

SUPREME COURT OF NIGERIA
2ND MARCH, 2001. SC. 108/2000
CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU, S. U. ONU,
U. A. KALGO, S. O. UWAIFO, JJSC.

REV. HYDE ONUAGULUCHI APPELLANT
AND

1. MR. BEN COLLINS NDU PETITIONER/RESPONDENT
2. THE RESIDENT ELECTORAL)
COMMISSIONER, ENUGU STATE) ... 2ND - 189TH RESPONDENTS
3. INDEPENDENT NATIONAL)
ELECTORAL COMMISSION & 186 OTHERS)

APPEALS - Reliefs sought before Court of Appeal - Must not be granted
- The court is free to grant any other appropriate reliefs.

ELECTION PETITIONS - Appeals - Finality of Court of Appeal's decision - As provided in s. 81 (1) and (3) of Decree No.5 of 1999 - Makes the present appeal incompetent.

ELECTION PETITIONS - Appeal - Purported election appeal - Which in substance does not fall under s. 81 (3) of the Decree - Will not be deemed finalized - By the Court of Appeal.

ELECTION PETITIONS - Wrong decision - Cannot be altered by the Supreme Court under any guise - Where the Constitution has made the Court of Appeal the final court.

JUDGMENTS - Appeals - Review of Court's judgment - Cannot be done by that court - Towards varying the judgment - Only clerical mistake or accidental slip can be corrected - Order 5 r. 3 Court of Appeal Rules.

FACTS

This case has to do with Election dispute in respect of the Enugu West Senatorial District election conducted in February, 1999. Appellant contested that election as a candidate of the all Peoples Party (APP). First respondent Mr. Ndu was a candidate of the Peoples Democratic Party (PDP). Appellant was duly returned by the 3rd respondent INEC as elected. 1st respondent then petitioned the Enugu Election Tribunal which dismissed his petition. His appeal to the Court of Appeal was successful as that court ordered that fresh election be conducted in that constituency. In reaction, appellant filed an originating summons before the Federal High Court Abuja seeking to establish that having been sworn in as a senator, his seat could not be made vacant. The court declined jurisdiction and dismissed appellant's action.

Appellant filed an application before the Court of Appeal Abuja division seeking to set aside judgment of the Enugu Court of Appeal on the ground that it was a nullity. The application was transferred to Enugu Division of the Court of Appeal. It dismissed the application. Being dissatisfied, appellant has now appealed to the Supreme Court. He raised several issues. But the apex court determined the appeal based on the preliminary objection raised by the respondents on the ground that the Supreme Court has no jurisdiction. That Court of Appeal's Decision is final on election matters.

ISSUES FOR DETERMINATION

“(i) Whether this court has jurisdiction to entertain this appeal which concerns questions of competence and jurisdiction of the lower court and violation of section 36(1) of the 1999 Constitution.

“(ii) Whether section 246(3) of the 1999 Constitution ousts the jurisdiction of this court to entertain an appeal from a decision of the lower court on questions concerning competence and jurisdiction of the lower court, and the breach of section 36(1) of the 1999 Constitution.”

HELD (Unanimously upholding the preliminary objection per lead ruling of UWAIFO JSC)

Reliefs sought before Court of Appeal

1. In the present ruling, I do not consider it necessary to comment on the respective reliefs sought before the Court of Appeal other than to say that Order 3, rule 23 of the Court of Appeal Rules gives that Court the liberty to give appropriate reliefs on hearing an appeal and will not therefore be bound by the reliefs sought in the notice of appeal. This power may be exercised by the Court of Appeal as the justice of the case demands to make orders which the trial court could have made. It could be in the form of consequential orders, or an order to correct a slip by the trial court. It is usually quite useful for the giving of a relief at the conclusion of an appeal which is appropriate to the occasion: see *Jadesimi v. Okotie-Eboh* (1986) 1 NWLR (pt.16) 264. (p. 841 D/G)

Election petitions - Finality of Court of Appeal decision

2. I have gone into some of the above matters not in the capacity of hearing the appeal brought by the appellant but in the consideration of the preliminary objection to show that the Court of Appeal throughout acted within its mandate of deciding an appeal arising from an election petition under Decree No.5 of 1999. Whether it did so perfectly rightly or was wrong in the decision it arrived at cannot be taken on appeal to this court for consideration. The reason for this can be founded on the provisions of section 81(1) and (3) of Decree No.5 of 1999. They read:

“81.(1) Notwithstanding the provisions of the Constitutional Court Decree 1998, an appeal arising in respect of an election petition under this Decree shall lie to the Court of Appeal.

(3) The decision of the Court of Appeal, on an appeal brought under subsection (1) of this section shall be final.” [Italics mine for emphasis] This court is without jurisdiction to entertain an appeal from the said decision of 30 May, 2000. I therefore hold that there is merit in the preliminary objection challenging the competency of the appeal lodged in respect thereof to this court. Accordingly I uphold the objection and strike out the appeal as being incompetent. (p. 844 A / 848 A)

When reliance cannot be placed on S. 81 (3) Decree No. 5 1999

3. I conceive that if a matter got to the Court of Appeal purporting to be an

election appeal but in substance it is not at all in respect of the National Assembly election or other relevant election, reliance cannot be placed on s.81(3) above or on other Constitutional provision to give a decision in such an appeal finality. This court would be entitled to intervene to declare the proceeding a nullity on the ground that it was not an appeal over which the Court of Appeal was given substantive jurisdiction. (p. 844 E)

Election petitions - Wrong Decision

4. This court will not permit or encourage any subterfuge under which it may assume jurisdiction to hear an appeal in respect of which the Constitution has in clear and unambiguous language made the Court of Appeal the final court. It follows that an appeal in respect of a decision of the Tribunal in an election petition when decided by the Court of Appeal cannot be taken on appeal to the Supreme Court but is final for all purposes. If I may add, the provisions of S.81(3) of Decree No. 5 of 1999 were included in S.246(3) of the 1999 Constitution just when the said Decree was repealed. It must be emphasised that such finality applies also to every interlocutory decision or any decision taken in respect of a matter or an issue concerning or arising from the decision reached in the appeal. No appeal shall lie from it to any other court even if it is patently wrong. (p. 845 A / D)

Appeals - Review of court's judgment

5. In the present case, in addition to S.81(3) of Decree No.5 of 1999 which made the decisions of the Court of Appeal in the relevant election matters final, Order 5, rule 3 of the Court of Appeal Rules provides:

“3. *The Court shall not review any judgment once given and delivered by it save to correct any clerical mistake or some error arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention. A judgment or order shall not be varied when it correctly represents what the Court decided nor shall be operative and substantive part of it be varied and a different form substituted.*”

This provision is similar to Order 8, rule 16 of the Supreme Court Rules.

It has been held in several decisions of this court that the said rule precludes it from reviewing its own decision. Once it is delivered it is final for all purposes, except for the limited end of correcting any clerical mistake or some error arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention having regard to S.215 of the 1979 Constitution (now S.235 of the 1999 Constitution) which allows no appeal from the decision of the Supreme Court: see *Chukwuka v. Ezulike* (1986) 2 NSCC (pt.17) 1347. (p.846H)

REPRESENTATION

Mr. Chike Ofodile SAN, with him Emeka Ofodile Esq., J.D. Moze Esq., Ike

Chude Esq. and Miss Nneka Ofodile for the appellant.

Mrs. C.J. Anyamene-Ezugwu, with her Mrs. U.A. Ndu for the petitioner/respondent.

Dr. B.O. Babalakin, with him O. Akoni Esq. and C.I. Oha Esq for the 2nd - 189th respondents.

CASES REFERRED TO

Chukwuka v. Ezulike (1986) 2 NSCC (pt. 17) 1347

Adigun v. The Governor of Osun State (1995) 3 NWLR (pt.385) 513

Adigun v. Attorney-General of Oyo State (No.2) (1987) 2 NWLR (pt.56) 197

Esewe v. N.T. Gbe (1988) 5 N.W.L.R. (pt. 93) 134

Econsult Ltd. V. Pancho Villa Ltd. (1999) 1 N.W.L.R. (pt. 588) 507

King v Powell (1925) 1 KB 641; *Joslowitz v Burstein* (1948) 1 KB 408;

R v Industrial Injuries Commissioner Exparte Amalgamated Engineering union (No.2) (1966) 2 QB 31

R.O. Kofi Mansu (1947) 12 WACA 113

Williams v. Williams (1987) 2 NWLR (PT.54) 66; *A.G.*

Bendel State v. Aideyan (1989) 4 NWLR (pt. 118) 646

Oko v. Ntukidem (1999) 6 NWLR (pt.607) 390

STATUTES & RULES REFERRED TO

Constitution of Nigeria 1999 ss. 68, 312 (2), 36 (1), 246(3), 246(1) (b)
 National Assembly (Basic Constitutional and Transitional Provisions)
 Decree No.5 of 1999 S.81 (1) & (3), Para 52 & 15 (3) (b) of the 5th
 B schedule, S.82 (1)

Court of Appeal Rules O. 3 r. 23, O. 5 r. 3

Court of Appeal Act 1976 S. 16

Supreme Court Rules O. 8 r. 16

C

LEAD JUDGMENT BY UWAIFO JSC

The appellant contested election to the Senate as a candidate of the All Peoples Party (APP) in Enugu West senatorial District in February, 1999. The other candidates were Mr. Ben Collins Ndu, a candidate of
 D the Peoples Democratic Party (PDP) now 1st respondent, and one Chief Mike Ugwu, a candidate of the Alliance for Democracy 9AD). On 20 February, 1999, the appellant was duly returned by the Independent National Electoral Commission (INEC), 3rd respondent, as elected. The 1st
 E respondent then petitioned to the National Assembly Election Tribunal, Enugu Division (the Tribunal), against the election. On 21 May, 1999, the petition was dismissed by the Tribunal. The 1st respondent appealed from that decision, and on 24 June, 1999, the Court of Appeal, Enugu
 F Division, set aside the judgment of the Tribunal and nullified the Senatorial election held in the constituency of Enugu West Senatorial District. It ordered that fresh election be conducted in that constituency without delay by the 2nd and 3rd respondents.

In reaction, the appellant filed an originating Summons on 5 July,
 G 1999 at the Federal High Court, Abuja praying for an order that having been sworn in as a Senator under the 1999 Constitution, his seat could not be made vacant by “*any act or judgment except in accordance with the provisions of section 68 and section 312(2) of the said Constitution.*”
 H The Federal High Court eventually declined jurisdiction to hear the action and dismissed it on 28th October, 1999. that same day, the appellant filed an application at the Court of Appeal, Abuja Division, seeking an order to set aside the judgment of the Court of Appeal, Abuja Division,

seeking an order to set aside the judgment of the Court of Appeal, Enugu Division, given on 24 June, 1999 on the ground that it was a nullity. That application was subsequently transferred to the Enugu Division of the Court of Appeal. The Court of Appeal heard the application and on 30 May, 2000, dismissed it. I think Olagunju JCA, one of the three learned B Justices who heard the application, specifically touched on the point that the application in the circumstances it was brought was incompetent. The learned justice also reasoned and came to the conclusion that the judgment of the Court of Appeal delivered on 24 June, 1999 had no C element of any kind that would render it a nullity.

From that decision of 30 May, 2000, is an appeal by the appellant to this Court in which he seeks the determination of the following issues stated in his brief of argument.

“3.01. Whether the Court of Appeal (in its ruling dated 30th D May, 2000 in motion NO. CA/E/163M/99) was right in the circumstances of this case in holding that service of the notice of Appeal NO.CA/E/91/99 on the chambers of Chief Enechi Onyia SAN pursuant to Order 3 rule 6(2) of the Court of Appeal rules satisfied the express provision of Sec- E tion 81 (2) of Decree 5 of 1999 which expressly precludes the application of the provisions of any other enactment for the purposes of GIVING NOTICE to the respondents, whereas Chief Enechi Onyia SAN told the Court of Appeal (as required pursuant to Order 1 rule 3(5) of the Court F of Appeal Rules): that the Appellant was not given the notice of Appeal contrary to section 36 of the 1999 Constitution; and that the Senior Counsel had no authority to act for the Appellant.

3.02. Whether the Court of Appeal was right in dismissing ap- G plication NO.CA/E/163M/99 in its ruling dated 30th May, 2000, when it was obvious to it; that notice of appeal was NOT given to the 2nd-189th respondents: And that pasting the notice of appeal meant for them at the door of the Ministry of Justice Enugu without any order for substituted service, impeached the competence and jurisdiction of the Court of Ap- H peal to hear appeal NO.CA/E/91/99, and also contrary to section 36 of the 1999 Constitution.

3.03. Whether the Court of Appeal (in its ruling dated 30th May,

2000 in motion NO.CA/E/163M/99) was right in refusing to set aside the proceeding and judgment in Appeal NO.CA/E/91/99 after it found: that even though Chief Enechi Onyia SAN was served with the Notice of Appeal, Neither the Senior Counsel Nor any other person whosoever, communicated the Notice of Appeal to the Appeal to the Appellant; that the Appellant did not take part in the entire proceeding up to the judgment dated 24th June, 1999, contrary to section 36 of the 1999 Constitution and that Chief Enechi Onyia SAN acted without authority.

3.04. Whether the Court of Appeal (in its ruling dated 30th May, 2000, in motion NO.CA/E/163M/99) was right in dismissing the motion of the Appellant when it was obvious to the Court of Appeal that in its previous judgement dated 24th June, 1999, in Appeal NO.CA/E/91/99, it had employed Section 16 of the Court of Appeal Act to grant reliefs not sought by any of the parties, without giving the parties a hearing as provided in Section 36 of the 1999 Constitution in contravention of the said Constitution.

3.05. Whether the Court of Appeal (in its ruling dated 30th May, 2000 in motion NO.CA/E/163M/99) was right in failing to consider the issues formulated in paragraph 3.06 of the Applicant's brief of argument that: the Appellant was not aware of the Appeal NO.CA/E/91/99, until after the judgment; that the Appellant was not heard in accordance with Section 36 of the 1999 Constitution: that the Senior Counsel who purportedly appeared for the Appellant did not have the authority of the Appellant and the Senior Counsel told the Court of Appeal so; and that Sections 64, 68 and 69 had not been satisfied pursuant to Section 312 (2) of the 1999 Constitution.

3.06. Whether the Court of Appeal (in its ruling dated 30th May, 2000 in motion NO.CA/E/163M/99) can reconsider afresh, the paragraphs of the affidavit in support of Chief Enechi Onyia's motion for extension of time, when in Appeal NO.CA/E/91/99 the Court of Appeal had granted the said motion based on the said affidavit, and the Senior Counsel for the 1st Respondent did not object to the affidavit before the motion was granted by the Court of Appeal.

3.07. Whether the Supreme Court ought to set aside the said

ruling of the Court of Appeal dated 30th May, 2000, in motion NO.CA/E/163M/99 and the proceeding and judgement dated 24th June, 1999, in appeal NO.CA/E/91/99 having regard to the findings of fact by the lower court: that the Appellant was not given notice; that Chief Enechi Onyia SAN, had no authority to act; and that the lower court granted a relief not claimed by the parties in appeal NO.CA/E/91/99.” B

Each counsel for the 1st respondent (Mrs C.J. Anyaemene-Ezugwu) and 2nd-189th respondents (Dr. B.O. Babalakin) respectively filed a notice of preliminary objection. The grounds are based on lack of jurisdiction of this Court to hear the appeal. I shall take the grounds from the notice filed on behalf of the 2nd-189th respondents which read: C

“The grounds of the preliminary objection are that:

(i) the Supreme Court lacks the jurisdiction to entertain this appeal and the same is therefore incompetent, being an appeal against a decision of the Court of Appeal in respect of a petition on an election held pursuant to Section 81(3) of the National Assembly (Basic Constitutional and Transitional Provisions) Decree No.5 of 1999, which Decree makes the decision of the Court of Appeal in respect of such matters final; D E

(ii) even though the present grounds of appeal in this present appeal are couched and expressed to be against the decision of the Court of Appeal refusing to set aside its judgment, the purport of the same is that the Supreme Court is still being asked to review the decision of the Court of Appeal, a request which the Supreme Court has no jurisdiction to make by virtue of section 81(3) of Decree No.5 of 1999”. F

I shall attempt to briefly paraphrase together the pith and substance of the submissions ably made by each counsel for the preliminary objectors to the appeal. Section 81(3) of the National Assembly (Basic Constitutional and Transitional Provisions) Decree No.5 of 1999 [Decree No.5 of 1999] makes the decision of the Court of Appeal brought by virtue of section 81(1) thereof final. Once such decision is final, it cannot be subject of an appeal to the Supreme Court. The word “*final*” in this regard means that the journey of the case is concluded, terminated, completed and is without further appeal. The intention of the said Decree was G H

to make the Court of Appeal the court of last resort in matters pertaining to election to the National Assembly. A prayer addressed to the Court of Appeal in such matters to set aside its decision when refused is treated exactly like the decision in the appeal; it is not appealable; it is final.

B It was also forcefully submitted by learned Senior Advocate of Nigeria on behalf of the appellant (Mr. Chike Ofodile SAN) that it must be borne in mind that this appeal is not against the decision of the lower court in Appeal NO.CA/E/91/99 given on 24 June, 1999, but against the ruling of the lower court given on 30 May, 2000 refusing to set aside its judgment in the said Appeal No.CA/E/91/99. Second, that the grounds on C which it was prayed to set aside that judgment were that it was a nullity in that the lower court lacked competence and jurisdiction to entertain the appeal, and that the proceeding thereat violated the rights of the appellant D to a fair hearing guaranteed by section 36(1) of the 1999 Constitution. Learned Senior Advocate identified two issues which would decide the preliminary objection, and these are:

E “(i) *Whether this court has jurisdiction to entertain this appeal which concerns questions of competence and jurisdiction of the lower court and violation of section 36(1) of the 1999 Constitution.*

F “(ii) *Whether section 246(3) of the 1999 Constitution ousts the jurisdiction of this court to entertain an appeal from a decision of the lower court on questions concerning competence and jurisdiction of the lower court, and the breach of section 36(1) of the 1999 Constitution.*”

A lot of argument was canvassed before the lower court as to whether the service on Chief Enechi Onyia SAN of the relevant processes on behalf of the appellant for the proceedings which culminated in G the judgment of 24 June, 1999 was proper service. That is what in essence the issue of incompetence and nullity is founded upon by the appellant. There was also argument as to whether the lower court exceeded its jurisdiction to grant a relief not sought by the parties by resorting to and purporting to act under section 16 of the Court of Appeal Act, H 1976. In the appeal filed from the decision of the Tribunal by the present 1st respondent to the Court of Appeal, he sought the following relief:

“*To set aside the decision of the tribunal below and declare the*

appellant duly elected by a majority of lawful votes cast in the election by subtracting the unmerited votes given to the 1st respondent and adding the merited votes taken away from the appellant, or in the alternative by cancelling the results from Awgu and Aninri Local Government Areas and basing the result on the votes recorded in the remaining three Local Government Areas.” B

The present appellant also cross-appealed and sought the following reliefs:

“The Court of Appeal should set aside that part of the judgment holding that the Petitioner established whether beyond reasonable doubt or on the preponderance of evidence that there were irregularities, mal- C practices, massive reduction of the votes of the petitioner to the votes of the 1st Respondent and uphold the remaining part of the judgment.”

The notice of cross-appeal was signed and filed by Chief Enechi Onyia SAN, as counsel for the cross-appellant therein (now appellant in this court). D

In the present ruling, I do not consider it necessary to comment on the respective reliefs sought before the Court of Appeal other than to say that Order 3, rule 23 of the Court of Appeal Rules gives that Court the liberty to give appropriate reliefs on hearing an ap- E peal and will not therefore be bound by the reliefs sought in the notice of appeal. The rule reads:

“23.(1) The Court shall have power to give any judgment or make any order that ought to have been made, and to make such further F or other order as the case may require including any order as to costs.

(2) The powers contained in paragraph (1) of this rule may be exercised by the Court, notwithstanding that the appellant may have asked that part of a decision may be reversed or varied, and may also be exer- G cised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision.”

This power may be exercised by the Court of Appeal as the justice of the case demands to make orders which the trial court could have H made. It could be in the form of consequential orders, or an order to correct a slip by the trial court. It is usually quite useful for the giving of a relief at the conclusion of an appeal which is appropriate

to the occasion: see *Jadesimi v. Okotie-Eboh* (1986) 1 NWLR (pt.16) 264; *Williams v. Williams* (1987) 2 NWLR (pt.54) 66; *A.G. Bendel State v. Aideyan* 91989) 4 NWLR (pt.118) 646.

The lower court was obliged to rely on the practice and procedure relating to appeals in the Court of Appeal. Paragraph 52 of the 5th Schedule to Decree No.5 of 1999, now repealed, provided that:

“Subject to the provisions of this Decree, an appeal to the Court of Appeal shall be determined in accordance with the practice and procedure relating to appeals in the Court of Appeal regard being had to the need for urgency on electoral matters.”

The Court of Appeal ended its judgment on the appeal with the following words per Galadima JCA:

“Consequently, in view of the provision of S.16 of the Federal Court of Appeal Act, 1976 and paragraph 15(3)(b) of the 5th Schedule to Decree No.5 of 1999, I hereby set aside the judgment of the Tribunal in view of these mass rigging, malpractices and other electoral fraud alleged by both parties and accordingly nullify the Senatorial Elections conducted by the 3rd Respondent on the 20th day of February, 1999 in the Enugu West Senatorial District. It is therefore ordered that fresh senatorial election into the said Enugu West Senatorial District be conducted without delay by the 2nd and 3rd Respondents.”

I do not intend to bother about the reliance on paragraph 15(3)(b) of the 5th Schedule to Decree No.5 of 1999 which was meant to apply to the Tribunal and not the Court of Appeal. The Court of Appeal could however rely on Order 3, rule 23 of the Court of Appeal Rules as I have already, shown to make that final order it made in its judgment of 24 June, 1999 even though nullification of the election was not sought since its jurisdiction to do what the Tribunal would have done is firmly backed by the provisions of section 82(1) of Decree No.5 of 1999 which read:

“Subject to subsection (2) of this section, if the Election Tribunal determines that a candidate who was returned as elected was not validly elected on any ground, the Election Tribunal shall nullify the election.”

In order to be able to exercise the jurisdiction under the said section 82(1)

of Decree No.5 of 1999, the Court of Appeal would have to rely on that aspect of its general powers of practice and procedure conferred on it by section 16 of the Court of Appeal Act which reads:

“The Court of Appeal may... make any order necessary for determining the real question in controversy in the appeal... and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as a Court of first instance...”

Therefore in the appeal which it had to decide, the Court of Appeal would, as and when necessary, take the place of the Tribunal acting under the said S.16 of the Court of Appeal Act to make the order which the Tribunal would have been entitled to make by virtue of section 82(1) of Decree No.5 of 1999: see *Onwuka v. Omogui* (1992) 3 NWLR (pt.230) 393; *Oko v. Ntukidem* (1993) 2 NWLR (Pt.274) 124; *Katto v. Central Bank of Nigeria* (1999) 6 NWLR (Pt. 607) 390.

It has been canvassed at length what the status of Chief Enechi Onyia SAN was in the appeal in the court below. Appellant has sought to disown Chief Onyia as his counsel thereby pressing the argument (1) that he was not in law served with the relevant processes for the appeal (which were served on Chief Onyia); (2) that he was not represented at the hearing of the appeal; and (3) that consequently he was not given a hearing at the appeal. Chief Onyia appeared to have been willing, when later there was an application by the appellant to get the Court of Appeal to set aside its decision in the election appeal on the ground that it was a nullity, to regard himself as a busybody who had no instructions from the appellant to represent him. This led the lower court in its judgment of 30 May, 2000 to make scathing remarks on him. The respondents have argued before us that Chief Onyia was served with the notice of appeal as the leading counsel for the appellant during the hearing of the petition at the Tribunal. He thereafter filed and moved an application seeking an extension of time within which to file a cross-appeal; he filed a respondent's brief of argument; and a cross-appellant's brief of argument; he appeared for the respondent (now appellant) at the hearing of the appeal and cross-appeal; and appeared in court the day the appeal and cross-appeal were

decided.

I have gone into some of the above matters not in the capacity of hearing the appeal brought by the appellant but in the consideration of the preliminary objection to show that the Court of Appeal throughout acted within its mandate of deciding an appeal arising from an election petition under Decree No.5 of 1999. Whether it did so perfectly rightly or was wrong in the decision it arrived at cannot be taken on appeal to this court for consideration. The reason for this can be founded on the provisions of section 81(1) and (3) of Decree No.5 of 1999. They read:

“81.(1) Notwithstanding the provisions of the Constitutional Court Decree 1998, an appeal arising in respect of an election petition under this Decree shall lie to the Court of Appeal.

(3) The decision of the Court of Appeal, on an appeal brought under subsection (1) of this section shall be final.” [Italics mine for emphasis]

It ought to be carefully observed that the finality given to the decisions of the Court of Appeal under the said Decree is in respect only of appeals arising in respect of National Assembly election petitions. It is that provision that confers the Court of Appeal with *substantive jurisdiction* to hear such appeals. I conceive that if a matter got to the Court of Appeal purporting to be an election appeal but in substance it is not at all in respect of the National Assembly election or other relevant election, reliance cannot be placed on s. 81(3) above or on other Constitutional provision to give a decision in such an appeal finality. This court would be entitled to intervene to declare the proceeding a nullity on the ground that it was not an appeal over which the Court of Appeal was given substantive jurisdiction. But where the appeal is actually in respect of National Assembly election or other relevant election, whatever errors of a procedural nature, or of a procedural vice as to jurisdiction or competency, cannot be corrected by this court. They can only be corrected by the Court of Appeal itself or else they will remain uncorrected unresolved as this court cannot intervene since it has no appellate or supervisory jurisdiction over the Court

of Appeal in such circumstances. **This court will not permit or encourage any subterfuge under which it may assume jurisdiction to hear an appeal in respect of which the Constitution has in clear and unambiguous language made the Court of Appeal the final court. It follows that an appeal in respect of a decision of the Tribunal in an election petition when decided by the Court of Appeal cannot be taken on appeal to the Supreme Court but is final for all purposes. If I may add, the provisions of S.81(3) of Decree No. 5 of 1999 were included in S.246(3) of the 1999 Constitution just when the said Decree was repealed.** Section 246(3) of the Constitution provides: “*The decisions of the Court of Appeal in respect of appeals arising from election petitions shall be final.*” Section 246(1)(b) specifies the elections concerned to be National Assembly, Governorship and State Houses of Assembly elections. **It must be emphasised that such finality applies also to every interlocutory decision or any decision taken in respect of a matter or an issue concerning or arising from the decision reached in the appeal. No appeal shall lie from it to any other court even if it is patently wrong.**

I shall refer at this stage to a decision of this court, *Esewe v. Gber* (1988) 5 NWLR (pt.93) 134. The facts are instructive. The applicant in that case filed an election petition in the High Court against the 1st respondent. He later brought an application to amend the petition and this was granted by the trial judge. The 1st respondent whose counsel had opposed the application filed a motion before the trial judge seeking leave to appeal against the ruling granting leave to amend. The application was refused by the trial judge on the ground that there was no right of appeal against interlocutory decisions made in an election petition filed under Decree no.37 of 1987. On a subsequent application to the Court of Appeal, the application was granted. The applicant therefore applied to the Supreme Court for leave to appeal against that decision of the Court of Appeal. At the Supreme Court, a preliminary objection was raised on the ground that the Supreme Court had no jurisdiction to entertain any appeal in the matter because section 36(2) of the said Decree No.37 of 1987 provided that “*The decision of the Court of Appeal shall be final.*”

This court in unanimous decision refusing the application held that the said section 36(2) of the Local Government Elections Decree 1987 made the decision of the Court of Appeal final on any question relating to the Local Government elections held under the Decree and did not give the Supreme Court appellate or supervisory jurisdiction.

In *Ecoconsult Ltd. v. Pancho Villa Ltd* (1999) 1 NWLR (Pt. 588) 507 a fairly similar situation arose. Section 1(a) of the Constitution (Amendment) Decree No.3 of 1998 which amended section 213(3) of the 1979 Constitution to the effect that notwithstanding the provisions of subsection (2) of this section, no appeal shall lie to the Supreme Court from any decision of the Court of Appeal in respect of an interlocutory decision, came into focus and was relied on. The Court of Appeal had made certain interlocutory orders suspending an interim injunction which had been granted by the High Court and also ordered a stay of the committal proceedings which had been begun against an alleged breach of that interim injunction. An appeal was brought against those interlocutory orders of the Court of Appeal to this court. A preliminary objection was taken as to the competency of the appeal. In reply to the preliminary objection, counsel argued that those orders amounted to a nullity *ab initio* having been made without hearing the parties and without either party asking for the same; and that being void they were no decisions since, as he argued, Decree No.3 of 1998 would only apply where a matter had been heard and determined without a violation of fundamental requirement of fair hearing. This court was not persuaded by those arguments but held that by virtue of Decree No.3 of 1998, the Supreme Court had no jurisdiction to entertain the appeal. At page 518, Ogundare JSC who read the leading judgment observed:

“The words of section 213(3) of the Constitution (as amended) are clear and unambiguous. To give an appeal in this case would defeat the whole object and purview of the Constitution which is to end interlocutory matters in the Court of Appeal.”

In the present case, in addition to S.81(3) of Decree No.5 of 1999 which made the decisions of the Court of Appeal in the relevant election matters final, Order 5, rule 3 of the Court of Appeal Rules

provides:

“3. The Court shall not review any judgment once given and delivered by it save to correct any clerical mistake or some error arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention. A judgment or order shall not be varied when it correctly represents what the Court decided nor shall be operative and substantive part of it be varied and a different form substituted.”

This provision is similar to Order 8, rule 16 of the Supreme Court Rules. It has been held in several decisions of this court that the said rule precludes it from reviewing its own decision. Once it is delivered it is final for all purposes, except for the limited end of correcting any clerical mistake or some error arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention having regard to S.215 of the 1979 Constitution (now S.235 of the 1999 Constitution) which allows no appeal from the decision of the Supreme Court: see *Chukwuka v. Ezulike* (1986) 2 NSCC (pt.17) 1347; *Adigun v. Attorney-General of Oyo State* (NO.2) (1987) 2 NWLR (Pt.56) 197; *Adigun v. The Governor of Osun State* (1995)3 NWLR (Pt.385) 513.

It will be recalled that the appellant in this case had applied to the lower court to set aside its earlier decision on the election appeal given on 24 June, 1999. The lower court went to great length to consider the complaints levelled against that decision. In the end it came to the conclusion that it found no substance in the complaints sufficient to declare its earlier decision a nullity and to set it aside. Even assuming that those complaints were not satisfactorily resolved, that decision which was given on 30 May, 2000 marked the final resolution of the election appeal brought before it or the complaints arising from the election appeal. It is impossible to separate that decision of 24 June, 1999 from that of 30 May, 2000. The latter simply confirmed that there was nothing improper in the former which decided the appeal from the Tribunal's judgment. Both were in the cause and course of laying the election appeal to rest. Howsoever both may have proceeded to achieve that result, it presaged the

end of the present appellant's right of appeal. **This court is without jurisdiction to entertain an appeal from the said decision of 30 May, 2000. I therefore hold that there is merit in the preliminary objection challenging the competency of the appeal lodged in respect thereof to this court. Accordingly I uphold the objection and strike out the appeal as being incompetent.** I award N10,000.00 costs to the 1st respondent and N10,000.00 cost to the 2nd – 189th respondents.

C **BELGORE JSC**

I also find merit in the objection and I uphold it. The appeal has no merit and I strike it out for the reasons set out by Uwaifo, J.S.C. N10, 000.00 costs to the respondents.

D

OGWUEGBU JSC

I had the advantage of reading in draft the judgment just delivered by my learned brother Uwaifo, JSC. I agree with his reasoning and conclusion, I, too, would uphold the preliminary objection and strike out the appeal.

Before the hearing of this appeal learned counsel for the petitioner/respondent and that for 2nd to 189th defendants/respondent filed notices of intention to raise preliminary objection to the hearing of this appeal.

The grounds of the objection as set out in the notice of counsel for the 2nd to 189th respondents are that:

G “(i) *the Supreme Court lacks the jurisdiction to entertain this appeal and the same is therefore incompetent, being an appeal against a decision of the Court of Appeal in respect of a petition on an election held pursuant to section 81(3) of the National Assembly (Basic Constitutional And Transitional Provisions) Decree No.5 of 1999, which Decree makes the decision of the Court of Appeal in respect of such matters final;*

(ii) *even though the present grounds of appeal in this present*

appeal are couched and expressed to be against the decision of the Court of Appeal requesting to set aside its judgment, the purport of the same is that the Supreme Court is still being asked to review the decision of the Court of Appeal, a request which the Supreme Court has no jurisdiction to make by virtue of section 81 (3) of Decree No.5 of 1999." B

The facts giving rise to this appeal briefly stated are that after the election to the Enugu West Senatorial District held on 20-2-99, the appellant was returned as the duly elected Senator for the Enugu West Senatorial District. The 1st respondent herein was dissatisfied with the result and filed a petition at the National Assembly Election Tribunal sitting at Awka, Anambra State. The petition was dismissed and the 1st respondent was not satisfied with the decision and appealed to the court of Appeal, Enugu Division in appeal No.CA/E/91/99. On 24-6-99, the court below allowed the appeal, nullified the election and ordered that a fresh election be conducted by the 2nd and 3rd respondents in the said district. D

The appellant filed an Originating Summons at the Federal High Court, Abuja in suit No. FHC/ABJ/CS/117/99 praying the court for an order *that the plaintiff (appellant herein) having taken the oath of office as prescribed by the Constitution of the Federal Republic of Nigeria 1999 as a Senator for Enugu West Senatorial District is a subsisting Senator and cannot be vacated by any act or judgment except in accordance with the provisions of section 68 and section 312(2) of the said Constitution."* F

The suit was in the end dismissed for want of jurisdiction. The appellant applied to the Court of Appeal, Abuja Division praying the court to set aside the judgment of the Court of Appeal, Enugu Division delivered on 24-6-99 nullifying his election. The matter was transferred to the Enugu Judicial Division of the Court of Appeal on the orders of the Honourable President of the Court of Appeal. At the Court of Appeal, Enugu Division various issues were raised in the application of the appellant ranging from non-service improper service of court process and lack of authority of counsel who purported to represent him in the proceedings leading to the judgment of the Court of Appeal, Enugu Division delivered on 24-6-99. The sum total of the appellant's application before the Court of Appeal, Enugu Division was that he was not aware of the G H

appeal which resulted in the judgment of that court dated 24-6-99 and that counsel who represented him in the said appeal did not have his instructions. The court below heard argument in respect of the application and in its ruling dated 30-5-2000 dismissed the same in its entirety and declared that it had no jurisdiction to review its earlier judgment. The appellant has appealed to this court and the incompetence of the appeal is raised by way of preliminary objection by the respondents to the appeal.

It has been urged on us that the decision of the court below dated 30-5-2000 cannot be the subject of an appeal to this court because the decision of that court is final having regard to the provisions of section 81(3) of Decree No.5 of 1999. Section 81 of Decree No.5 of 1999 provides as follows:

“81(1) Notwithstanding the provisions of the Constitutional Court Decree, 1999, an appeal arising in respect of an election Petition under this Decree shall lie to the Court of Appeal.

(2)...

(3) The decision of the Court of Appeal on an appeal brought under subsection (1) of this section shall be final.”

In the interpretation of the above provisions, the first issue to be considered is the substance and not the form of the proceeding leading to this appeal. Is the substance in respect of an election petition? If the answer is in the affirmative, any complaint against the decision of the Court of Appeal arising in respect of the said election petition cannot confer on the appellant the right of appeal to this court by virtue of section 81(3) of Decree No.5 of 1999. That provision is clear and unambiguous. It means what it says. To confer on the appellant the right of appeal in this case would defeat the whole object and purport of Decree No.5 of 1999. Section 81(3) of the Decree has made the decision of the Court of Appeal on any question relating to Senatorial Election under the Decree, final and does not give this court appellate or supervisory jurisdiction. See Esewe v. N.T. Gbe (1988) 5 NWLR (Pt.93) 134 and Econsult Ltd. v. Pancho Villa Ltd. (1999) 1 NWLR (Pt.588) 507 where this court considered the provisions section 213 of the Constitution of the Federal Republic of Nigeria, 1979 (as amended) and section 36(2) of the Local Government Elec-

tions Decree No. 37 of 1987 which are similar to section 81(3) of Decree No.5 of 1999.

This appeal is a clear invitation to this court to breach the law. It is a calculated attempt by the appellant to circumvent the clear provisions of the aforesaid section of Decree No.5 of 1999 and this court will not assist the appellant in his adventure. B

It is true that section 81(3) of Decree No.5 of 1999 was not in operation at the time the appeal was heard having been repealed by the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No.63 of 1999. The finality of the decision of the Court of Appeal in such matters was re-enacted in section 246 of Constitution of the Federal Republic of Nigeria, 1999. C

For these and the fuller reasons contained in the ruling of my learned brother Uwaifo, JSC with which I am in entire agreement, there is merit in the preliminary objection and it is upheld by me. The appeal is therefore incompetent and struck out I abide by the orders as to costs contained in the said judgment of my learned brother Uwaifo JSC. D

E

ONU JSC

I was opported to read before now the leading Ruling of my learned brother Uwaifo, JSC just delivered. I entirely agree with his reasoning and conclusion that the preliminary objection succeeds and it is upheld by me. F

Accordingly, I declare the appeal as incompetent and is struck out by me with costs assessed at N10,000.00 to the 1st respondent and N10,000.00 to the 2nd – 189th respondents. G

KALGO JSC

I have read in advance the ruling just delivered by my learned brother Uwaifo JSC in the preliminary objection raised by the learned counsel for the respondents in this appeal and I am in agreement with the reasoning and conclusions reached therein. H

I have not doubt in my mind that Appeal No.CA/E/91/99 decided by the Court of Appeal Enugu on 30/5/99 against which the present appeal was brought to this court, is one “*arising out of an election petition*” under Decree No. 5 of 1999 i.e. the National Assembly Basic Constitutional and Transitional Provisions) Decree, 1999. See for example King v Powell (1925) 1 KB 641; Joslowitz v Burstein (1948) 1 KB 408; R. v. Industrial Injuries Commissioner Exparte Amalgamated Engineering Union (No. 2) (1966) 2 QB 31. And by virtue of the provisions of section 81 (3) of the said Decree, the decision of the Court of Appeal in respect of an appeal brought before it pursuant to S.81(1) of the same Decree, as in this case, is final. The words of section 81 (3) of the said Decree are clear and unambiguous and cannot in any respectful view, be defeated by the allegation of nullity of the proceedings of the Court of Appeal as submitted by the learned counsel for the appellant. The decision of the Court of Appeal in Appeal No. CA/E/91/99 is conclusive and terminal for all intents and purposes and cannot be the subject of an appeal to this or any other court in Nigeria. The intention of the law makers in S.81(3) of the said Decree is clearly to make the decision of the court of Appeal final in all appeals brought to it from the decisions of the National Assembly Election Tribunals and this is the case here. That being the case, there cannot be a valid appeal by the appellant in this case to this court. I therefore sustain and uphold the preliminary objection by the respondents’ counsel in the circumstances of the case.

Finally, I find that the appeal filed by the appellant in this court in this case, is incompetent and is hereby struck out. I abide by the order of costs made by Uwaiwo JSC in the leading ruling.