

IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA- A.D. 2018

Filed on 18-7-2018
2:40 am/pm
Registrar
SUPREME COURT OF GHANA

WRIT TO INVOKE THE ORIGINAL JURISDICTION OF THE SUPREME COURT

SUIT NO. J1/24/2018

BETWEEN:

FAFALI NYONATOR.....
HOUSE NO. 11/17
MAMA'S INN
DANSOMAN HIGH STREET
ACCRA

PLAINTIFF/APPLICANT

AND

THE ATTORNEY-GENERAL.....DEFENDANT/RESPONDENT
MINISTRY OF JUSTICE & ATTORNEY-GENERAL'S
DEPARTMENT, ACCRA

MOTION ON NOTICE FOR INTERLOCUTORY INJUNCTION

PLEASE TAKE NOTICE that the Plaintiff/Applicant shall at the hearing of the present application pray this Honourable Court for an order of interim injunction to restrain His Excellency the President of the Republic of Ghana from appointing any person to the position of the Chairperson of the Electoral Commission of Ghana and/or permitting the swearing into office of any such person and/or permitting any such person to serve as the substantive Chairperson of the Electoral Commission of Ghana pending the final determination of the instant constitutional suit, upon the grounds set out in the accompanying affidavit; and

For such other or further order(s) as this Honourable Court may deem fit.

A DATE TO BE FIXED
COURT TO BE MOVED on the day of 2018 at 9 o'clock in the forenoon or so soon thereafter as Counsel for and on behalf of the Plaintiff/Applicant may be heard.

DATED AT ACCRA THIS 17TH DAY OF JULY 2018.


.....
PLAINTIFF/APPLICANT

THE REGISTRAR
SUPREME COURT
ACCRA

AND SERVICE ON THE DEFENDANT/RESPONDENT, MINISTRIES, ACCRA

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MINISTRY OF JUSTICE & ATTORNEY-GENERAL'S
DEPARTMENT, ACCRA

AFFIDAVIT IN SUPPORT OF MOTION OF APPLICATION
FOR INTERIM INJUNCTION

I, FAFALI NYONATOR, of HOUSE NO. 11/17 MAMA'S INN DANSOMAN
HIGH STREET, ACCRA, do hereby make oath and say as follows:

1. That I am the Plaintiff/Applicant and the deponent herein.
2. That the matters deposed to in this affidavit are within my personal knowledge, information or belief.
3. That in July 2018 I instituted the instant suit seeking the following reliefs:
 - a. A declaration that the determination by Her Ladyship the Chief Justice of a prima facie case pursuant to article 146 of the Constitution for the

removal from office of the Chairperson of the Electoral Commission is inconsistent with article 130 (a) of the Constitution as by the said determination Her Ladyship the Chief Justice usurped the exclusive original jurisdiction of the Supreme Court to construe and/or define the scope of application of the provisions of the Constitution, particularly articles 44 (2) and 146 thereof.

- b. A declaration that the Committee set up by Her Ladyship the Chief Justice pursuant to article 146 of the Constitution to inquire into the petition for the removal from office of the Chairperson of the Electoral Commission, exceeded its powers by construing, or defining the scope of application of, provisions of the 1992 Constitution, including articles 44 (2) and 146, and thus acted in violation of article 130 (a) of the Constitution by usurping the exclusive original jurisdiction of the Supreme Court to interpret the provisions of the Constitution;
 - c. An order of this Honourable declaring as null and void the said prima facie determination of Her Ladyship the Chief Justice, the report of the said Committee that recommended the removal from office of the Chairperson of the Electoral Commission as well as the decision of His Excellency the President of Ghana to remove from office the Chairperson of the Electoral Commission on the basis of the said report;
 - d. Any other or further order(s) as this Honourable Court may deem appropriate.
1. That the overriding purpose for commencing this action is to assist in efforts to entrench the Rule of Law in Ghana and to seek legal remedies for what I consider patent violations of the provisions of the 1992 Constitution.
 2. That in the likely event that my claim in this action is upheld then the position of Chairperson of the Electoral Commission cannot be said to be vacant to require the appointment of another person to occupy that position.
 3. That it will also mean that Mrs. Charlotte Osei will remain as the Chairperson of the Electoral Commission until she is removed in a manner consistent with the provisions of the Constitution.
 4. That in November 2017, the Her Ladyship Chief Justice ("Chief Justice") established a prima facie case in respect of some of allegations made against Mrs. Charlotte Osei, the Chairperson of the Electoral Commission, as contained in a petition submitted to His Excellency the President of the

Republic ("President") for her removal from office as the Chairperson of the Electoral Commission.

5. That subsequently, the Chief Justice set up a Committee pursuant to Article 146 (4) of the 1992 Constitution to inquire into the allegations for which a prima facie case had been established.
6. That in the Committee's report dated 25th June 2018, the Committee recommended the removal from office of the Chairperson of the Electoral Commission, Mrs Charlotte Osei. (*Annexed hereto and marked as Exhibit FN 1 are relevant extracts from the Committee's Report*)
7. That at page 50 of *Exhibit FN 1* the Committee stated as follows:

"RECOMMENDATION

By Article 44(2) of the 1992 Constitution, the Chairman of the Electoral Commission shall have the same terms and conditions of service as a Justice of Court of Appeal. Accordingly, the removal of the Chairperson of the Electoral Commission shall be governed by Article 146 of the Constitution dealing with the removal from office of Superior Court Justices."

8. That the Committee further stated at pp. 50-51 of *Exhibit FN 1* thus:

"In this report we have demonstrated through evidence before the Committee that the Chairperson, Mrs. Charlotte Osei breached the Public Procurement Act in all the procurement activities for which she was accused. She blatantly breached the Public Procurement Act without any justification, a conduct which amounted to misbehaviour. The Honourable Chief Justice in her prima facie determination defined misbehaviour as conduct based and is generally understood to connote conduct which falls below the accepted norms or stipulated standards of morality, propriety and or legality. The Chief Justice still discussing what amounts to misbehaviour stated as follows:-

"Furthermore, Halsbury's Laws of England, 4th Edition, in Vol. 8, Para 1107, states as follows- "Behaviour" means behaviour in matters

concerning the office.... Misbehaviour as to the office itself means improper exercise of the functions appertaining to the office, or non-attendance, or neglect of or refusal to perform the duties of office."

The Honourable Chief Justice concluded thus "to my mind, this means that if a person is required by law to perform a certain official function or duty in a particular way but fails or neglect to do so, then the person may be said to have misbehaved in that regard".

From the above exposition on what constitutes misbehaviour and the implication of such conduct pertaining to an office such as the Chairperson of the Electoral Commission, we cannot but agree with the opinion expressed by the Chief Justice above and conclude that the conduct of Mrs. Charlotte Osei that violated the Public Procurement Act as demonstrated in this report, constitutes misbehavior."

9. That from the above, the Committee does not only construe and/or define the scope of application of "stated misbehavior" as contained in Article 146 but goes further to prescribe the standard of misbehaviour sufficient for the removal of the Chairperson of the Electoral Commission under Article 146.
10. That in the Committee's view, breaches of the Public Procurement Act constitute sufficient "stated misbehavior" to warrant the removal from office of the Chairperson of the Electoral Commission under Article 146.
11. That the meaning and scope of application of Article 146 is not beyond dispute and the problematic aspects and the interpretative challenges presented by the said Article 146 compelled Akuffo JSC (as she then was) in *Agyei-Twum v Attorney-General & Akwetey* [2005-2006] SCGLR 227 to "express misgivings and discomfiture arising from the absence of any consequential enactments" to regulate the application of Article 146.
12. That in *Agyei-Twum v Attorney-General & Akwetey* [2005-2006] SCGLR 227, Akuffo JSC (presently the Chief Justice) had further observed, at pp. 787- 788, of the report as follows:

"The provisions of article 146 sketch out in broad strokes the basic procedures for commencing and carrying out the process for the removal of Justices of the

Superior Courts and the Chief Justice...Moreover, even the nature of the offences for which a Justice of the Superior Court or the Chief Justice may be impeached and removed is rather nebulously expressed in the Constitution. As they stand the formulation of these offences leaves too much to room for personal opinion and individual proclivity. For example, what is "misbehavior"? What is the standard behavior the violation of which amounts to behavior? Surely, it was expected that that requisite legislation and instruments would be enacted giving more flesh depth and precision to the sketchy outline drawn by the Constitution, so as to ensure that the impeachment process will have integrity and transparency"

13. That it is my firm belief that without a definite and clear pronouncement of this Court on the matters that are sufficient under Article 146 to warrant removal from office, the Chief Justice and the Committee lacked the legal mandate to specify and apply the requisite standard/threshold of stated misbehavior that warrants removal from office under Article 146.
14. That when the Committee determined that breaches of procurement rules meet the "standard of behaviour" for removal under Article 146, the Committee had essentially, whether explicitly or implicitly, defined the requisite standard of behavior required under Article 146 and the same is unconstitutional as it amounts to a naked usurpation of the exclusive original mandate of this Honourable Court to interpret and define the scope of application of constitutional provisions.
15. That despite the patent usurpation by the Committee of the exclusive original mandate of this Court to interpret and prescribe the requisite standard of misbehavior that warrants removal under Article 146, by letter dated 28th June 2018 His Excellency the President of Ghana on the basis of the recommendation of the Committee removed from office Mrs Charlotte Osei as the Chairperson of the Electoral Commission "with immediate effect" (*Annexed hereto and marked as Exhibit FN 2 is a copy of the said letter*]
16. That it is my firm and reasonable belief that both the Chief Justice and the Committee exceeded the bounds of their legal authority and strayed into matters exclusively reserved for this Court by essentially interpreting and/or defining

the scope of application of Articles 44 and 146 and, in particular, by prescribing the standard of misbehavior required for removal pursuant to Article 146, when they lacked the legal mandate to do so.

17. That it is also my firm and reasonable belief that the provisions of Article 146 do not form part of the terms and conditions of service of the Chairperson of the Electoral Commission and the Chief Justice and the Committee erred in determining otherwise.
18. That despite the pendency of this suit, a Deputy Minister for Justice and Attorney-General, Mr. Godfred Yeboah Dame, has indicated that His Excellency the President will proceed to appoint a Chairperson of the Electoral Commission unless and until there is an order of injunction restraining His Excellency the President from doing so. *[Annexed hereto and marked as Exhibit FN 3 is a copy a news item reporting the statement made by the said Mr. Godfred Yeboah Dame].*
19. That the appointment of a new person to perform the role of the Chairperson of the Electoral Commission will undermine the authority of this Court and further render nugatory any decision that may be rendered in favour of the Applicant.
20. That the Applicant has not only established a strong case by her writ and the other processes filed but has also established a strong prima facie case of the illegality and unconstitutionality of the removal from office of the Chairperson of the Electoral Commission.
21. That in the likely event this Court determines the instant suit in favour of the Applicant which would require the Chairperson of the Electoral Commission, Mrs. Charlotte Osei, to remain in office but prior to the decision of the Court another person has been appointed to serve as the Chairperson of the Electoral Commission, the decision of the Court in upholding the claim of the Applicant is likely to be rendered nugatory.
22. That furthermore if my claim in this case is upheld by this Court but before the decision was handed down another person has been appointed to serve as the Chairperson of the Electoral Commission decisions already taken by that new Chairperson of the Electoral Commission stand the substantial risk of being

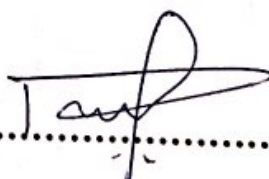
challenged as unconstitutional-throwing into confusion and chaos the work of the Electoral Commission.

23. That the nature of the work of the Electoral Commission requires the support and cooperation of the public and diverse political groupings and it is necessary that there is no cloud of legal uncertainty surrounding position of the Chairperson of the Electoral Commission.
24. That any such legal uncertainty will affect the authority of the Electoral Commission to carry out effectively its constitutional duties and it is in the public interest that such legal uncertainty is not further aggravated by the unlawful appointment of a new person to serve as the Chairperson of the Electoral Commission pending the final determination of this case.
25. That unless the Respondent is prepared to give an undertaking that in the event I win this case Mrs. Charlotte Osei, the Chairperson of the Electoral Commission, would be permitted to continue to perform the functions of her office it is more likely than not that once a new person assumes the role of Chairperson of the Electoral Commission and is sworn into office any prospect of Mrs. Charlotte Osei being allowed or permitted to continue to perform the functions of her office as Chairperson of the Electoral Commission will be dissipated.
26. That the public interest is irreparably harmed when unconstitutional conduct is not only allowed to persist and fester but is aggravated by further unconstitutional conduct as will be the case in the present case if a new person is appointed as the Chairperson of the Electoral Commission pending the final determination of the instant suit.
27. That in the circumstances of this suit there are exceptional circumstances for this Honourable Court to grant the instant application.
28. WHEREFORE I swear to this affidavit in support of the instant application.

SWORN IN ACCRA

THIS 18th DAY OF July
2018

COMMISSIONER FOR OATHS
MAXWELL MACAULAY NYAMKUI


.....
DEPONENT