

Lessons from Ghana and Kenya on why presidential election petitions usually fail

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Summary

Most presidential election disputes have been unsuccessful. Although the petitioners almost invariably have adduced evidence of non-compliance with electoral laws, so far the judiciary has hardly been persuaded that the alleged infractions against electoral laws have had any adverse impact on the validity of disputed presidential election results. The article examines the burden and standard of proof which must be discharged in presidential election disputes, and then, based on relevant national case law, it discusses the circumstances under which the courts would invalidate presidential elections results. It concludes with the observation that, although the Raila Odinga case confirms the reluctance of judges to overturn election results, the narrow win in the Nana Akufo-Addo case suggests that the era of unsuccessful presidential election petitions may be drawing to a close.

Key words: elections; voting; biometrics; petition; electorate

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1 Introduction

Judicial challenges to presidential election results are hardly ever successful. In Africa, Ghana,¹ Kenya,² Nigeria,³ Sierra Leone,⁴ Uganda,⁵ Zambia⁶ and Zimbabwe⁷ are among the countries where petitions filed against the results of various presidential elections have failed. Perhaps the only success story in Africa has been the Gbagbo/Ouattara case of Côte d'Ivoire, which is distinguishable also because it was not a judicial challenge. Rather, acting upon its powers under article 94 of the 2000 Constitution of the Republic of Côte d'Ivoire, the Constitutional Council proclaimed Mr Laurent Gbagbo, instead of Mr Alassane Ouattara, the winner of the 2010 presidential elections.⁸ It would appear that, in the long history of judicial challenges to presidential election results, it is only in the Ukraine that a presidential election petition has been successful.⁹

In all the instances where presidential election petitions have been unsuccessful, although the petitioners alleged non-compliance with electoral laws and adduced evidence in support, the courts declined to invalidate the election results on the basis that the alleged irregularities were not substantial enough to affect the validity of the results. This, therefore, raises questions about the threshold of proof applicable in presidential election disputes and how it is discharged.

It is worth noting at the outset what is beyond the scope of this article. The article does not discuss the normative values that underpin democracy. Accordingly, it does not discuss human rights concepts such as the right to participate in the political process (including the rights to vote and/or be voted for) as guaranteed in international,

1 *Nana Addo Dankwa Akufo-Addo & 2 Others v John Dramani Mahama & 2 Others* (Writ J1/6/2013).

2 *Orengo v Moi & 12 Others* (Election Petition 8 of 1993); *Mwau v Electoral Commission of Kenya & 2 Others* (Petition 22 of 1993); *Kibaki v Moi & 2 Others* (No 3) (2008) 2 KLR (ep) 351; *Moi v Matiba & 2 Others* (2008) 1 Klr (ep) 622; *Raila Odinga v The Independent Electoral and Boundaries Commission & 3 Others* (2013) eKLR.

3 *Buhari v Obasanjo* (2005) 13 NWLR 1; *Muhammadu Buhari v Independent National Electoral Commission & 4 Others* (SC 51/2008); *Abubakar v Yar'Adua* (2008) 1 SC 77.

4 *Sierra Leone People's Party v National Electoral Commission & Another* (SC 4/2012).

5 *Besigye v Electoral Commission, Yoweri Museveni* (2007) UGSC 24; *Besigye Kiiza v Museveni Yoweri Kaguta, Electoral Commission* (2001) UGSC 3.

6 *Lewanika & Others v Chiluba* (1999) 1 LRC 138; *Anderson Kambela Mazoka & 2 Others v Levy Patrick Mwanawasa & 2 Others* (SCZ/EP/01/02/03/2002).

7 *Morgan Tsvangirai v Robert Mugabe & 3 Others* (Case CCZ71/2013).

8 Human Rights Watch 'A long way from reconciliation: Abusive military crackdown in response to security threats in Côte d'Ivoire' (November 2012) 14 <http://www.hrw.org/sites/default/files/reports/cotedivoire1112webwcover.pdf> (accessed 30 August 2013).

9 For an account of why the Ukrainian Supreme Court annulled the results of the 2004 presidential elections, see '2004: Yushchenko wins Ukraine election re-run' 27 December 2004 http://news.bbc.co.uk/onthisday/hi/dates/stories/december/27/newsid_4408000/4408386.stm (accessed 30 September 2013).

regional, sub-regional and national human rights instruments. Similarly, it does not make use of the jurisprudence, if any, of supra-national human rights bodies interpreting the rights referred to above.

Instead, the article does three things. First, it examines the evidentiary rules, especially the burden of proof and standard of proof, which must be discharged in presidential election disputes. Second, based on relevant national case law, it discusses the circumstances under which the courts would invalidate presidential elections results. Finally, it concludes with a commentary on some extra-legal matters that may appear to occasionally influence judges when they are confronted with the resolution of presidential election disputes. The issues raised in the article are discussed using the *Raila Odinga*¹⁰ and *Nana Akufo-Addo*¹¹ cases. These cases are the two most recent presidential election disputes in Africa to have been decided on their merits. It is appropriate at this point to provide a brief account of the facts and findings of both cases.

2 *Raila Odinga*

On 9 March 2013, the Chairperson of Kenya's Electoral Management Body (EMB), Mr Issack Hassan, announced Mr Uhuru Kenyatta as the winner of the 2013 presidential race. It was the first time in Kenya's history that biometric voting technology was used. According to Mr Hassan, Mr Kenyatta polled 6 173 433 out of a total of 12 338 667 votes, representing 50,07 per cent of all votes cast. His closest contender, Mr Raila Odinga, garnered 5 340 546 votes, representing 43,31 per cent of votes cast. Consequently, pursuant to article 138(4) of the 2010 Constitution of the Republic of Kenya (2010 Constitution), Mr Hassan declared Mr Kenyatta as the President-elect of Kenya. This automatically made Mr Kenyatta's running mate, Mr William Ruto, the Deputy President-elect.

Following the announcement, three separate petitions were filed at the Supreme Court of Kenya challenging the validity of Mr Kenyatta's election. The first petition, which was filed by three persons against the EMB and its Chairperson as the respondents, alleged that the inclusion of rejected votes in the final tallying of the results had the prejudicial effect of increasing the percentage votes of Mr Kenyatta and decreasing that of the petitioners. They asserted that this was an irregularity in contravention of articles 36(b) and 138(c) of the 2010 Constitution and rule 77(1) of the Elections (General) Regulations, 2012.

The second petition was filed by two people against the EMB, its Chairperson, Mr Kenyatta and Mr Ruto. In calling upon the Supreme Court to annul the results, this petition alleged that for the following

10 *Raila Odinga* (n 2 above).

11 n 1 above.

reasons, the elections were not conducted substantially in accordance with the 2010 Constitution and Kenya's electoral laws: first, that the EMB had failed to establish and maintain an accurate voter register; second, that the credibility of the electoral system was compromised due to the failure of the electronic management system to electronically transmit the results; and third, that in addition to the failure of the EMB and its officials to tally and verify results at the polling stations as mandated by law, they excluded designated party agents from the National Tallying Centre in contravention of the law.

The third petition was filed by Mr Odinga against the EMB, its Chairperson, Mr Kenyatta and Mr Ruto. First, it averred that the EMB had failed to develop and maintain a credible voter register and, therefore, there was a material difference between the total number of registered voters announced during the declaration of the results and the figure in the voter register that had been circulated to political parties before the elections. Secondly, the failure of the electronic voting technology systems to electronically transmit the results was fatal to the whole exercise. Finally, the elections were fraught with several instances of over-voting, errors in the manual tally of results and the declaration of results using irregular declaration forms, that is, forms that had not been signed by the relevant agents of the EMB.

The Supreme Court consolidated the cases on 25 March 2013, and designated Mr Odinga as the first petitioner. The second petitioners were jointly made the second petitioner and the first petitioners were jointly referred to as the third petitioner. The EMB, its Chairperson, Mr Kenyatta and Mr Ruto were designated the first, second, third and fourth respondents respectively. The respondents opposed all the allegations contained in the petition. The main issue that was set down for trial was whether the third and fourth respondents were validly elected as President-elect and Deputy President-elect respectively. To arrive at a determination of this issue, the Supreme Court set down two main issues: one, whether the presidential election was conducted in a free, fair, transparent and credible manner in compliance with Kenyan law; and two, whether the second respondent erred in including rejected votes in its tally of the final votes cast in favour of each presidential candidate.

After analysing the facts in the light of relevant national, regional and international jurisprudence, the Supreme Court held that the third and fourth respondents were validly elected. According to the Supreme Court, because of imperfections associated with electronic voting technology, section 39 of the Elections Act¹² and regulation 82 of the Elections (General) Regulations had to be construed to mean that the electronic transmission of results is neither exclusive nor mandatory in Kenya. Therefore, it held that the EMB had exercised its discretion properly when it resorted to the manual tallying of votes when the electronic system failed.¹³ The Supreme Court unanimously

12 24 of 2011.

held on this score that no injustice resulted from the fact that the EMB did not use the electronic system exclusively throughout the elections.

Additionally, the Supreme Court held that the petitioners had failed to prove that the tallying system used by the first and second respondents inflated the votes of the third respondent but deflated that of the petitioners.¹⁴ Furthermore, it held that the voter registration process was generally transparent, accurate and verifiable and thus the voter register which resulted from that registration process was also, generally, credible.¹⁵ Therefore, in its view, the discrepancies with the voter register were not of a magnitude that could adversely affect the elections.

Finally, as regards the rejected votes, the Supreme Court held that the rejected votes ought not to have been included in the computation of the total votes of the candidates because 'all the votes cast' in article 138(4)(a) of the 2010 Constitution could only properly refer to only the valid votes cast. Yet, the Supreme Court did not uphold the petitioners' claim on this ground. In unanimously dismissing the petition, it held:¹⁶

In summary, the evidence, in our opinion, *does not disclose any profound irregularity* in the management of the electoral process, nor does it gravely impeach the *mode of participation* in the electoral process by any of the candidates who offered himself or herself before the voting public. It is *not evident*, on the facts of this case, that the candidate declared as the President-elect had not obtained the basic vote-threshold justifying his being declared as such.

3 *Nana Akufo-Addo*

On 7 December 2013, Ghanaians went to the polls to elect a new President. It was the first time in Ghana's history that biometric voting technology was employed. It was also the first time since the commencement of the Fourth Republic that voting occurred on more than one day, spilling over from 7 to 8 December. On 9 December 2013, the Chairperson of the EMB, Dr Kwadwo Afari-Gyan, declared that 5 574 761 votes, representing 50,70 per cent of the total votes, were cast in favour of incumbent president Mr John Dramani Mahama. He also announced that 5 248 898 votes, representing 47,74 per cent of the votes, went in favour of Nana Addo Dankwa Akufo-Addo, the flag-bearer of the main opposition party. Based on these results, Dr Afari-Gyan declared Mr Mahama the winner of the presidential elections in accordance with article 63(9) of the 1992 Constitution of the Republic of Ghana (1992 Constitution).

13 *Raila Odinga* (n 2 above) para 235.

14 *Raila Odinga* para 246.

15 *Raila Odinga* para 257.

16 *Raila Odinga* para 306. For similar comments on when the courts would treat non-compliance as being of such a magnitude as to result in the invalidation of presidential election results, see also *Nana Akufo-Addo* (n 1 above) 42-45.

On 28 December 2012, Mr Akufo-Addo filed a petition in the Supreme Court. He was the first petitioner; Dr Mahamudu Bawumia – his running mate – was the second petitioner; and the Chairperson of the New Patriotic Party, Mr Jake Otanka Obetsebi-Lamprey, was the third petitioner. Mr Mahama was named in the petition as the first respondent, while the EMB was made the second respondent. The National Democratic Congress, the party on whose ticket Mr Mahama contested and won the elections, successfully applied and was joined as the third respondent. On 7 January 2013, while the petition was still pending before the Supreme Court, Mr Mahama was sworn into office as President in accordance with the 1992 Constitution.¹⁷

By their second amended petition, the petitioners sought an order setting aside the election and swearing in of Mr Mahama as President. They alleged that the elections had been marked by the following six categories of non-compliance with Ghana's electoral laws, in various combinations: over-voting; voting without biometric verification; the absence of signatures of presiding officers on some result declaration forms; duplicate serial numbers; duplicate polling station codes; and results from polling stations unknown to the 26 002 polling stations of the country. They contended that, if the Supreme Court annulled 4 381 145 votes from 11 138 of the 26 002 polling stations of the country, the results would tilt in favour of Mr Akufo-Addo. Accordingly, they prayed for an order annulling those votes and for a declaration that Mr Akufo-Addo, instead of Mr Mahama, was the validly-elected President of Ghana. The respondents vehemently opposed the averments contained in the petition.

After perusing the evidence on record, the Supreme Court unanimously found no merit in the last three allegations and accordingly dismissed them. Therefore, it resolved the case based on the allegations of over-voting, voting without biometric verification and the absence of the signature of presiding officers on some result declaration forms.¹⁸ The main issue for trial was whether the first respondent was validly elected as President of Ghana. To determine this, the Supreme Court set down the following issues: first, whether there had been violations against the electoral laws in the conduct of the presidential elections; and second, if there were such violations, whether they affected the election results.

In a sharply-divided opinion, the Supreme Court decided by a very narrow margin of a five-to-four majority that Mr Mahama had been validly elected as President. While four judges held that the alleged instances of over-voting, voting without biometric verification and the absence of the signature of the presiding officers on some of the declaration forms were fatal to the validity of the election of the first respondent, the other five judges were of the opposite opinion.

¹⁷ Art 64(2); see also *Nana Akufo-Addo* (n 1 above) 304.

¹⁸ *Nana Akufo-Addo* 3-4.

It must be mentioned that the minority decision, itself, was not unanimous in its outcome because of the interesting conclusions of some of the judges. Four judges in the minority were satisfied that the petitioners had proven the allegations of over-voting, voting without prior biometric verification and the declaration of results using irregular forms. However, while three of them ordered a rerun of elections at the affected polling stations,¹⁹ one made an order for the conduct of fresh presidential elections.²⁰ The minority nevertheless was united in its view that, because the electoral laws in question are mandatory in nature, infractions against them were 'monumental irregularities' that could not be mitigated by any lenient considerations.²¹

However, in the end, what holds sway is the majority opinion that dismissed the petition. First, the majority was of the opinion that it was unfair to visit the administrative blunders of EMB agents upon the electorate, especially when those errors could be corrected by court orders.²² Therefore, it declined to cancel votes based on the allegations of voting without prior biometric verification and the declaration of results using irregular forms.²³ In respect of the former, the majority also took judicial notice of the fact that the reason why the elections were continued on 8 December 2012 was to enable voters whose biometrics could not be verified at polling stations on 7 December to exercise their franchise.²⁴ In respect of the latter, it observed that the number of irregular declaration forms were not substantial enough to make any adverse impact on the election results. In support of this, Akoto-Bamfo JSC held:²⁵

Elections cannot be perfect so when we are faced with the consideration of irregularities that are alleged to have occurred in an election, we should exercise a reluctance in striking down every single vote just by reference to a provision of the law. On the contrary, the irregularity must have affected the integrity of the elections.

Finally, the majority held that the petitioners had failed to prove the allegation of over-voting except to the limited extent admitted by Dr Afari-Gyan, which it held 'cannot impact much on the declared results'.²⁶ Indeed, Adinyira JSC held that the mere fact that there had been setbacks in the elections did not, without more, automatically mean that the results had been adversely affected.²⁷

It is obvious from the two judgments that both the 2012 and 2013 presidential elections in Ghana and Kenya, respectively, were marred

19 *Nana Akufo-Addo* 101, 218, 231-232 & 418-419.

20 *Nana Akufo-Addo* 505-506.

21 *Nana Akufo-Addo* 65-73.

22 *Nana Akufo-Addo* 37.

23 *Nana Akufo-Addo* 6.

24 *Nana Akufo-Addo* 25.

25 *Nana Akufo-Addo* 543 & 565-566.

26 *Nana Akufo-Addo* 28.

27 *Nana Akufo-Addo* 131.

by instances of non-compliance with the relevant electoral laws. Indeed, the respondents did not deny that, and the courts also acknowledged the imperfections. However, the prevailing consideration in the determination of both cases was whether the non-compliance was substantial enough to have adversely impacted on the results. While the Kenyan Supreme Court unanimously held that the non-compliance did not significantly affect the validity of the results and so did not warrant a declaration of invalidation, in Ghana it was the majority of the bench that held the same view.

So, what is 'substantial non-compliance', and under what circumstances would the courts invalidate presidential election results due to 'substantial non-compliance'?

4 Circumstances under which the courts would invalidate presidential election results

According to Halsbury's Laws of England, the general position of the law is that²⁸

[n]o election is to be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate elections rules if it appears to the tribunal, having cognisance of the question that the election was conducted substantially in accordance with the law as to the elections, and that the act or omission did not affect the result.

Accordingly, in *Medhurst v Lough Casquet*,²⁹ Kennedy J observed that election results should not be declared void just because there had been inadvertent breaches of the law by EMB officials, provided that, in spite of the breaches, the court is satisfied that the elections were conducted in substantial compliance with the electoral laws and that the breaches could not adversely impact on the success of one candidate over the other(s). These views by Kennedy J in the *Medhurst* case were adopted by the Ghanaian Supreme Court, *per* Ansah JSC.³⁰

The justification for not invalidating election results merely because there have been administrative breaches appears to lie with the authorship of the infractions. The general thinking in the jurisprudence is that it is unfair and contrary to the principles regulating adult suffrage that the administrative sins of election officials be visited upon voters, so long as the latter have voted in accordance with the law.

In *Opitz v Wrzesnewskyj*, the court observed:³¹

28 Vol 15(4), fourth edition, para 670.

29 [1901] 17 LTR 230.

30 *Nana Akufo-Addo* (n 1 above) 95.

31 (2012) SCC 55-2012-10-256 para 66; see also *McCavitt v Registrars of Voters of Brockton* 626 (Mass 1982).

By contrast, if a vote cast by an entitled voter were to be rejected in a contested election application because of an irregularity, the voter would be irreparably disenfranchised. This is especially undesirable when the irregularity is outside of the voter's control, and is caused solely by the error of an election official.

Similarly, in the *Nana Akufo-Addo* case, Adinyira JSC held that so long as voters cast their ballot in good faith, their votes should not be annulled just because an officer failed to perform some duty imposed by law.³²

However, there are exceptions to this general principle. One of these is that the court will declare elections void when it is satisfied that the legal trespasses are of such a magnitude that they have resulted in substantial non-compliance with the existing electoral laws. Additionally, where there is a reasonable doubt that the breaches have affected the results³³ and thus it is open to doubt whether the returned candidate actually won the majority of the votes from the election, the court is obliged to declare the elections void.³⁴

It is from this perspective that *Morgan & Others v Simpson & Others*³⁵ must be understood. The English Court of Appeal had occasion to consider the conditions under which electoral results could be nullified on grounds of violations of electoral statutes. According to the facts, the votes in the ballot box at an election were 23 691. Forty-four of these were rejected because some officials at 18 polling stations had inadvertently not affixed the official stamps to the ballot papers. The winner won by a majority of 11, but it was argued that if the rejected votes had been included, he would have had a majority of seven. A petition was filed for a declaration that the election was invalid because the issue of unstamped ballot papers was a breach of the officials' duty which had affected the results adversely.

The court of first instance dismissed the petition, holding that, as the election was conducted substantially in accordance with the electoral laws, the fact that there had been a small number of administrative errors was not a sufficient reason for declaring it invalid. On appeal, the Court of Appeal reversed this decision and ruled that the election was invalid despite the fact that it had been held in substantial compliance with the electoral laws.

Speaking through Lord Denning MR, the Court of Appeal then outlined two circumstances under which the court would nullify election results: firstly, that if elections are so poorly conducted that they cannot be said to have been conducted in substantial compliance with the electoral laws, then they are void whether or not the non-compliance affected the results; secondly, that even if the elections are conducted in substantial compliance with the electoral

32 *Nana Akufo-Addo* (n 1 above) 144.

33 *Nana Akufo-Addo* 446.

34 *Medhurst* (n 29 above) 230.

35 [1974] 3 WLR 517.

laws but there are breaches or mistakes at the polls that adversely affect the results, then the results have to be cancelled.

The following opinion in the Nigerian case of *Ibrahim v Shagari & Others* canvasses this principle:³⁶

[T]he Court is the sole judge and if it is satisfied that the election has been conducted substantially in accordance with Part II of the Act it will not invalidate it. The wording of section 123 is such that it presumes that there will be some minor breaches of regulations but the election will only be avoided if the non-compliance so resulting and established in court by credible evidence is substantial. Further, the court will take into account the effect, if any, which such non-compliance with [the] provisions of Part II of the Electoral Act, 1982 has had on the result of the election.

These common law principles are also codified in section 83 of the Elections Act,³⁷ which provides that elections shall not be declared void if they are conducted in accordance with law and non-compliance, if any, does not affect the election results.

Another exception has to do with express statutory stipulation. It was observed in the *Nana Akufo-Addo* case that if the electoral laws explicitly provide that non-compliance with electoral laws automatically voids an election, then the courts will give effect to that explicit statutory stipulation.³⁸ It was in this respect held in the *Nana Akufo-Addo* case that, since neither article 49 of the 1992 Constitution nor the Public Elections Regulations³⁹ contained any such express stipulations, non-compliance with their provisions was not fatal to the election results.⁴⁰

The last exception to be discussed is fraud. It is a basic principle of law that fraud vitiates everything.⁴¹ Therefore, the courts have held that if the non-compliance with electoral laws can be attributed to fraud or any fraudulent intentions on the part of the election officials, then the election results would be annulled.⁴² It is on the strength of this principle that, in 2004, the Ukrainian Supreme Court ordered a repeat runoff presidential election between Viktor Yanukovich and Viktor Yushchenko when it was proven that the original election had been marked by widespread electoral fraud.⁴³

From the foregoing jurisprudence, it appears that the courts would invalidate presidential election results only if the results are the product of fraud, or if there is an express statutory injunction that non-compliance with the electoral laws automatically voids election results, or if the elections were not conducted in substantial

36 (1985) LRC (Const) 1.

37 n 12 above.

38 *Nana Akufo-Addo* (n 1 above) 144.

39 2012 (CI 75).

40 n 38 above.

41 G Woodward 'Collateral attack upon judgments on the ground of fraud' (1916) 65 *University of Pennsylvania Law Review and American Law Register* 109.

42 n 38 above.

43 n 9 above.

compliance with the electoral laws, or where, although the elections were conducted in substantial compliance with the electoral laws, certain statutory infractions are proven to have muddied the election results.

In conclusion, it is only when non-compliance with electoral laws adversely affects presidential election results that the courts would consider the non-compliance to be substantial enough to require an invalidation of the results. This approach is influenced by the widely-accepted fact among judges that elections, of which presidential elections are a subset, cannot be without hitches and therefore the judiciary should hasten slowly in invalidating their results.⁴⁴ A purposive, as opposed to a regimental, interpretive approach to interpreting electoral laws is preferred by the proponents of this school.⁴⁵

So, how does a petitioner prove to a court that there has been substantial non-compliance with electoral laws?

5 Threshold of proof in presidential election disputes

At common law, it is generally presumed that all official acts are rightly and regularly done.⁴⁶ It is also presumed that all official records are accurate.⁴⁷ Consequently, it is presumed that presidential elections are conducted regularly, and that presidential election results as published by an EMB are also right and accurate.

These presumptions of regularity and accuracy are rebuttable.⁴⁸ Accordingly, it is the duty of a petitioner to adduce evidence in rebuttal.⁴⁹ This is because by the very nature of the burden of proof, it is the person who would lose a case if any stated proposition in issue is not proven who has the singular duty to prove same.⁵⁰ Applied to presidential election disputes, since it is a petitioner who would lose if the presumptions of regularity and accuracy are not rebutted, it is a petitioner who bears the initial burden of proving non-compliance with electoral laws.⁵¹ Thereafter, the burden shifts to the respondents to counter the evidence produced by a petitioner.⁵²

In Ghana and Kenya, the constitutional provisions on elections as well as the electoral laws are silent on the burden of proof that must be discharged in presidential election petitions. Therefore, the burden

44 *Nana Akufo-Addo* (n 1 above) 543 565-566.

45 *Raila Odinga* (n 2 above) para 285.

46 *Raila Odinga* para 196.

47 *Nana Akufo-Addo* (n 1 above) 59-60 62.

48 Sec 37(1) Evidence Act, 1975 (NRCD 323).

49 *Nana Akufo-Addo* (n 1 above) 459.

50 JB Thayer *A preliminary treatise on evidence at the common law* (1898) 355.

51 Sec 17(1) NRCD 323; see also n 49 above.

52 *Raila Odinga* (n 2 above) para 203; see also *Nana Akufo-Addo* (n 1 above) 58-59, 204-205 & 458-459.

of proof is regulated by the general provisions of the common law as codified in the Ghanaian Evidence Act, 1975 (NRCD 323) and the Kenyan Evidence Act.⁵³ This means that the common law rules on the burden of proof as discussed above apply with the same force to presidential election disputes in Ghana and Kenya. The author now examines how the Ghanaian and Kenyan Supreme Courts treated the burden of proof and standard of proof in the *Nana Akufo-Addo* and *Raila Odinga* cases.

6 Burden of proof

The burden of proof basically is concerned with the question of whose duty it is to prove allegations of facts by placing evidence before a court. It has been observed that, since presidential election disputes to a significant degree rest on facts,⁵⁴ they must be proven in the same way as other factual cases are: The petitioner must establish an appreciable degree of belief in the mind of the court.⁵⁵

The burden of proof has two components: the burden of producing evidence that is satisfactory enough to prove a particular issue and the burden of persuading the court that the allegations made are true or untrue.⁵⁶ The burden of producing evidence is also known as the evidential burden,⁵⁷ while the burden of persuasion is sometimes referred to as the legal burden.⁵⁸ Therefore, beyond adducing evidence in support of an allegation, a party must also satisfy the court that the allegations are true, before it would be deemed that he or she has discharged the burden of proof. The result is that it is probable to succeed in the former but fail in the latter.

In the context of presidential elections, it has been held that where a petitioner alleges non-compliance with electoral laws, the petitioner must first prove that there has been such non-compliance by introducing evidence to that effect. Thereafter, the petitioner must satisfy the court that the non-compliance has adversely affected the validity of the election results.⁵⁹ It is after a petitioner has successfully surmounted these two hurdles of the burden of proof that the onus of proof shifts to the respondent(s).⁶⁰ Therefore, it is incumbent upon a petitioner to first and foremost establish firm and credible evidence of an EMB's departure from the prescriptions of the law. After that, the

53 2009 (Cap 80).

54 *Raila Odinga* (n 2 above) para 191.

55 *Nana Akufo-Addo* (n 1 above) 458; see also *Hawkins v Powells Tillery Steam Coal Co Ltd* [1911] KB 996.

56 M Opoku-Agyemang *Law of evidence in Ghana* (2010) 145; see also sec 10 NRCD 323 and *Nana Akufo-Addo* (n 1 above) 458.

57 Opoku-Agyemang (n 56 above) 157.

58 As above.

59 *Nana Akufo-Addo* (n 1 above) 121-122.

60 *Nana Akufo-Addo* 61.

burden shifts and keeps shifting until the court reaches a determination. In the words of Ansah JSC:⁶¹

If the petitioners are able to establish the facts they rely on to ask for their reliefs, the onus will then shift to the respondents to demonstrate the non-existence of that fact. This [i]s because the court bases its decision on all the evidence before it; the petitioner and the respondent alike have a burden to discharge so as to be entitled to a claim or a defence put up.

EMBs are constitutionally mandated to organise, manage and conduct elections so that people can exercise their political right to vote.⁶² It is conceivable that the electoral laws under which EMBs operate can be flouted through violations, omissions, incompetence, malpractice or sheer fraud on the part of officials. Notwithstanding this, it is appropriate to place the initial burden of proof on a petitioner since it is a petitioner who challenges the presumption that the presidential elections in question were regularly conducted and that their results are accurate.⁶³ At the conclusion of proceedings, the court would deliver judgment for the petitioner if the respondents fail to discharge the burden of proof when it shifts to them or *vice versa*. But to what standard must a presidential election dispute be established? This requires a discussion of the standard of proof in presidential election petitions.

7 Standard of proof

The standard of proof has to do with the weight that a court should place on the material facts that are placed before it.⁶⁴ Generally, in civil cases, the standard of proof is 'on the preponderance of probabilities' and in criminal trials it is proof 'beyond reasonable doubt'.⁶⁵

Unlike the burden of proof, the standard of proof applicable in presidential election disputes is not uniform – it varies from one jurisdiction to the other. For example, in Ghana, presidential election disputes are civil in nature and therefore the standard of proof is on the preponderance of probabilities.⁶⁶ It is only when crime is alleged in a presidential election petition that the criminal elements of the case are required to be proven beyond reasonable doubt. So, in the *Nana Akufo-Addo* case, Anin Yeboah JSC stated:⁶⁷

The petition is simply a civil case by which petitioners are seeking to challenge the validity of the presidential elections. From the pleadings and the evidence, no allegations of fraud or criminality were ever introduced by

61 *Nana Akufo-Addo* 62.

62 Art 45 1992 Constitution and art 88(4) 2010 Constitution.

63 *Nana Akufo-Addo* (n 1 above) 178-179.

64 *Nana Akufo-Addo* 58.

65 *Opoku-Agyemang* (n 56 above) 164.

66 Sec 12 NRCDC 323.

67 *Nana Akufo-Addo* (n 1 above) 459-460.

the petitioners. The standard of proof of allegations in civil cases is proof by preponderance of probabilities. It is only when crime is pleaded or raised in the evidence that the allegation sought to be proved must be proved beyond reasonable doubt.

The position is the same in India. In *Shri Kirpal Singh v Shri VV Giri*⁶⁸ the court held that allegations of corrupt practices had to be proven beyond any reasonable doubt. In the later case of *M Narayan Rao v G Venkata Reddy & Another*,⁶⁹ the Indian Supreme Court explained that this is so because allegations of corrupt practices are quasi-criminal in nature and, accordingly, they must be proven according to the criminal standard.

However, in some other jurisdictions, the standard of proof in presidential election disputes goes beyond the preponderance of probabilities but falls slightly below the criminal standard. For example, in the *Chiluba* case,⁷⁰ it was held that the standard of proof in presidential election petitions is a degree higher than that of the civil standard.⁷¹ Also, in the *Raila Odinga* case, the Supreme Court of Kenya held that the threshold for proving presidential election petitions is slightly above the preponderance of probabilities but below proof beyond reasonable doubt.⁷²

So, whereas in Kenya a presidential election dispute must be established to a degree between the civil and criminal standard, in Ghana, the correct position of the law is proof on the preponderance of probabilities, except when a crime is alleged.⁷³ Indeed, in the words of Anin Yeboah JSC:⁷⁴

The standard of proof of allegations in civil cases is proof by preponderance of probabilities. It is only when crime is pleaded or raised in the evidence that the allegation sought to be proved must be proved beyond reasonable doubt ... The fact that this petition is brought under article 64 of the 1992 Constitution does not make any difference in the applicability of the standard of proof. The allegations in the petition that were denied by the respondents in their answers to the petition ought to be proved as required in every case. The fact that the petition is a constitutional matter is also entirely irrelevant. The standard of proof in all civil cases is the usual standard of proof by preponderance of probabilities and no more.

Therefore, the observation by Adinyira JSC that the standard of proof in presidential election petitions ought to be above the civil standard⁷⁵ is inconsistent with Ghanaian law and must be disregarded.

68 1970 (2) SCC 567.

69 1977 (AIR) (SC) 208.

70 *Chiluba* (n 6 above).

71 However, in the *Mwanawasa* case (n 6 above), which was decided later, the Zambian Supreme Court reviewed its position and held that the applicable standard of proof must depend upon the allegations contained in the petition.

72 *Raila Odinga* (n 2 above) para 203.

73 Sec 12 NRCD 323; see also *Opoku-Agyemang* (n 56 above) 164 167-168.

74 *Nana Akufo-Addo* (n 1 above) 62 459-460.

75 *Nana Akufo-Addo* 123.

So, is it the case that most presidential election disputes are unsuccessful because the petitioners generally fail to discharge the burden and standard of proof, or is it because the judgments are sometimes influenced by extra-legal considerations?

8 Extra-legal considerations in the resolution of presidential election disputes

Presidential election disputes are very important because they trigger all the three arms of government into action simultaneously: They constitute a challenge to the highest executive office of a country which the judiciary must resolve based on laws enacted by the legislature. That notwithstanding, presidential election disputes are not foreign to the law; they are instituted with constitutional or legal backing. Further, they are not extraordinary because the judiciary has the authority to dispose of them in accordance with the rules of evidence, just like all other cases.

However, some judges have created the impression that presidential election disputes are a special breed of cases. In *Peters v Attorney-General*, for instance, Sharma JA said that election petitions are 'sui generis'.⁷⁶ The Court of Appeal in *Chris Nwebueze v Peter Obi & 436 Others*⁷⁷ also remarked that election petitions are 'peculiar from the point of view of public policy'. Also, the Kenyan Supreme Court stated in the *Raila Odinga* case that a presidential election dispute consists of 'special circumstances'.⁷⁸ Finally, in the *Nana Akufo-Addo* case, presidential election disputes were variously described as 'serious and volatile';⁷⁹ of a 'peculiar nature and potential effects';⁸⁰ and 'multidimensional' with 'several legitimate interests at stake which cannot be ignored'.⁸¹ The use of these adjectives in the description of presidential election disputes justifies an enquiry into whether the courts are influenced by extra-legal considerations when resolving presidential election disputes.

In the United States case of *Bush v Al Gore*,⁸² it was submitted that presidential election disputes were, in essence, political contests⁸³ involving questions that are more political than they are legal.⁸⁴ Accordingly, it was argued that the judiciary ought to play a very

76 (2002) 3 LRC 32 CA 101.

77 [2006] 18 WRN 33.

78 *Raila Odinga* (n 2 above) para 230.

79 *Nana Akufo-Addo* (n 1 above) 434.

80 *Nana Akufo-Addo* 51.

81 *Nana Akufo-Addo* 34-37.

82 531 US (2000) (United States Supreme Court).

83 *Raila Odinga* (n 2 above) para 225.

84 *Raila Odinga* para 188.

limited role,⁸⁵ exercising 'judicial care and restraint'.⁸⁶ What is subtly meant by these submissions is that, since it is the province of an electorate to determine its leadership, judicial intervention in presidential election disputes must be geared towards preserving that political right.⁸⁷ The US Supreme Court rendered it in the following words:⁸⁸

None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people ... and to the political sphere.

These extra-legal sentiments were re-echoed by counsel in the *Raila Odinga* case, and they appear to have influenced the decision of the Kenyan Supreme Court. This is because the Supreme Court remarked that its role in resolving the *Raila Odinga* case was 'fundamentally political-cum-constitutional'.⁸⁹

Similarly, in Ghana, it appears that some extra-legal considerations engaged the minds of some of the judges in the majority. Akoto-Bamfo JSC, for instance, took into consideration the evolving phenomenon of democracy and the imperfect nature of elections and observed that '[w]e should exercise a reluctance in striking down every single vote just by reference to a provision of the law'.⁹⁰ Adinyira JSC went a step further and attributed the general reluctance of judges to void election results to public policy. According to her, since it is a very serious matter to overturn election results, '[p]ublic policy favours salvaging the election and giving effect to the voter's intent, if possible'.⁹¹ Similarly, the president of the court, Atuguba JSC, also noted that '[t]he judiciary in Ghana, like its counterparts in other jurisdictions, does not readily invalidate a public election but often strives in the public interest to sustain it'.⁹²

But what is this 'public policy' or 'public interest', and why does it favour a voter-friendly approach? The answer appears to lie in the following passage from the *Raila Odinga* case:⁹³

An alleged breach of an electoral law, which leads to a perceived loss by a candidate, as in the presidential election which has led to this petition, takes different considerations. The office of President is the focal point of political leadership ... This office is one of the main offices which, in a democratic system, are constituted strictly on the basis of majoritarian expression. The whole national population has a clear interest in the

85 n 82 above.

86 *Raila Odinga* (n 2 above) para 189.

87 *Raila Odinga* paras 220 & 225.

88 *Raila Odinga* para 222.

89 *Raila Odinga* (n 2 above) para 226.

90 *Nana Akufo-Addo* (n 1 above) 565-566 (my emphasis).

91 *Nana Akufo-Addo* 144-147 178-179.

92 *Nana Akufo-Addo* (n 1 above) 40.

93 *Raila Odinga* (n 2 above) para 298.

occupancy of this office which, indeed, they themselves renew from time to time, through the popular vote.

From this viewpoint, the Kenyan Supreme Court concluded that 'as a basic principle, it should not be for the Court to determine who comes to occupy the presidential office'.⁹⁴

9 Conclusion

Most presidential election disputes have been unsuccessful. Although the petitioners have almost invariably adduced evidence of non-compliance with electoral laws, so far the judiciary has hardly been persuaded that these trespasses had any significant or adverse impact on the validity of presidential election results. The *Raila Odinga* case appears to confirm the reluctance of judges to overturn presidential election results. However, the narrow win of the respondents in the *Nana Akufo-Addo* case suggests that the era of unsuccessful presidential election petitions may be drawing to a close.

Another point to note is that in declining to invalidate the results of presidential elections, the courts have insisted that they have been guided only by the law.⁹⁵ However, the literature indicates that some judges have been influenced by extra-legal considerations, which some of them have indicated is necessary because of public policy or the public interest. Perhaps the judiciary has been mindful that it is the unelected minority arm of government and so it must tread cautiously on any path that would easily be construed as a usurpation of the right of the electorate to determine their political leadership through the ballot.

Finally, it should be noted that the Ivorian crisis⁹⁶ indicates that the resolution of presidential election disputes has critical implications for the democratisation process of a country. Indeed, while the acceptance of its judgment can contribute immensely to the smooth operation of the government apparatus, the converse can hardly be seriously disputed. Accordingly, the judiciary, which is the arm of government with the constitutional mandate to resolve presidential election disputes, ought to strike a proper balance between providing effective redress to the grievances of petitioners and supplanting its will for that of the people.

94 *Raila Odinga* para 299.

95 *Raila Odinga* para 230.

96 n 8 above.