PRESIDENT MILLS' EXECUTIVE JUDGMENT OVERRULING THE JUDGMENT OF THE SUPREME COURT IS UNCONSTITUTIONAL AND AGAINST THE FOUNDING PRINCIPLES OF THE NDC: BY MARTIN A. B. K. AMIDU

On the night of Thursday 24 May 2012 I read on ghanaweb.com/GhanaHome Page a story with the title 'Government no longer selling 'Jake Bungalow."' The story in its concluding paragraph '"described the acquisition as "immoral"'. I also read a statement attributed to the Forum for Governance and Justice (FGJ) in which my nephew and kinsman Dr. Appaak was alleged to have said: "the forum will study the docket and possibly seek redress. The plaintiff – Okudzeto Ablakwa and Omane-Boamah have also indicated that they will push for review of the case." Another newspaper on the same web on 24th May 2012 referred to the judgment as "Stinking Supreme Court Ruling .." and concluded that: "We wish Justice Brobbey a happy retirement and may he live long to experience ….his actions." I also read another newspaper with the title "Two "Jake Bungalow" Judges are NNP – Akume." I heard other comments about the morality of the case on radio as well and I see nothing immoral or unconstitutional when ordinary citizens temperately criticize rulings or judgments of the Courts.

I accordingly agree entirely with all those who expressed temperate concerns about the moral issues at stake. I took the view that the moral issues could cut both ways and be very damaging as well to Mr. Jake Obetsebi-Lamptey and the NPP during the coming elections should the voters perceive his conduct to be very reprehensible. I also took the view that whatever anybody's perceptions about the outcome of the Supreme Court's judgment a review application or redress under the due process of the law as indicated by Dr Apaak was the only available cause of action open within any civilized democratic Government under the Supremacy of the Constitution and the rule of law. I nonetheless determined not to make any comments on the matter and sent an e-mail on the night of 24 May 2012 to a South African friend in the USA who wanted to know the latest exciting happenings in Ghana. In the last paragraph of the e-mail I stated that:

"The Supreme Court gave a judgment in favour of Jake, the Chairman of the NPP over a government bungalow which he occupied as a Minister but which was allegedly sold to him after he left office. Hell broke loose from the Government side. The Cabinet decided it is no longer going to sell the bungalow to him even though he had already paid for it. Morally the Government may be right to oppose Ministers or former Ministers buying the bungalows in which they live as such Ministers. But legally and constitutionally the Government directive overruling the Supreme Court's 6-3 majority decision constitutes executive judgment over judicial judgment. My professional view is that the Government decision is unconstitutional as the Constitution even forbids legislative judgment over decisions of the Supreme Court. But I dare not speak openly otherwise I will be accused of just opposing everything the Government does. I am happy and thank God I left as their Attorney-General before this because I would not have agreed to it. I would have urged an application for judicial review of the decision first. Take my word; the Government is for ever going to be accused of unconstitutional conduct in spite of any moral arguments. Courts do not decide morals they decide law, period."

But on the morning of 25 May 2012 professional curiosity urged me to read what the Government really said on the Government of Ghana Official Portal least there had been some misrepresentation of the Government's position. The GNA statement recited the fact that Mr. Jake Obetsebi-Lamptey bought the property when he was a Minister under the Kufuor administration. It then quoted the following and attributed it to the statement issued by the Minister for Information:

"In the supreme interest of the people of Ghana, and taking cognizance of the Supreme Court ruling in the matter of Mr. Jake Obetsebi-Lamptey's immoral acquisition of State Property he occupied as a Minister of State, Cabinet at its sitting ..Thursday…has decided not to sell the said property." (Peacefm has the fuller quotation with the date and year)

I realized how serious and unconstitutional the above quoted statement constituted an "executive judgment" by the President over the ruling of the Supreme Court. The statement incites the people of Ghana against the Supreme Court's ruling with the innuendo that the Supreme Court acts contrary to "the supreme interest of the people of Ghana" in the exercise of the Judicial Power entrusted to it under Article 125(3) and its independence under Article 127(2) and (3) of the Constitution. Coming from a President vested with the Executive Power to be exercised in accordance with the provisions of the Constitution the statement further violated Articles 3(3), 12, 58(1) and (2), of the Constitution. I have no doubt whatsoever that the President's executive judgment over the decision of the Supreme Court (declaratory or whatever) has the tendency to affect the credibility and fortunes of the NDC as a democratic and Constitutional party for electoral purposes now and in future.

The Plaintiffs who had sued the Attorney-General, as the Defendant had expressed an intention to exercise their right to apply for a review of the decision of the Supreme Court. The Attorney-General as the main Defendant under Article 88 of the Constitution must know the exclusivity of his right to apply for review of the decision of the Supreme Court. The working constitutional system of the nation did not have to be interfered with by any unconstitutional Executive judgment by the President. The Constitution and the laws of Ghana provide several available legal alternatives for dealing with the decision of the Supreme Court without unconstitutionally calling its integrity into disrepute.

Firstly, Court packing has become part of the indecent baggage of constitutional and democratic governance all over the world where most Presidents who have the opportunity during their tenure to make appointments or replacement appointments to the Courts choose lawyers or judges whom they perceive to be ideologically ad idem with their politics. Many a President has, however, been disappointed with the decisions of his chosen judges after the appointment. Indeed in 2001 all the justices on the Supreme Court had been appointed to the Court by either the PNDC or the NDC but they did not slavishly make decisions based upon that fact. Secondly, President Mills knows that there have been two vacancies on the Supreme Court for him to fill since early or mid last year which he has not insisted on filling. It does not, therefore, lie in anybody's mouth to make an argument of previous Court packing when the President has characteristically chosen not to expedite the nominations by demanding the names from the Judicial

Council. How many days did it take for the late Mr. Justice D. K Afreh to be appointment to the Supreme Court? I repeat that there is no guarantee that the judges will decide for Government simply because the President appointed them. Thirdly, unless there is cogent and credible evidence of judicial misconduct on the part of the Supreme Court or a majority thereof in the exercise of the judicial power it is unconstitutional for any President in whom the Executive Power is vested to make insinuations against the Supreme Court. I imagine the dissenting Justices even detesting the President's executive judgment more, because of the impression it creates over their dissent. Fourthly, three judges have now to join the panel of the Supreme Court should any of the parties, including Mr. Obetsebi-Lamptey, decide to exercise a right to review based on exceptional circumstances (which includes errors of law) because Mr. Justice Brobbey would not be available to sit on the review. Fifthly, there is abundant evidence in the Ghana Law Reports that Supreme Court Justices can be convinced by strong persuasive and credible argumentation to change their minds in some review applications. I will give only one example very similar to this case for lack of space.

In Ghico Refrigeration & Household Products Ltd v Hanna Assi [2005-2006] SCGLR 458, Sophia Akufo, Dr. Date Bah, Prof Ocran, Ansah, and Aninakwah JJSC unanimously dismissed the Plaintiff-company's appeal and by a three to two majority decision (Sophia Akuffo and Prof Ocran JJC dissenting) also dismissed the defendant's cross appeal. In a first review application by the plaintiff-company to the Supreme Court in Gihoc Refrigeration & Household Products (No 1) v Hanna Assi [2007-2008] SCGLR 1 the Supreme Court constituted by the same review panel as the (No. 2) case below unanimously dismissed the Plaintiff-company Applicant's application again.

But in Ghico Refrigeration & Household Products (No. 2) v Hanna Assi [2007 – 2008] SCGLR 16 the Supreme Court constituted by Atuguba, Sophia Akuffo, Georgina Wood (as she then was), Dr. Date-Bah, Prof Ocran, Ansah, and Aninakwah JJSC allowed an application for review by the Defendant/Applicant, Hanna Assi, of the majority decision of the ordinary bench of the Supreme Court in Gihoc Refrigeration & Household Product Ltd v Hanna Assai [2005-2006] SCGLR 458 on the grounds, inter alia, that a decision touching on jurisdiction, if wrong, was a fundamental error which could lead to injustice and was clearly a ground for review. In the instant case, the majority of the ordinary bench erred in affirming the decision of the Court of Appeal which had held that in the absence of a counterclaim, the trial court had no jurisdiction to grant the reliefs of declaration of title and recovery of possession of the disputed property to the Defendant/Applicant.

I have cited the above cases, particularly the Hanna Assi (No. 2) to demonstrate the value of review and the possibility of even a majority going over to join the dissenting judges or judge to overrule their previous decision with the support of the two additional judges for the review. In Hanna Assi (No. 2) Sophia Akuffo, and Prof Ocran (the dissenters) where joined by Dr. Date-Bah, Ansah, and Aninakwah (the majority) and the additional justices Atuguba and Georgina Wood to unanimously allow the application for review for the Defendant/Applicant, Hanna Assi. There are several other cases in the Ghana Law

Reports showing Supreme Court judges acceding to cogent, credible and persuasive argumentation on review.

The National Democratic Congress was founded upon the realization of the importance of Constitutionalism under an independent judiciary as an inclusive and civilized mode of attaining the rule of law ideal. Even Parliament has been deprived under Article 107of the Constitution of any "…power to pass any law – (a) to alter the decision or judgment of any court as between the parties subject to that decision or judgment;…"

I know as a fact that the property in dispute is only one of others under the Accra Redevelopment Scheme. The contest has been whether or not the Accra Redevelopment Policy was followed in the sale of the bundle of properties in dispute. I also know as a fact that under the authority of the President a Committee of eminent land lawyers and administrators was appointed to Investigate the Sale of Government Lands in Accra (including the in-fillings) and the Committee submitted its report in September 2009. The President has not had both the moral and legal courage as President to make a decision one way or the other on the report after several meetings on it. It therefore beats my imagination what the special immoral circumstances surrounding this lone property, which can be subject to review by the Court, are in contradistinction to the other properties contained in the findings and recommendations of the Committee to warrant the President to resort to executive judgment, defame the Supreme Court and also drag the NDC's Constitutional credentials into disrepute. Equality they say is equity. Has the political morality contained in this maxim changed under our multiparty Constitutional dispensation?

As a foundation member of the NDC I am afraid that the working people, the middle class and particularly the floating voters of Ghana are more discerning of spins to know that an unconstitutional executive judgment by the President purporting to overrule a judgment of the Supreme Court and accompanied by insinuations on the integrity of the Supreme Court and legal profession can never be in "the supreme interest of the people of Ghana." It is in this connection that I feel compelled to repeat an advice I gave to the Attorney-General (when he was the Minister of the Interior) in the concluding paragraph of my letter No. D. 19/SF.9 dated 8th March 2011 entitled "RECALL FROM INTERDICTION". I concluded thus: "I have a parting thought: It is our constitutional duty as Ministers of this Republic to uphold the truth and defend justice to the end that we save our party and Government from embarrassment even to the peril of our being dismissed from office than keep quiet for our party and Government to be damned by our timidity." I lived my words. George W. Bush's, "Decision Points" at pages 172 to 174 is good guidance for the Attorney-General's Office and the Presidency on the professional ethics mandated by Article 88 of our Constitution.

I feel compelled to speak for myself as a foundation member of the NDC, in exercise of my right to freedom of speech and in defence of the Constitution. Spinning can never win the NDC the elections. Only integrity can. Respect the Constitution.

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