for the end of the nomination period is set to last longer than the nomination date so that the nomination period span a time after the acceptance of the nomination forms. For that is the only way to make the enjoyment of the right afforded a candidate meaningful under regulation 9(2) of C. I 94. And to interpret it otherwise will mean the Returning Officer arrogating to itself the power to snatch from candidates what the Rules have given them. And the Returning Officer and the EC have no such power.

Assuming that even the court is wrong on this above point made, does it sit well with the Respondents to contend in this court that even though it told Applicant that he had the liberty to present his forms either on the 29th or the 30th of September, 2016; nonetheless, if Applicant has followed that instructions by bringing his form on 30th and not 29th September, Applicant has done so to his own peril because the days of acceptance of the nomination papers was the same as the end of the nomination period. This appears to me that Respondents intended to take from the Applicant what the Rules have afforded him. Applicant acted within the scope of the instructions of the Commission and cannot be made to suffer any penalty of denial of a hearing that the Rules under C. I. 94 give him before a decision was taken as to whether he had fully satisfied all the requirements necessary to contest as a candidate to the office of President of the Republic.

If the right to put oneself up as a candidate to contest an election is needlessly denied by the Respondents without due regard to well-trodden paths of fairness and propriety, it renders meaningless the exercise of the right to vote guaranteed by the Constitution in a participatory democracy. As the choice of a voter may have been denied him not through the fair means and processes prescribed by law. The conduct of the Returning Officer and the Commission in its denial of the right afforded the Applicant by law to make alteration or amendment to his form has been taken in a petulant fashion and their decision in respect of Applicant has been extremely perverse. The Applicant, Dr. Papa Kwesi Nduom, has made a clear case on the basis of the '*audi alteram partem*' rule of natural justice for the grant of the reliefs of certiorari and prohibition.

Before I deal with the contention of counsel for Respondent that this court is impotent to make any further consequential orders to give directions regarding the opportunity to amend that Applicant seeks; I find it necessary and useful to respond to two pertinent riposte made by 1st Respondent in her affidavit in opposition to the Applicant's affidavit in support of his application.

First is the claim that the conduct of the Applicant in admitting that Richard Aseda signed in two different districts bothers on criminality and does not deserve the relief he seeks. I will not spend much ink on this submission save to say that counsel seems to misapprehend the import and the scope for the invocation of the supervisory jurisdiction of the court. Consistently eminent jurists have emphasized that certiorari application does not deal with the merits of one's substantive case but more with whether or not there had been a decision that is irrational, deprives a party of fair hearing, procedural impropriety etc.

This point was drummed home in the case of **REPUBLIC v COURT OF APPEAL, EX-**

PARTE GHANA CABLE CO. LTD. (BARCLAYS BANK GHANA LTD - INTERESTED PARTY) [2005-2006] SCGLR 107 where at 118 of the decision, Dr. Twum JSC, noted as follows:

“Certiorari is not concerned with the merits of the decision. It is a complaint about jurisdiction or some procedural irregularity like the breach of natural justice”.

Again on the case 16th of March, 2011 in the case of **REPUBLIC v HIGH COURT, ACCRA; EX PARTE SALLOUM & OTHERS (COKER INTERSTED PARTY)** Suit No J5/4/2011 the majority per Anin Yeboah JSC stated that:

“The courts in Ghana and elsewhere seriously frown upon breaches of the audi alteram partem rule to the extent that no matter the merits of the case, its denial is seen as a basic fundamental error which should nullify proceedings made pursuant to the denial”.

These are enough to foreclose that argument. The second troubling claim of the 1st Respondent is that if it was just a fair hearing that Applicant complains of then he was amply afforded the opportunity to meet with 1st Respondent when he was disqualified. To reduce the denial of fair hearing that the law afford the Applicant before a decision is made to disqualify him to the meeting that took place after the disqualification of the Applicant is to trivialize the weightier and substantial mandate placed on the shoulders of the Returning Officer to afford an opportunity to the Applicant to amend his nomination paper within the nomination period before a pronouncement was made to disqualify him.

What was the usefulness of the meeting if it would not result in Applicant have the opportunity to effect the amendment or ensuring the compliance of the 1st Respondents with the law? The meeting of 13th October, 2016 cannot be advanced, in any way, as meeting the very intendment of the fair hearing that Regulation 9(2) of C.I 94 anticipate. The fair opportunity to amend the forms must precede any action to disqualify and not the other way round. I find that submission, again with profound respect to Sory, Esq. to be gravely pedestrian and peripheral.

The decision disqualifying the Applicant and as contained in Ex DPKN3 is ordered to be brought for the purposes of having same quashed and is hereby quashed by the court in the exercise of its supervisory jurisdiction.

Does this court have the power to order the Commission to afford opportunity to Applicant to amend the forms and receive same? Sory, Esq has made copious submissions on this issue and I understand them as follows: That article 46 of the Constitution insulate the Commission from any external control and that the case of **ABU RAMADAN & ANOR v ELECTORAL COMMISSION & ANOR** J1/14/16 and dated the 5th of May, 2016 reinforces this constitutional provision of insulation of the Commission from any control. In the Abu Ramadan case counsel relies on the dictum, of Gbadegbe JSC wherein he noted that:

“It is observed that in the exercise of the court’s original jurisdiction, it is not permissible for the court to substitute its own decision for that of the body or persons exercising a discretion conferred on it by the Constitution. This is necessary to keep the court itself within its proper limits in order to give effect to the supremacy of the law ...”

Counsel for Respondent will recall that Gbadegbe JSC proceeded to emphasize that when it had to do with the exercise of the discretion of the Commission, then it was not proper for the court to substitute its own discretion for the Commission. The finding that I have made of a breach of a right afforded the law to the Applicant regarding the opportunity to alter or amend his nomination paper, is not an exercise of a discretion of the Returning Officer and Commission but a mandatory obligation imposed on them by the law. And where Commission's actions disclosed any vitiating circumstances such as illegality, irregularity, unfairness or failure to satisfy an essential pre-requisite to the making of a decision that may justify the intervention of the court to set any exercise of discretion Commission aside.

I take umbrage under the glowing words of wisdom delivered at page 29 of the judgment by the learned Judge, Gbadegbe JSC as follows:

“The correct position is that the courts as constituted under the 1992 constitution may intervene in acts of the first defendant to ensure that it keeps itself within the boundaries of the law and also to give effect to provisions of the constitution. This is a jurisdiction that our courts have always exercised in relation to the first defendant of which the recent decision in the Abu Ramadan case (supra) is an example”.

I adopt the above words as mine and as counsel for Respondents is fully aware that just yesterday the Supreme Court in the case of **KWESI NYAME- TEASE ESHUN v ELECTORAL COMMISSION** has ordered the Commission to furnish agents of political parties with collation sheets of signed declared results and for Commission to give agents of political parties a signed and completed copy of Form One EL 23A and One EL 23 B for parliamentary and presidential elections respectively, it should be clear

to him that Commission cannot claim immunity from the directions of the court intended to give full meaning to the exercise of the court's supervisory jurisdiction.

I will proceed after quashing the decision of the Respondents disqualifying the Applicant as a candidate and order that the Respondents afford opportunity to the Applicant to make the necessary alteration or amendment to its nomination paper for it to receive same and then proceed to determine whether the Applicant had met all the criteria laid down by the laws of the Republic, in line with its duty laid down by C.I. 94. EC has no basis to complain that nomination period has closed when they did not set one. They only set nomination day under regulation 7 but not nomination period under regulation 9(2) as I have already found. The time frame to afford the Applicant is entirely within the discretion of the Respondents being mindful of the limited time available for the elections on December 7, 2016

In conclusion, I trust and hope, that this ruling dissolves doubts and illuminate our perception of the C.I 94 especially Regulations 7 and 9, an area that has been tormented by controversy and ambiguity. I will exercise my discretion not to award cost. Each party shall bear its own cost.

Eric K. Baffour, Esq.
Justice of the High Court

Representation:
Applicant – Present

1st Respondent –

Nii Ayikoi Otoo, Esq. with Gary M. Nimako, Esq., Felix Ograh, Esq., Dennis Ofosu Appiah, Esq., Barbara Brown, Ms, Cecil Adasi, Esq and Naa G. Ayiko Otoo, Ms for Applicant – Present.

Thaddeus Sory, Esq., with Sean Poku, Esq., and Theodora Tawiah Armah, Ms for Respondents – Present