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Registrar
SUPREME COURT OF GHANA

IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA - A. D. 2021

SUIT NO. _____

WRIT TO INVOKE ORIGINAL JURISDICTION OF THE SUPREME COURT
PURSUANT TO ARTICLES 1(2), 2(1) AND 130(1) OF THE 1992 CONSTITUTION OF
GHANA AND RULE 45 OF THE SUPREME COURT RULES, 1996 (C.I. 16)

BETWEEN

FOOD SOVEREIGNTY GHANA
HOUSE NO. C155/4, KOTOKO AVENUE
KOKOMLEMLE, ACCRA

- PLAINTIFF

AND

THE ATTORNEY – GENERAL
ATTORNEY - GENERAL'S DEPARTMENT
MINISTRIES - ACCRA

- DEFENDANT

STATEMENT OF CASE OF THE PLAINTIFF

- 1) The Plaintiff is a Ghanaian Non-Governmental Organization incorporated as a company limited by guarantee operating and existing under the laws of Ghana.
- 2) Defendant per Article 88 of the 1992 Constitution of Ghana is the principal legal adviser to the Government and is responsible for the initiation and conduct of all civil proceedings on behalf of the State, as well as the initiation and conduct of all prosecutions of criminal offences.
- 3) Defendant per Section 61 of the Plant Variety Protection Act, 2020 (Act 1050) is mandated to implement Act 1050, which is purportedly tailored on the tenets of the International Convention for the Protection of New Varieties of Plants of 1961 (the UPOV 61 Convention).
- 4) Plaintiff brings this action to challenge first and foremost the power given to Defendant per Section 61 of Act 1050 to ensure that the implementation of the Act

does not affect the fulfilment of the obligations of Ghana pertaining to the protection of plant breeder rights under the "Convention to which Ghana is a party". However, Section 63 of Act 1050 defines "Convention" as used in Section 61 to mean the International Convention for the Protection of New Varieties of Plants of 1961 (UPOV 61), which Ghana at the time Act 1050 was passed, was not a party, and still not a party to UPOV 61, when the instant action was instituted. Subsequently Plaintiff comes under Article 2(1) to invoke the exclusive original jurisdiction of the Supreme Court under Article 130(1) for the reliefs and orders indorsed on Plaintiff's Writ. The provisions of Article 2(1) and 130 of the 1992 Constitution are set out below:

Article 2 – Enforcement of the Constitution

(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) any 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.

Article 130 - Original Jurisdiction of Supreme Court

(1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in –

(a) all matters relating to the enforcement or interpretation of this Constitution; and

(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.

- 5) Plaintiff states that both the letter and spirit of the 1992 Constitution of Ghana are breached by the implementation of Act 1050 by Defendant to ensure that the implementation of same is subject to UPOV 61, which Ghana is not a member nor a signatory. By making UPOV 61 binding on Ghana in terms of its obligations to plant breeders, when Ghana is not a party to same, and which Convention has not been ratified by Parliament or a resolution taken thereon, Sections 61 and 63 are in breach of Articles 1(2), 11 and 75 of the 1992 Constitution. The provisions of Articles 1(2), 11 and 75 are set out below:

Article 1(2) -The Supremacy of the Constitution

(2) This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void

Article 11 – The Laws of Ghana

- (1) The Laws of Ghana shall comprise
- (a) this Constitution;
 - (b) enactments made by or under the authority of the Parliament established by this Constitution;
 - (c) any Orders, Rules and Regulations made by any person or authority under the power conferred by this Constitution;
 - (d) the existing law;
 - (e) and the common law.

Article 75 – Execution of Treaties

- (1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.
- (2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by
- (a) an Act of Parliament, or
 - (b) a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament.
- 6) Plaintiff states that Act 1050 mandating Defendant to implement same not to affect the obligations of Ghana under UPOV 61, is in breach of the 1992 Constitution. That at the time Act 1050 was enacted, the UPOV 91 Act was the operative Act of the UPOV Convention in force for its members, and which Ghana is not a member. It is therefore untenable in law for an enactment such as Act 1050 to give power to Defendant to implement a UPOV Convention, which Ghana is not signatory and party to, over and above the Constitution and laws of the Republic of Ghana.
- 7) Plaintiff submits that this is a proper case for this Honourable Court to exercise its exclusive original jurisdiction as provided under Article 130 of the 1992 Constitution. In the case of **GBEDEMAH v. AWOONOR-WILLIAMS (1970) 2 G&G 438 AT 439** the Court of Appeal, sitting as the Supreme Court, stated the parameters within which the original and exclusive jurisdiction can be invoked thus: "It seems to us that for a plaintiff to be able to invoke the original and exclusive jurisdiction of the Supreme Court his writ of summons or statement of claim or both must prima facie raise an issue relating to:
- 1. the enforcement of a provision of the Constitution; or
 - 2. the interpretation of a provision of the Constitution; or
 - 3. a question whether an enactment was made ultra vires Parliament, or any other authority or person by law or under the Constitution."
- 8) A relevant case for consideration is **PENKRO v. KUMNIPAH II [1987-88] 1 GLR 558 at 563**. It was established in the said case above, that whenever anything is a nullity and same is brought to the attention of the Court, it is the duty of the Court so to declare it. In **SUMAILA BIELBIEL v. ADAMU DRAMANI (No. 1) [2011] 1**

SCGLR 132, the Supreme Court held that illegality and breaches of the Constitution will not be allowed to stand.

- 9) The Plaintiff, as a incorporated organization in Ghana, is entitled as of right to challenge in this Honourable Court any act or omission which is inconsistent with, or in contravention of, a provision of the Constitution. This right follows from the principle established in **SAM (No. 2) v. ATTORNEY-GENERAL [2000] SCGLR 305** that in an action to enforce or interpret the Constitution, a party need not show a personal interest in the litigation. This principle was again emphasized by this Honourable Court in **AMIDU v. ATTORNEY-GENERAL, ISOFOTON S.A. and ANANE-AGYEI FORSON (J1/23/2012) (21ST January, 2013)** when it held that “a citizen’s duty under Articles 3 (4) (a) and 41(b) to defend the Constitution are a sufficient interest to invoke the Supreme Court’s special jurisdiction under Article 2 (1)”.
- 10) Plaintiff respectfully submits that the current Act 1050 has no constitutional foundation, as the Defendant herein has not met the critical requirement of Article 75 of the 1992 Constitution of Ghana. The Defendant herein is being called upon by Section 61 of the Act, to ensure the implementation of the Act, an Act with tenets not constitutionally founded to govern Ghana’s agricultural sector. In the case of **BANFUL & ANOR. v. ATTORNEY-GENERAL & ANOR. (2017-2020) 1 SCGLR 82**, it was held that failure to obtain a parliamentary ratification or resolution of an agreement entered into by the President for the reception into Ghana of the persons formerly held at the Guantanamo Bay detention centre was unconstitutional.
- 11) Plaintiff submits that in the instant case, there is no parliamentary ratification or resolution whatsoever made for Ghana’s obligations under the UPOV regime, making the coming into force of Act 1050 unconstitutional. In the **Banful** case (supra) on page 83, Her Ladyship Sophia Akuffo CJ, succinctly, appraised our constitutional jurisprudence in the following terms:

“The language of article 75 is perfectly clear. The article forms part of the set of provisions governing the role of the Executive arm of government in Ghana’s international relations. The scope of the article deals with treaties in general ... and the body of the text makes reference to treaties, agreements and conventions. It is also clear that the instruments referred to Ghana’s international relations with other countries or groups of countries and the article requires that such instruments must be ratified by parliament ... From the afore-mentioned principles of constitutional interpretation in Ghana, there is no doubt that where, by various forms of documentation, the Government of Ghana binds the Republic of Ghana to certain obligations in relation to another

country or group of countries, an international agreement comes into existence... there is, therefore, no doubt that the agreement, unique as it is, cannot be made without parliamentary ratification”.

- 12) In GLENISTER v. PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA (2001) ZACC 6, 2011(3) SA 347, (CC), the position is that approval by Parliament of an international agreement does not only have domestic constitutional effect but it also establishes the country's willingness to be bound to an obligation at the international level.
- 13) Plaintiff strongly submits that what Act 1050 seeks to do under section 61 by granting the Minister, precisely the Defendant herein, the power to implement Act 1050 to fulfil Ghana's obligations under UPOV 61, a Convention to which Ghana is not a party, and which terms and agreement Parliament has not ratified or taken a resolution on, is unconstitutional. Consequently, the terms of the Convention (UPOV 61) upon which Act 1050 is founded is unconstitutional, making Act 1050 a nullity. In the case of MACFOY v. UAC (1961) 3 All ER 1169 at 1172, the Judicial Committee of the Privy Council speaking through Lord Alfred Thomas Denning stated that “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”. In summation, Plaintiff submits that Act 1050 has no constitutional basis and cannot stand as same is a nullity.
- 14) Plaintiff contends that Section 22 of Act 1050 providing for measures to regulate commerce, to regulate plant breeder rights, is not subjected enough to the sovereign laws of the Republic of Ghana. The laws of Ghana are expressly stated in Article 11 of the 1992 Constitution supra, and nowhere does the phrase “**any measures taken by the Republic**” finds expression therein as part of the laws of Ghana. The above Section 22, seeking to subject a plant breeder right to normative rules, as either the lawmaker's intention or the draftsman's industry, is ambiguous. Section 22 of Act 1050 opens up the gamut of legal control in the hands of the implementing authority in respect of plant breeder rights without limits, as “any measure”, means any measure. Subsequently, the appropriate legal control to govern plant breeder rights under Ghana's national laws is impaired by Section 22 of Act 1050.
- 15) In the case of REPUBLIC v HIGH COURT, ACCRA; EX PARTE: ADJEI (1984-86) 2 GLR 511, it was held per Adade JSC, that a statute must be interpreted to give effect to all its parts. It is the duty of a draftsman, when given policy changes to put into legislative form, to ensure that the required amendment when effected, will run and be compatible with the remaining sections of the law he is amending. Carelessness in drafting can result in irreparable loss to litigants, including governments and place unnecessary but avoidable difficulties in the way of the

courts in their efforts to dispense justice.

16) Plaintiff respectfully submits that nowhere in Article 11 of the 1992 Constitution, does the wording, 'any measure taken by the Republic' find expression as part of the laws of Ghana, upon which Act 1050 would be subjecting plant breeder rights in its operation, in respect of the agricultural sector in Ghana.

17) Plaintiff asserts that Section 19 (1) of Act 1050, is an unnecessary infringement on farmers' rights to save, use, exchange and sell farm-saved seeds and other propagating material. Ecologically, the rights of farmers and plant breeders can be protected without necessarily violating the rights of farmers via a legislation such as Act 1050 and that, there are other available options to protect such equitable rights. The said Section 19 (1) of Act 1050 is reproduced herein below:

Requirement of authorisation of holder of a plant breeder right for specific acts

19 (1) Subject to sections 20 and 21, the following acts in respect of propagating material of a protected variety require the authorisation of the breeder:

- (a) production or reproduction;
- (b) conditioning for the purpose of propagation;
- (c) an offer for sale;
- (d) sale or marketing;
- (e) exportation;
- (f) importation; and
- (g) stocking for any of the purposes mentioned in paragraph(a) to (f).

Plaintiff presents that consequently, the above Section 19 of Act 1050 infringes on farmers' right to propagating material as same is hindered by authorization.

18) Plaintiff asserts that the 1992 Constitution of Ghana enjoins the State to respect and observe its international obligations as provided under article 40, herein below:

Article 40 – International Relations

In its dealings with other nations, the Government shall

- (c) promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means;
- (d) adhere to the principles enshrined in or as the case may be, the aims and ideals of...
- v. any other international organization of which Ghana is a member.

19) Plaintiff presents that Ghana is a member of the World Trade Organization (WTO) and the rights and obligations concerning intellectual property, that Act 1050 purportedly seeks to protect, are equally catered for under the WTO's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement).

20) Plaintiff avers that Article 27.3 (b) of the TRIPS Agreement provides Member States like Ghana the flexibility to provide plant variety protection by an effective sui generis

system to suit its agricultural sector.

Article 27.3 (b) of TRIPS Agreement

3. Members may also exclude from patentability:

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof...

- 21) Plaintiff presents that the above Article 27.3 (b) of the TRIPS Agreement, allows Ghana maximum flexibility to design its plant variety protection to suit its agricultural sector for the benefit of all stakeholders. Subsequently, this is the path many developing nations like India, Malaysia, Thailand and a host of others have embarked on, and which the African Union (AU) has also advised African nations to legislate, for the benefit of all stakeholders, including peasant farmers.
- 22) Plaintiff further presents that other international legal regimes for the protection of farmers' rights exist under the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP). These UNDROP provisions are stark international treaty obligations to be observed by Ghana for the protection of farmers' rights per Article 40 of the 1992 Constitution. Consequently, Section 19 (1) of Act 1050 is a hindrance to Ghana's obligations under Article 2, (4) and (5), 19 (1), 19 (3), 19 (6) and 19 (8) of UNDROP. These relevant provisions of the UNDROP are reproduced herein below:

Article 19 (1) of the UNDROP provides as follows:

Peasants and other people working in rural areas have the right to seeds, in accordance with article 28 of the present Declaration, including: d. The right to save, use, exchange and sell their farm-saved seed or propagating material.

Article 19 (3) of the UNDROP provides as follows:

States shall take measures to respect, protect and fulfil the right to seeds of peasants and other people working in rural areas.

Article 19 (6) of the UNDROP states:

States shall take appropriate measures to support peasant seed systems, and promote the use of peasant seeds and agrobiodiversity.

Article 19 (8) of the UNDROP provides as follows:

States shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas.

Article 2 (4) and (5) of the UNDROP is reproduced herein below:

4. States shall elaborate, interpret and apply relevant international agreements and standards to which they are a party in a manner consistent with their human rights obligations as applicable to peasants and other people working in rural areas.

5. States shall take all necessary measures to ensure that non-State actors that they are in a position to regulate, such as private individuals and organizations, and transnational corporations and other business enterprises, respect and strengthen the rights of peasants and other people working in rural areas.

23) Plaintiff asserts that Act 1050 towing the UPOV arrangements, the intended Convention, which is restrictive and lacks any empirical and demonstrable evidence for the protection of ALL farmers, is not beneficial to a developing nation like Ghana.

24) Plaintiff asserts that holistically, Act 1050 weakens farmers' rights, and infringes on Farmers' Managed Seed System, which still covers over 85% of the Ghanaian seed market (<https://www.mordorintelligence.com/industry-reports/seed-market-in-ghana>). Subsequently, any seed law, including plant variety protection must support both the "Commercial Seed System" and Farmers' Managed Seed System under Ghana's agricultural sector.

25) Plaintiff presents that the United Nations Food and Agriculture Organization (FAO)'s Voluntary Guide for National Seed Policy Formulation, adequately supports the advancement and development of both the Farmers' Managed Seed System and Commercial Seed System across the globe, as same is an integral part of the sustainable use of plant genetic resources for food and agriculture.

26) Plaintiff asserts that subsequently, the main tool for strengthening Farmers' Managed Seed System is the holistic promotion of farmers' rights, as envisaged by Articles 36 and 37 of the 1992 Constitution of Ghana. The key provisions of Articles 36 (1), 36 (2) (b), 36 (3), 37 (2) (a) & (b), 37 (3) and 37 (6) (a) relevant to the instant action are reproduced herein below.

Article 36 – Economic Objectives

(1) The State shall take all necessary action to ensure that the national economy is managed in such a manner as to maximize the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Ghana and to provide adequate means of livelihood and suitable employment and public assistance to the needy.

(2) The State shall, in particular, take all necessary steps to establish a sound and healthy economy whose underlying principles shall include;
(b) affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy

(3) The State shall take appropriate measures to promote the development of

agriculture and industry.

Article 37 – Social Objectives

(2) The State shall enact appropriate laws to assure -

(a) the enjoyment of rights of effective participation in development processes including rights of people to form their own associations free from state interference and to use them to promote and protect their interests in relation to development processes, rights of access to agencies and officials of the State necessary in order to realize effective participation in development processes; freedom to form organizations to engage in self-help and income generating projects; and freedom to raise funds to support those activities

(b) the protection and promotion of all other basic human rights and freedoms, including the rights of the disabled, the aged, children and other vulnerable groups in development processes

(3) In the discharge of the obligations stated in clause (2) of this article, the State, shall be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes.

(6) The State shall -

(a) ensure that contributory schemes are instituted and maintained that will guarantee economic security for self-employed and other citizens of Ghana

27) Plaintiff further asserts that Act 1050 in its current form violates farmers' rights to participate in decision making both nationally and internationally, regarding farmers' involvement and utilisation of plant genetic resources, denying them equitable rights in such sensitive economic matters. Consequently, there is no protection for the right to equitable participation as exhibited in Section 42 of Act 1050. Section 42 of Act 1050 is produced herein below:

Plant Breeders Technical Committee

42. (1) There is established by this Act, the Plant Breeders Technical Committee consisting of

(a) the Registrar;

(b) the Director of the Crops Research Institute;

(c) the Director of the Directorate of Crops Services of the Ministry responsible for Agriculture;

(d) the Director of Plant Protection and Regulatory Services Directorate of the Ministry responsible for Agriculture;

(e) one representative of one of the Faculties of Agriculture in one of the public universities in Ghana nominated on a rotational basis for a term of three years at a time by the public universities;

(f) the Director of the Savannah Agricultural Research Institute;

(g) one representative from the private sector who is engaged in the plant breeding

industry; and

(h) one representative of the Office of the Attorney-General with expertise in intellectual property law not below the rank of a Principal State Attorney.

(2) The chairperson of the Technical Committee and members of the Committee shall be appointed by the Minister.

Article 2 (3) of the UNDROP (supra) is reproduced below:

Without disregarding specific legislation on indigenous peoples, before adopting and implementing legislation and policies, international agreements and other decision-making processes that may affect the rights of peasants and other people working in rural areas, States shall consult and cooperate in good faith with peasants and other people working in rural areas through their own representative institutions, engaging with and seeking the support of peasants and other people working in rural areas who could be affected by decisions before those decisions are made, and responding to their contributions, taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

Plaintiff submits that there is no provision for participation by farmers on the Plant Breeders Technical Committee, significantly denying farmers the right to participate as provided under Article 2 (3) of UNDROP supra and in contravention of Article 37 (2) (a) of the Constitution.

28) Plaintiff further presents that Act 1050, in its current form, disregards the protection of indigenous knowledge and practices primarily the practices of saving, using, multiplying, stocking, exchanging or selling seeds and other propagating material. Hence, Act 1050 does not support the cultural rights and practices of Ghana's local or peasant farmers, which contravenes Article 26(1) of the 1992 Constitution. This disregard for the protection of traditional farming practices manifests in the total disregard of the Act in respect of Ghana's informal farmer seed system, where about 85% of Ghana's seed market revolves around peasants, who have been practicing this system since time immemorial, and only if these practices and traditions can be lived and practised, the related traditional knowledge will also be protected and preserved. Article 26(1) of the 1992 Constitution is reproduced herein below:

Article 26 – Cultural Rights and Practices

(1) Every person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution.

29) **Article 12 (4) of the Nagoya Protocol** for non-restriction of the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities of the Convention on Biological Diversity (Nagoya Protocol) is instructive and is reproduced herein below:

Parties, in their implementation of this Protocol, shall, as far as possible, not restrict

the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the Convention.

- 30) Consequently, Act 1050 prohibiting the customary practices to save, use, exchange and sell farm-saved seed and propagating material is in contravention of Article 40 of the 1992 Constitution with regards to Ghana's international treaty obligations under Article 12 (4) of the Nagoya Protocol. Subsequently, this disregard by Act 1050 in protecting indigenous farming practices is in breach of Article 26 (1) of the 1992 Constitution of Ghana. It is instructive that Articles 19 (1) (a), 19 (6) and 19(8) of UNDROP as well as article 9 (2) (a) of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) provide protection for indigenous farming practices and knowledge, which is consistent with Article 26 (1) of the 1992 Constitution, and the Plaintiff's case for the respect of Ghana's peasant farmers.
- 31) Plaintiff submits that Ghana's peasant farmers are encouraged and protected under Article 26 (1) *supra*, to keep practising their cultural and indigenous knowledge in their farming activities and to benefit from these cultural practices. However, Act 1050 is inconsistent with Article 26 (1) of the Constitution (*supra*) and a breach of the fundamental human rights of Ghana's peasant farmers. In **REPUBLIC v NATIONAL HOUSE OF CHIEFS & ORS. (2019) GHASC 6 (30 JANUARY 2019)**, Amegatcher JSC in presenting our national jurisprudence for the observance of our customary rights and practices espoused thus, "it is very clear from the intention of the framers of the constitution and the lawmakers that the responsibility given to the National and Regional Houses of Chiefs is to do everything within its power to **preserve the customary practices of this revered institution in our culture.**" This position by the apex Court is a conclusive presentation that customary practices of prominence to Ghana as a nation must be promoted and preserved as a way of life of our people.
- 32) Plaintiff submits that the Ghanaian customary practice of farmers' right to save, use, exchange and sell farm-saved seeds and other propagating material is constitutionally protected under Article 26 (1) and also promoted under Article 36 (1) of the 1992 constitution, as key fundamental human rights principles. Subsequently, in **REPUBLIC v. COURT OF APPEAL; EX PARTE ATTORNEY-GENERAL (FRANK BENNEH CASE) (1998-99) SCGLR 559**, it was held in holding 3, that, respect for human rights is an attribute or element of good governance, and all efforts must be made to ensure its observance. Plaintiff respectfully submits that this apex Court would agree with Plaintiff on this submission.
- 33) Plaintiff submits that biopiracy is the creation of biological products from native species without consent or compensation to the country of origin. Ghana in 2018 ratified the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol). This Nagoya Protocol affirms the sovereign rights of States over their natural resources according to the provisions of the

Convention on Biological Diversity and implements the fair and equitable sharing of the benefits arising from the utilization of genetic resource and the related traditional knowledge. The relevant provisions of the Nagoya Protocol against biopiracy are reproduced below as follows:

Article 15 (1) of the Nagoya Protocol provides that

Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources utilized within its jurisdiction have been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other Party.

Article 5 (5) on Fair and Equitable Benefit-Sharing of the Nagoya Protocol provides that, each party shall take legislative, administrative or policy measures, as appropriate, in order that the benefit arising from the utilisation of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms.

- 34) Plaintiff submits that Section 9 of Act 1050 seeks to grant plant breeder rights to misappropriate Ghana's genetic resources and traditional knowledge, subsequently disregarding Ghana's obligation under the Nagoya Protocol and enabling biopiracy.
- 35) Plaintiff further states that on a true and proper interpretation of **Article 41 of the 1992 Constitution on the duties of a citizen of Ghana**, the provision in Section 9 (5) of Act 1050 to treat a foreign citizen or resident in the territory of a party to a treaty to which the Republic is a party in Section 9 (1) (b) of Act 1050 and to treat a legal entity that has a registered office within the territory of a party to a treaty to which the Republic is a party in Section 9 (1) (c) of Act 1050 as citizens in respect of the operation of Act 1050, is inconsistent with and contravenes Article 41 of the 1992 Constitution and Sections 18 (2), 182 , 345 and 346 of Ghana's Companies Act, 2019 (Act 992).
- 36) Article 41 provides that the enjoyment of rights and freedoms under the constitution is inseparable from the duties of a citizen. It contravenes, the spirit and letter of the constitution for Section 9 (5) of Act 1050 to treat a foreign citizen or resident in the territory of a party to a treaty to which the Republic is a party in Section 9 (1) (b) of Act 1050 and to treat a legal entity that has a registered office within the territory of a party to a treaty to which the Republic is a party in Section 9 (1) (c) of Act 1050 as citizens of Ghana without corresponding duties. The relevant provisions of Article 41 are reproduced below:

Article 41 – Duties of a Citizen

The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly, it shall be the duty of every citizen

- (a) to promote the prestige and good name of Ghana and respect the symbols of the nation;
- (b) to uphold and defend this Constitution and the law;
- (c) to foster national unity and live in harmony with others ...”

37) Plaintiff in respect of Article 41 supra submits that Section 9 (5) of Act 1050 seeking to treat foreign citizens as citizens of Ghana without corresponding duties as borne by citizens of Ghana contravenes the 1992 Constitution.

38) Plaintiff further submit that incorporation of a company under Act 992 supra is umbilically tied to a company enjoying some rights and powers but subject to it performing certain duties and obligations.

Her Ladyship Sophia Akuffo JSC (as she then was) rendered the Ghanaian position on the effect of incorporation in **MORKOR v KUMA [1998-1999] SCGLR 620 at 622** as follows:

“Save as otherwise restricted by its Regulations, a company, after its registration, has all the powers of a natural person of full capacity to pursue its authorized business. In this capacity, a company is a corporate being, which, within the bounds of the Companies Code, 1963 (Act 179) and the Regulations of the company, may do everything that a natural person might do. In its own name, it can sue and be sued and **it can owe and be owed legal liabilities** (my emphasis).

39) Per section 18(1) of Act 992, once a company is incorporated it has full capacity, rights, powers and privileges to carry on or undertake any business or activity, do any act or any activity. However, Section 18 (2) states that “... a company shall be capable of giving and entering into and **being bound by** and claiming all rights under a deed or mortgage or other instrument” (my emphasis). However, in the instant action, the foreign entities referred to under Section 9 of Act 1050 are per Section 9 (5) given the rights of a company incorporated in Ghana in respect of plant breeder rights without any corresponding obligations associated with incorporation under Ghanaian law.

40) A company incorporated under Act 992 has an obligation to ensure that at all times one of its directors is resident in Ghana. The foreign entities envisaged under Section 9 of Act 1050 are given powers and rights of a plant breeder but are free from this obligation associated with incorporation under Act 992. Section 182 of Act 992 makes it mandatory for every company incorporated under the law to always have at least one director resident in Ghana. In default, the company itself and every director is liable to pay 25 penalty units as a penalty for each day that the default continues. Section 182 (3) provides that rights arising out of a contract made during the time during which the default occurs are not enforceable. Plaintiff submits that nowhere in Act 1050 after the provisions in Section 9, are these foreign entities obligated to perform any obligations associated with incorporation which is inconsistent with Act 992.

- 41) A company incorporated under Act 992 is under obligation per Sections 345 and 347 of the Act not to provide false statements to the Registrar of Companies nor publish misleading statements regarding shares or capital, respectively. In default of the above offences are penal sanctions of fines between 250-500 penalty units for the former and 750 penalty units for the latter. It is inequitable and inconsistent with Act 992 for foreign entities under Section 9 of Act 1050 to enjoy the benefits of plant breeder rights without being subject to the corresponding obligations of a company incorporated in Ghana in respect of the penal sanctions hereinabove stated.
- 42) Plaintiff submits that it is inconsistent with the spirit and letter of the Constitution and Act 992 to allow foreign entities not incorporated or registered under the Companies Act to be granted plant breeder rights. It is untenable in law for a treaty between Ghana and another country to override the requirements of incorporation in Ghana under Act 992.
- 43) Plaintiff asserts that Section 8 of Act 1050 on eligibility for a plant breeder right and Section 9 of Act 1050 on application for a plant breeder right are discriminatory because the intent in Section 9 of the Act to give foreign entities and citizens eligibility to apply for plant breeder rights without corresponding duties and obligations so borne by Ghanaian corporate entities and citizens, contravenes Article 41 of the 1992 Constitution and **Ghana's Companies Act, 2019 (Act 992)**. Article 17 of the 1992 Constitution provides for equality and freedom from discrimination and is herein reproduced below:

Article 17 – Equality and Freedom from Discrimination

(1) All persons shall be equal before the law.

(2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.

(3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.

- 44) Plaintiff further asserts that Section 60 of Act 1050 which provides that the wilful offering for sale, selling or marketing of protected propagating material, marketing propagating material without the registered variety denomination and using a protected registered variety denomination for another variety likely to cause confusion to be an offence and liable on summary conviction to a fine of not less than five thousand penalty units and not more than eight thousand penalty units or a

term of imprisonment of not less than ten years and not more than fifteen years is harsh, and inconsistent with Articles 15 (2) (a) and (b) and 296 (b) of the 1992 Constitution. This is particularly so, as other jurisdictions like the United States of America (USA) and India do not provide such harsh sanctions in their Plant Variety Protection Acts. Articles 15 (2) (a) and (b) and 296 (b) are reproduced herein below:

Article 15 (2) (a) and (b) – Respect for Human Dignity

(2) No person shall, whether or not he is arrested, restricted or detained, be subjected to –

(a) torture or other cruel, inhumane or degrading treatment or punishment;

(b) any other condition that detracts or is likely to detract from his dignity and worth as a human being.

Article 296 (b) – Exercise of Discretionary Power

(b) the exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law

Section 2568 of the USA's Plant Variety Protection Act of 1970 (PVPA), 7 U.S.C provides as follows:

"§2568. False Marking; Cease and Desist Orders
(a) Each of the following acts, if performed in connection with the sale, offering for sale, or advertising of sexually or asexually reproducible plant material or tubers or parts of tubers, is prohibited, and the Secretary may, if the Secretary determines after an opportunity for hearing that the act is being so performed, issue an order to cease and desist, said order being binding unless appealed under section 2461 of this title:

(1) Use of the words "U.S. Protected Variety" or any word or number importing that the material is a variety protected under certificate, when it is not.

(2) Use of any wording importing that the material is a variety for which an application for plant variety protection is pending, when it is not.

(3) Use of either the phrase "Unauthorized Propagation Prohibited" or "Unauthorized Seed Multiplication Prohibited" or similar phrase without reasonable basis. Any reasonable basis expires one year after the first sale of the variety except as justified thereafter by a pending application or a certificate still in force.

(4) Failure to use the name of a variety for which a certificate of protection has been issued under this chapter, even after the expiration of the certificate, except that lawn, turf, or forage grass seed, or alfalfa or clover seed may be sold without a variety name unless use of the name of a variety for which a certificate of protection has been issued under this chapter is required under State law."

b) Anyone convicted of violating a binding cease and desist order, or of performing any act prohibited in subsection (a) of this section for the purpose of deceiving the public, shall be fined not more than \$10,000 and not less than \$500.

(c) Anyone whose business is damaged or is likely to be damaged by an act prohibited in subsection (a) of this section, or is subjected to competition in connection with which such act is performed, may have remedy by civil action. (emphasis supplied)”

Section 71 of India’s Protection of Plant Varieties and Farmers Rights Act, 2001 provides as follows:

“Any person who sells, or exposes for sale, or has in his possession for sale or for any purpose of trade or production or any variety to which any false denomination is applied or to which an indication of the country or place in which such variety was made or produced or the name and address of the breeder of such variety registered under this Act has been falsely made, shall, unless he proves--

(a) that having taken all reasonable precautions against committing an offence against this section, he had at the time of commission of the alleged offence no reason to suspect the genuineness of the denomination of such variety or that any offence had been committed in respect of indication of the country or place in which such variety registered under this Act, was made or produced or the name and address of the breeder of such variety;

(b) that, on demand by or on behalf of the prosecutor, he gave all the information in his possession with respect to the person from whom he obtained such variety; or

(c) that otherwise he had acted innocently,
be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years, or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both”.

45) Plaintiff submits that the above sanctions from the USA and India, clearly presents the sanctions under Section 60 of Act 1050 in respect of Article 15 (2) (a) and (b) inhumane and Article 296 (b) arbitrary, making Section 60 of Ghana’s Act 1050 inhumanely harsh and arbitrary and same must be struck out by this apex court.

46) Thus in **CUBAGEE v ASARE & OTHERS (2017-2020) 1 SCGLR 305**, it was held that, “the preservation of the integrity and repute of the administration of justice is a matter of vital public interest so courts in whatever they do must strive to achieve that ultimate objective”.

LEGAL CONCLUSION

Respectfully Your Lordships, the Plaintiff submits in sum as follows:

That the constitutional provisions of Article 75 of the 1992 Constitution is very clear as aptly stated by Her Ladyship Sophia Akuffo CJ in the Banful case(supra). In the instant case, there is no evidence of a parliamentary ratification or resolution by the Republic of Ghana to join the UPOV regime.

Also empowering the Minister for Justice and Attorney-General to ensure the implementation of Act 1050 in Section 61, not to affect the obligations of Ghana under the UPOV regime is inconsistent and contravenes the constitution, as Ghana was not and is still not a party to UPOV at the time of the passage of Act 1050. Consequently, the passage of the Plant Variety Protection Act, 2020 (Act 1050) on the tenets of the UPOV regime is unconstitutional and a nullity. Hence the Plaintiff respectfully prays the Honourable Court to so declare and set aside Act 1050.

Respectfully in the case of CENTRE FOR JUVENILE DELINQUENCY v. GHANA REVENUE AUTHORITY & ATTORNEY-GENERAL (2017-2020) 1 SCGLR 567, it was held at page 572 that "the plaintiff is not making a mountain out of a molehill but has raised very cogent and important constitutional issues; which brings into question the very function of the judiciary as the watchdog of the constitution, the protector of human rights and upholder of the rule of law and the power of judicial review of legislative action by the Supreme Court per article 2 (1) (a) and 130 (b) of the constitution". Subsequently, Plaintiff respectfully invokes the Supreme Court's jurisdiction in this instant action to align with the jurisprudence of the above case.

Humbly Submitted.

DATED THIS 10th DAY OF NOVEMBER 2021 AT DROMOH CHAMBERS, ACCRA

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ACCRA

AND TO THE ABOVE-NAMED DEFENDANT:
ATTORNEY-GENERAL, ATTORNEY-GENERAL'S DEPARTMENT, MINISTRIES,
ACCRA