IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA – AD 2017

SUIT NO. J1/14/2017

JAMES KWABENA BOMFEH **Plaintiff**

VRS.

THE ATTORNEY-GENERAL **DEFENDANT**

LEGAL ARGUMENTS OF DEFENDANT

Pursuant to order of Court dated 6th November, 2018

INTRODUCTION

Respectfully, on 28th March 2017, the plaintiff herein invoked the original jurisdiction of this Court for the reliefs endorsed on his writ of summons. Plaintiff filed an amended writ of summons and amended statement of case on 9th November, 2018.

The defendant subsequently filed her statement of case in opposition to the plaintiffs' action.

At the hearing of the instant action on 6th November, 2018, this Honourable Court ordered the parties herein to file legal arguments on the issues set out in the Memorandum of Issues.

The issues are:

i. Whether or not plaintiff's case raises an issue for the exercise of this Court's jurisdiction under articles 2(1) and 130(1) of the 1992 Constitution.

ii. Whether or not the specific treatment accorded the Christian and Islamic religions complained of by plaintiff amounts to preferential treatment prohibited by the 1992 Constitution;

iii. Whether or not the establishment and operations of the Hajj Board by the Government and Government support for and/or involvement in the construction of a National Cathedral amount to an unconstitutional entanglement by the State with religion.

These submissions are filed pursuant to the order of this Honourable Court, and will be made in the following order:

i. The requisites for cause of action under articles 2(1) and 130(1) of the Constitution, 1992.

ii. Does plaintiff's case raise an issue for the exercise of this Court's jurisdiction under articles 2(1) and 130(1) of the 1992 Constitution.

iii. Are the specific actions by Government complained of by plaintiff, i.e. establishment of the Hajj Board and Government support for the construction of a National Cathedral prohibited by the 1992 Constitution?

iv. Conclusion.

REQUISITES FOR A CAUSE OF ACTION UNDER ARTICLES 2(1) AND 130(1) OF THE CONSTITUTION, 1992.

1. The plaintiff invokes the jurisdiction of the Court under articles 2(1) and 130(1)(a) of the Constitution. For the avoidance of doubt, article 2 (1) of the Constitution provides the scope of

matters that this Court may deal with in its original jurisdiction. The provisions stipulate as follows:

> "*2. (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 the Constitution, may bring an action in the Supreme Court for a declaration to that effect.*"
>
> *"130. (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.*"

2. It is submitted, respectfully, that in order for an action to be cognisable under the original jurisdiction of the Court, it clearly must fall within the scope of three (3) matters anticipated by articles 2(1) and 130(1). These 3 matters warranting an invocation of the Court's jurisdiction are:

   i. An action for the enforcement of the Constitution.
   ii. An action for the interpretation of some provisions of the Constitution.

iii. An allegation that an enactment is in excess of Parliament's authority or the authority conferred by the Constitution or any law on authority.

3. It is noted that plaintiffs' suit invokes articles 2(1) and 130(1)(a) only. Article 130(1)(b) is not invoked by plaintiffs, and therefore does not come into play.

In what has become a locus classicus on the subject matter, in **Republic v. Special Tribunal; Ex Parte Akosah [1980] GLR 592,** the Court of Appeal (sitting as the Supreme Court), examined the width and ambit of the original jurisdiction of the Court, when determining an issue on the enforcement or interpretation of article 118 (1) (a) of the Constitution, 1979, which is in *pari materia* with article 130(1)(a)of the 1992 Constitution. It held as follows:

"(1) an issue of enforcement or interpretation of the Constitution, 1979, under article 118 (1) (a) would arise in any of the following eventualities:

(a) Where the words of the provision were imprecise or unclear or ambiguous. Put in another way, it would arise if one party invited the court to declare that the words of the article had a double meaning or were obscure or else meant something different from or more than what they said;

(b) Where rival meanings had been placed by the litigants on the words of any provision of the Constitution;

(c) Where there was a conflict in the meaning and effect of two or more articles of the Constitution and the question was raised as to which provision should prevail; and

(d) Where on the face of the provisions, there was a conflict between the operations of particular institutions set up under the Constitution. And in the event of the trial court holding that there was no case of "enforcement or interpretation" because the language of the article of the Constitution was clear, precise and

unambiguous, the aggrieved party might appeal in the usual way to a higher court against what he might consider to be an erroneous construction of those words. Also where the submission made related to no more than a proper application of the provisions of the Constitution to the facts in issue, that was a matter for the trial court to deal with."

4. In numerous actions adjudicated under the Constitution, 1992, this Court has had occasion to delineate the circumstances under which the exclusive original jurisdiction of the Court ought to be invoked. In so doing, the Court has been quick to dismiss actions which, do not raise any genuine case of interpretation or do not strike at the enforcement jurisdiction of the Court, in spite of being artfully dressed in garbs of a constitutional case under. In the case of **Ghana Bar Association v. Attorney General and Another (Abban Case) [2003-2004] 1 SCGLR 250,** Bamford Addo, JSC held at page 269 thus,

*"**Is there a question of interpretation in relief 1**? The answer is that where words in the Constitution are plain and unambiguous and there is no dispute as to their meaning, the question of constitutional interpretation does not arise and the court would decline to give an interpretation in such circumstances."*

5. The decision of the Court in **Osei-Boateng v. National Media Commission and Appenteng [2012] 2 SCGLR 1038** is representative of the jurisprudence in this area. The following can be found at Holding 2 of the decision of the Court:

"The requirement of an ambiguity/imprecision or lack of clarity in a constitutional provision was as much a precondition for the exercise of the exclusive original enforcement jurisdiction of the Supreme Court as it was for the exclusive original interpretation jurisdiction under Articles 2(1) and 130 of the 1992 Constitution; that was clearly right in principle since to hold otherwise would imply opening the floodgates for enforcement actions to

overwhelm the Supreme Court. Accordingly where a constitutional provision was clear and unambiguous any court in the hierarchy of courts might enforce it and the Supreme Court's exclusive original jurisdiction would not apply to it."

6. Quite recently, in **Danso v. Daaduam II & Another [2013-2014] 2 SCGLR 1570** the Court held per His Lordship Anin Yeboah JSC at page 1574 as follows:

"It is clear that the Plaintiff is inviting this court to interpret Article 267(1) which obviously calls for no interpretation. The words are clear and unambiguous and it is a cardinal rule of interpretation of status and national constitutions for that matter, that if the provisions are clear and unambiguous, no interpretation arises. See Bimpong Buta v. General Legal Council [2003-2004] 2 SCGLR 1200."

The Court further held that:

"the 2 reliefs sought and the statement of case in support of the two main reliefs could not be construed as raising any claim founded on Article 2 of the Constitution …this court has exhibited remarkable consistency since the case of Republic v. Special Tribunal Ex parte Akosah and continued same under the 1992 Constitution in cases like Adumoah II v. Adu-Twum. It is clear that the plaintiff is resorting to the use of this court as a court of original adjudication of an ordinary land case between a stool subject and occupant of a stool. This court must not attempt to enlarge/ extend its interpretative jurisdiction exclusively vested in it under Article 130(1)(a) of the 1992 Constitution so as to deny the opportunity and jurisdiction vested in the lower courts to exercise their jurisdiction in areas where no interpretation arises whatsoever."

7. Respectfully, we have carefully examined the decisions referred to above, to show that, the jurisdiction of this Court under articles 2(1) and 130(1) of the Constitution is restricted and

confined solely to the circumstances set out in the provisions. An action filed must relate to either a claim for the enforcement of the Constitution or an interpretation of provisions clearly identified. In respect of the interpretative jurisdiction, same is properly invoked only in cases where disputed words are unclear, imprecise or ambiguous. The Court has consistently guarded against the assumption of jurisdiction over actions in which it could clearly be discerned that the plaintiff has attempted cleverly, to manufacture a case of interpretation, whereas no issue of interpretation genuinely arises upon a careful scrutiny of same.

DOES PLAINTIFF'S CASE RAISE AN ISSUE FOR THE EXERCISE OF THIS COURT'S JURISDICTION UNDER ARTICLES 2(1) AND 130(1) OF THE 1992 CONSTITUTION?

8. It is our humble submission that the reliefs sought by plaintiff do not raise any issue for the legitimate exercise of this Court's original jurisdiction and for that matter, there is absolutely no cause of action disclosed in the plaintiff's writ. We will demonstrate the lack of a cause of action by examining the reliefs sought by plaintiff herein in order to show that, a careful consideration of them will disclose that the plaintiff's writ is devoid of a cause of action. It constitutes much ado about nothing.

9. Firstly, the Court will observe that in the plaintiff's amended writ of summons filed on 9th November, 2018, the plaintiff has put two reliefs numbered as relief "2". He also has two reliefs numbered as relief "3". One of the reliefs in relief "2" is in italics and in square brackets as well. The same goes for relief "3".

   We respectfully submit that this is incompetent. It is contrary to procedure and incongruous for a person to "build two reliefs into one relief" in the manner indicated on the plaintiff's amended writ of summons, especially in a manner as the invocation of the original jurisdiction of the highest court of the land. This practice ought to be jettisoned.

10. Secondly, the Court will observe that the first relief sought on the amended writ of summons merely seeks to deny the effect of the clear provisions in articles 258, 265 and in fact, the entire Chapter of the Constitution on management of public lands. Plaintiff claims in his relief that:

   "*… upon a true, combined and contextual interpretation of the letter and spirit of the Constitution, particularly articles 258(1)(a) and (b) and 265 thereof, the Government of Ghana does not possess the legal authority to grant or allocate any public land, and consequently, the decision of the Government of Ghana to allocate or grant 6.323 Ha of the public lands of Ghana for the construction of the Ghana National Cathedral to serve as Ghana's Mother Church is unconstitutional*".

11. We are baffled by this relief claimed by plaintiff herein. This is because the effect of all the provisions on the management of public lands is as clear as crystal. We submit that this Honourable Court ought not to permit any person to make any changes, alterations or tweaks to the effect of the clear constitutional provisions in Chapter Twenty-One of the Constitution including articles 258 and 265 by way of an interpretation of the provisions contained therein. Simply because plaintiff does not, with respect, understand Chapter

Twenty-One including articles 258 and 265 does not mean that there is a constitutional issue genuinely arising for interpretation. A constitutional issue is not raised on account of a plaintiff's absurd, strained and far-fetched understanding of clear provisions in the Constitution.

12. We submit that article 258(1)(a) of the Constitution that the plaintiff relies on to dispute the Government's legal right or authority to grant or allocate public lands in general, clearly makes the Government of Ghana the owner of all public lands. The provision indicates explicitly that the Lands Commission **on behalf** of the Government shall manage public lands. The Lands Commission quite clearly manages public lands only on behalf of the Government. The Lands Commission, in truth and in fact, when giving out leases over Government lands or making grants of those lands, issues the leases and makes the grants in the name of the public. The President is the stated lessor or grantor, even though he acts by the Chairman of the Lands Commission.

13. It is submitted that the provisions of articles 258 and 265 do not divest the Government of Ghana of the ownership of the land. Neither does it make the Lands Commission the new owner of public lands or prohibits the Government of Ghana from determining the public purpose for which public land shall be allocated. In point of fact, article 258(1)(e) directs the Lands Commission to perform such other functions as the Minister responsible for land and natural resources, with the approval of the President, may assign to the Commission. Article 258(2) also empowers the Minister responsible for lands and natural resources to give general policy directions in writing to the Lands Commission on matters of policy and the Commission is obliged to comply with them. It is submitted that the reason why the Lands Commission is obliged to perform such functions as the Minister appointed by the President may assign, and comply with such policy directions as the Minister with the approval of

the President may come up with, is that the public lands they manage belong to the Government of Ghana in trust for the people.

14. Quite emphatically, article 257(1) vests all public lands in the President on behalf of, and in trust for, the people of Ghana. The President, it goes without saying, is the head of the Government of Ghana at all times. Further, article 257(5) guarantees the right of the Government to vest "*in itself of any land which is required in the public interest for public purposes*".

15. With the greatest respect, the question is, if all public lands are vested in the President of Ghana to hold in trust for the people of Ghana, and the Constitution guarantees the right of the Government to vest in itself any land required in the public interest for public purposes, how can it be unconstitutional for the President (in whom the land is vested by the Constitution) or the Government to allocate it for a specific purpose in the public interest? It is humbly submitted that there is no constitutional issue that is legitimately raised around the constitutional authority of the President of the Government to allocate the land for the purpose stated.

16. In our submission, we contend that, to assert a manifestly absurd meaning contrary to the very explicit meaning and effect of clear words in the Constitution does not mean that a genuine issue of interpretation of some relevant constitutional provisions has arisen. We further submit that merely because the plaintiff does not understand the clear words of articles 258, 265 and article 20 of the Constitution, or elects to put on the words therein an obviously strange and far-fetched meaning does not give legitimate basis for invoking this Court's original jurisdiction. If this Court were to entertain an action for an interpretation of the Constitution on account of a clearly absurd meaning being placed on some constitutional provisions, this Court will be flooded by hundreds, if not thousands, of actions purportedly invoking the original jurisdiction of the Court. All a

person has to do in the circumstances will be to advance a very strange meaning to clear words in the Constitution, and an invocation of the Court's original jurisdiction would be justified. It is submitted that this is palpably untenable.

17. Plaintiff in his attempt to force a constitutional issue in relief (1) claimed by him, contends in his statement of case that the Lands Commission is not part of "government". He relies on the definition of "government" in article 295 of the Constitution. With the greatest respect, we submit that the Lands Commission is part of the public services of Ghana, and therefore part of Government. The Lands Commission, it cannot be doubted, is part of government. Plaintiff's submission that the Lands Commission is not part of government is clearly erroneous and outrageous.

18. Indeed, "public service" as defined by article 295, upon a careful examination, refers more to those services which are part and parcel of the civil office of government, or which are related to the running of government machinery. "*Public service*" is defined by **article 295** as:

"*…**includes service in any civil office of Government**, the emoluments attached to which are paid directly from the Consolidated Fund or directly out of moneys provided by Parliament and service with a public corporation*".

19. This Court has held that the meaning of "government", would be defined within the context in which it was used and, ordinarily, may imply the mechanism or structures for the exercise of direct executive authority of the state, i.e. central government or those offices which are part of the day-to-day routine administration of the State. It is submitted that the Lands Commission, which clearly has been stated by the Constitution to be the organ which manages public lands on behalf of the government, is part of the public services and

therefore is part of government. Its officers are in truth, public servants.

Please see: **Klomega (No. 2) v. Attorney-General & Ghana Ports and Harbours Authority (No.2)** [2013-2014] 1 SCGLR 681.

Article 190 (1)(c) of the Constitution defines "Public Services" to include "*public services established by this Constitution*". The Lands Commission is one such public service institution established by the Constitution, and therefore on the strength of the definition of government in article 295 and the holding of this Honourable Court in **Klomega (No. 2) v. Attorney-General & Ghana Ports and Harbours Authority (No.2)** (supra), is part of government.

20. Respectfully, we contend that plaintiff is simply wrong in his contention that the Lands Commission is not part of government. This does not require any act of constitutional interpretation, neither does it mean that defendant herein is advancing a rival meaning to articles 258, 265 and 295, and therefore, a case has been made by plaintiff for the exercise of this Court's jurisdiction. The plaintiff, quite clearly creates an artificial case for interpretation. This must be jettisoned by the Court.

21. The **third point** we make is that, relief 2 on the plaintiff's writ is also devoid of a cause of action. Before we advance arguments on the merit on this point, we would like to point out that the formulation of relief 2 is simply procedurally incompetent. Relief 2 is long, nebulous and argumentative. The practice and procedure of this Honourable Court prohibits the formulation of a relief in a nebulous and argumentative manner. The reference to "*the core values, basic structure and the nature of the Constitution of Ghana*" and "*a combined and contextual interpretation of the letter and spirit of the Constitution*" is nebulous and incomprehensible. The rules of court require reliefs to be cast in easily understandable terms and in a

manner which sets out clearly the ambit of the dispute between the parties. Relief 2 does not measure up to the standard.

22. Further, relief 2 also does not allude to any specific act alleged to have been committed by the State. The relief simply seeks a declaration from the Court of what he deems to be the effect of provisions in the Constitution without relating it to a real situation. Thus, the plaintiff requests the Court to declare that "*by the core values, basic structure and the nature of the Constitution of Ghana and upon a combined and contextual interpretation of the letter and spirit of the Constitution … it is unconstitutional for the through its organs of Government to purposely aid …. and/or be excessively entangled in, any religion or religious practice*". The plaintiff in this relief does not allude to any real matter in controversy. Neither does he identify any breach of the Constitution in relation to a specific act by the State.

23. It is submitted that relief 2 sought by plaintiff merely seeks a declaration from the Court as to the theoretical principles underpinning the Constitution, and therefore improper. It is contrary to this Court's holding in **Asare-Baah III & Others v. Attorney-General & Electoral Commission** [2010] SCGLR 463. In a case alleging a violation of the Constitution by the plaintiff therein, the Supreme Court held in holding (1) dismissing the action thus:

"*a court's duty was to determine the real matters in controversy between the parties effectually. It was therefore imperative in actions, such as in the instant case, that all alleged acts of statutory and constitutional invalidity, breaches or violations, inconsistencies or non-compliance be identified with sufficient particularity. It was equally crucial that the relevant constitutional requirement alleged to have been violated, be sufficient particularity. <u>It was equally crucial that the relevant constitutional requirement alleged to have been violated, be sufficiently identified, so as to enable the court effectively</u>*

measure the allegations against the confines of the relevant constitutional provisions. Therefore, unless the circumstances clearly warranted it, a general reference to an entire article or provision would be insufficient……

Per Georgina Wood CJ. This just requirement of the law, which is based on plain good sense, serves the interests of justice well in all civil actions. It enables issues in controversy between parties to be clearly identified so each side can adequately prepare to meet the case alleged against him or her, thereby enabling the court to firmly and effectually determine all disputed issues."

Relief 2 on the writ of summons does not seek a relief in relation any real matter in controversy and is, thus, not cognizable by this Court. It should be dismissed in limine.

24. The second relief in italics – part of relief 2 suffers from the same difficulties identified above, and should be struck out. They do not allude to any real matter in controversy. Neither do they identify any specific matter alleged to have bene committed by the State and identified to be unconstitutional.

25. The **fourth** point we make in support of our contention that the instant action is devoid of a cause of action is that reliefs 3 and 4 of the plaintiff's writ, even though they identify the setting up of a Hajj Board and the construction of a National Cathedral, do not identify the specific constitutional breach by the State, and therefore, still do not disclose a cause of action.

26. The Court will note that the plaintiff only makes a blanket statement that the acts of the State identified in reliefs 3 and 4 are unconstitutional, without an identification of the specific breach. Which article(s) of the Constitution has or have been allegedly breached by the State? Plaintiff does not indicate in his writ of summons. It is as if plaintiff expects the defendant to comb through the entire Constitution to find out plaintiff's

specific cause of action. These reliefs are contrary to the Court's holding in **Asare-Baah III & Others v. Attorney-General & Electoral Commission** (supra), wherein the Court held that

"*…It was equally crucial that the relevant constitutional requirement alleged to have been violated, be sufficient particularity. It was equally crucial that the relevant constitutional requirement alleged to have been violated, be sufficiently identified, so as to enable the court effectively measure the allegations against the confines of the relevant constitutional provisions. Therefore, unless the circumstances clearly warranted it, a general reference to an entire article or provision would be insufficient……*"

27. The plaintiff in the manner in which he has formulated reliefs 3 and 4 which seem to be the only substantive reliefs, has disabled the defendant and the Court from identifying the real issues in controversy. This is unjust and unlawful. He has also prevented the defendant from knowing the case against her, contrary to the dictates of justice and sound procedure. A party in action invoking the Court's original jurisdiction ought to know clearly in advance the specific constitutional provision in issue. This will enable the party know whether the action is one for interpretation of the Constitution or enforcement. If it is for interpretation, the party ought to know which specific provision is in issue, so as to know whether the Court's interpretative jurisdiction has, in the first place been properly invoked. However, if it is for enforcement of the Constitution, the party ought to know which specific provision has allegedly been violated by the State. This will enable the State and the Court measure the specific acts alleged to have been committed by the State against the dictates of the Constitution, so as to ascertain whether there is a cause of action in the plaintiff's claim, to start with.

We submit that the plaintiff's case, in the manner in which he has formulated his reliefs, is most unfair to the defendant. The defendant is disabled from ascertaining the real matters in

controversy and thus, the real cause of action for the plaintiff. We pray for the reliefs to be dismissed in limine.

28. Respectfully, assuming the Court were to consider reliefs 3 and 4 on plaintiff's writ as regular, it is our contention that none of the constitutional provisions cited by plaintiff in his amended statement of case to support his claim raises any genuine issue for interpretation of the Constitution. Throughout his amended writ of summons, plaintiff relies on articles 21(1)(b), (c), 35(1), 37 and 56 of the Constitution in support of the contention that the establishment of a Hajj Board and the construction of a National Cathedral are unconstitutional. The plaintiff makes this contention after asserting that Ghana is a secular state.

29. Preliminarily, we observe that the assertion that Ghana is a secular state is not grounded on any express provision of the Constitution, 1992. **Invariably, the recognition of religious pluralism and diversity are what earn a State the attribute of secularism.** The essential feature of secularism the freedom of people of different religions and beliefs to manifest such religion and beliefs.

30. Defendant contends that the framework of government which the constitutional architecture of this nation seeks to establish, coupled with the practices of the Ghanaian State, casts Ghana more in the mould of a secular State. It is further submitted that the freedom to practice any religion desired by any person resident in Ghana and the absence of discrimination against persons of different religious persuasions, constitute the benchmark for determining whether an act of an authority in Ghana is a violation of the Constitution.

3. More substantively, the defendant submits that plaintiff has not throughout his statement of case, demonstrated an essential condition precedent for the invocation of this Court's original jurisdiction, i.e. the presence of ambiguity, imprecision or lack

of clarity with any of the constitutional provisions he relies on to institute his action. It can be seen from the writ and statement of case, particularly paragraph 41 thereof, that, plaintiff relies on the provisions in articles 21(1)(b),(c), 35(1) and (5), 37 and 56 of the Constitution to claim the reliefs in the instant action. For the purposes of emphasis and of the avoidance of doubt, the said provisions provide as follows:

"21. (1) All persons shall have the right to-

(b) freedom of thought, conscience and belief which shall include academic freedom;

(c) freedom to practice any religion and to manifest such practice.

35. (1) Ghana shall be a democratic state dedicated to the realization of freedom and justice; and accordingly, sovereignty resides in the people of Ghana from whom Government derives all its powers and authority through this Constitution.

(5) The State shall actively promote the integration of the peoples of Ghana and prohibit discrimination and prejudice on the grounds of place of origin, circumstances of birth, ethnic origin, gender or religion, creed or other beliefs.

37. *(1) The State shall endeavour to secure and protect a social order founded on the ideals and principles of freedom, equality, justice, probity and*

accountability as enshrined in Chapter 5 of this Constitution; and in particular, the State shall direct its policy towards ensuring that every citizen has equality of rights, obligations and opportunities before the law.

56. *Parliament shall have no power to enact a law to establish or authorize the establishment of a body or movement with the right or power to impose on the people of Ghana a common program or set of objectives of a religious or political nature".*

31. Respectfully, there is no ambiguity in article 21(1)(b) and (c) of the Constitution. It guarantees to every citizen the freedoms of speech, expression, thought, conscience, religion and academic freedom. For the purposes of the instant action, it guarantees to the citizen the freedom to practice any religion and manifest same without inhibition. The provision is not capable of a double meaning. There is no lack of clarity about same. Neither has plaintiff alleged any act by the State by which it can be seriously contended that the State is preventing a citizen or person in Ghana from practising or manifesting his religion or belief. It is thus respectfully submitted that article 21(1)(b) and (c) do not raise a genuine issue for interpretation warranting the invocation of this Court's original jurisdiction.

32. Further article 35(1) without controversy, sets out the political objective of the Constitution for the State of Ghana, which is that, Ghana is dedicated to the realization of freedom and justice and sovereignty resides in the people. There is no issue for interpretation of this provision. Article 35(5) also sets out the duty of the State to promote the integration of the peoples of Ghana and the prohibition of discrimination on grounds of place of origin, circumstances of birth, ethnic origin, gender, religion, creed or other beliefs. In substance, article 35(5) is not much different from the effect of article 21(1)(b) and (c). The plaintiff has not shown any ambiguity about these provisions. Neither has he shown any double meanings of the provision or lack of clarity about them.

33. The force of the foregoing submissions applies to the provisions in articles 37(1) and 56. The plaintiff has failed to show any ambiguity, imprecision, lack of clarity or double meanings with the two provisions. Their effect, i.e. the duty of the State to ensure that every citizen has equality of rights and obligations, and not to impose on the citizen a law to establish or authorise the establishment of a movement with a common objective of a religious nature, is very clear. The plaintiff has also failed to allege any act by the State by which it could said that the State is imposing on the people of Ghana a movement with one religious or political agendum. The plaintiff has not alleged or established in his case that the State is forcing one

religion on the people of Ghana. From the plaintiff's case, there is no idea of a state religion being forced on the people of Ghana. We respectfully submit that the plaintiff has failed to prove an issue for interpretation in either articles 37(1) or 56 also.

34. It is our humble contention that the presence of a genuine issue for interpretation in a constitutional provision relied on for the institution of an action under articles 2(1) and 130(1), is a sine qua non for a cause of action. The failure of a plaintiff to raise issues that legitimately call for an interpretation of the Constitution based on which it can be contended that the enforcement jurisdiction of the Court arisen, renders the invocation of this Court's jurisdiction improper. The most classical illustration of the rejection by this Court of its interpretative jurisdiction, where no genuine issue of interpretation exists, is in **Bimpong-Buta v. General Legal Council and Others** [2003-2004] 2 SCGLR 1200. *Sophia Akuffo JSC* held at pages 1217 – 1219 (in a judgment concurred in by all) that:

"*In the light of the foregoing, despite the plaintiff's submissions to the contrary, my respectful view is that the suit does not raise*

any real or genuine issues of constitutional interpretation such as would justify our exercising our original jurisdiction under article 2 or 130(1).

….

The words of these provisions are precise, clear and unambiguous. They are not obscure or in any manner capable of any meaning other than what they say. None of the parties has placed or attempted to place any meaning on these words to rival that of another party; nor is there any conflict between these provisions and any other provisions of the Constitution. The plaintiff simply wants the provisions to be applied. There is, therefore, nothing in these provisions for us to interpret.

Does the suit nevertheless raise any issues of constitutional enforcement within the terms of article 2(1)? My simple answer is that it does not. In ***Adumoa II v. Twum*** *(supra) this court, in striking out the action therein, considered the original jurisdiction of the court and had this say (per Acquah JSC) (ss he then was) at pages 167, 169 and 171:*

'The original jurisdiction vested in the Supreme Court under articles 2(1) and 130(1) of the 1992 Constitution to interpret and

enforce the provisions of the Constitution is a special jurisdiction meant to be invoked in suits raising genuine or real issues of interpretation of a provision of the Constitution; or enforcement of a provision of the Constitution; or a question whether an enactment was made ultra vires Parliament or any other authority or person by law or under the Constitution…

This special jurisdiction is not meant to usurp or to be resorted to in place of any of the jurisdictions of the lower court. In other words, where our said jurisdiction has been invoked in an action which properly falls within a particular cause of action at a lower court, this court shall refuse to assume jurisdiction in that action, notwithstanding the fact that it has been presented as an interpretation or enforcement suit or both. For, a large number of actions which fall within specific causes of action can be presented in the form of interpretation or enforcement actions or both…

Now, it is very important to understand and appreciate that the 1992 Constitution is the fundamental and supreme law of the land, the provisions of which no other law is permitted to contradict… Therefore, all courts, tribunals, institutions,

including the government, and all individuals are bound by the provisions of the Constitution. Accordingly, all courts, tribunals and indeed, all adjudicating authorities in Ghana are obliged to apply the provisions of the Constitution in the adjudication of disputes before them…"

35. The decision of the Court in the relatively recent case of **Osei-Boateng v. National Media Commission and Appenteng [2012] 2 SCGLR 1038** affirmed the thinking of the Supreme Court that there must really be a genuine issue for interpretation of the Constitution before the Court's jurisdiction under articles 2(1) and 130(1) of the Constitution may be invoked. The decision is fairly representative of the jurisprudence in this area. The following can be found at Holding 2 of the decision of the Court:

"The requirement of an ambiguity/imprecision or lack of clarity in a constitutional provision was as much a precondition for the exercise of the exclusive original enforcement jurisdiction of the Supreme Court as it was for the exclusive original interpretation jurisdiction under Articles 2(1) and 130 of the 1992 Constitution; that was clearly right in principle since to hold otherwise would imply opening the floodgates for enforcement actions to overwhelm the Supreme Court*. Accordingly where a constitutional provision was clear and unambiguous any court in the hierarchy of courts might enforce it and the Supreme Court's exclusive original jurisdiction would not apply to it."*

36. Also, in **Danso v. Daaduam II & Another [2013-2014] 2 SCGLR 1570** the Court held per His Lordship Anin Yeboah JSC at page 1574 as follows:

"It is clear that the Plaintiff is inviting this court to interpret Article 267(1) which obviously calls for no interpretation. The words are clear and unambiguous and it is a cardinal rule of interpretation of status and national constitutions for that matter, that if the provisions are clear and unambiguous, no interpretation arises. See Bimpong Buta v. General Legal Council [2003-2004] 2 SCGLR 1200."

The Court further held that:

"the 2 reliefs sought and the statement of case in support of the two main reliefs could not be construed as raising any claim founded on Article 2 of the Constitution …this court has exhibited remarkable consistency since the case of Republic v. Special Tribunal Ex parte Akosah and continued same under the 1992 Constitution in cases like Adumoah II v. Adu-Twum. It is clear that the plaintiff is resorting to the use of this court as a court of original adjudication of an ordinary land case between a stool subject and occupant of a stool. ***This court must not attempt to enlarge/extend its interpretative jurisdiction exclusively vested in it under Article 130(1)(a) of the 1992 Constitution so as to deny the opportunity and jurisdiction vested in the lower courts to exercise their jurisdiction in areas where no interpretation arises whatsoever****."*

37. It is submitted that in so far as there is the absence of a situation genuinely raising an issue for interpretation of the Constitution, the plaintiff's cause of action, if any, is not in this Honourable Court. The High Court has jurisdiction in all matters. As the Supreme Court has stated in the cases referred to above, all courts in the country have the jurisdiction to apply the Constitution. Even though it is out of place for counsel on the other side to proffer legal advice to a party in a matter, we would respectfully submit that if the plaintiff seeks to have the Constitution applied in a situation where there is no genuine

issue for interpretation, the appropriate forum will be the High Court. This is especially so as the provisions on freedom of religion which he seeks to apply, albeit unjustifiably in the circumstances of the instant action, are human rights provisions.

38. The plaintiff cannot force an issue for interpretation by the use of nebulous expressions like "*the combined and contextual interpretation of the Constitution*", "*core values, basic structure and the nature of the 1992 Constitution*", etc. These are insufficient to force an interpretation of the Constitution. We respectfully pray for the instant action to be dismissed as devoid of a cause of action.

ARE THE SPECIFIC ACTIONS BY GOVERNMENT COMPLAINED OF BY PLAINTIFF, I.E. ESTABLISHMENT OF THE HAJJ BOARD AND GOVERNMENT SUPPORT FOR THE CONSTRUCTION OF A NATIONAL CATHEDRAL PROHIBITED BY THE 1992 CONSTITUTION?

39. Respectfully, even though we have argued that the plaintiff's action does not raise any real issue for an invocation of the Court's jurisdiction under articles 2(1) and 130(1) of the Constitution, we would respectfully further argue, in the event that the Court would be minded to setting the case down for hearing on the merits, that, the specific acts complained of by plaintiff herein do not contravene any provision of the Constitution.

40. In advancing legal arguments in opposition to the plaintiff's actions, we would emphasise on the following matters, which are beyond controversy:

i. Plaintiff has been unable to demonstrate any action by the State which hinders or interferes with the exercise

by any specified religious group of its rights under the Constitution, 1992;

ii. The Plaintiff does not allege a request by any specified religious group for any form of assistance which has been denied by the State;

iii. The Plaintiff does not allege or allude to any action, policy or legislation by the State which seeks to project one religion as religion for the State.

The establishment of a Hajj Board

41. The relief sought by plaintiff against the establishment of a Hajj Board stems from the swearing-in on 16th February, 2017 of the members of the Hajj Board at a ceremony at the Jubilee House, seat of Government. The Plaintiff states that the Hajj, one of the five pillars of Islam is the annual pilgrimage to the Holy sites of Islam, an obligation cast on every Muslims who has the means.

42. The Plaintiff further alleged that although there are reports that the Republic of Ghana supports or aids Muslims who embark on the Hajj pilgrimage, there is no publicly available information as to the nature and quantum of this support or aid and that the express public endorsement given

by the State for the Hajj including the setting up of a Committee under the color of state authority, the housing of the Committee with State resources constitutes clear and undeniable support or aid, endorsement and promotion of Islam and therefore the State has crossed the line in the relationship between the State and religion.

The construction of a National Cathedral

43. The basis for the plaintiff's claim is that on 6th March 2017, as part of the 60th anniversary of Ghana's independence celebrations, the President of Ghana cut the sod for the construction of a National Cathedral in Accra to serve as a national non-denominational Christian worship centre for the country. On 16th March 2017, the President of Ghana inaugurated a 13-member Board of Trustees to oversee the successful completion of the National Cathedral. The Plaintiff alleged that the President is reported to have said that "the national worship center would be an inter-denominational church hosting state occasions such as State thanksgiving services, State funerals, and State burials."

44. According to the Plaintiff, the support or aid the Republic of Ghana has extended for the construction of a National Cathedral when such facilities have not been extended to other religions in Ghana, does not demonstrate neutrality in matters of religion. The Plaintiff argues that the said support or aid

shows a preference Christianity when other religions are practiced in Ghana.

Substantive arguments on the merits

45. It is our humble submission that the Plaintiff's case is grounded, first, in a fundamental misunderstanding of the character of Ghanaian secularism and assumes, wrongly, that there is a singular model of a secular state to which all States, regardless of their unique histories, cultures, and traditions, must conform.

46. Secondly, it is our respectful submission that the Government of Ghana is, and has at all material times, been compliant with the constitutional provisions affecting the secular status of Ghana as a nation. Ghana is a religiously pluralistic society, where people, individually and in association with others, have been free to practice and manifest their religion and religious beliefs without hindrance or favour from the state.

47. Further, the specific acts complained of by the plaintiff do not border on a violation by the State of its obligations under the relevant constitutional provisions relied on by plaintiff.

48. We first, admit that even though not written in any letter of the Constitution, it is apparent that the framework of

Government which the constitutional architecture of this nation seeks to establish casts Ghana in the mold of a secular State. Articles 21(1)(b),(c) and 56 of the 1992 Constitution provide plausible basis for inferring that a characterization of Ghana as a secular State will not be far from the reality.

49. Respectfully, it is submitted that the freedom to practice any religion desired by any person resident in Ghana and the absence of discrimination against persons of different religious persuasions, constitute the benchmark for determining whether an act of an authority in Ghana is a violation of the Constitution. These two factors ought to be the standard for assessing the constitutional validity of the acts of the Government the subject matter of this suit.

50. Further, it is our humble submission that the Government of Ghana, as indicted above, has lived up to its obligation of establishing and ensuring the existence of a secular state. In particular, this Honourable Court cannot be oblivious of the fact that conditions prevailing in Ghana foster an environment for the free practice of religion and manifestation of same; the Government has not by law established a religion for the state; neither has it promoted any movement with a set of objectives of a religious nature so as to support a contention that Ghana is becoming a "one religion" state. There thus cannot be any questions lawfully raised about

a recognition by the Government of the "secular orientation" of the state of Ghana.

51. Defendant submits however that, although the provisions of the 1992 Constitution cited above portray Ghana as a Secular State, Ghana is not an atheistic or an irreligious State.

Please see: Kofi Quashigah, Religion and the Secular State in Ghana, https://www.iclrs.org/content/blurb/files/Ghana.pdf

52. This submission brings into focus the distinction that ought to be drawn between secularism and atheism. Secularism is not one and the same as atheism. The plaintiff's statement of case respectfully blurs the line between the two and further, foists on the Court a single notion of secularism, i.e. a situation where the state completely disregards or ignores the religiosity of the people in the taking and implementation of policy decisions for a just and free society.

53. Defendant respectfully submits that contrary to the tone and tenor of plaintiff's submissions, there is no universal, "one size fits all" model of secularism. Secular states come in many different shapes and forms. Some, such as **France**, border on the "atheistic," maintaining a more or less strict wall of separation between the State and religion while respecting religion as a private matter. Others like the **United States of America** embrace a vision of secularism that allows a fair amount of "accommodation" of religion by government.

Ghanaian secularism has been similarly shaped by our peculiar society and culture (as a generally theistic people) and by our history (including precolonial and colonial encounters and engagement with Christian Europe from the coastal south and similar encounters and engagement with Islam principally from the north). Consequently, Ghanaian secularism is, both in law and in fact, not irreligious or anti-religion or atheistic. To the contrary, Ghanaian secularism may be described as "theistic", with a fair amount of "peaceful coexistence" and "accommodation" between religion and the State. We support this proposition by reference to the following historical facts:

i. State recognition and funding of historically denominational and religiously-identified public schools – most of them originally founded by private religious missions. It is submitted that the history of education in Ghana itself cannot be written without tribute to the instrumental role of missionaries in the establishment of the first schools in Cape Coast and other areas in the southern part of Ghana. In a poignant demonstration of peaceful co-existence and accommodation between religion and the State, the Government of Ghana has now taken over the running of the likes of Mfantsipim, Adisadel, Wesley Girls High School, St. Augustine's, Holy Child School, etc., with the various religious denominations which

founded them still providing support in diverse forms.

ii. Use of multiple religious invocations and prayers at state functions. The Government of Ghana, regardless of which political party it is composed by, has incorporated religious liturgy and prayers into national events like Independence day celebration, Farmers' day celebrations, Workers' day activities and other national celebrations. Thus, traditional, Islamic and Christian prayers and rituals are observed in symbolic expression of the religious beliefs of the Ghanaian.

iii. National anthem opens with "God bless our homeland Ghana". A national anthem is the most powerful identity of any country. The Ghana state is identified with our national anthem entitled "God bless our homeland Ghana". It is submitted that it is not for nothing that the National anthem commences with the words "God bless our homeland Ghana". It once again attests to the Ghanaian conception of the pre-eminent role a spiritual being, God, plays in his life. By the adoption of that anthem, it is respectfully submitted that Ghana as a state, also recognizes the role of God in the struggle for independence and establishment of Ghana as the first nation south of the Sahara to liberate itself from the clutches of colonialism. It would respectfully be observed that the choice of "God bless our homeland Ghana" as our National Anthem has not received any serious criticism in Ghana. This Honourable Court can take judicial notice of the fact that our national anthem, together with its recognition of God, has been largely roundly approved in Ghana over the years.

iv. Observance of principal Christian and Islamic holidays as statutory public holidays. This is also a phenomenon that has not received any criticism in Ghana. Over the years, Ghanaians have observed Christmas, Easter and the Eid events as public holidays. It is submitted that this is yet another manifestation of the "theistic" secularism observed by the people of Ghana. While in principle and in practice upholding the tenets of secularism, i.e. respecting the right of every person in Ghana to practice his religion and non-discrimination against any religion in Ghana, the State duly takes cognizance of the particular nature of religion as a way of life of the Ghanaian and thus, observes the holidays observed in the predominant religions in Ghana, Islam and Christianity.

v. State facilitation and co-management of annual Hajj pilgrimage to Mecca (Saudi Arabia) by Muslims. The State once again in seeing the Hajj pilgrimage as an event that is part of the way of life of a significant percentage of the population as well as one that has consequences for its international relations, facilitates the acquisition of visas and management of the trip.

54. Respectfully, it can therefore be seen that although there is no State religion in Ghana, no State church or mosque, it is a fallacy to conclude that Ghana is a State which does not believe in the Supreme Being or a God. Recognition for the existence of a supreme spirit being is a way of life of the Ghanaian and underscored in important parts of the Constitution.

The preamble of the 1992 Constitution opens as follows:

> ***"IN THE NAME OF THE ALMIGHTY GOD***
>
> ***We the People of Ghana,***
>
> ***IN EXERCISE of our natural and inalienable right to establish a framework of government, which shall secure for ourselves, and posterity the blessings of liberty, equality of opportunity and prosperity..."***

55. The preamble of the Constitution, 1992 forms part of the Constitution which is the highest law of the land. The **Black's Law Dictionary** has defined preamble as:

"an introduction statement in a constitution, statute or other document explaining the document basis and objective, especially a statutory recital of the inconveniences for which the statute is designed to provide a remedy."

56. In **Customs, Excise and Preventive Service v. National Labour Commission and Attorney General (Public Service and Workers Union of TUC Interested Party) [2009] SCGLR 530,** the Supreme Court per Jones Dotse JSC at page 565 explained preambles as follows:

> *"In making use of the preamble in Act 526, I am aware of the fact that a preamble to an Act of Parliament is only a narrative of the facts that gave rise to the passage of the Act*

and will give a semblance of the main objectives of the Act. It thus gives a historical basis for the passage of the Act and can be described as the gateway to understanding the reasons why the Act was enacted and the problems which it is meant to solve."

57. It is our humble submission that, from the letter and spirit of articles 17, 21, 35 and 56, what the Constitution prohibits is the elevation of any religious organization into a State religion and the restriction of persons in Ghana in terms of practicing and manifesting any religion of their choice. While secular in that regard, it is correct to say that the Ghanaian State has historically recognized the existence and importance of religious identity and affiliation in the Ghanaian society and encouraged their open and lawful expression even at national events.

58. It is worthy to note that the examples of "coexistence" and "accommodation" between religion and the State referred to above, *predate* the Constitution of the 4th Republic and none was expressly or implied abolished or prohibited by the 1992 Constitution. To the contrary, the Constitution of the 4th Republic, while secular in nature, affirms and maintains the historically and culturally theistic and religious character of Ghanaian society. Evidence of this comes from various parts or provisions of the text of the Constitution, including, notably:

i. As stated above, the Preamble – following Ghanaian tradition, the Preamble opens with the words "In the Name of the Almighty God".

ii. Article 17(4)(b): The State is authorized to make laws in relation to adoption, marriage, divorce, burial and devolution of property and other matters of "personal law". It is submitted that this recognizes the different religions and religious preferences of different persons and communities. In effect, religion is recognized as a source of law in matters of "personal law".

iii. Chapter 22 - State recognition and incorporation of Chieftaincy as an institution of traditional governance, along with its associated cultural, pseudo-religious theistic beliefs and practices. Chieftaincy, undoubtedly, has religious underpinnings. Regular practices by chieftains like the pouring of libation for instance, are inherently religious. The recognition by the State of chieftaincy as an institution, it is submitted, is further proof of the fact that the concept of secularism as enshrined in the Constitution of Ghana, is synonymous with atheism. The State is allowed to, within reasonable limits, facilitate the aspiration by the citizen of his religious practices as a way of ensuring national cohesion

59. In the text of the **Presidential Oath,** the **Oath of Vice-President,** the **Judicial Oath**, the **Oath of Member of Council of State**, the **Cabinet Oath**, the **Oath of Minister of State**, the **Oath of Secrecy**, the **Speaker's Oath**, the **Oath of a Member of Parliament** and all other oaths administered for other high officials of the Republic upon their being sworn into office, a call

is made on God to assist in the performance of functions by the particular public officer concerned.

60. Further, it is remarkable that the 1992 Constitution itself, expressly proceeds to grant formal representation on an independent national body to certain identifiable religious bodies that have played historically important roles in the social and civic life of the country, notwithstanding the provisions in Articles 21 and 35 suggesting the creation of a secular State. The provision in question, namely Article 166(1) on the composition of the National Media Commission provides as follows:

> *"(1) There shall be established by Act of Parliament within six months after Parliament first meets after the coming into force of this Constitution, a National Media Commission which shall consist of fifteen members as follows:*
>
> -
>
> *(a) one representative each nominated by*
> *(i) the Ghana Bar Association;*
> *(ii) the Publishers and Owners of the Private Press;*
> *(iii) the Ghana Association of Writers and the Ghana Library Association;*
> *(iv)* ***the Christian group (the National Catholic Secretariat, the Christian Council, and the Ghana Pentecostal Council)***

(v) ***the Federation of Muslims Councils and Ahmadiyya Mission****;*

(vi) the training institutions of journalists and communicators;

(vii) the Ghana Advertising Association and the Institute of Public Relations of Ghana; and

(viii) the Ghana National Association of Teachers;

(b) two representatives nominated by the Ghana Journalists Association;

(c) two persons appointed by the President; and

(d) three persons nominated by Parliament.

(2) The Commission shall elect its own Chairman."

61. Accordingly, we respectfully submit that a country that invokes the name of God in its pledge of allegiance and anthem, regularly observes religious holidays as public holidays and grants formal representation on a constitutional body to specifically named religious bodies, **cannot** be said to subscribe to a vision of secularism that does not permit the Government to make reasonable accommodation for religion. It is submitted that secularism in the context of the Ghana Constitution must be understood to allow, even encourage, State recognition and accommodation of religion and religious identity.

62. Religious autonomy is guaranteed in Ghana, and the State is duty-bound to respect the right of every person to freedom of

religion. This means, among other things, that the State may not interfere in the internal affairs of religious organizations. The Ghanaian State is, however, **not** precluded from collaborating with religious bodies or assisting a religious body, if and when necessary, to accomplish lawful and legitimate ends. This, with the greatest respect, must be the most objective and realistic understanding of the core value of Secularism that seems to underpin the Constitution, 1992 as well as the true and proper interpretation of **Articles 21(1)(b), (c)** and **35(1), (5)** and **(6)(a)** of the Constitution. In advancing this proposition, we are mindful of the oft-quoted dictum Court of Appeal sitting as the Supreme Court in **Tuffour v. Attorney-General** [1980] GLR 637, that an interpretation of a National Constitution must reflect the basic aspirations of the people for whom the Constitution was enacted, and therefore the Constitution was a living organism capable of growth.

63. Respectfully, my lords, the plaintiff does not deny that the State may provide support or aid for the different religions in the country. His complaint is that all the religions must be granted the same "privileges" granted by the State. With the greatest respect, this is a rather absurd and simplistic consideration of the issue. We respectfully submit that the 1992 Constitution does **not** provide for any such simultaneous equality of treatment to all religions. It does **not** suggest that when you accord to one religion "X gesture", then you must

accord to another religion the same "X gesture". What the Constitution guarantees, is the equal right of all persons to subscribe to the religious belief and faith of their own choosing without interference or imposition by the State. The State is thus only prohibited from discriminating against any person on grounds of religion or creed or the establishment of a State religion, and also preventing the free expression of religious orientations. It is our contention that it is not the relative status of religious groups as groups that should be equalized but the basic *opportunities of individuals members of the different religions*.

Please see: Belief, Law and Politics: What Future for a Secular Europe? - Marie-Claire Foblets, Katayoun Alidad, Zeynep Yanasmayan, https://books.google.com.gh/books

64. We advert our minds to the following questions in dealing with this issue:

a). whether equality of religion is possible in a country, which professes freedom of religion and with a variety of over religions as in other jurisdictions?

b). if the answer is in the affirmative, would that mean that anything done for one particular religious group will have to be replicated for all the others regardless of the size of that religious group?

65. Plaintiff alleges that the State has discriminated against other religions by the provision of a piece of land for the construction of a National Cathedral and the facilitation of the Hajj pilgrimage for Muslims. Once again, we find this submission totally misconceived and borne out of an inadequate examination of the relevant provisions of the Constitution. We submit that per the 1992 Constitution, the State may not dictate to its citizens which religion they should belong to. Nor may the State establish a State religion. However, the State is free to lend support or aid to a religious group if it deems such beneficence to be for the good of the nation.

66. Extending State support to one religion or sect does not mean that the State is discriminating impermissibly against other religions. My Lords, the different religions and religious groups in Ghana do not all have the same needs, concerns, or priorities; neither do they engage in the same observances or practices. Thus, what assistance is extended by the State to one religion or group need not necessarily be extended to or replicated for every other religion or religious group. Indeed, given the potentially infinite number of religions and religious groups, it would be impracticable for the State to be placed under such a duty or limitation to extend identical privileges to all religions or religious groups. If Plaintiff sees discrimination or preferential treatment in the State support and facilitation of annual Hajj pilgrimages by Muslims or for the construction of a

National Cathedral by Christian denominations, it is our contention that such "discrimination" is no different from the Constitution's explicit grant of permanent seats on the National Media Commission to Muslim and Christian groups—to the exclusion of all others.

67. Further, it would be observed that no exclusivity or exclusion is granted to any religion in terms of access to state support or facility. Lending a helping hand to one religious community does not mean a denial or preclusion of similar or other support/ assistance to another in similar circumstances. The State deals with each religious community according to its own peculiar needs or requests, without prejudice to any other.

68. Respectfully, it is our submission that the "freedom of religion" and non-discrimination/equality provisions of the Constitution do not tie the State's hands in the manner the Plaintiff wishes or suggests. The upshot of those provisions is that all persons within the jurisdiction of the Ghanaian State are free, without hindrance from the State, to profess and practice their religion (subject to the usual "peace, order, and security" restrictions) and, as individuals, stand equal before the law irrespective of their religion or creed. Those provisions do not prohibit or constrain the ability of the State to assist a particular religion or religious group based on their peculiar needs or circumstances.

69. Indeed the Constitution recognizes that the needs of the citizens of the State vary. That is why for instance **Article 17(4)(d)** provides that in ensuring equality and freedom from discrimination nothing shall prevent Parliament from making *"different provision for different communities having regard to their special circumstances……."*

70. The case of **Eweida and Others v. the United Kingdom**, the European Court of Human Rights (Fourth Section), (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) best explains the effect of the above quoted constitutional provisions of Ghana.

"The right to freedom of thought, conscience and religion, includes: the freedom to change religion or belief; the freedom to exercise religion or belief publicly or privately, alone or with others; the freedom to exercise religion or belief in worship, teaching, practice and observance; and the right to have no religion (e.g. to be atheist or agnostic) or to have non-religious beliefs protected (e.g. philosophical beliefs such as pacifism or veganism). Freedom of religion does not prevent there being a state church, but no one can be forced to join a church, be involved in its activities or pay taxes to a church. The role of the State is to encourage tolerance and all religions or non-religions, if regulated, must be regulated with complete neutrality. The fact that someone could resign to get round a restriction on

manifesting his/her religious belief in the workplace does not prevent there being an interference with his/her rights under Article 9. There will be interference if restrictions make it practically difficult or almost impossible to exercise the religion or belief."

71. The Supreme Court in **Federation of Youth Association of Ghana (FEDYAG) (No. 2) V Public Universities Of Ghana & Others (No. 2) [2011] 2 SCGLR P1081 @p1095** defined opportunity as:

"*The word 'opportunities' in article 25(1) may be defined as a favourable or advantageous circumstance or combination of circumstances, or a good chance for advancement or progress, or simply an advantage. The phrase 'equal opportunities' may thus be defined as a situation in which people have the same chance or advantage in life as other people without being treated in an unfair way because of their race, color, ethnic origin, religion, creed or social or economic status."*

The right not to be discriminated against on any grounds whatsoever is a fundamental human right. Following the definition of term **"equal opportunities"** in the cited case above, we can conclude that the words in the constitutional provisions cited above confer on every Ghanaian the right to have the same or equivalent chance and opportunity to be treated equally regardless of his place of origin, sex or religion and also that all religions are treated fairly. We have in this

light, already referred the Court to **Article 17(4)(d)** above, which permits the State to make different provision for different communities having regard to their special circumstances. It is submitted that **Article 17(4)(d),** in fact advances the principle of "constructive discrimination", where necessary to ensure the enhancement of the status of specific groups of people in Ghana or a promotion of their interests, to the extent that such interests are not in violation of the Constitution.

72. It has been established that the proper test for determining an infringement to a fundamental right is to examine its effect and not merely its object. This principle was clearly stated in **Bennet Coleman and Co. Ltd. & Ors. V Union of India & Ors. AIR 1973 SC 106 at 118**. The Indian Supreme Court per Ray J explained the principle in relation to the right to free expression thus:

"The true test is whether the effect of the impugned action is to take away or abridge fundamental rights. If it be assumed that the direct object of the law or action has to be direct abridgment of the right of free speech by the impugned law or action it is to be, related to the directness of effect and not to the directness of the subject matter of the impeached law or action. The action may have a direct effect on a fundamental right although its direct subject matter may be different."

73. It is important to note that the manner in which the State offers support to the various recognizable religious groups in the country is varied and actually demonstrative of the diversity of the Ghanaian society. Certainly the Plaintiff does not really expect the State to replicate to all other religions any assistance given to one religion. The State facilitates the Hajj Pilgrimage, Christians go on pilgrimage to Israel, the birthplace of Jesus Christ, but without support from the State. Perhaps the State could have facilitated the pilgrimage of Christian to Israel but it has chosen to provide land for the construction of a Cathedral by the Christian groups themselves which would serve public purposes. The State also supports the African Traditional religion in several ways, one notable way being the support it gives the institution of Chieftaincy. In our submission, we respectfully contend that the provision of assistance to religious groups as a way of facilitating the exercise of religious rights by some citizens in a way which does not impede the enjoyment by other groups of citizens of their own religious rights, is not inconsistent with any provision of the Constitution, 1992. We further contend that having regard to the specific circumstances of our country as one in which faith plays a very vital part of the Ghanaian and the existence of a Supreme Being and thus the spiritual world is even acknowledged by the Constitution itself, it would simply be absurd for one to assert that an effort by the State to facilitate the exercise of religious rights by groups of persons who, in truth and in fact, form a

vast majority of our population, is unconstitutional. It would amount to a complete abdication of the political and social duties of the State under **Articles 35(6)(c)** and **37 (1)** for the State not to play any role at all in the facilitation of the religious rights by Christian and Islamic groups who together constitute over eighty-five percent (85%) of the population of Ghana. The ways through which the State may facilitate the exercise of religious rights in the country ought not to be the same for all religious groups, given the diversity and peculiarity of the needs of various religious groups in the country. The proposition for each assistance given one group to be extended to every other group, ignores the heterogeneity of the Ghanaian society and is rather in contravention of **Article 17(4)(d)** of the Constitution.

74. In view of the different needs of different religions, any provision made for them would be done having regard to their peculiar circumstances. This ought not be perceived either as discrimination or constitutionally impermissible religious populism or even a failure to demonstrate religious balance or neutrality. Judge Tanaka in the **SOUTH WEST AFRICA CASE;** [1966] ICJ REP stated that equality does not mean;

"…absolute equality, namely the equal treatment of men without regard to individual concrete circumstances, but it means – relative equality, namely the principle to treat equally what are equal and unequally what are unequal …. To treat unequal

matters differently according to the inequality is not only permitted but required"

75. The Court would note that Chieftaincy, an institution which derives its authority from a religious source and is thus an inextricable part of the African Traditional Religion as practiced in Ghana, is provided for and protected in **Article 270** of the Constitution. Traditionally, some Chiefs and Queen mothers have perceived themselves as servants and/or agents of the ancestral spirits, from whom they receive the divine power to rule by occupying a 'stool' (throne).

Please see: Religion and Chieftaincy in Ghana: An explanation of the persistence of a traditional political institution in West Africa. Louise MullerPublished: 22 July 2013, Http://Ww.lit-Verlag.de/Isbn/3-643-90360-0

This power enables them to mediate between the spiritual beings and the community and to take care of their wellbeing. **Article 270(1)** provides as follows ;

> "270.(1) *The institution of chieftaincy, together with its traditional councils as established by customary law and usage is hereby guaranteed".*

76. Quite significantly, this provision for Chieftaincy and by extension, African Traditional Religion, is not made for

Christian or Islamic religion. Nobody is complaining that Christians or Muslims are discriminated against.

77. In our submission, we humbly contend that the acid test is not whether the State gives aid or support to any religious groups, but rather whether the State through its actions, is imposing a religion on the citizenry of this country. That is why for instance religious bodies are entitled to tax exemptions as long as they are not engaged in commercial activities. It is our further submission that the State supports all the three (3) religions that are widely practiced in this country and does not hinder the practice of any religion at all. However, it is impracticable for the State to replicate the same assistance to all the various religious groups since the groups are diverse and the assistance they require are different.

78. We submit that over the years, the support or aid Government has given to Christianity, Islam, the African traditional Religion and other religions have been different but it has not culminated in the proclamation of any of these religions as the State's religion. Thus, in accordance with the provisions of the Constitution, no support by the State should lead to the recognition of any religion as a state religion.

Plaintiff's allegation of excessive entanglement by the State with religion

79. Respectfully, the Plaintiff argues that any support or aid for any religion which does not serve a secular purpose amounts to "e*xcessive State entanglement* with religion.

80. Respectfully your Lordships, the expression "excessive entanglement" which is one of three parts of what is referred to as the Lemon Test, was first used in the American case of **Walz v. Tax Commission of the City of New York** 397 U.S. 664 (1970) 602 (1971) (relating to tax exemptions granted to churches). In dismissing the Plaintiff's case, the United States Supreme Court made the following observation;

> "*Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or support or aiding religion does not end the inquiry, however we must also be sure that the end result -- the effect -- is not an excessive government entanglement with religion. The test is inescapably one of degree"*

81. The Lemon Test was fully developed in the case of **Lemon v. Kurtzman**, 403 U.S. 602 (1971), in this case both Pennsylvania and Rhode Island adopted statutes that provided for the State to pay for aspects of non-secular, non-public education. The Pennsylvania statute was passed in 1968 and provided funding for non-public elementary and secondary

school teachers' salaries, textbooks, and instructional materials for secular subjects. Rhode Island's statute was passed in 1969 and provided state financial support for non-public elementary schools in the form of supplementing 15% of teachers' annual salaries. The United States Supreme Court on appeal found that the funding provided by both states to be unconstitutional on the ground of excessive entanglement, arising both from the continuing state surveillance necessary to ensure that statutory restrictions are obeyed and from the state inspection of school records necessary to implement the programs.

82. The Court's decision established the "**Lemon test**" as follows:

a. The statute must have a secular legislative purpose.

b. The principal or primary effect of the statute must not advance nor inhibit religion.

c. ***The statute must not result in an "excessive government entanglement" with religion.***

A consideration of the above shows that, clearly, the **Lemon test** which lays the threshold for "excessive entanglement", is inapplicable in the instant case. The State has not enacted any legislation or adopted a policy for the promotion, advancement or inhibition of any particular religion.

83. Excessive entanglement has not been defined by the Court but may be determined by a set of factors:

a. *The character and purpose of the institutions that are benefited*
b. *The nature of the aid that the state provides*
c. *The resulting relationship between the government and the religious authority.*

84. Even though, the Lemon case presented no workable definition of entanglement or specify the point at which that entanglement became excessive, the Court in Lemon case looked to administrative surveillance and the fiscal auditing requirements for the implementation of the legislative programs and held that the cumulative impact of the relationship between the church and State arising from such interaction offended the Establishment Clause. (A Clause which prohibits the enacting laws which has the effect of aiding any religion or establishing an official state religion).

85. Respectfully, the determination of whether or not the State's interaction with both the Christian and Islamic religions in Ghana constitutes excessive entanglement, requires an examination of nature of the aid that the State has provided or continues to provide both religions and the resulting relationship between the State and these religions. It is our humble contention that each of the specific acts or practices challenged by the Plaintiff is consonant with Ghanaian secularism, as exemplified above.

86. We begin with the **Hajj Pilgrimage**. We submit that the involvement of the State/government in this is not inappropriate. It is designed largely to ensure the smooth and orderly organization of the pilgrimage. We respectfully submit

that same is necessary in light of the fact that the Hajj involves the foreign relations of the country. Same involves large numbers of Ghanaians seeking the consular and immigration services of a foreign country, Kingdom of Saudi Arabia. An improper or disorganized management of the Hajj therefore has implications for the foreign and diplomatic relations with a friendly government. It is in this context that the State gets involved.

87. **We consider the National Cathedral** next. We respectfully submit that in this case too, the involvement of the government is very limited in nature. The Government only proposes to provide a piece of land for the construction of a National Cathedral by the different denominations. The funding for the construction and maintenance of the National Cathedral is to be provided by the Christian community, and not Government. It is also proposed by Government that the Cathedral will be available for likely secular uses – for some state funerals, thanksgiving services, etc. It is submitted that this is no different from the National Cathedral in Washington, D.C., which though religiously affiliated, is used for many formal state events by the U.S. government.

88. It is our submission that in order to be unconstitutional, the above mentioned situations must lead to the following conclusions:

- That the aid must be or is necessary to the survival of the religion;
- The aid must have or has the effect of indoctrinating the citizens with a particular religion.

89. Respectfully your lordships, it is our contention that the aid or support that is given by the State to these two religions

is not necessary for their survival. For instance, although Hajj is one of the five pillars of Islam, and all able-bodied Muslims who have the financial means are required to perform it once in their lifetime, Muslims who are not physically and financially able to undertake the Hajj pilgrimage are not required by Islam to undertake the pilgrimage. My Lords, per the Quran borrowing or using the means owned by someone else to embark on a Hajj pilgrimage is impermissible in Islam. It is therefore not allowed in Islam for the State to pay for pilgrims to go on the Hajj with taxpayers money, this would certainly amount to entanglement.

The Quran verse 97 in surah 3 Al-el-Imran states as follows:

> *"97.In it are manifest signs (for example), the Maqam (place) of Ibrahim (Abraham); whosoever enters it, he attains security. And Hajj (pilgrimage to Makkah) to the House (Ka'bah) is a duty that mankind owes to Allah, those who can afford the expenses (for one's conveyance, provision and residence);and whoever disbelieves [i.e. denies Hajj (pilgrimage to Makkah), then he is a disbeliever of Allah], then Allah stands not in need of any of the Alamin (mankind, jinn and all that exists)."*

90. Respectfully, the diplomatic and consular support that Government gives for the Hajj Pilgrimage is not peculiar to the Government of Ghana. States whose citizens attend the Hajj

Pilgrimage offer this kind of support to their citizens because, consular arrangement is a State to State arrangement.

91. My Lords, as already mentioned, the National Cathedral will be constructed by the different denominations in the Christian community and will serve public purposes (including National church services, Annual thanksgiving, Presidential services, burial services during state funerals). The various denominations which are expected to pool resources together to construct the Cathedral already have places of worship which were constructed without any support or aid from the State. We humbly submit that Christianity will survive with or without a National Cathedral. To this extent, it cannot be reasonably contended that the State is engaged in excessive entanglement with religion.

92. My Lords, the very nature of the support or aid that the State has given the two (2) religions as at the filing of this suit cannot be used as vehicles of indoctrinating the citizenry. We further submit that in the absence of any policy to that effect there is no risk of fostering any State religion through the kind of support or aid that Government has provided Christianity and Islam. It is the Defendant's contention that the State has not engaged in acts that should lead to a conclusion of undue or excessive entanglement with religion. The State has not adopted any policy or enacted any law which allows the State to

provide support to any religion for which State interference is required (through surveillance and substantial controls) to ensure that the support or aid is not diverted.

In the Lemon case (supra) the Supreme Court held that as follows;

> *"There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by public schools whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the Government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of State inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches".*

93. Respectfully, it has been amply demonstrated above that the State has not discriminated against any of the religions in Ghana, neither is the State excessively entangled with religion by virtue of the support it sometimes offers to any religion in

execution of its duties to the citizen under relevant provisions of the Constitution, 1992 referred to above. The Plaintiff has thus failed to provide any lucid reasons for a declaration by this Honourable Court that the State is unconstitutionally entangled with religion in this country. We respectfully advert the Court's attention to the fact that it is entirely the burden of plaintiff to adduce evidence in support of his contentions. This is the effect of the operation of the relevant sections of the **Evidence Act, 1975 (NRCD 323)**, relating to the burden of producing evidence particularly, **sections 11(4)** and **14** thereof. We submit that this burden is not made any lighter by virtue of the nature of this action as a constitutional action. It is thus the duty of Plaintiff to allege and prove the necessary facts, i.e. specific acts by the State, that would support a finding by the Court that the State is actually engaged in unconstitutional or as he puts it "excessive" entanglement with religion. This, he has woefully failed to do so.

CONCLUSION

94. We submit that for failure to satisfy the essential requisites for an invocation of the Court's original jurisdiction under articles 2(1) and 130(1), the instant action is devoid of a cause of action, and ought to be dismissed.

95. Further, the acts of the Government are simply in keeping with Ghana's long tradition of a pragmatic, peaceful co-

existence and accommodation between the State and religion, recognizing the importance to the citizenry of religious identity and worship. Ghanaian secularism encourages an active role for Government in the management of its relationships with the religious constituencies within civil society, as these are important levers of influence in society and are often called upon to assist in the prevention and management of social conflict. As noted at the commencement of these submissions, Plaintiff's case is clearly grounded in a fundamental misunderstanding of the character of Ghanaian secularism and assumes, wrongly, that there is a singular model of a secular state to which all States, regardless of their unique histories, cultures, and traditions, must conform.

Respectfully submitted.

LIST OF AUTHORITIES DEFENDANT INTENDS TO RELY ON

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4. **Republic v. Special Tribunal; Ex Parte Akosah [1980] GLR 592**
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DATED AT ATTORNEY-GENERAL'S CHAMBERS, ACCRA THIS 19TH DAY OF NOVEMBER, 2018

Godfred Yeboah Dame
DEPUTY ATTORNEY-GENERAL
For: THE ATTORNEY-GENERAL

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