

SUPREME COURT OF NIGERIA
FRIDAY 5TH APRIL, 2002. SC. 53/2001
CORAM:- U. MOHAMMED, A. I. KATSINA-ALU,
U. A. KALGO, S. O. UWAIFO, E. O. AYOOLA, JJSC

NNAH GEORGE ONYEABUCHI APPELLANT
AND
1. INDEPENDENT NATIONAL
ELECTORAL COMMISSION ABUJA
2. ALHAJI IBRAHIM SALIM
(Permanent Secretary/Clerk of
National Assembly)
3. ALHAJI ADAMU BAWA MU'AZU RESPONDENTS
4. MR. MALA ALAMAI (Resident
Electoral Commissioner Rivers State)
5. MR. OLUDI O. EDWIN

RES JUDICATA - Judgments - Binding nature - Once judgment is final - Whatever it decided as between parties - Is conclusive and binding (H1)

RES JUDICATA - Plea of - Condition precedent - For there to be valid plea - Judgment being relied upon - Must be a final one (H2)

JUDGMENTS - Finality of - Test - Res judicata - Fadiora v. Gbadebo - If court that gave a decision cannot vary or set aside same - Then such decision is considered as final one (H3)

ESTOPPEL - Res judicata - Principle - Ojo v. Abadie - Once it is clear that the same question is substantially in issue in two suits - Estoppel subsists between parties (H4)

ESTOPPEL - Res judicata - Applicability - Where a question is determined to finality - Even if such did not determine rights and liabilities in a suit - Doctrine of estoppel will still be applicable (H5)

ESTOPPEL - Res judicata - Issue estoppel - Applicability - Since issue of jurisdiction has been finally determined - Appellant was rightly

estopped from raising the same issue (H6)

COURTS - Powers - Stay of proceedings - Discretion of court to stay proceedings - Is derived from inherent jurisdiction of court - And such must be sparingly exercised (H7)

FACTS

Appellant and 5th respondent were two of three candidates in a bye-election in wards 6 and 7B of Obio/Akpor Federal Constituency for the Federal House of Representatives. At the conclusion of the election, the Returning Officer issued a Declaration of Result of Election stating inter alia that appellant is returned elected. There was another declaration of result of election from the same Returning Officer declaring 5th respondent as scoring the majority of votes cast and being returned elected. 3rd respondent thereafter informed 2nd respondent that the properly returned candidate was 5th respondent and not appellant.

Being unhappy, appellant commenced this action at Federal High Court, Abuja seeking declarations and injunctions in order to restrain the recognition of 5th respondent as duly elected candidate. 5th respondent raised preliminary objection to the competence of the suit on the grounds amongst others that the matter was *res judicata* and an abuse of court process. The trial judge Auta J. held that the matter was *res judicata* and an abuse of process. Aggrieved, appellant brought an appeal to the Court of Appeal, Abuja division. The court upheld the decision of the trial court and in the event dismissed the appeal. Aggrieved further, appellant has therefore appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the court below was right in holding that the trial court lacked jurisdiction to entertain the suit.

2. Whether the claim was caught by the doctrine of estoppel per rem judicatam.

3. Whether the court below having found that the suit was caught by the doctrine of res judicata and that the suit was an abuse of process rightly dismissed the originating summons.”

HELD (Unanimously dismissing the appeal per **AYOOLA JSC**)

Judgments - Binding nature

1. It needs to be stated that the correctness, on the merits of a judgment on which a plea of res judicata is founded is not in issue in the case in which the judgment is produced as basis either for a plea of res judicata or one of abuse of process. Once it is final, whatever it decided as between the parties thereto is conclusive and binding. The issues with which this appeal is concerned are, therefore, the last two of the three mentioned above. (p. 1033 G)

RES JUDICATA - Plea of - Condition precedent

2. It is trite law (or principle) that one of the pre-conditions for a valid plea of res judicata is that the judgment on which the plea is raised must be final. (p. 1035 H)

JUDGMENTS - Finality of - Test

3. In my view, the test whether an issue has been finally decided for the purpose of establishing a valid plea of issue res judicata does not necessarily always need to be tied to the question whether or not there has been an adjudication of the substantive suit on its merits. Since the question whether or not a court can reopen in a later case, or even at a later stage in the same case, a question it has decided on a previous occasion, arises in a variety of circumstances, the test most adequate for all occasions, is whether the court which gave the decision can vary, reopen or set aside the decision. If it cannot, the decision is in that context 'final'. Lord Diplock in *DSV Silo – und Verwaltungsgesellschaft GmbH v. Sennar (Owners), The Sennar (No. 2)* (1985) 2 ALL E.R 104 held that a decision is final if it “is one that cannot be varied, reopened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction.” There was a passage from *Bower & Turner on the Doctrine of Res Judicata* (1969 Edn) Art. 164 p. 134

cited with approval by Idigbe J.S.C. in *Fadiora v. Gbadebo* (1978) 11 NSCC 121, 126 – 7 as follows: “A judicial decision is deemed to be final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent decision, review or modification by the tribunal which pronounced it ...”. (p. 1036 C)

ESTOPPEL - Res judicata - Principle

4. The guiding principle, I think, is contained in a statement in the decision of the West African Court of Appeal in *Ojo v. Abadie* 15 WACA, 55 per Coussey, J.A., as follows:

“...when once it is made clear that the self-same question is substantially in issue in two suits, the precise form in which either suit is brought, or the fact that the plaintiff in the one case was the defendant in the other is immaterial, the estoppel subsists between the parties.” (p. 1037 B)

Res judicata - Applicability

5. Taking a wider view of the word “issues” in this context, as I do, I include not only issues touching on the merits of the suit but also issues raised concerning the suit itself, such as, for instance, the issue of the jurisdiction or competence of the court to entertain the suit, or that of the standing of a party to institute the suit. If such a question is raised concerning a suit and is determined to finality, in the sense that the court which gave the decision cannot vary, reopen or set it aside, notwithstanding that it is a threshold issue which may not determine question of rights and liabilities raised in the suit, there is no reason why the wider doctrine of estoppel per rem judicatam should not apply so as to create, as between the same parties and in respect of the same question, an issue estoppel.

(p. 1037 D)

Issue estoppel - Applicability

6. There is, therefore, no doubt that in this case the appellant has tried to litigate the question of the election of the 5th ap-

pellant which he had tried to litigate in suit 101/99 and which the Federal High Court had ruled in suit 101/99 it has no jurisdiction to entertain. The issue of the competence of the Federal High Court to determine such question was, thus, as between the parties finally and conclusively decided by the ruling given in suit 101/99 on 21st July, 1999. The appellant is rightly estopped from raising the same issue in the present suit. To permit the self-same issue to be raised would have led to Auta, J., or a judge of co-ordinate jurisdiction, re-opening the question of the jurisdiction of the Federal High Court all over again. As the case of Ojo v. Abadie (supra) shows what is important for the doctrine of issue estoppel to operate is that “the self-same question is substantially in issue in the two suits.” In Alao v. Akano (1988) 1 NSCC 329, Craig, JSC said at p. 338. “In 1972 when the issue arose between the parties it was held that under the 1963 Constitution the court has no jurisdiction to hear the matter; in my judgment that same ruling will apply to the same issue which was re-opened in 1981. It was for this reason that the Court of Appeal had ruled that the case was res judicata and I agree with that decision.” In my judgment, and in the same vein, the decision by Auta, J., in 101/99 that he had no jurisdiction would apply also to the present suit without the need to reopen the question of jurisdiction once again. (p. 1038 B)

COURTS - Powers - Stay of proceedings

7. The power of the court to stay or dismiss proceedings which are an abuse of its process derives from the inherent jurisdiction of the court. Although the jurisdiction is often, and should be, sparingly exercised and in only exceptional cases, it is a jurisdiction which exists. The exercise of the power is discretionary. In this case the court below approved of the exercise of the trial judge’s discretion to dismiss the suit in these words: “Considering the facts and the circumstances of this case, where the appellant earlier sued the same parties before the lower court seeking the same reliefs as in the present case whereby the court struck out the case for want of jurisdiction and the appellant still went back to the same court in

a different disguise seeking for the same reliefs, I am of the view that the court was justified, having held that the case was an abuse of court process to dismiss the case to bring an end to litigation.” (p. 1040 A)

^B NOTABLE POINT INTEREST

AYOOLA JSC

1. Failure of plea of res judicata does not necessarily lead to failure of plea of abuse of process

- ^C Where the twin pleas of res judicata and abuse of process are raised in a case, failure of the former does not necessarily lead to failure of the latter. As noted by the learned authors of Phipson on Evidence (15th edition) para 38 – 03, “*it is common to find cases being argued, and almost as often decided, on the basis that if one doctrine*”
- ^D *does not apply then another certainly should.*” It follows that even if the appellant had succeeded on the grounds on which the finding of estoppel had been challenged, the appeal would still have been dismissed as there was no challenge to the finding that the suit was an abuse of process. (p. 1039 B)

REPRESENTATION

Z. Adengo Esq. for the appellant

Ibrahim K. Bawa Esq. for the 1st, 3rd & 4th respondents

- ^F Ikechukwu Ezechukwu Esq. and Obi Nwakor Esq. for the 2nd respondent

Professor Taiwo Osipitan with Mrs. J. O. Adesina and A. M. Kayode Esq., for the 5th respondent

^G CASES REFERRED TO

Arubo v. Aiyeleru (1993) 24 NSCC (Pt. 1) 255

Fadiora v. Gbadebo (1978) 11 NSCC 121

Alao v. Akano (1988) 1 NSCC 329 p. 338

- ^H Okafor v. A-G Anambra State (1991) 6 NWLR (Pt. 200) 659
- Okorodudu v. Okoromadu (1977) 11 NSCC 105
- Wills v. Earl of Beauchamp (1886) 11 59

BOOK REFERRED TO

Phipson on Evidence (15th Edition) para 38-03

LEAD JUDGMENT BY AYoola JSC

This is an appeal from the decision of the Court of appeal (Mudapher, Munkata-Commassie and Bulkachuwa, JJ.C.A.) made on 12th February, 2001 dismissing the appellant's appeal from the decision of the Federal High Court (Auta, J.) whereby a case initiated by the appellant by an originating summons was dismissed on a preliminary objection raised by counsel on behalf of Mr. Oludi Edwin, the 6th defendant, who is now the 5th respondent in this appeal.

In the Federal High Court the appellant claimed as follows:

"(a) A declaration that the letter dated 3rd day of June, 1999 Ref. No. INEC/LEG/L.3/RV/14/197 and purportedly made by the 4th Defendant is invalid, illegal, unconstitutional and of no legal effect.

(b) A declaration that the 1st – 5th Defendants not being a court of law or tribunal established by law lack the competence to entertain and determine complaints by the 6th Defendant challenging the declaration and return of the plaintiff by the 5th Defendant as the elected member Obio/Akpor Federal Constituency, House of Representatives.

(c) A perpetual injunction restraining the Defendants either by themselves or by their servants, agents or privies from recognizing, parading, admitting or accepting the 6th Defendant as the elected member for Obio/Akpor Federal Constituency House of Representatives or otherwise howsoever allowing or permitting the 6th Defendant from attending or participating in any of the proceedings/sessions or enjoying any benefits as the elected member for Obio/Akpor Federal Constituency, House of Representatives.

(d) A perpetual injunction restraining the 6th Defendant from parading or representing himself to the 1st – 5th Defendants or exercising any function as the elected member for Obio/Akpor Federal Constituency, House of Representatives."

The 1st and 2nd defendants mentioned in the claim are respectively the 1st and 2nd respondents in this appeal while the 4th and 5th are respectively the 3rd and 4th respondents.

The appellant and the 5th respondent were two of three can-

didates in a bye-election in Wards 6 and 7B of Obio/Akpor Federal Constituency for the House of Representatives. At the conclusion of the bye-election on 22nd May, 1999 the Returning Officer, one Andrew Erofarokuma, issued a Declaration of Result of Election (FORM EC. BEI) stating inter alia that the appellant “*having complied with requirements of the law and scored the majority of votes, is hereby returned elected.*” It so happened that in respect of the same bye-election there was another Declaration of Result of Election issued by the same Returning Officer and bearing the same date as the one held by the appellant, declaring that the 5th respondent scored the majority of votes and was returned elected. There were thus two apparently contradictory declarations and returns.

In a letter dated 3rd June 1999 the 3rd respondent who was the Secretary of the 1st respondent, the Independent National Electoral Commission, wrote to the 2nd respondent, Permanent Secretary/Clerk of the National Assembly, a letter as follows:

“RE: DECLARATION OF RESULT OF BYE-ELECTION INTO THE NATIONAL ASSEMBLY (HOUSE OF REPRESENTATIVES) FOR THE OBIO/AKPOR FEDERAL CONSTITUENCY

May I have the honour to notify you of the result of the bye-election held for Obio/Akpor Federal Constituency in Rivers State.

Our Resident Electoral Commissioner had earlier submitted the name of Nnah G. N. as the member elected for the said Federal Constituency.

An appeal to the Commission’s headquarters on the declaration of result was considered and the election, and return of Mr. Oludi E. O. of the P.D.P. is hereby restored.

You are to act accordingly, please.

ALHAJI ADAMUBAWA MU’AZU
SECRETARY”

The appellant in respect of that letter commenced the proceedings that led to this appeal claiming the relief earlier set out and seeking a determination of the following questions:

(i) *WHETHER the 1st – 4th Defendants are competent under the Independent National Electoral Commission (Establishment etc) Decree No. 17 of 1998 as amended and the constitution of the Federal Republic of Nigeria 1999 to set aside and /or nullify the Return/ Declaration of the Plaintiff by the 5th Defendant as the elected mem-*

ber for Obio/Akpor Federal Constituency, House of Representatives following appeals/complaints lodged by the 6th Defendant or otherwise howsoever replace the plaintiff with the 6th Defendant, as the elected member for the aforesaid Federal Constituency House of Representatives without recourse to a court of law or tribunal established by law. B

(ii) *WHETHER* the letter dated 3rd day of June, 1999 Ref. No. INEC/LEG/L.3/RV/14/197 and purportedly signed by the 4th Defendant and by which the 1st – 4th Defendants purported to replace the plaintiff with the 6th Defendant as the elected member for Obio/Akpor Federal Constituency, House of Representatives is valid, and effective in law by virtue of the provisions of the Independent National Electoral Commission (Establishment etc) Decree No. 17 of 1998 and the constitution of the Federal Republic of Nigeria 1999.” C

In an affidavit sworn by a Principal Legal Assistant in the Legal Department of the 1st respondent, one Jerry Akaozua, on 29th July, 1999 the facts were deposed to in paragraphs 6 and 7 thereof as follows: D

“6 That at the said election, the Plaintiff/Applicant was declared and returned but that declaration was nullified by the Court of Appeal which ordered bye-election in two wards. E

7. I know as a fact that the bye-election ordered by the court was held on the 22nd May, 1999 at which election, Mr. Oludi E. O was declared winner by the Returning Officer having polled a total of 67,497 inclusive of the valid part of the Result of the election of 20/2/99 and was duly issued, Exhibits ‘A’ and ‘B’.” F

A preliminary objection was raised by counsel on behalf of the 5th respondent to the competence of the suit on the grounds, among others, (i) that the matter was *res judicata*; (ii) that by virtue of section 285 of the 1999 Constitution and sections 75 and 76 of the National Assembly (Basic Constitutional and Transitional) Provisions Decree, 1999 No. 5 only the “National Assembly Election Tribunal shall have exclusive and original jurisdiction to hear and determine a question or petition or anything concerning the National Assembly Election, term of office, and whether any person has been validly elected or otherwise.” G

(iii) that it was an abuse of process. Auta, J., upheld the objection and dismissed the originating summons. In holding that the H

matter was res judicata and an abuse of process, Auta, J., said.

“A look at the originating summons and the reliefs sought by the plaintiff, it is clearly with regard to INEC letter which is dated 3/6/99, with ref no. INEC/LEG/L.3/RV/14/197. It is against the action of INEC and what the plaintiff sought to do in this case is to couch his claim differently, but the subject matter remains the same. The effect of the court declaring the action of INEC illegal or unconstitutional will be tantamount to declaring the plaintiff, as the winner of that election or declaring him the right representative for that constitution. This court has already declared in Exhibit ‘K’ that it has no jurisdiction to do so. The right thing for the plaintiff’s counsel to do if he is not satisfied with the ruling of this court delivered on the 21/7/99 is to appeal to the Court of Appeal. This will encourage the growth of the law and we will all benefit from wealth of wisdom of the Court of Appeal. The filing of this Originating Summons therefore is an abuse of Court process. It is not just an ordinary case as submitted by the plaintiff’s counsel. It is an election case and this court cannot give any decision, the effect of which will be tantamount, to declaring that one of the parties is the proper candidate to be in the house of representative. I therefore hold again, that this Court has already ruled on the subject matter contained in the originating summons and therefore this court has no jurisdiction to consider it again. The claim of this plaintiff no matter how he couched it revolves, around election matter. The matter has already been decided upon by this Court. The preliminary objection is therefore upheld. The Originating Summons is dismissed.” (Emphasis Supplied)

Put in a nutshell, the purport and substance of the decision of Auta, J., was that as he had in a former suit declared that he had no jurisdiction over the subject matter of this present suit, it was an abuse of process of the court for the appellant to institute the present suit on the same subject-matter since his decision concerning the former suit was conclusive and binding on the parties so as to stop them from re-litigating that same issue.

In the appeal brought by the appellant to the Court of Appeal from that decision three issues were raised as follows:

“1. Whether the learned trial Judge was right when he held that he lacked jurisdiction to entertain the Appellant’s claims as endorsed in the originating summons. (Grounds 1,3,4 and 6 of the

ground of appeal)

2. *Whether the learned trial judge was right when he held that the Ruling delivered in suit No. FHC/ ABJ/CS/101/99 striking out that suit for want of jurisdiction creates estoppel per rem judicatam between the parties in the present suit commenced by originating summons. (Grounds 2 of the grounds of appeal)* B

3. *Whether the dismissal of the Appellant's suit by the learned trial judge on grounds of lack of jurisdiction and abuse of court process was proper in law. (grounds 5 and 7 of the grounds of appeal)."*

The Court of appeal held that the Federal High Court was right to have held that it lacked jurisdiction to determine the matter; that as the subject matter in the former suit is the same as in the present one, both between the same parties, the Federal High Court was right to hold that the case was caught by the principles of estoppel per rem judicatam; and that the Federal High Court having held that the suit was an abuse of court process, rightly dismissed the originating summons. In the event the court below dismissed the appeal. C

This is a further appeal from the decision of the Court of Appeal. Three issues were formulated by the appellant. Succinctly put, they are as follows: E

"1. *Whether the court below was right in holding that the trial court lacked jurisdiction to entertain the suit.*

2. *Whether the claim was caught by the doctrine of estoppel per rem judicatam.*

3. *Whether the court below having found that the suit was caught by the doctrine of res judicata and that the suit was an abuse of process rightly dismissed the originating summons."* F

A careful reading of the ruling of the trial judge shows that the respondents' objection was upheld on the grounds only that the matter was res judicata and was in abuse of process. It was thus unnecessary for the Court of Appeal to have gone over the question of jurisdiction all over again as if the ruling, Exhibit K, which was the basis of the plea of res judicata was on appeal before it. ***It needs to be stated that the correctness, on the merits, of a judgment on which a plea of res judicata is founded is not in issue in the case in which the judgment is produced as basis either for a plea of res judicata or one of abuse of process. Once it is final, whatever it decided as between the parties thereto is*** G
H

conclusive and binding. The issues with which this appeal is concerned are, therefore, the last two of the three mentioned above.

In suit FHC/ABJ/CS/101/99 (“suit 101/99”) between the same parties the present appellant claimed in the Federal High Court as follows:

“1. That the Plaintiff is the elected member of House of Representatives by virtue of the Elections held on 20/2/99 and 22/5/99 respectively and original Certificate of Returns of House of Representatives Election Result.

2. That the 1st to 5th Defendants be restrained from substituting, returning and giving recognition to the 6th Defendant as an elected member of House of Representatives.

3. That the letter dated 3rd of June, 1999 is fake, invalid, vague, mischievously and maliciously meant to embarrass the person and dignity of the plaintiff as it does not emanate from the appropriate authorities.

4. That the 1st Defendant is not and cannot in any way assume the position of a National Assembly Election Tribunal that can hear and determine the appeal of the 6th Defendants and act accordingly.

5. That the 1st to 6th Defendants to pay the cost of filing this Suit and Legal representation of the Plaintiff.

6. That the 1st to 6th Defendants to pay the sum of N100,000,000 (One Hundred Million Naira Only) as special and general damages to the plaintiff due to the national embarrassment caused to his dignity, reputation and personality as a duly elected member of the House of Representatives.

7. 10% Judgment cost up to satisfaction of judgment.”

The 5th respondent who was the 6th defendant in the said suit 101/99 raised a preliminary objection to the suit on the ground that the Federal High Court lacked jurisdiction to entertain the suit by reason of “non-compliance with the supreme provisions of Decree No. 5 of 1999.” The 1st, 4th and 5th defendants in the suit (who are the 1st, 3rd and 4th respondents in this appeal) also filed a motion on notice urging the Federal High Court to strike out the suit on the ground of lack of jurisdiction.

On 21st July, 1999 Auta, J., upheld the objection and struck

out the appellant's suit. The ruling delivered on 21st July, 1999 related to the objection and the motion. Auta, J., stated that the main issue for determination in the suit was whether the court had jurisdiction to declare that the appellant was the elected member of the House of Representatives by virtue of elections held on the 20th February and 22nd May, 1999. He held that the Federal High Court had no jurisdiction to make such declaration. For the purpose of this appeal it is expedient to quote the relevant passage from the ruling as follows:

"On the submission of the Plaintiff/Respondent counsel that section 251(1)(2) confers jurisdiction on this court because the relief they are seeking pertains to the decision of INEC, which is an agent of the Federal Government but any decision of this agent of the Government that affects elections conducted under Decree No. 5 of 1999 or any law, has been clearly and specifically taken away from the Federal High Court by the provisions of section 285 of the constitution, which vest the said right only on the Election Tribunals."

It was for this reason that he declined jurisdiction in the matter. There was no appeal from that decision. In this court counsel for the appellant argues that Auta, J's decision in suit 101/99 was not a final decision and therefore a plea of res judicata could not be founded on it. It was argued that the decision was an interlocutory decision which by its nature is not conclusive and therefore outside the contemplation of the doctrine of res judicata. He submitted that:

"...since Suit No. FHC/ABJ/CS/101/99 was struck out by trial Court preliminarily for lack of jurisdiction, there was no adjudication of the said suit on its merits by the trial Court. This is because it is an elementary principle of law that there can be no adjudication of suit on the merits where there is no jurisdiction or competence to adjudicate."

Counsel for the 1st, 3rd and 4th respondents submitted that the judgment in the previous suit was final in the light of the decision of this court in the case of Alao v Akano (1988) 1 NSCC 329.

Professor Osipitan, counsel for the 5th respondent, submitted that the decision was final because it put an end to suit FHC/ABJ/CS/101/99.

It is trite law (or principle) that one of the pre-conditions for a valid plea of res judicata is that the judgment on

which the plea is raised must be final. One hardly needs citation of authorities for this basic rule. But what is a final judgment? The law distinguishes a final judgment from an interlocutory judgment. However, to import a definition of the “*finality*” that distinguishes a final judgment from an interlocutory judgment for the purpose of an appeal, or for the purpose of cause of action *res judicata*, into a consideration of what a decision is for the purpose of a plea of issue *res judicata* may be misleading and confusing. Counsel for the appellant’s preoccupation with what a final judgment is, in terms of whether there was adjudication of the suit or not, and in terms of whether there was a decision of the suit on the merit or not, accounted for the rather lengthy submission on what was a final decision as distinguished from an interlocutory decision.

In my view, the test whether an issue has been finally decided for the purpose of establishing a valid plea of issue *res judicata* does not necessarily always need to be tied to the question whether or not there has been an adjudication of the substantive suit on its merits. Since the question whether or not a court can reopen in a later case, or even at a later stage in the same case, a question it has decided on a previous occasion, arises in a variety of circumstances, the test most adequate for all occasions, is whether the court which gave the decision can vary, reopen or set aside the decision. If it cannot, the decision is in that context ‘final’. Lord Diplock in *DSV Silo – und Verwaltungsgesellschaft GmbH v Sennar (Owners), The Sennar (No. 2)* (1985) 2 ALL E.R. 104 held that a decision is final if it “is one that cannot be varied, reopened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction.” There was a passage from *Bower & Turner on the Doctrine of Res Judicata* (1969 Edn) Art. 164 p. 134 cited with approval by Idigbe J.S.C. in *Fadiora v. Gbadebo* (1978) 11 NSCC 121, 126 – 7 as follows:

“A judicial decision is deemed to be final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent decision, review or modification by the

tribunal which pronounced it ...”.

The submissions are made by counsel for the appellant that there can be no adjudication of a suit on the merits where there is no jurisdiction or competence and that a ruling preliminarily striking out a suit for lack of jurisdiction is not a decision on the merits. He referred to *DIN v. Attorney-General of the Federation* (1986) 1 NWLR ^B (Pt 17) 471, 508; *Ojora v. Odunsi* (1964) 1 ALL NLR 55. However, these submissions though valid are not in point where, as in this case, the question is whether the question of the jurisdiction or competence of the court can be reopened. ***The guiding principle, I think, is contained in a statement in the decision of the West African Court of Appeal in Ojo v Abadie 15 WACA, 55 per Coussey, J.A., as follows:*** ^C

“...when once it is made clear that the self-same question is substantially in issue in two suits, the precise form in which either suit is brought, or the fact that the plaintiff in the one case was the defendant in the other is immaterial, the estoppel subsists between the parties.” ^D

Taking a wider view of the word “issues” in this context, as I do, I include not only issues touching on the merits of the suit but also issues raised concerning the suit itself, such as, for instance, the issue of the jurisdiction or competence of the court to entertain the suit, or that of the standing of a party to institute the suit. If such a question is raised concerning a suit and is determined to finality, in the sense that the court which gave the decision cannot vary, reopen or set it aside, notwithstanding that it is a threshold issue which may not determine question of rights and liabilities raised in the suit, there is no reason why the wider doctrine of estoppel per rem judicatam should not apply so as to create, as between the same parties and in respect of the same question, an issue estoppel. ^E ^F ^G Seen in that light, the contention of counsel for the appellant is well off the mark.

Let me at this stage draw attention to the limited nature of ^H counsel’s submission on behalf of the appellant. First, although *Auta, J.*, upheld the respondents’ objection on the twin grounds of estoppel per rem judicatam and abuse of process, but principally and more directly on the ground of abuse of process, appellant’s counsel’s ar-

gument and, indeed, issue for determination formulated by him, have been confined to the question of estoppel. Secondly, counsel for the appellant's submission has been confined to the question of finality of the decision in suit 101/99. There was no question raised about identity of issues. It must, therefore, be taken as common ground
 B that identical issues were raised in the former suit as in present one.

There is, therefore, no doubt that in this case the appellant has tried to litigate the question of the election of the 5th appellant which he had tried to litigate in suit 101/99 and which the Federal High Court had ruled in suit 101/99 it has no jurisdiction to entertain. The issue of the competence of the Federal High Court to determine such question was, thus, as between the parties finally and conclusively decided by the ruling given in suit 101/99 on 21st July, 1999. The appellant is rightly estopped from raising the same issue in the present suit. To permit the self-same issue to be raised would have led to Auta, J., or a judge of co-ordinate jurisdiction, re-opening the question of the jurisdiction of the Federal High Court all over again. As the case of Ojo v Abadie (supra) shows what is important for the doctrine of issue estoppel to operate is that "the self-same question is substantially in issue in the two suits." In Alao v Akano (1988) 1 NSCC 329, Craig, JSC, said at p. 338:
 E

"In 1972 when the issue arose between the parties it was held that under the 1963 Constitution the court has no jurisdiction to hear the matter; in my judgment that same ruling will apply to the same issue which was re-opened in 1981. It was for this reason that the Court of Appeal had ruled that the case was res judicata and I agree with that decision."
 F
 G

In my judgment, and in the same vein, the decision by Auta, J., in 101/99 that he had no jurisdiction would apply also to the present suit without the need to reopen the question of jurisdiction once again.

H Auta, J., in his ruling held that the filing of the originating summons was an abuse of Court Process. Bulkachuwa, JCA, (in an opinion in which Musdapher and Muntaka-Commassie JJ.C.A concurred) agreed that that was so by holding that "*having held that the case was an abuse of Court process*" Auta, J., was justified in dismiss-

ing the case. Before us it has not been contended that Auta, J., was wrong to have held that the case was brought in abuse of process, what has been contended is that the order of dismissal made was wrong in the circumstances. There seems to have been an assumption by counsel for the appellant that if he had succeeded in upsetting the finding that the matter was *res judicata* that would be sufficient to dispose of the appeal. But, that was an erroneous assumption. Where the twin pleas of *res judicata* and abuse of process are raised in a case, failure of the former does not necessarily lead to failure of the latter. As noted by the learned authors of Phipson on Evidence (15th edition) para 38 - 03, "*it is common to find cases being argued, and almost as often decided, on the basis that if one doctrine does not apply then another certainly should.*" See also *Arubo v. Aiyeleru* (1993) 24 (part 1) NSCC 255. It follows that even if the appellant had succeeded on the grounds on which the finding of estoppel had been challenged, the appeal would still have been dismissed as there was no challenge to the finding that the suit was in abuse of process.

For the reasons I have given I hold that the court below was right in confirming the decision of the Federal High Court. As I have said, the question whether the Federal High Court had or did not have jurisdiction to entertain the suit, being a question that the Federal High Court had rightly declined to re-open, was not a question properly arising in the court below or in this appeal. The appellant having failed on the issues of *res-judicata* and abuse of process, that should be the end of the matter. The only issue left is whether or not the trial judge should have struck out the suit instead of dismissing it. In *Arubo v. Aiyeleru* (1993) 24 NSCC (Part 1) 255, this court, per Nnaemeka-Agu, JSC, citing *Wills v. Earl of Beauchamp* (1886) 11 P G 59, 53 said:

"Once a court is satisfied that any proceedings before it is an abuse of process it has the power, indeed the duty, to dismiss it." (Emphasis mine)

Further, it was repeated at p. 268:

"Once a court is satisfied that the proceedings before it amounts to an abuse of process, it has the right, in fact the duty, to invoke its coercive powers to punish the party which is in abuse of its process. Quite often, that power is exercisable by a dismissal of the

action which constitutes the abuse.”

The power of the court to stay or dismiss proceedings which are an abuse of its process derives from the inherent jurisdiction of the court. Although the jurisdiction is often, and should be, sparingly exercised and in only exceptional cases, it is a jurisdiction which exists. The exercise of the power is discretionary. In this case the court below approved of the exercise of the trial judge’s discretion to dismiss the suit in these words:

“Considering the facts and the circumstances of this case, where the appellant earlier sued the same parties before the lower court seeking the same reliefs as in the present case whereby the court struck out the case for want of jurisdiction and the appellant still went back to the same court in a different disguise seeking for the same reliefs, I am of the view that the court was justified, having held that the case was an abuse of court process to dismiss the case to bring an end to litigation.”

Since in this appeal, as in the appeal in the court below, the question was whether the Federal High Court had power to dismiss the suit at all for abuse of process of the court, the question did not then, and does not now, arise whether or not a discretion to do so was properly exercised, even though the court below had gone out of its way to justify the exercise of discretion.

For the reasons that I have given, I hold that there is no substance in this appeal. Accordingly, I dismiss the appeal with N10,000 costs to each set of respondents.

G

MOHAMMED JSC

I agree that the Court of Appeal is right to affirm the decision of Auta J. of the Federal High Court that the filing of the suit, which is the subject of this appeal, is an abuse of court process. This is because in a previous suit No. FHC/ABJ/101/99, whose issues and parties are identical with the issues in the present suit Auta J, declined jurisdiction. The learned judge gave his reason for doing so in the following words:

“The issue of jurisdiction of the court is statutory. The juris-

dition of the Federal High Court is contained in section 251 of 1999 Constitution. It does not include determining whether a person is validly elected into a legislative arm. The issue of an election whatsoever is not contained in this section, on the other hand, section 285(1) of the Constitutionmakes it clear that only the election Tribunal have (sic) jurisdiction to entertain these type of cases. The Federal High Court is not an election Tribunal. It does not therefore have jurisdiction over this subject matter. Therefore this court has not the jurisdiction to declare whether the plaintiff was the winner of the election”.

I agree with the learned counsel for the respondent, Professor Taiwo Osipitan, that the appellant did not appeal against the decision reproduced above. The decision being final has estopped the appellant from invoking the jurisdiction of the Federal High Court in respect of disputes touching on the validity of the election which he contested against the respondent.

It is in abuse of the process of court for the plaintiff to litigate again over an identical question which has already been decided against him. In the case of *Domer v. Gult Oil (Great Britain)* [1975] 119 S.J. 392 it was held that where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to failure, they maybe dismissed as being an abuse of the process of the court.

For these reasons and the fuller reasons in the judgment of my learned brother, Ayoola, J.S.C., this appeal has failed and it is dismissed. I abide by the order on costs made in the lead judgment.

KATSINA-ALU JSC

I have had the opportunity of reading in draft the judgment of my learned brother Ayoola, JSC. I agree with it. For the reasons he had given, I too dismiss the appeal. I abide by the order as to costs made by my learned brother Ayoola, JSC.

KALGO JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Ayoola JSC in this appeal. I

entirely agree with his reasoning and conclusions to the effect that the Court of Appeal was right to confirm that the principle of *res judicata* applied to the appellant's case and that the filing of the same case in the Federal High Court Abuja would amount to an abuse of the process of court. See *Okafor v. A-G. Anambra State* (1991) 6 B NWLR (pt. 200) 659 at 681; *Okorodudu v. Okoromadu* (1977) 11 NSCC 105. I therefore also find no merit in this appeal and I accordingly dismiss it and abide by the orders of costs made in the leading judgment.

C _____

UWAIFO JSC

I have had the opportunity to read in advance the judgment of my learned brother, Ayoola, J.S.C. I agree with it for the reasons D he has fully stated.

At the trial court, Auta, j., held that the second action was a camouflage of the first one. The learned trial judge held in that first action that he lacked the jurisdiction to entertain it, being an election matter which by virtue of section 285 of the 1999 Constitution is E exclusively within the province of the National Assembly Election Tribunal. In regard to the second action, the learned trial judge held that the matter was *res judicata*, and, in addition, an abuse of process. Looking at the issue of jurisdiction decided in the first action and realizing that it is such that the said court cannot re-open, or reverse F itself on it, it was a final decision: see *DSV Silo etc. v. Sennar (Owners), The Sennar (No.2)* (1985) 2 All E.R. 104. It was an effective *res judicata* in the narrow sense (I hate to regard it as issue estoppel) on the issue of jurisdiction when the second action was brought. The G learned trial judge was therefore right to refer to the second action as an abuse of court process in the manner the appellant tried to disguise it. When abuse of court process is found, the proper order is dismissal as done by the trial court: see *Arubo v. Aiyeleru* (1993) 24 N.S.C.C. (pt. 1) 255. The court below was right to have upheld the H trial court in dismissing the action.

I too find no merit in this appeal and dismiss it. I abide by the order as to costs made by my learned brother, Ayoola, J.S.C.