IN THE SUPERIOR COURT OF JUDICATURE, THE SUPREME COURT (CIVIL DIVISION) SITTING IN ACCRA ON THURSDAY THE 11TH DAY OF FEBRUARY, 2021

CORAM: YEBOAH (CJ) (PRESIDING), APPAU, MARFUL-SAU, AMEGATCHER, PROF. KOTEY, OWUSU AND TORKORNOO JJ.S.C

WRIT
NO. J1/5/2021

ARTICLE 64 OF THE CONSTITUTION AND SUPREME COURT RULES, 1996
(C. I. 16) AS AMENDED BY C. I. 74 AND C. I. 99)

AMENDED PRESIDENTIAL ELECTION PETITION
PRESIDENTIAL ELECTION HELD ON 7TH DECEMBER, 2020

JOHN DRAMANI MAHAMA - PETITIONER

AND

1. ELECTORAL COMMISSION - 1ST RESPONDENT

2. NANA ADDO DANKWA AKUFO-ADDO - 2ND RESPONDENT

PARTIES: PETITIONER REPRESENTED BY JOHNSON ASIEDU NKETIA

1ST RESPONDENT REPRESENTED BY JEAN MENSA, CHAIRPERSON

2ND RESPONDENT REPRESENTED BY PETER MAC-MANU

COUNSEL: TSATSU TSIKATA WITH HIM TONY LITHUR FOR THE PETITIONER

JUSTIN AMENUVOR FOR 1ST RESPONDENT WITH HIM A. A. SOMUAH ASAMOAH

AKOTO AMPAW FOR 2ND RESPONDENT WITH HIM FRANK DAVIES, KWAKU ASIRIFI AND YAW OPPONG

RULING

The fundamental issue raised in this objection is whether or not the 1st and 2nd Respondents in this petition could be compelled by this court to give evidence notwithstanding their express indication to the court that they do not intend to do so. This petition was brought under article 64 (1) of the 1992 Constitution. The petition seeks to challenge the validity of the election of the President in the2020 Presidential Elections conducted on the 7th December 2020. At the close of the Petitioner's case, Counsel for 1stRespondent announced to the court that the 1st Respondent does not intend to adduce any evidence in the case and, therefore, wanted its case closed.Counsel for the 2nd Respondent associated himself with the position taken by the 1st Respondent and reiterated that the 2nd Respondent would also close his case because he was not adducing any evidence. Both counsel submitted that, having regard to the evidence led by the Petitioner through his Witnesses, they do not deem it necessary to adduce any evidence in the matter. The two Counsel relied on Order 36 r 4 (3) of the High Court (Civil Procedure) Rules, CI 47 and Order 38 R 3E (1) and (5) of CI 47 as amended by the High Court (Civil Procedure) (Amendment) Rules 2014, CI 87.

Learned Counsel for the Petitioner has opposed the position taken by the Respondents and argued that the Respondents especially the 1st Respondent cannot refuse to adduce evidence in this petition. The grounds upon which Counsel for the Petitioner opposed the Respondents' decision not to adduce evidence are that they have both elected to adduce evidence, in that they havefiled and served Witness statements, as ordered by the Court. Counsel for the Petitioner argued further that the 1st Respondent in particular, besides filing an answer to the petition, hasalso specificallydeposed to an affidavit in opposition to an application to serve interrogatories, in which the Chairperson indicated her availability for cross-examination.

Finally, it was contended by Counsel for the Petitioner that the 1st Respondent's Chairperson performs a very important Constitutional function and as such must be made to adduce evidence in this petition to account for her stewardship to the people of Ghana.In their submissions before the court, Counsel for Respondents, particularly for the 1st Respondent sought to rely on Order 36 r 4(3) of CI 47 and Order 38 r 3E of CI 87.

We have carefully examined the above rules and are of the opinion that the provision that is relevant in the determination of this issue is Order 38 r 3E of CI 87, which specifically deals with the use of Witness statements in civil trials. We deem this rule to be crucial in view of the position taken by Counsel for the Petitioner amongst others that, the filing and service of a Witness statement connotes that a party has elected to adduce evidence at the trial. We recall that the filing and service of Witness statements in this case was in compliance with an order of this Court as part of the pre-trial protocols before trial commenced. It is also an undisputed fact that a Defendant in a case can elect whether or not to adduce evidence at the close of Plaintiff's case, when such a Defendant is called upon by the Court to open his or her defence.

We are of the considered opinion that it would be wrong in law to hold that a party is deemed to have elected to adduce evidence as soon as that party files and serves a Witness statement in compliance with a Court order. To hold so would mean that once a party files and serves a Witness statement that party mandatorily has to mount the witness box and adduce evidence at the trial. This position is not borne out of the rules. Indeed Order 38 r 3E (5), clearly provides otherwise as follows:-

''(5) If a party who has served a Witness statement does not call the witness to give evidence at the trial or put the Witness statement in as hearsay evidence, any other party may put the Witness statement in as hearsay evidence.''

The above rule implies that when a witness statement is filed and served the party who filed same may choose not to give evidence at the trial. The principle is the same in viva voce evidence where a party or witness who mounts the witness box, testifies in chief and fails to turn up for cross-examination. Such a witness cannot be compelled by the court to appear for cross-examination. He suffers the penalty of the evidence being expunged from the record. This is exactly the position the Respondents have taken in this petition where both respondents have decided not to adduce evidence even though they have filed and served witness statements. The above rule also points to the fact that a witness statement filed and served does not constitute evidence in law till the author of the statement mounts the witness box, takes the oath and prays that the witness statement be adopted as evidence in chief pursuant to Order 38 r 3E(2), which provides thus:

"(2) Where a witness is called to give oral evidence under subrule(1), the witness statement of that witness shall stand as the evidence in chief of that witness unless the Court otherwise orders."

In view of the clear provisions of the rules referred to above, we do not agree with the submission of Counsel for the Petitioner that when, as in this case, an answer to the petition was filed at the pleadings stage and Witness statements filed, the Respondents had elected to adduce evidence at the trial. We are also of the opinion that the filing of affidavit in interlocutory applications with deposition that the deponent would be available for cross-examination does not make the deponent compellable to adduce evidence at the trial.

Counsel for the Petitioner has argued that because the 1st Respondent performs a very important Constitutional duty, when it is sued in an action such as in this casedifferent rules should be applied. However, Counsel failed to refer us to any provision of the 1992 Constitution or any statute which required that the 1st Respondent, being a Constitutional body should be subjected to different rules of the Court and our own industry did notunearth any such authority. The law is that parties before this court must always comply with the known rules of procedure and settled practice regulating the jurisdiction of this court regardless of the nature of the case. See Oppong v. Attorney-General & Others (1999-2000) 2 GLR 402.

The 1st Respondent is not subject to any different rules of procedure because it is a Constitutional body.The evidential duty imposed by law on a person seeking to challenge a presidential election result has been settled by this Court in the 2013 election petition case intituled**Akufo-Addo & Others v. Mahama& Another (2013) SCGLR(Special Edition)73**.

After citing with approval several decisions of Courts in some Commonwealth countries notably Nigeria, Uganda, Kenya, and Canada, Adinyira JSC concluded at page 218 that:

''Accordingly the petitioners bear the burden of proof to establish not only that there were violations, omissions, malpractices and irregularities in the conduct of the presidential election held on 7th and 8th December 2012 but also that the said violations, omissions, malpractices and irregularities, if any, affected the results of the election. It is after the petitioners have established the foregoing that the burden shifts to the respondents, to establish that the results were not affected. The threshold of proof should, in principle, be above the balance of probability."

We have cited Adinyira JSC's dictum to drive home the legal proposition that a Petitioner in an election dispute stands or falls on the strength of his or her own case and never on the weakness or otherwise of the evidence of the Respondents.

Counsel for the Petitioner cited to us the case of **SumailaBielbiel v. AdamuDramani& Attorney – General No. 4 (2012) 1 SCGLR 374**, in which this court ordered a party to adduce evidence because that party had already adduced evidence in the form of an affidavit. That case is distinct from what is before us now and it must be read in its context relative to the facts before the court then. In that case this court was dealing with a submission of no case in a trial admitting affidavit evidence, unlike the current petition where this court is dealing with Witness statements which areunsworn and are not yet evidence. Indeed, the distinction between that case and the current case is clearly demonstrated in the ruling of Dr.Date-Bah, JSC who delivered the ruling

of the court. At page 357 of the report the learned jurist delivered himself as follows:-

'' It is the unanimous view of this court that the first defendant, AdamuDramani should be called upon to open his defence in the interest of justice. This case does not have the ordinary characteristics of a trial, say the High Court. The procedure before this court is such that, before the commencement of oral testimony in this case the first defendant had already put matters in evidence by affidavit. In this circumstance, it is artificial and hardly sustainable, to disregard the evidence already adduced by the affidavit of the first defendant and proceed to an assessment of a no case submission *made on* his behalf, as if the evidence on record is that of the plaintiff.''

The distinction here is that in the petition before us the 1st Respondent has not put before us any evidence in the form of an affidavit or otherwise. As already stated, learned Counsel for the Petitioner only referred us to an affidavit deposed to by the Chairperson of the 1st Respondent in opposition to an interlocutory application to serve interrogatories. That affidavit is not evidence in this petition to enable us compel the 1st Respondent to mount the witness box to be cross-examined. The SumailaBielbiel case is clearly distinguishable on the facts and the law.

Now, besides the rules referred to in this ruling, we take notice of the well-settled practice that a Defendant in a case has a right not to adduce evidence after the close of a Plaintiff's case. This right which originates from the Common Law has been incorporated into civil trials in our jurisdiction through case law and has been applied in several cases in our Courts. The general principle of law

is that a party cannot be compelled to adduce evidence in a trial. In this direction we intend to refer to some cases on this principle of law.

In **Nyamekye v. Ansah (1989-90) 2 GLR 152 CA**, Ampiah JA (as he then was), delivered at page 155 thus:

''The Plaintiff contended that since the first defendant did not give evidence, judgment should have been entered against him. I do not agree. A party to an action need not give evidence himself. Provided he can adduce evidence of some sort from other sources, the court would have to look at that evidence in considering the totality of the evidence before it.''

In **Baron v. Larbi (1962) 1 GLR 168**, in a Practice Note, Ollennu J (as he then was), delivered himself as follows:-

''... a party to a suit is not bound to give evidence and the court cannot compel him to give evidence if he does not want to. And if a party, having gone into the witness box and sworn or affirmed elects to give no evidence his opponent is not obliged to cross- examine him. This procedure, therefore, is not irregular, and cannot vitiate the proceedings and the judgment in the case''.

In **Tei& Another v. CEIBA Intercontinental (2017-2018) 2 SCGLR 906 at 919**, Pwamang JSC opined as follows:-

''It must be remembered that the fact that a Defendant does not appear to contest a case does not mean that the Plaintiff would be granted all that he asks for by the court. The rule in civil cases is that he who alleges must prove on the balance of probabilities and the burden is not lightened by the absence of the defendant at the trial.

The absence of the Defendant will aid the Plaintiff only where he introduces sufficient evidence to establish a prima facie case of entitlement to his claim''.

In **Armah v Hydrafoam Estates Ltd (2013-2014) 2 SCGLR 1551 at 1567**, which was cited to us by Counsel for Respondents, Benin JSC held thus:-

'' A Court has no duty to call upon any party to testify in the case; the court acts as an umpire and only hears such evidence as the parties will proffer; whether the parties will testify or not is none of the Court's business. Indeed for a court to insist that a party should testify will amount to the judge descending into the arena of conflict. After determining the triable issue/s the trial court leaves the field clear for the parties themselves to decide who will testify. We know of no law or rule which entitles a court to call upon a party to testify in the action. If such a law or rule does we would venture to say that it is inapplicable under legal dispensation.''

Finally, we refer to the case of **The Society of Lloyd's v. Sir William OthoJaffray BT(2000) QBD Commercial Court**, which on the facts is similar in terms of procedure with the current case before us and cited by Counsel for the 2nd Respondent. In that case, all the witnesses had served their witness statements in accordance with pre-trial directions under the civil procedure rules but Lloyd's had decided not to call them to testify at the trial. An application was made to the court for an order requiring the opposing party to call the witnesses at the trial so that the Applicant could cross-examine them.

Cresswell, J. held that in civil proceedings, the trial judge had no power to dictate to a litigant what evidence he or she should tender. There was no obligation to call witnesses. It was counsel's duty to decide what evidence was

called and the order in which it was called. The instant court had no jurisdiction to make the orders sought.

The law, is therefore settled that a party will not be compelled to enter the witness box and testify in support of his or her case. It is a risk parties who decline to give evidence take knowing perfectly well that the court would be left with no option but to proceed with the available evidence before it. Counsel for the Petitioner has strongly submitted to us that we should not apply the Society of Lloyds case to the peculiar facts of this petition because the 1st Respondent being a Constitutional body with defined responsibilities must be brought before this court to be cross-examined as a way of accounting to the people of this country for its stewardship.

The Society of Lloyd's case like this petition also deals with witnesses who had served Witness statements and have decided not to give evidence to be cross-examined. We are minded to state that our jurisdiction invoked in this election petition is a limited jurisdiction clearly circumscribed by law. We do not intend to extend our mandate beyond what the law requires of us in such petitions brought under article 64(1) challenging the validity of the election of a President.

Simply put, we are not convinced and will not yield to the invitation being extended to us by counsel for the Petitioner to order the Respondents to enter the witness box to be cross-examined.

Accordingly, we hereby overrule the objection raised by counsel for the Petitioner against the decision of the Respondents declining to adduce evidence in this petition.

BY COURT

By the ruling just read the respective cases of the 1st and 2nd Respondents are deemed closed. This Court hereby orders that the Parties herein should simultaneously file their respective closing addresses/submissions on or before Wednesday the 17th of February 2021.

The Petition is hereby adjourned to the 18th of February 2021 for Counsel in this petition to highlight on the written addresses/submissions so filed for the petition to be adjourned for judgment.

(SGD) ANIN YEBOAH
(CHIEF JUSTICE)

(SGD) Y. APPAU
(JUSTICE OF THE SUPREME COURT)

(SGD) S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

(SGD) N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

(SGD) PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

(SGD) M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

(SGD) G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)