

COURT OF APPEAL
JOS DIVISION
12TH MARCH, 1999. CA/J/48/99
CORAM:- J. J. UMOREN, I. A. MANGAJI, A. SANUSI, JJCA.

ALHAJI IDRIS WAZIRI APPELLANT
AND
1. ALHAJI SALE USMAN DANBOYI
2. INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC) RESPONDENTS
3. CHIEF SOLOMON OGOH
4. DR. MUSTAPHA ABBA
5. RETURNING OFFICER FOR GUBERNATORIAL
AND STATE ASSEMBLY ELECTION
6. REV. JOLLY T. NYAME, PEOPLES
DEMOCRATIC PARTY (PDP)

ELECTION PETITION - Lapse of time - The tribunal cannot go one day - Beyond the period specified by Law - And if it does the proceedings will become a nullity.

ELECTION PETITION - Non Compliance - Address for service - Failure to mention the occupier - Is not fatal - And should not make the petition incompetent.

FAIR HEARING - The principle - Does not mean the court should do the impossible - Where the tribunal gives the parties - Chance to address it on the issues raised - The appellant's right to fair hearing has not been infringed.

LOCUS STANDI - Issue of locus - Is a condition precedent - To any action before a court of Law - And ought to be decided at the earliest stage of the proceedings.

LOCUS STANDI - Evidence - Issue of locus Standi - Where evidence has

not been taken - Can only be decided on the statement of claim - And the statute creating the cause of action.

FACTS

At the end of the governorship and legislative Houses election held nationwide on the 9th of January, 1999 the 1st and 6th respondents were returned by the 2nd and 4th respondents as Governor and Deputy Governor of Taraba state respectively. The petitioner aggrieved filed a petition on 22nd January, 1999 before the Taraba State Governorship and Legislative Houses Election Petition Tribunal challenging such return on the ground that he was the running mate of the 6th respondent (i.e. Deputy Governorship candidate) at the said election. The Appellant/Petitioner in filing his petition gave his address for service within 5km radius in Jalingo as required by Law but failed to mention the occupier. The 1st and 6th respondents filed their joint reply on 20th February 1999 and issues were joined in the petition. The 2nd to 4th respondents also filed joint reply on the same date denying most of the averments in the petitioner's petition. Thereafter the appellant/petitioner filed what he called a reply to the replies of the respondents. The tribunal sat on 18th February, 1999 but neither the petitioner nor his counsel was present as none of them could be served. The matter was then adjourned to 22nd February, 1999 for the tribunal's secretary to serve the appellant's counsel in Jos. At its sitting on 22nd February, 1999 the tribunal in its considered ruling dismissed the petition giving its reasons, for doing so.

Dissatisfied with the ruling the appellant appealed to the Court of appeal, Jos Division raising three issues.

ISSUES FOR DETERMINATION

1. *Whether the appellant has the locus standi to bring the petition.*
2. *Whether the petitioner complied substantially with the laws and rules and if any non-compliance has rendered the petition incompetent and the jurisdiction of the tribunal nugatory.*
3. *Whether the petitioner was given a fair hearing.*

HELD (Unanimously dismissing the appeal per the leading judgment of SANUSIJCA)

1. Issue of locus - Is a condition precedent

It is trite law that the issue of locus standi is a condition precedent to any action before a court of law and as it is a fundamental issue, it goes to the root of the entire action and it ought to be decided at the earliest stage of the proceedings in order to save legal expenses and time of the court and the litigants before even the merit or otherwise of the action is considered. (See Thomas v. Olufosoye (1986) 1 NWLR (pt. 18) 669; Pepple v. Green (1990) 4 NWLR (pt. 142) 108 and Bolaji v. Bamgbose (1986) 2 NWLR (pt. 37) 632. Locus Standi goes to affect the jurisdiction of the court before which an action is brought, because if there is no locus standi to file the action in the first case, the court cannot properly assume jurisdiction to entertain the action. (p. 840 F)

2. Evidence - Issue of locus Standi

Where evidence has not been taken in the proceedings before the lower court, the issue of locus standi can only be decided on the statement of claim (in this case the petition of the petitioner) See Oloriode v. Oyebe (1984) 1 SCNLR 390, (1984) 15 NSCC 286; Thomas v. Olufosoye (supra). I will add here also that the statute creating the cause of action may also be considered in determining whether the party bringing the action has the standing to sue. By paragraph 1 of the petition, the appellant stated that he was a candidate for Deputy Governor at the elections held on 9th January, 1999. He further averred in the petition that he was duly nominated, screened and declared qualified to contest the election on that post. Section 133 (1)(a) of the State Government (Basic Constitutional and Transitional Provisions) Decree No. 3 of 1999 (hereinafter called 'The Decree') provides that an election petition may be presented by ... a person claiming to have had a right to contest or be returned at an election; section 40 of the Decree also created the post of a Deputy Governor of State. Also section 41 of the same Decree makes it incumbent upon a gubernatorial candidate to nominate his running mate tagged "Deputy Governor". The lower tribunal in its ruling which is the subject

matter of this appeal recognized these facts on page 25 of its records (see lines 14 to 18). In his brief the learned Senior Advocate of Nigeria Mr. Ofodile Okafor quoted an excerpt from page 25 lines 18 - 23 of tribunal's ruling which reads thus:

B *"He has no right as of fact and law to stand separately as a candidate for election into the post of Deputy Governor. It cannot therefore be traced to plead that the petitioner "was a candidate for Deputy Governor at the Governorship and Legislative Houses Election for Taraba State".*

C This court in Opia v. Ibru & Ors. (1992) 3 NWLR (pt. 231) 658 per Awogu J.C.A. at page 689 held thus: "section 89 of the Decree provides for who may be a petitioner in an election petition, and states that he is one or more of the following:

- D a. a person who voted at an election or who had a right so to vote or;
- b. a person claiming to have a right to be elected or returned at the election.'

E A 'petitioner' in paragraph 16(1) of the 6th Schedule, can therefore, be the persons so qualified under section 89 of the Decree. He is either the defeated candidate or the one claiming the seat for a defeated candidate. I found support that in the provisions of the Electoral Act, F 1982, section 137 which is in pari materia with paragraph 16(1) of the 1991 Decree" It should be noted that this provision is of the 1991 Decree is in pari materia with section 133(1) of the Decree No. 3 of 1999. Thus, in my view the petitioner in this case has locus standi to present the petition as he did in the light of aforesaid provisions of the G Decree. (p. 841 A)

3. Election petition - Lapse of time

H By the provisions of paragraph 2 (1) (b) of the Decree a petition shall be heard and determined within 30 days from the date of its filing. Since the petition was filed on 22/1/99 it would be deemed to have lapsed on 22nd February, 1999. The tribunal cannot go one day beyond the period specified by law and if it does such proceedings become a nullity. See Kuti v.

Balogun (1978) 1 SC 53. In its ruling the tribunal at page 27 last paragraph said thus:

"The tribunal cannot ascribe to itself the jurisdiction it does not have otherwise all its efforts to do justice will be perverted if it tries a case where it does not have jurisdiction or its jurisdiction has expired however brilliant the judgment or ruling may be.

It is on the foregoing we hold as of fact and law that the petition is incompetent.

It is hereby dismissed."

I entirely agree with the tribunal's conclusion reproduced above. There is no way it can be faulted. The tribunal is therefore correct in dismissing the petition but only on the ground of application of time. That lapse of time in my view makes the petition to be barred and has denied the tribunal of the jurisdiction to inquire into the petition any longer. (p. 843 D)

4. Election petition - Non compliance

The other leg of the issue relates to non-compliance with the provisions of the Decree especially the issue of the non-provision of occupier's address. We have noticed that at the tip end of the petition, the appellant gave as his address for service within 5km of the judicial division at No. 4 Government House Road, Jalingo. I feel that has satisfied the requirement of the Decree even if it has not been stated in a separate column meant for that service could comfortably be effected there. The tribunal is therefore wrong to have held otherwise as that is mere technicality on form and not on substance. Courts are always enjoined to disregard technicalities where it will defeat the course of justice. The alleged non-compliance with the provisions of the decree in this aspect is not fatal and should not guard a reason to dismiss the petition or to make the petition incompetent. (p. 844 A)

5. Fair hearing - The Principle

Coming to the third issue for determination which pertains to fair hearing, I have closely studied the arguments of the counsel and it is not

disputed that the tribunal held its first sitting on the petition on 18/2/1999. No counsel appeared for the appellant on that day and the appellant did not appear either due to non-service. When he appeared on 22/2/99 he sought for adjournment to 24th and 25th February. As said above by 22/2/99 the petition has lapsed, even if it was adjourned or heard it will be a futile exercise since the proceeding would become a nullity. The principle of fair hearing does not mean the court should do the impossible or impracticable. The learned Senior Advocate of Nigeria complained too much about the tribunal's raising some topical issues suo motu. The law is that court of law is not allowed to formulate a case for the parties or decide on issues not raised by them. But I think where the court or tribunal gives the parties chance to address it on the issues it raised (as the petition) the court is covered. See Kudu v. Aliyu & Ors. (1992) 3 NWLR (pt. 231) 615 at (pt. 615) per Akanbi, J.C.A. (as he then was). In my view the parties were given ample opportunity to address the tribunal on the issues raised. Its action in my view does not in any way infringe the appellant's right to fair hearing. (p. 844 E)

REPRESENTATION

G. Ofodile SAN with J. O. Chigbo Esq. for the appellant
 B. M. Isah Esq. (SG/DG), Ministry of Justice, Taraba State with Yakubu Esq. for 2nd to 4th Respondents
 A. T. Sam Tsokwa Esq. for the 1st, 5th and 6th Respondents

CASES REFERRED TO

Thomas v. Olufosoye (1986) 1 NWLR (pt. 18) 669
 G Pepple v. Green (1990) 4 NWLR (pt. 142) 108
 Bolaji v. Bamgbose (1986) 2 NWLR (pt. 37) 632
 Oloriode v. Oyebi (1984) 1 SCNLR 390, (1984) 15 NSCC 286
 Opia v. Ibru (1992) 3 NWLR (pt. 231) 658
 H Kuti v. Balogun (1978) 1 SC 53
 Kudu v. Aliyu (1992) 3 NWLR (pt. 231) 615 at (pt. 615)

LEAD JUDGMENT BY SANUSI JCA

At the end of the Governorship and Legislative Houses election held nationwide on the 9th of January, 1999 the 1st and 6th respondents were returned by the 2nd and 4th respondents as Governor and Deputy governor of Taraba State respectively. Both of them contested on the platform of the Peoples Democratic Party (P.D.P). The 6th appellant aggrieved by the return of the 6th and 1st respondents as Governor elect and Deputy Governor elect, the petitioner filed a petition on 22nd January, 1999 before the Taraba State Governorship and Legislative Houses Election Petition Tribunal challenging such return on the ground that he was the running mate of the 6th respondent (i.e. Deputy Governorship candidate) at the said election. It is apt to say that the appellant petitioner in filing his petition gave his address of service within 5km radius in Jalingo but failed to mention the occupier. The 1st and 6th respondents filed their joint reply on 20th February, 1999 and issues were joined in the petition. The 2nd to 4th respondents also filed joint reply on the petition. Thereafter, on 22nd February, 1999 the appellant/petitioner filed what he called reply to the replies of the respondents. As shown in the printed record of proceedings, the tribunal sat on 18th February, 1999 and when the petitioner's petition was called neither the appellant nor his counsel was present as none of them could be served. The matter was then adjourned to 22nd of February, 1999 for the tribunal's secretary to serve the appellant's counsel in Jos since as said above the latter failed to give his occupier's address in Jalingo. At its sitting on 22nd February, 1999 the tribunal in its considered ruling dismissed the petition giving its reasons for doing so.

Dissatisfied with the ruling of the tribunal the appellant appealed to this court and filed his notice of appeal containing five grounds of appeal.

Issues were founded and the appellant formulated three issues for determination which are reproduced below:

1. Whether the appellant has the locus standi to bring the petition.
2. Whether the petitioner complied substantially with the laws

and rules and if any non-compliance has rendered the petition incompetent and the jurisdiction of the tribunal nugatory.

3. Whether the petitioner was given a fair hearing.

B Counsel to the 1st, 5th and 6th respondents has formulated two issues for determination in his brief of argument and these include the followings:

a. Whether or not the tribunal was right in dismissing the appellant's petition for want of jurisdiction and or for incompetency.

C b. Whether or not the tribunal in determining the appellant's petition denied the appellant the right to fair hearing.

Only one issue for determination was formulated by the learned counsel for the 2nd to 4th respondents which is simply thus:

D Whether or not the learned Justices of the Governorship and Legislative Houses Election Tribunal were correct in law when they dismissed the appellant's petition on grounds of incompetence on 22nd February, 1999.

E I am of the view that the three issues for determination formulated by the learned SAN the counsel for the appellant are more elegant and all encompassing. I shall therefore adopt and deal with them in treating this appeal in the order they are reproduced above.

F The 1st issue for determination has to do with the vexed issue of locus standi. The question is, does the appellant have locus standi to bring the petition before the tribunal as he did? **It is trite law that the issue of locus standi is a condition precedent to any action before a court of law and as it is a fundamental issue, it goes to the root of the entire action and it ought to be decided at the earliest stage of the proceedings in order to save legal expenses and time of the court and the litigants before even the merit or otherwise of the action is considered.** (See Thomas v. Olufosoye (1986) 1 NWLR (pt. 18) 669; Pepple v. Green (1990) 4 NWLR (pt. 142) 108 and Bolaji v. Bamgbose (1986) 2 NWLR (pt. 37) 632. **Locus Standi goes to affect the jurisdiction of the court before which an action is brought, because if there is no locus standi to file the action in the first case, the court cannot properly assume jurisdiction to entertain the ac-**

tion. It is pertinent to note that no evidence was led in the proceedings before the lower tribunal. **Where evidence has not been taken in the proceedings before the lower court, the issue of locus standi can only be decided on the statement of claim (in this case the petition of the petitioner)** See Oloriode v. Oyebi (1984) 1 SCNLR 390, (1984) 15 NSCC 286; Thomas v. Olufosoye (supra). I will add here also that the statute creating the cause of action may also be considered in determining whether the party bringing the action has the standing to sue. By paragraph 1 of the petition, the appellant stated that he was a candidate for Deputy Governor at the elections held on 9th January, 1999. He further averred in the petition that he was duly nominated, screened and declared qualified to contest the election on that post. Section 133 (1)(a) of the State Government (Basic Constitutional and Transitional Provisions) Decree No. 3 of 1999 (hereinafter called 'The Decree') provides that an election petition may be presented by ... a person claiming to have had a right to contest or be returned at an election; section 40 of the Decree also created the post of a Deputy Governor of a State. Also section 41 of the same Decree makes it incumbent upon a gubernatorial candidate to nominate his running mate tagged "Deputy Governor".

The lower tribunal in its ruling which is the subject matter of this appeal recognized these facts on page 25 of its records (see lines 14 to 18). In his brief the learned Senior Advocate of Nigeria Mr. Ofodile Okafor quoted an excerpt from page 25 lines 18 - 23 of tribunal's ruling which reads thus:

"He has no right as of fact and law to stand separately as a candidate for election into the post of Deputy Governor. It cannot therefore be traced to plead that the petitioner "was a candidate for Deputy Governor at the Governorship and Legislative Houses Election for Taraba State".

This court in Opia v. Ibru & Ors. (1992) 3 NWLR (pt. 231) 658 per Awogu J.C.A. at page 689 held thus: "section 89 of the Decree provides for who may be a petitioner in an election petition, and states that he is one or more of the following:

a. a person who voted at an election or who had a right so to vote or;

b. a person claiming to have a right to be elected or returned at the election.'

B A 'petitioner' in paragraph 16(1) of the 6th Schedule, can therefore, be the persons so qualified under section 89 of the Decree. He is either the defeated candidate or the one claiming the seat for a defeated candidate. I found support that in the provisions of the Electoral Act, 1982, section 137 which is in *pari materia* with
C paragraph 16(1) of the 1991 Decree"

It should be noted that this provision is of the 1991 Decree is in *pari materia* with section 133(1) of the Decree No. 3 of 1999. Thus, in my view the petitioner in this case has *locus standi* to
D present the petition as he did in the light of aforesaid provisions of the Decree.

On the second issue for determination i.e. whether the appellant as petitioner at the lower tribunal has complied substantially with the
E laws and rules on whether any non-compliance has rendered the petition incompetent and the tribunal's jurisdiction nugatory, there is need to refer to the printed records in order to appreciate what had actually transpired in the whole petition at the tribunal before dealing with the issue of alleged non-compliance or the competence or otherwise of the petition in
F relation to the tribunal's jurisdiction. The petition was filed before the tribunal on 22nd January, 1999. The petitioner gave his address for service care of his counsel i.e. No. 42 Tudun Wada Ring Road, Jos Plateau State. He was however alleged to have failed or neglected to
G provide his address for service within 5km radius and the name of the occupier as required by paragraph 5 (4) and (5) of Schedule 6 to the Decree. This requirement is meant to facilitate service. It needs to be emphasized here, that paragraph 5(5) of Schedule 6 to the Decree states
H that if para. 5(4) which deals with the provisions of these addresses are not complied with, the petition shall be deemed not to have been filed, unless the tribunal otherwise orders.

The printed records of the proceedings show that the lower tri-

bunal sat on 18th February, 1999, and when the petition was called neither the petitioner nor his counsel was present due to non-service. Its Secretary explained on his inability to effect service on them because they gave a Jos address. The matter was then adjourned to 22/2/99 for hearing or striking out (*italics mine*). On 22nd February, 1999 one Mr. Oyewole appeared for the appellant/petitioner and was served with the replies of the respondents. He then applied for adjournment to 24th and 25th February, 1999 and other counsel conceded. But before granting his application for adjournment the tribunal *suo motu* drew the attention of counsel to paragraph 2(1) of Schedule 6 to the Decree and he reacted that he was going to seek for enlargement of time under paragraph 4(A) (1) of the said schedule. He also complained that that was the first time he was seeing the Decree. Other counsel alike chipped in their responses too on the issues raised and the tribunal afterwards reserved its ruling till afternoon of that same day.

By the provisions of paragraph 2 (1) (b) of the Decree a petition shall be heard and determined within 30 days from the date of its filing. Since the petition was filed on 22/1/99 it would be deemed to have lapsed on 22nd February, 1999. The tribunal cannot go one day beyond the period specified by law and if it does such proceedings become a nullity. See Kuti v. Balogun (1978) 1 SC 53. In its ruling the tribunal at page 27 last paragraph said thus:

"The tribunal cannot ascribe to itself the jurisdiction it does not have otherwise all its efforts to do justice will be perverted if it tries a case where it does not have jurisdiction or its jurisdiction has expired however brilliant the judgment or ruling may be. It is on the foregoing we hold as of fact and law that the petition is incompetent. It is hereby dismissed."

I entirely agree with the tribunal's conclusion reproduced above. There is no way it can be faulted. The tribunal is therefore correct in dismissing the petition but only on the ground of application of time. That lapse of time in my view makes the petition to be barred and has denied the tribunal of the jurisdiction to inquire

into the petition any longer. This laid to rest the second leg of this issue as it relates to jurisdiction of the tribunal as at that date (22/2/99) or the competence of the petition on that date.

The other leg of the issue relates to non-compliance with the provisions of the Decree especially the issue of the non-provision of occupier's address. We have noticed that at the tip end of the petition, the appellant gave as his address for service within 5km of the judicial division at No. 4 Government House Road, Jalingo. I feel that has satisfied the requirement of the Decree even if it has not been stated in a separate column meant for that service could comfortably be effected there. The tribunal is therefore wrong to have held otherwise as that is mere technicality on form and not on substance. Courts are always enjoined to disregard technicalities where it will defeat the course of justice. The alleged non-compliance with the provisions of the decree in this aspect is not fatal and should not guard a reason to dismiss the petition or to make the petition incompetent.

Coming to the third issue for determination which pertains to fair hearing, I have closely studied the arguments of the counsel and it is not disputed that the tribunal held its first sitting on the petition on 18/2/99. No counsel appeared for the appellant on that day and the appellant did not appear either due to non-service. When he appeared on 22/2/99 he sought for adjournment to 24th and 25th February. As said above by 22/2/99 the petition has lapsed, even if it was adjourned or heard it will be a futile exercise since the proceeding would become a nullity. The principle of fair hearing does not mean the court should do the impossible or impracticable.

The learned Senior Advocate of Nigeria complained too much about the tribunal's raising some topical issues suo motu. The law is that court of law is not allowed to formulate a case for the parties or decide on issues not raised by them. But I think where the court or tribunal gives the parties chance to address it on the issues it raised (as the petition) the court is covered. See Kudu v. Aliyu & Ors. (1992) 3 NWLR (pt. 231) 615 at (pt. 615) per Akanbi, J.C.A.

(as he then was). In my view the parties were given ample opportunity to address the tribunal on the issues raised. Its action in my view does not in any way infringe the appellant's right to fair hearing.

As a corollary, I am of the firm view that the tribunal is correct in dismissing the petition on that ground only; that it was caught up by the effluxion of time which made the petition to become time barred and incompetent. The appeal is therefore dismissed on that ground only. I award N2,000.00 cost to the 1st respondent while the other respondents are awarded N2,000.00

UMOREN JCA

I have had a preview of the judgment of my learned brother Sanusi, J.C.A. in this appeal. I agree with his reasoning and conclusion and accordingly, I dismiss the appeal. I also abide by the consequential orders made by him, that as to costs inclusive.

MANGAJI JCA

I have had the privilege of reading in draft the lead judgment just delivered by my learned brother Sanusi, J.C.A. I entirely agree with the reasoning and conclusions reached therein. Accordingly, I adopt the judgment as mine and abide by the order of cost made therein.

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