

COMMUNITY COURT OF JUSTICE,
ECOWAS
COUR DE JUSTICE DE LA COMMUNATE,
CEDEAO
TRIBUNAL DE JUSTICA DA COMUNIDADE,
CEDEAO



No. 10 DAR ES SALAAM CRESCENT
OFF AMINU KANO CRESCENT
WUSE II, ABUJA-NIGERIA.
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IN THE COMMUNITY COURT OF JUSTICE OF
ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN IN ABUJA NIGERIA

ON THE 1ST DAY OF JULY, 2020

SUIT NO: ECW/CCJ/APP/48/18

JUDGMENT NO. ECW/CCJ/JUD/10/20

BETWEEN:

1. **OBINNA UMEH**
2. **KENNETH ROBERTS**
3. **GOODLUCK EDAFE**
4. **DR. MATTHEW OGUCHE**
5. **MACAULEY S. WILLIAM-JUMBO**
6. **JOSEPHINE E. OKEKE (MRS)**
7. **EMMANUEL AGADA**

.... **PLAINTIFFS**

AND

FEDERAL REPUBLIC OF NIGERIA

.... **DEFENDANT**

COMPOSITION OF THE COURT:

Hon. Justice Edward Amoako ASANTE	- Presiding
Hon. Justice Keikura BANGURA	- Member
Hon. Justice Januaría T. Silva Moreira COSTA	- Member

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ASSISTED BY:

Mr. Athanase ATANNON - Deputy Chief Registrar

REPRESENTATION OF PARTIES:

Plaintiffs' Solicitors:

Festus A. OGUCHE, Esq.

Dr. D. D. MAKOLO, Esq.

K. C. NWAFOR, Esq.

M. S. WILLIAM-JUMBO, Esq.

J. E. OKEKE (Mrs.)

Defendant's Solicitors

T. D. AGBE, Esq.

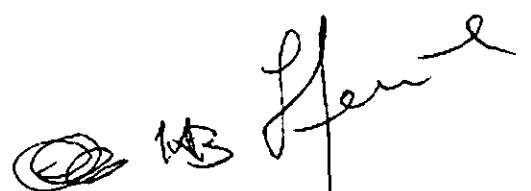
Suleiman JUBRIN, Esq.

JUDGMENT:

1. The judgment was read virtually pursuant to Article 8(1) of the Practice Directions on Electronic Case Management and Virtual Court Sessions, 2020.

PARTIES:

2. The Plaintiffs are community citizens and reside in different parts of the Federal Republic of Nigeria namely Port Harcourt, Abuja, Idah and Enuju.
3. The Defendant is the government of the Federal Republic of Nigeria, a member State of ECOWAS and a signatory of the African Charter on Human and Peoples' Rights (hereinafter referred to as the "African Charter").




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SUBJECT MATTER OF PROCEEDINGS:

4. i. Restriction of the right of a citizen to take part in a government of his country by imposition of political parties as the only platform for aspiration to elective offices, and the total ban of independent candidacy;
- ii. Denial of the right of participation under Article 21, Universal Declaration of Human Rights; Article 13 of the African Charter; and Article 25 of the International Covenant on Civil and Political Rights.
- iii. Curtailment of the aspiration of space for contest into elective public offices by the criteria of political party platforms as pre-requisite or condition for participation in an electoral process.

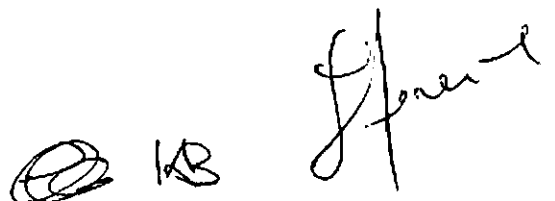
PLAINTIFFS' CASE:

5. The Plaintiffs stated that the Defendant operates a democracy within its national framework, whereby qualified individuals aspire to public offices and as members of Legislative Houses both at the national and state levels. According to the Plaintiffs these elective offices, named in the Defendant's 1999 Federal Constitution (as amended) and in its Electoral Act are essentially the office of the President and the Vice, State Governors and their Deputies, the members of the National Assembly namely the Senate and the House of Representatives and members of the respective States Legislative Assemblies.
6. The Plaintiffs are saying that the cumulative effect of the relevant provisions of the Defendant's 1999 Constitution and its related electoral laws makes elections to these offices mandatorily under the ticket of a political party. The Plaintiffs say that to aspire to any elective offices, an aspirant must be a card-bearing member of a political party and the former must be certified by the latter as

having fulfilled all its internal regulations and formalities to be presented as a candidate for any elections. The Plaintiffs continue that the electoral system is arranged in such a manner that votes cast at any given elections are seen as votes for the political parties that presented the candidates and not for the candidates who contested.

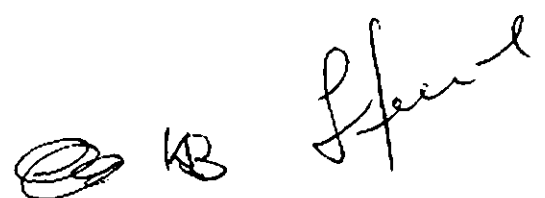
7. According to the Plaintiffs, public spirited individuals, Plaintiffs inclusive, who have good intentions to serve their country selflessly in any of the elective positions are hamstrung by the restriction on the political and aspirational space which also is an impediment on their right to freedom of participation in the political administration of their country and to take part in the government of their country.
8. Plaintiffs lodged this suit seeking to get reparation for the alleged violation of their rights to participate directly in the government of their country; citing the refusal of the Defendant to allow them stand as independent candidates in the periodic elections into the Executive and Legislative arms of the government as the basis of the violation.
9. It is the case of the Plaintiffs that Section 221 of the Defendant's 1999 Constitution as amended; is not in compliance with the provisions of Article 13 of the African Charter which accords them the right to participate freely, directly or indirectly in the government of their country.
10. Plaintiffs further argue that by the provisions of the said Section 221 of the 1999 Nigerian Constitution as amended; which they claim limits participation in election through the platform of political parties, their rights to direct participation in government have been violated and the Defendant is in default of its obligation under Article 1 of the African Charter to protect their rights.

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11. In their pleas in law, the Plaintiffs placed reliance on Article 13 of the African Charter, Article 21 of the Universal Declaration of Human Rights, Article 25 of the International Covenant on Civil and Political Rights, all other relevant international human rights instruments and decisions of Human Rights Courts from various jurisdictions as submitted in their Originating Application.

12. The Plaintiffs therefore urge the Court to find against the Defendant that there has been a continuous violation of their human rights for as long as the law remains in its present state and seek the following declarations:


1. **A DECLARATION** that the Plaintiffs, and indeed every citizen of the Federal Republic of Nigeria is entitled to the participation in the government of their country either directly or through freely elected representatives.
2. **A DECLARATION** that the exclusion of independent candidacy as criteria for aspiration to elective positions under the Defendant's Constitution is a violation of Articles 21, 13 and 25 of the Universal Declaration of Human Rights, African Charter on Human and Peoples' Rights and International Covenant on Civil and Political Rights, respectively.
3. **A DECLARATION** that the pre-requisite of membership of a political party as condition for aspirations to elective positions under the Defendant's 1999 Constitution (as amended) and with no provision whatsoever or approval for independent candidacy is an abridgement, curtailment and restriction of the right of participation pursuant to Articles 21, 13 and 25 of the Universal Declaration of Human Rights, African Charter on Human and Peoples' Rights and International Covenant on Civil and Political Rights, and is undemocratic and infringement on internationally guaranteed human rights.

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4. **AN ORDER**, compelling the Defendant to ensure the full and unimpeded participation of all citizens, including independent candidates in all political processes leading to elections into elective positions through the inclusion of independent candidacy as pre-requisites or criteria for such participation in its domestic laws including its 1999 Constitution (as amended), necessary for the stoppage of the breach of the right of citizens to participate and take part in the conduct of its public affairs particularly those touching on elective positions.
5. **AN ORDER** compelling the Defendant to bring its municipal laws, including its Constitution in conformity with the rights enshrined under Article 13 of the African Charter on Human and Peoples' Rights, Article 21 of the Universal Declaration on Human Rights, and Article 25 of the Covenant on Civil and Political Rights, as to allow independent candidature for all its elective positions.
6. **AN ORDER**, compelling the Defendant to pay the sum of ₦5 Million Naira, as exemplary damages for the wanton infringement of fundamental rights of the Plaintiffs and its citizenry and for breach of its international obligations to respect those rights.
7. **AN ORDER** compelling the Defendant to pay the costs of this litigation.

DEFENDANT'S CASE:

13. The Defendant refutes the allegations of the Plaintiffs about the violation of human rights and puts them to the strictest proof. Defendant argues that the said Constitutional provision being challenged by the Plaintiffs is in compliance with the human rights provision in Article 13 of the African Charter and other international human rights instruments cited by the Plaintiffs. Defendant



further argues and submits that the right in question is not an absolute right as there is a drawback clause.

14. Further, Defendant is challenging the jurisdiction of the Court to entertain the suit on the grounds that, it is not a case of human rights violation but rather the Plaintiffs are seeking the interpretation of the provision of a member state's Constitution which is not within the jurisdiction of the court. The Defendant states that the Court is bereft of competency to order amendments of a member state's Constitution as being sought by the Plaintiffs. The Plaintiffs' suit is also being opposed by the Defendant on grounds that the suit is statute barred.

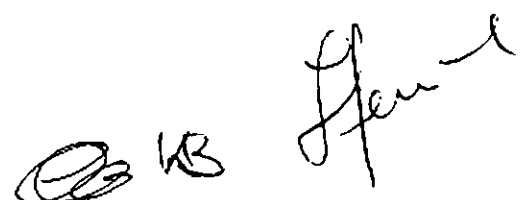
15. In their plea in law, Defendant relied on Article 13 of the African Charter, Section 221 of the 1999 Nigerian Constitution as amended, all relevant international human rights instruments and case laws as submitted in their pleadings. According to the Defendant, the provision of its Constitution which opens the right to participate in government through a registered political party is justified under the African Charter and the related international human rights instruments.

RELIEF BEING CLAIMED BY THE DEFENDANT:

16. The Defendant therefore seeks an order of the Court to strike out the suit or declare itself incompetent to entertain same for being speculative, frivolous, vexatious and wanting in merit, being statute barred or for want of jurisdiction.

ISSUES FOR DETERMINATION:

17. After a careful study of the submissions of both parties in the instant case, the Court distilled the following issues for determination:

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1. Whether the Court has jurisdiction to hear this case
2. Whether the case is statute barred
3. Whether the Community Court of Justice, ECOWAS can order the amendment of the laws of a member state, particularly the national Constitution
4. Whether the criteria for participation in the government of the defendant state as provided for in its Constitution and related electoral laws are in conflict with its international and community obligations particularly under the African Charter on Human and People's Rights.

The Court will now proceed to address the issues stated for determination seriatim.

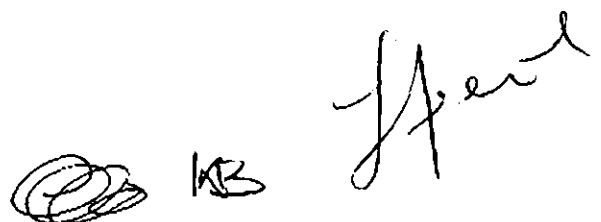
ISSUE 1

Whether the Court has jurisdiction to hear this case:

18. Parties rely on the provisions of the law establishing the human rights jurisdiction of the Court to argue for and against whether the Court can hear and determine the instant case by quoting Articles 9(4) of the Protocol 2005 on the Court which define the competence of the Court to entertain cases of human rights violations that occur in member states. The provisions are as follows:

Article 9(4): "The Court has jurisdiction to determine cases of violation of human rights that occur in any member state".

19. The bone of contention between the parties on jurisdictional issues can be summarized in the following synopsis: Defendant claims that the alleged violation of the Plaintiffs' right was done as a result of the plaintiffs' breach of



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an existing law, therefore the Plaintiffs cannot approach this Court to invoke Article 13 of the African Charter in their favour. According to the Defendant the issue presented before the Court by the Plaintiffs is not that of human rights violation but an interpretation of the Constitution of a member state which is beyond the scope of the jurisdiction of this Court.

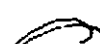

20. On the other hand, the Plaintiffs maintain that their application before this Court borders on the failure of the Defendant to fulfill its human rights obligation and that they are questioning the extent to which portions of the Defendant's electoral laws are in conflict with its international obligations specifically, the rights guaranteed pursuant to Article 13 of the African Charter. The Plaintiffs claim that some provisions of the electoral laws of the Defendant relative to election to public offices are in violation of their human rights to participate freely in the Government of their country.

21. This Court having perused the submissions of both parties on the issue of jurisdiction, recalls its numerous jurisprudence to the effect that once an allegation of human rights violation is made, the court will assume jurisdiction simpliciter over the matter as a separate subject from the determination of the veracity of the claims being sought as amounting to violation of human rights.

22. In **BAKARE SARRE v. MALI (2011) CCJELR 57**, the Court stressed that:

“Once human rights violations which involves international or community obligations of a member state is alleged, it will exercise its jurisdiction over the case.”

Again, in the most affirmative terms, this Court in **KAREEM MEISSA WADE v. REPUBLIC OF SENEGAL (2013) CCJELR 231** held that:

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“... simply invoking human rights violation in a case suffices to establish the jurisdiction of the Court over that case”.

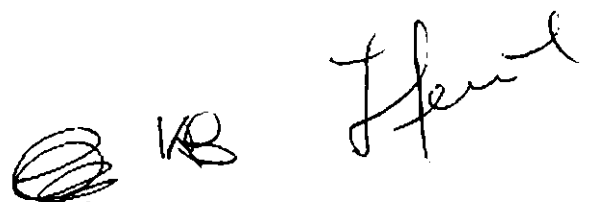
23. The Plaintiffs are alleging violation of, inter alia, Article 13 of the African Charter. In the case of **MOUSSA LEO KEITA v. THE REPUBLIC OF MALI ECW/CCJ/JUD/03/07**, this Court held that:

“the rights enshrined in the Africa Charter on Human and Peoples’ Rights have been so described so as to bring out clearly their content, import and extent of enjoyment, so that the act of their violation may be qualified as a “Human Rights Violation”.

24. At this stage, jurisdiction ought to be considered as a separate subject from the Court’s overall determination of the veracity of the claims being sought by the Plaintiffs. This was amply stated in the case of **SERAP & 10 ORS. v. FRN & 4 ORS., ECW/CCJ/JUD/16/14 @72**, where this Court held that:

“the mere allegation that there has been a violation of human rights in the territory of a member state is sufficient prima facie to justify the jurisdiction of this court on the dispute, surely without any prejudice to the substance and merits of the complaint which has to be determined only after the parties have been given the opportunity to present their case, with full guarantees of fair trial.”

25. The Plaintiffs in this instant case having made a claim for the alleged violation of their human rights to participate freely in the government of their country contrary to the rights guaranteed for individuals in Article 13 of the African Charter; and the subject matter of human rights falls within the jurisdiction of

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this Court and based on the Court's jurisprudence as espoused thus far, the Court holds that it has the jurisdiction to hear and determine this suit.

ISSUE 2:



Whether this case is statute barred

26. It is the Defendant's case that pursuant to Article 9(3) of the Protocol 2005 on the Court, any action by a party for the violation of his right must be brought within three years of the occurrence of the cause of action. It is the submission of the Defendant that the Plaintiffs' alleged cause of action arose on the 9th January 2010 thereby becoming statute barred on the 10th January 2013. According to the Defendant, the instant action having become statute barred, this Court cannot proceed to entertain same for adjudication. Defendant further submits that its current Constitution came into operation on the 29th May 1999 and the Plaintiffs' suit was filed on the 22nd October 2018, a total of about nineteen (19) years after the Constitution came into effect; arguing that this renders the present suit incurably bad and therefore praying this Court to dismiss same.

27. The Plaintiffs in response argues that Article 9(3) is not applicable to the instant case and that assuming it applies, a statute of limitation cannot apply to terminate the enforcement of a right in terms of a continuing violation of that same right.

Article 9 (3) of the Protocol, 2005 on the Court states:

"Any action by or against a community institution or any member of the community shall be statute barred after three (3) years from the date on which the cause of action occurred."

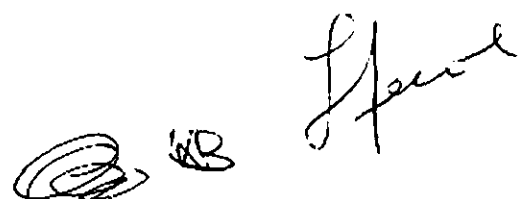
28. Indeed the law is certain, that when an action is statute barred, the plaintiff loses the right to enforce the cause of action by judicial process because the period of limitation had lapsed. In other words, when a statute of limitation prescribes a period within which an action must be initiated, legal proceedings cannot be properly and validly instituted after the expiration of the prescribed period. A quick perusal of the jurisprudence of the Court on the provisions of its Article 9(3) of Protocol 2005 will assist the Court in arriving at a decision on this issue.

29. In the case of **VALENTINE AYIKA v. REPUBLIC OF LIBERIA (2011) ECW/CCJ/RUL/10/11** at page 237, this Court held as follows;

“It should be stated that where a violation of a right continues, a cause of action lies so long as the infringement persists. Thus a person detained will have a cause of action against his galore any day that the detention continues and time will not run from the date of the first detention.”

30. The above stated jurisprudence is also in tandem with the decisions of some International Courts. In the case of **LOIZIDOU v. TURKEY – Application No. 15318/89**, the European Court of Human Rights was confronted with a similar situation which required its pronouncement on a continuing violation of the European Convention on Human Rights. It held that:

“The court recalls that it has endorsed the notion of a continuing violation of the convention and its effect as to the temporal limitations of the competence of Convention organs. Accordingly, the present case concerns alleged violations of a continuing nature of the Applicant, for purpose of Article 1 of protocol No. 1 (p1 – 1) and Article 8 of the Convention can still be regarded – as remains to be examined by the court”.

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31. What is peculiar to the instant case is the fact that the Plaintiffs' complaint about the alleged infringing electoral laws of the Defendant is not in respect of an isolated election, but the entire legal architecture that keep recurring anytime elections to political office within the federation of the Defendant are conducted. Therefore, the Plaintiffs' submission is that, the alleged infringement is a continuous one against which the Statute of Limitation does not apply as clearly established in the jurisprudence of the Court.

32. The purport of all the above analyzed jurisprudence is that the statute of limitation does not begin to run until the last day the alleged violation takes place and in the case of continuous violation of human rights, the statute of limitation is not applicable. See also: **EBERE ANTHONIA AMADI & 3ORS V. FEDERAL REPUBLIC OF NIGERIA ECW/CCJ/JUD/22/19**).

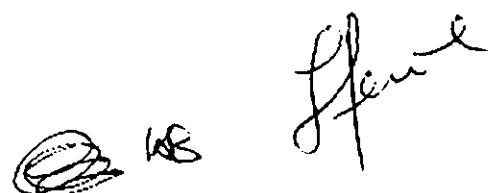
33. In the light of the above, this Court is of the view that as long as the allegation of continuous violation of human rights made by the Plaintiff is not controverted, the provisions of Article 9(3) of the Protocol on the Court is not applicable. The Court consequently holds that the instant case is not statute barred.

ISSUE 3:

Whether the ECOWAS Community Court of Justice can order the amendment of the Constitution of a member state:

34. The Plaintiff stated their mission for coming to this Court when they averred in paragraph 1.3 of their reply to the Defendant's statement of defence in the following words:

"The whole fulcrum of this case is to compel the Defendant to amend Section 221 and other related provisions of its Constitution to make for the

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participation of individual candidates in its elected process without the compulsion of joining any party or group in conformity with fundamental rights of individuals as enshrined under the Charter “.

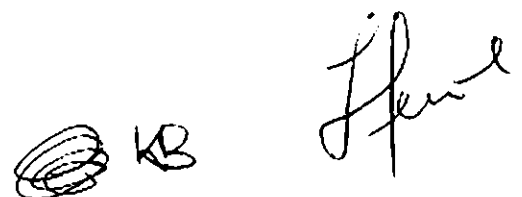
35.To achieve the above mission, the Plaintiffs firmly argued that this Court

“possesses the competence to compel the Defendant to conform or meet its international obligations. This is notwithstanding whether the act of conformity entails amending the provisions of its domestic laws including the Constitution.”

36.Indeed the parties to the African Charter firmly convinced of their duty to promote and protect human and peoples’ rights and freedoms, collectively and individually agreed under Article 1 of the Charter that they undertake “... to adopt legislative or other measures to give effect to them (the rights).” Emphasis mine. This undertaking is very significant in general treaty laws for the reason as amplified by the UN Department of Economic and Social Affairs – Handbook for Parliamentarians on the Convention on the Rights of Persons with Disability as follows:

“Except in the rare cases that the laws in a country already conform fully to the requirements of the Convention, a state party will normally have to amend existing laws or introduce new laws in order to put the Convention into practice”.

37.When the issue was presented to the Inter-American Court of Human Rights to comment on the state party’s obligation under the American Convention which is similar to the undertaking of the state parties in Article 1 of the African

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Charter, the Court in the case of *Garridico and Baigorria v. Argentina (Reparations)* – August 27, 1998, Series C, No. 39, para 68 stated as follows:

“Under the law of nations, a customary law prescribes that a state that has signed an international Agreement must introduce into its domestic laws whatever changes are needed to ensure execution of the obligations it has undertaken. This principle is universally valid ... Accordingly, the American Convention stipulates that every state party is to adopt its domestic laws to the provisions of that Convention so as to guarantee the rights embodied therein”.

38. It is obvious that where a state party's extant laws are not in conformity with its international obligations, particularly where some persons claim violation of their rights as a result of the non-conformity, the human rights court with the mandate of securing compliance will be resorted to by the affected persons.

39. The present suit represent the situation afore-mentioned where the plaintiffs in their Application have impugned Section 221 of the Defendant's Constitution as being incompatible with and infringes on their right to participate in the government of the Defendant as protected under the African Charter, UDHR, ICCPR and other international human rights instruments.

40. The obvious question then is, does this Court have the powers to review the constitution of member states with the view to compelling amendments where the continued application of provisions of the Constitution violates the rights of its citizenry?

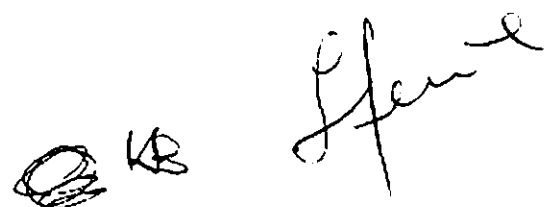
41. The above question is not foreign to this Court. There is a sound jurisprudence of this Court which addresses the issue comprehensively. This Court has

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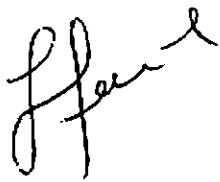
repeatedly affirmed in its well established jurisprudence that it is not a Court of Appeal or Court of Cassation over national courts, neither is it empowered to take over the duties of such courts of member states in the interpretation of their constitutional provisions. In the case of **Messrs Abdoulaye Balde & Ors. v. The Republic of Senegal, ECW/CCJ/JUD/04/13** pg. 22, the Court recalls its consistently held case law that it has no mandate to examine the national laws of member states or to review decisions made by domestic courts of member states.

42. Again, in the case of **Mr. Akungwang M. Sampson & Anor. v. Federal Republic of Nigeria, ECW/CCJ/JUD/16/17** at page 7, it was held that the Court must first set aside any reference to the national law of Nigeria since the ECOWAS Court does not have jurisdiction over the legality of the national laws of member states.

43. The Court in adhering to its jurisprudential reasoning not to usurp the powers of national courts to examine the laws of member states, has nonetheless not reneged on or negated its mandate to determine cases of human rights violations that occur in member states. To this end, where in a given application before it, there exists complaint about any human rights violation occasioned by application of any national legislation, to the extent of such violation, this Court will examine the national legislation in the context and pursuit of protection of the human rights concerned. In other words, this Court shall, where a case is brought before it, examine impugned legislations to ascertain whether or not the application of that impugned legislation constitutes a violation of human rights with the view to directing a review.

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44. In the case of **Federation of African Journalist v. The Republic of The Gambia**, Judgment No. **ECW/CCJ/JUD/04/18**, the Court reviewed the question whether it can examine an impugned provision of the laws of a member state with the view to compelling amendments where necessary. In that case, the Applicants impugned some statutory provisions of The Gambian Criminal Code and the Information and Communication (Amendment) Act by submitting that the continued application of those provisions violated their rights to personal liberty.
45. In its judgment, the Court reiterated its competence in human rights cases and emphatically held that in exercising its jurisdiction, it has the powers to examine the laws of member states under some conditions. In citing the case of **Hadijatou Mani Koraou V. Republic of Niger (2004-2009) CCJELR, pg 232 para. 60**, in which the court held that: "it does not have the mandate to examine the laws of member states of the community *in abstracto* but rather, to ensure the protection of rights of individuals whenever such individuals are victims of the violation of those rights which are recognized as theirs, and the court does so by examining concrete cases brought before it", the Court adjudged that "in view of its jurisprudence, this Court has the competence to examine the laws upon which the allegations are based to ascertain whether the laws and punitive measures are regular or in violation of the Applicants' rights".
46. Having come to the conclusion that there were violations, the Court directed the Respondent State, The Gambia "to immediately repeal and/or amend its laws ... in line with its obligations under international law especially Article 1 of the African Charter on Human and Peoples' Rights, the ICCPR and the ECOWAS Revised Treaty".

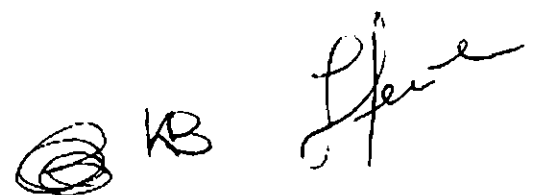
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47. In addressing the role between the domestic courts of member states and the European Human Rights Court, the latter held in the case of **M.N. AND OTHERS v. SAN MARINO 28005/12 | Judgment (Merits and Just Satisfaction) | Court (Third Section) | 07/07/2015**, that:

“However, the Court would recall that it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The Court’s role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention.”

48. Consequently, this Court underscores the fact that it lacks jurisdiction to examine national laws *in abstracto* but holds that it has the competence to compel member states to conform or meet their international and community obligations, and it does so where necessary by examining any impugned national laws with the view to ascertaining whether indeed any human rights violations have occurred. In that judicial enterprise, where it is proven that any human rights violations have occurred as a result of an application of any offensive laws, it is within the powers of this Court to direct their review in conformity with international and community obligations of member states.

49. At this stage, this Court will proceed to examine the impugned Section 221 of the Defendant Constitution vis-à-vis the allegation of infringement of the Plaintiffs’ rights, to ascertain whether the said electoral laws are in violation of the Plaintiffs’ right to participate in the government of their country as protected under the UDHR, African Charter, ICCPR and other international human rights instruments to which the Defendant is a party.

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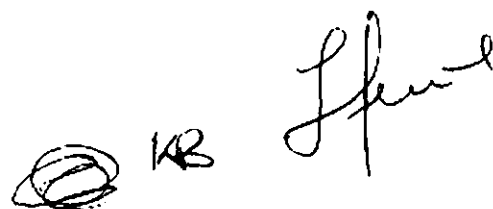
ISSUE 4:

Whether the criteria for participation in the government of the Defendant State as provided for in its Constitution and related electoral laws are in conflict with its international and community obligations particularly under the African Charter on Human and People's Rights.

50. It is the contention of the Plaintiffs that the Defendant's electoral laws which limit the participation of individuals in electoral processes via the platform of political parties and the refusal to recognize independent candidacy violate the provision of Article 13 of the African Charter and thereby constitutes a violation of their human rights to participate freely and directly in the government of their country.

51. The Defendant rebuts this allegation and argues that its electoral laws are in conformity with Article 13 of the African Charter. The Defendant again submits that the rights provided for under Article 13 are not absolute but subject to the consideration and obedience to law previously laid down which the Plaintiffs are subject to. The Defendant argues that it has a well-considered legal regime for electoral matters and therefore where the alleged violation was as a result of the plaintiffs' breach of any existing electoral laws, the Plaintiffs cannot pray this Court to invoke Article 13 in their favour.

52. It is important at this stage to reproduce the two laws in contention. It is provided under Section 221 of the 1999 Constitution of the Federal Republic of Nigeria as follows:

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“No association, other than a political party, shall canvass for votes for any candidate at any election or contribute to the funds of any political party or to the election expenses of any candidate at an election.”

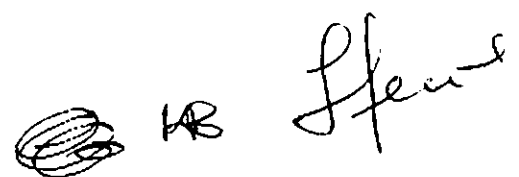
53. Article 13 of the African Charter on Human and peoples’ Rights reads as follows:

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

It is pertinent to state that Article 21 of UDHR and Article 25 of ICCPR are in *pari-materia* with the Article 13 of the African Charter. Therefore the determination of the Plaintiffs’ rights as protected under Article 13 of the African Charter mutatis mutandis amounts to determination of same under the UDHR and ICCPR.

54. To find a breach of this provision, national authorities must act in total contravention of the choices made available in the statute. They are not bound by this provision to apply both conditions, the application of one or the other will be sufficient and in compliance with the provision of the words of the charter “either directly or through”.

55. Again, it is trite principle in all jurisdictions where international law is applicable that in the interpretation of treaties, wherever the term in “accordance with the law” appears, it is usually in reference to the

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“domestic or national law” of the state party to the treaty as the case may be. It is also commonly agreed in all jurisdictions of the world that national or state parties enjoy a very wide margin of appreciation/flexibility/leverage in the application of their laws in the determination of what is in accordance with the law (so long as the law is not arbitrarily applied), because national authorities know and understand their citizens and territory better.

56. Where applicable, to determine whether or not the extant laws of a state party are in conformity with the provision of international treaties and to avoid arbitrariness, such national laws are usually subjected to any of the following tests that may be applicable to the situation like; proportionality, reasonableness, foreseeability, legitimate purpose and whether it is necessary in a democratic society as the case may be. It must be noted that not all the above stated tests may be applicable in all situations as it will depend on the peculiarity of a given case in its application.

57. The European Court of Human Rights gave a very useful hint in the application of some of the relevant tests as stated above in the case of **BREYER v. GERMANY 50001/12/Judgment (Merits and Just Satisfaction)/Court (Fifth Section) 30/01/2020** where it held that:

“According to the Court’s established case-law, the requirement that an interference be **“in accordance with the law”** does not only mean that the measure in question should have some basis in domestic law, but also that the law should be accessible to the person concerned and foreseeable as to its effects.”

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“Necessary in a democratic society”

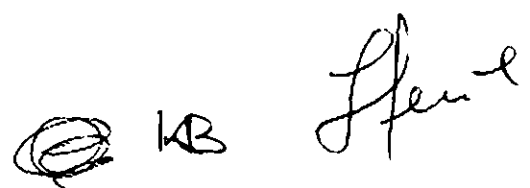
“An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and if it is proportionate to the legitimate aim pursued.”

58. In the case of **SEYIDZADE v. AZERBAIJAN (Application no. 37700/05)** **JUDGMENT STRASBOURG 3 December 2009**, the same Court held as follows:

“In examining compliance with Article 3 of Protocol No. 1, the Court does not apply the tests of “necessity” or “pressing social need”; instead, it has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people”

59. It is important to state here that the Article 3 of Protocol No. 1 of the European Convention is in *pari-materia* to Article 13 of the African Charter, which is the provision in contention in this case. Again, considering the relative younger age of this Court vis-à-vis other international courts, it has enormously benefitted from the external aids to interpretation particularly, foreign judgments i.e. judgments of other international courts and tribunals where the issues concern interpretation of provisions of statutes in *pari materia*. Though of persuasive effect, this Court has resorted to pronouncements of such courts of no mean standing like the European Court of Human Rights and African Court of Human Rights in carving its own jurisprudence.

60. In order to determine whether there has been a violation of human rights where a drawback clause “in accordance with the law” like that of Article 13 of the

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African Charter is applicable, the Court must advert its mind to the following two caveats:

- i. That such right is not absolute;
- ii. Whether in its interpretation or application by the national authorities, the citizens are left with any option of choice of how to exercise such right without interfering with the free expression of the opinion of the people. In other words, are there any alternatives available to the Plaintiffs to exercise their right in accordance with the law.


In the instant case, the answer to all the above stated caveats are in favour of the Defendant.

We explain the two caveats stated herein.

i. On the issue of the right not being absolute:

61. The right to participate in the government of one's country as provided for under Article 13 of the African Charter is not absolute due to the draw back clause that gives the state party the leverage to enact laws to streamline the realization of individual aspirations of participating in the government of the state.

62. This Court in addressing this issue also takes cognizance of the basic rule of interpretation to the effect that the text of a statute must be interpreted to give effect to its plain meaning. The relevant portion of Article 13 (1) of the African Charter which guarantees the right of the citizenry to participate in the government of their country reads: ".....either directly or through freely chosen representatives in accordance with the provisions of the law."



63. The Court's appreciation of the above phrase in its simple grammatical construction, connotes a choice of one or the other and comes to the conclusion that so long as the choice made falls within the parameters of the options provided for in the Charter, the defendant will be acting in accordance with its wide margin of appreciation as one in a position to know what is best suited for the Country. The Court therefore concludes that the rights of political participation as enshrined in Article 13 of the African Charter is not absolute, therefore Section 221 of the Defendant's Constitution is not at variance with the provision of the Charter, consequently there is no violation of the rights of the Plaintiffs to freely, directly or indirectly participate in the government of their country.

ii. **On the issues of options available to the Plaintiffs:**

64. The interpretation and application of the extant laws of the Defendant in relation to citizens' participation in government gives wide range of options to any aspiring citizen for political and executive office of the state. The Plaintiffs have other alternatives of exercising their right to participate in the government of their country without necessarily standing for an election as an independent candidate.

65. In the European Court of Human Rights' case of **M.N. AND OTHERS v. SAN MARINO 28005/12 | Judgment (Merits and Just Satisfaction) | Court (Third Section) | 07/07/2015**, it was held that:

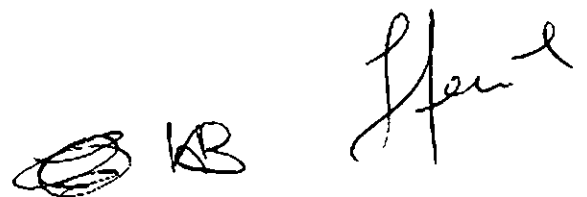
"The Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the need for an interference, the Court further considers that the measure pursued various legitimate aims, namely, the prevention of crime, the protection of the rights and freedoms of others,

and also the economic well-being of the country. It remains to be determined whether the measure, as applied to the applicant, was necessary in a democratic society and in particular whether it was accompanied by the relevant procedural safeguards.”

66. The above cited decision of the Strasbourg based Human Rights Court reiterated an established rule that in censoring national laws that have been alleged to be in violation of international human rights Conventions, it is unlikely that violation of human rights will suffice when states exercise their powers under the margin of appreciation in accordance with the relevant provision of the law. This more so where the necessary tests and safeguards have been considered in the interest of the general society and the law is not restrictive or arbitrary in nature.

67. As already stated, the state party enjoys a wide margin of appreciation because they know best and they are in a better position to determine what is reasonable, practicable and applicable in their special circumstances. It is not in the place of the citizens to choose or determine what they think is best, because if everyone had that choice, the state of anarchy will set in and the test of what is necessary for the society would fail. It is therefore the preserve of the government to make a choice based on the reasonableness test - the application of which varies from state to state.

68. The European Court of Human Rights again emphasized the above position when it held in its jurisprudence in the case of **SEYIDZADE v. AZERBAIJAN (Application no. 37700/05) JUDGMENT STRASBOURG 3 December 2009** : in which the applicant’s request for registration as a candidate was refused

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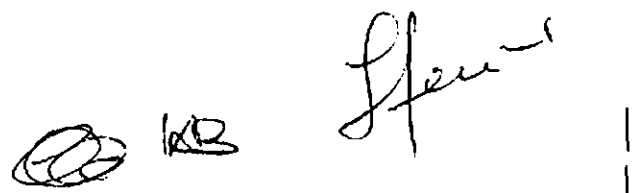
on the basis of Article 85 (II) of the defendants State's Constitution, which banned "clergymen" from being elected to parliament, and Article 14.2.4 of the Electoral Code, which made "clergymen" ineligible to serve as members of parliament while they were engaged in "professional religious activity.

The court held as follows:

"Stricter requirements may be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility. States have broad latitude to establish constitutional rules on the status of members of parliament, including criteria for declaring them ineligible. These criteria vary according to the historical and political factors specific to each State. For the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another."

69. Also, In the separate opinion of the Vice President of the African Court of Human Rights in the case of **REV. CHRISTOPHER R. MTILIKA AND TANGAYIKA LAW SOCIETY v. THE UNITED REPUBLIC OF TANZANIA – APPLICATION NO: 09/2011 AND 11/2011**, Judgment of 14th June, 2013, the Judge said that:

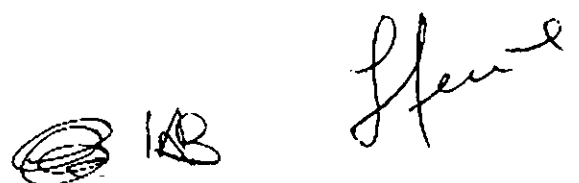
"I am of the view that barring independent candidates from certain elections and the correlative obligation to belong to a political party are not in themselves violations of articles 10 and 13 (1) of the African Charter; they can only be violations of such provisions if they are considered unreasonable or illegitimate limitations to the exercise of the rights enshrined in the said provisions."

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70. In the light of the foregoing analyses, and in the application of all the above cited persuasive jurisprudence, the option of the Defendant State; The Federal Republic of Nigeria, which is indirect participation through membership of any registered political parties in the country cannot be faulted as a violation of the citizens' right to participation in the government of the country. This position is further fortified with the possibility of registration of new political parties upon fulfilment of the set criteria for registration by any person or group of persons who nurture ambition to aspire to any political office.

71. The Plaintiffs in this case have the option of expressing their participation in government through the platform of any political parties of their choice or at best as an alternative they could register their own political party to have direct access to participate in government through the electoral process. The barring of independent candidates by the Defendant from political elections and the correlative obligation to belong to a political party as a means of realizing one's political aspirations was neither without justification nor arbitrarily instituted. The Defendant opted for this choice being in the best position to know in the exercise of its wide margin of appreciation, what is most suitable for the country for the purpose of maintenance of law and order, what is reasonable and necessary for a democratic society like Nigeria based on the historical evolution of the country. Such an interference in the enjoyment of the right to participate in the Defendant's government is not and cannot be considered as a violation.

72. In the case of **YAŞAR v. ROMANIA 64863/13 | Judgment (Merits and Just Satisfaction) | Court (Fourth Section) | 26/11/2019**: The applicant, a Turkish national who owned a vessel which had been used for illegal fishing activities in the Black Sea, complained that the confiscation of the vessel was

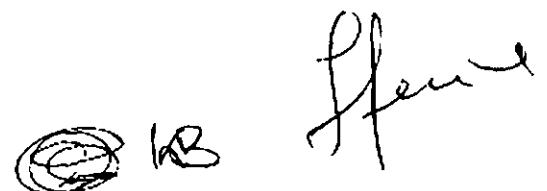
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disproportionate in view of its high value and the absence of any proven environmental damage. Determining whether the interference was in the public interest, the Court held:

“The Court reiterates that in order to be compatible, an interference must be effected “in the public interest” and “subject to the conditions provided for by law and by the general principles of international law”. The interference must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. In so determining, the Court recognizes that the State enjoys a wide margin of appreciation with regard to the means to be employed and to the question of whether the consequences are justified in the general interest for the purpose of achieving the objective pursued. In view of the above, the Court sees no sign of arbitrariness in the interpretation in question concerning the applicable domestic law”

73. In a similar vein, this Court sees no arbitrariness in the application of the provision of Section 221 of the Nigerian Constitution in its present form and consequently, the submission of the Defendant that its electoral laws, particularly Section 221, are in conformity with the provisions of Article 13 of the African Charter is upheld.

74. The Defendant State, Nigeria prides itself with a population of over two hundred million people with registered political parties numbering ninety-two (92) at the time of the filing of this action by the Plaintiffs, one can imagine a situation in which every adult citizen of voting age decides to stand as an independent candidate in an election, the task to manage the electoral process will be humongous. It is to avert these apparent impossibilities that the Defendant has

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therefore in accordance with its extant laws, exercised its wide margin of appreciation by asking citizens to participate in governance through the platform of registered political parties of their choice. This option which is not arbitrary and is in accordance with the relevant provision of the law, is in conformity and not at variance with the provisions of Article 13 of African Charter.

75. By virtue of Article 1 of the African Charter, to which the Defendant is a signatory, the Defendant is under the obligation to recognize the rights enshrined in the Charter and adopt legislative or other measures to give effect to them. In other words, the Defendant is obliged to protect the human rights of its citizens inclusive of the Plaintiffs in the instant case, as guaranteed under the African Charter and prevent their violations even by private actors. The Defendant's law- Section 221 in its present form is not at variance with the provisions of Article 13 of the African Charter as being claimed by the Plaintiffs.

76. Further, under the obligation of state to make its law in conformity with its obligations under International Conventions, the Defendant is allowed to apply implied limitation except where expressly forbidden. The European Court of Human Rights explained this concept in the case of **SEYIDZADE v. AZERBAIJAN (Application no. 37700/05) JUDGMENT STRASBOURG 3 December 2009**, where it held in the interpretation of the import of Article 3 Protocol 1 of the European Human Rights Convention – which; as already stated; is in *pari-materia* with Article 13 of the African Charter as follows:

“The Court has established that this provision guarantees individual rights, including the rights to vote and to stand for election. As important as those rights are, they are not, however, absolute. Since Article 3 recognizes them

without setting them out in express terms, let alone defining them, there is room for “implied limitations”, and contracting States have a wide margin of appreciation in this sphere. In their internal legal orders they may make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3.”

77. In the instant case, the establishment of political parties and enjoining citizens to participate in election by means of such political parties as a way of taking part in the government of their country, is not expressly forbidden provided such obligation is in accordance with the law as stated in the provision of the Article 13 of the Charter.

78. Again, independent candidacy on its own is not a guarantee or short cut to direct participation; to become a legislator or a member of the executive, the individual must still contest in a competitive election. Therefore, competing either through political parties or independent candidacy is not a guarantee or access to direct participation in government and the Court so holds.

79. In the Inter-American Court of Human Rights (Judgment of 6 August, 2008) in the case of **CASTANEDA GUTMAN v. MEXICO** at paragraph 193, the Court held:

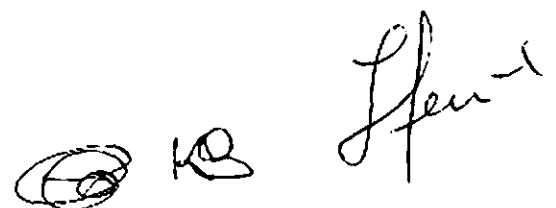
“The Court considers that the State has justified that the registration of candidates exclusively through political parties responds to compelling social needs based on diverse historical, political and social grounds. The need to create and strengthen the party system as a response to an historical and political reality; the need to organize efficiently the electoral process in a society of 75 million voters, in which everyone would have the same right to be elected; the need for a system of predominantly public financing to ensure the development of genuine free elections, in equal conditions, and

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the need to monitor efficiently the funds used in the elections, all respond to essential public interest. To the contrary, the representatives have not provided sufficient evidence that, over and above their statements regarding the lack of credibility of the political parties and the need for independent candidacies, would nullify the arguments put forward by the State.”

80. Further, the Plaintiffs’ argument in response to the Defendant’s statement of defence and legal submissions, is replete with the decision of the African Court of Human Rights in the case of **REV. CHRISTOPHER R. MTILIKA AND TANGAYIKA LAW SOCIETY v. THE UNITED REPUBLIC OF TANZANIA – APPLICATION NO: 09/2011 AND 11/2011**, merit Judgment of 14th June, 2013, a case in which the Court ordered the Tanzania State to amend its constitution. The Plaintiffs contend that this decision is binding on all member states.

81. It is pertinent to quickly clarify that while this court draws inspiration from the rich, flourishing and persuasive jurisprudence of the African Court of Human Rights and other reputable International Courts, this Court is not bound to follow their decisions. This position is further strengthened where the circumstances and peculiarity of the cases differ in all material sense. In the context of the Tanzanian case, the Applicants combined the rights envisage under Article 13 with the freedom of association. The instant case is distinguishable because, in the case of Tanzania, there is restriction on the Applicants to join only two political parties and no other choice of association, however in the present case of Nigeria, there are many political parties the Plaintiffs have the choice of joining or better still the choice of forming their own political party is also available. The facts and situations are not exactly the same.

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The peculiarity of the Tanzanian case occasioned that judgment because of the restriction placed on freedom of association.

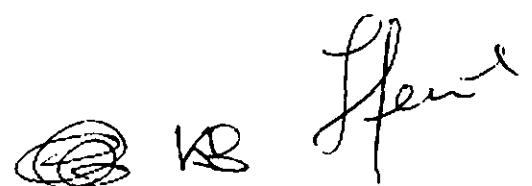
82. In sum, after a careful study of the pleadings before this court as well as the persuasive precedents from other international courts with similar jurisdiction, it is the conclusion of this Court that the provisions of the Defendant State's Constitution affords it a wide margin of appreciation that enjoins it to operate the way it does with respect to its electoral laws.

83. It is clear that the Defendant's electoral legal regime does not stifle or restrict the right of the Plaintiffs to participate directly or indirectly in the elections of the country. The drawback clause in Article 13 of the African Charter amply puts the national authorities in the best position to enact local laws in accordance with the Charter to address peculiar circumstances. The proper exercise of that mandate does not amount to violation of their obligations as signatories to the African Charter. The Court therefore holds that the Defendant is not in breach of its community obligations as enshrined in the African Charter.

84. Consequently, the Court cannot compel the Defendant to amend its Constitution *in abstracto* where there have not been any proven violation of Plaintiffs' right as a results of the provisions of the Constitution and the Court so hold.

DECISION

85. For the reasons stated above, the Court, adjudicating in a public hearing, after hearing both parties, and their submissions duly considered in the light of the African Charter on Human and Peoples' Rights and other international human

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rights instruments, and also the Protocol on the Court as amended and the Rules of Court, hereby declares as follows:

As to jurisdiction of the Court:

- i. *Adjudges* that it has jurisdiction to entertain the suit.
- ii. *Adjudges* that the plaintiffs' suit is not statute barred and declares same admissible.

As to merits of the case:

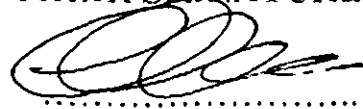
- i. *Adjudges* that the Plaintiffs have not established their claim.
- ii. *Adjudges further* that Section 221 of the Defendant's 1999 Constitution as amended is not an infringement on the Plaintiffs' right to participate freely in the government of their country, either directly or through freely chosen representatives in accordance with the provisions of the law.
- iii. *Consequently*, the Plaintiffs' case is hereby dismissed in its entirety.

ORDERS:

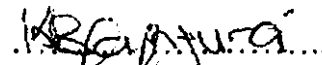
- i. Parties are to bear their respective costs.

AND THE FOLLOWING HAVING APPENDED THEIR SIGNATURES

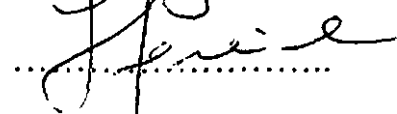
Hon. Justice Edward Amoako ASANTE



Hon. Justice Keikura BANGURA



Hon. Justice Januaria T. Silva Moreira COSTA



ASSISTED BY:

Mr. Athanase ATANNON - Deputy Chief Registrar

