

**SUPREME COURT OF NIGERIA**  
FRIDAY 28TH NOVEMBER, 2003. SC. 205/2003  
**CORAM:- I. L. KUTIGI, U. MOHAMMED, S. U. ONU,**  
**A. I. IGUH, S. O. UWAIFO, A. O. EJIWUNMI, N. TOBI, JJSC**

CHIEF SERGEANT CHIDI AWUSE ..... APPLICANT  
AND  
1. DR. PETER ODILI  
2. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION  
3. THE RESIDENT ELECTORAL ..... RESPONDENTS  
COMMISSIONER RIVERS STATE  
4. THE RETURNING OFFICER RIVERS  
STATE AND 323 ORS

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ELECTION PETITIONS - Gubernatorial elections - Final court - By s. 246(3) 1999 constitution - Decision of Court of Appeal is final - In respect of appeals arising from such petitions (H1)

ELECTION PETITIONS - Gubernatorial elections - Appeals - Jurisdiction - Supreme Court has no jurisdiction - Since Court of Appeal is the final apex court in such appeals (H2)

**FACTS**

Petitioner/respondent/applicant contested in the April 2003 gubernatorial elections for Rivers State. After the elections, 1<sup>st</sup> appellant/respondent was declared the winner thereof. In consequence applicant filed this election petition at the Rivers State Governorship Election Petition Tribunal, Port Harcourt challenging the return of 1<sup>st</sup> respondent. After service of the petition on him, 1<sup>st</sup> respondent filed a notice of preliminary objection challenging the competence of the petition. Upon hearing arguments of counsel on the preliminary objection, the Tribunal upheld the objection and struck out the petition. Aggrieved, applicant appealed to the Court of Appeal, Port Harcourt. That court allowed the appeal and remitted the petition back to the Tribunal for hearing on the merit.

Dissatisfied, respondent filed a notice of appeal to Supreme Court. Upon being served with the notice of appeal, applicant filed

the instant application praying Supreme Court for an order striking out the appeal in limine for incompetence on the ground that under section 246(3) of the 1999 Constitution, the decision of Court of Appeal in a gubernatorial election appeal petition is final.

### **ISSUE FOR DETERMINATION**

Whether the decision of the Appeal Tribunal (Court of Appeal) on 31/7/2003 remitting the petition back to the Governorship Election Tribunal for hearing on merit, is not appealable.

**HELD** (Unanimously granting the application per KUTIGI JSC)

*ELECTION PETITIONS - Gubernatorial elections - Final court*

**1. Under Section 246(b) (ii) of the Constitution above an appeal would ordinarily lie to the Court of Appeal from that decision striking out the applicant's petition. Also under Section 246(3) above, the decision of the Court of Appeal in respect of an appeal arising from an election petition as in this case, is final. I have not the slightest doubt that the Constitution has in clear and unambiguous language made the Court of Appeal a final court in respect of appeals arising from election petitions as in the matter before us now.** (p. 2435 G)

*Gubernatorial elections - Appeals - Jurisdiction*

**2. It must be emphasized here now that, whether the decision of the Governorship Election Tribunal striking out the petition was interlocutory or not is a matter to be raised and decided in the Court of Appeal itself and not in this court. So also is the question whether the Court of Appeal has or has not the jurisdiction to entertain an interlocutory appeal in respect of an Election Petition as contended by Mr. Sofola. It is certainly true that matters of jurisdiction can be raised at any time even at the last stage in the apex court. The Court of Appeal being the final apex court in this matter ought to be the place to raise the issue of its jurisdiction. Not in this court. An appeal does not lie from the Court of Appeal to this court in the instant case.** (p. 2436 A)

## NOTABLE POINT OF INTEREST

### **ONU JSC**

#### ***1. S. 318 of 1999 Constitution - “Decision” includes interlocutory ruling***

My learned brother having held that the decision of the Court of Appeal herein is final as prescribed by the Constitution and that it is not appealable to this court, the case of Buhari & Ors. v. Obasanjo & Ors. (supra) and Orubu v. N.E.C. & Ors. (1988) 12 S.C. (Pt.III) 1; (1988) 5 NWLR (Pt. 94) 323 which are clear and admit of no ambiguity, must be given effect to.

In the former case, the full panel of this court ruled, correctly in my view, that “decision” as defined under Section 318 of the 1999 Constitution includes interlocutory ruling in any proceedings.  
(p. 2437 E)

### **REPRESENTATION**

Chief M. I. Ahamba, SAN with V. I. Ikeanu, C. H. Nwuke and Ken Saronwiyo), for Petitioner/Respondent/Applicant  
K. Sofola, SAN with B.M. Wifa, SAN, D. West, J. Ugboduma, E. Thompson, (Mrs.), O. Ogunniyi, (Miss) and I. E. Uche), for Respondent/ Appellant/Respondent  
John Kalipa, for 2nd-327th Respondents

### **CASES REFERRED TO**

Oyekan v. Akinjide (1965) 1 All NLR 200  
Esewe v. Gbe (1988) 5 NWLR (Pt. 93) 134  
Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248  
Erisi v. Idika (1987) 4 NWLR (Pt. 66) 503  
Onuaguluchi v. Ndu (2001) 3 S.C. 49  
Orubu v. N.E.C. & Ors. (1988) 12 S.C. (Pt. III) 1  
Ecoconsult Ltd v. Pancho Villa Ltd. (1999) 1 S.C. 83

### **STATUTES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1999, ss. 233, 246 & 318  
Constitution of the Federal Republic of Nigeria, 1979, s. 213

Local Government Election Decree No. 37 of 1987, s. 36  
Electoral Act, 2002, s. 4

**LEAD JUDGMENT BY KUTIGI JSC**

By Motion on Notice, the applicant prays for the following re-  
B liefs-

1. An order of court for accelerated hearing of the appeal and  
an interlocutory application arising therein.

2. An order of court striking out the appeal in limine for in-  
C competence.

3. Making any other order or orders as the Honourable Court  
may deem fit and proper in the circumstances of this appeal.

AND further take notice that the grounds upon which this ap-  
plication is brought are as follows-

D (a) Under Section 246(3) of the 1999 Constitution of the Fed-  
eral Republic of Nigeria, the decision of the Court of Appeal in an  
election petition is final.

(b) The Notice of Appeal is a deliberate abuse of judicial pro-  
cess intended to delay and pervert the cause of justice.

E (c) Notice of Appeal is a nullity:-

The application is supported by an Affidavit of Urgency and a  
15-paragraph affidavit both sworn to by the applicant himself with  
five exhibits attached. Because of the importance and clarity of the  
supporting affidavit the proceedings I shall reproduce it hereunder  
F leaving out the exhibits or attachments. The affidavit reads-

*"1. I am the petitioner/respondent/applicant in this matter.*

*2. I contested election for the post of Governor of Rivers State  
on 19th April, 2003.*

G *3. After the election, the appellant/respondent, Dr. Peter Odili,  
was declared elected. I duly filed an election petition challenging the  
declaration.*

*4. After service of the petition on the appellant/respondent, a  
Notice of Preliminary Objection was filed on his behalf challenging  
H the competence of the petition.*

*5. After hearing argument on the Notice of Preliminary Objec-  
tion, the Election Tribunal sitting at Port-Harcourt struck-out the pe-  
tition. The petitioner/respondent/applicant, appealed to the Court of  
Appeal.*

6. On 31st July. 2003, the Court of Appeal allowed the appeal and remitted petition back to the Tribunal for hearing on merit. A copy of the enrolled order of the Court of Appeal is hereto exhibited and marked Exhibit "AA".

7. On 11th August. 2003, the appellant/respondent filed a Notice of Appeal to this Honourable Court challenging the decision of Appeal on the election petition matter. It is this Notice of Appeal that is the subject of this application. B

8. My lead counsel, Chief M.I. Ahamba, SAN, has informed me, and I verily believe him, that appeals from the Election Tribunals terminate at the Court of Appeal. C

9. The appellant/respondent has filed an application before the Court of Appeal seeking to prevent delay the commencement of the hearing of my petition on merit in the Tribunal. A copy of the application now pending before the Court of Appeal and fixed for hearing on 30<sup>th</sup> September, 2003, is hereto exhibited and marked as follows;

"Motion paper Exhibit "AB"

Affidavit in Support Exhibit "AB1"

Exhibit "A" thereto (Notice of Appeal): Exhibit "AB2" E

10. The appellant/respondent is resting Exhibit "AB2" to obtain to a stay of execution of the Order of the Court of Appeal, and of the hearing before the Tribunal.

11. The appellant/respondent is using an incompetent appeal to pervert the cause of annoy, irritate and frustrate me. F

12. I sincerely believe that it is necessary to strike out the incompetent appeal to avoid the misuse of judicial process for an unjust end. I rely on the three grounds stated on the motion papers.

13. The appellant/respondent and his counsel know that the appeals terminate in the Court of Appeal in matters arising in the election Tribunal, but is only interested in delaying the hearing of the petition. G

14. The newly constituted election Tribunal now sitting in Port-Harcourt cannot hear my petition until this appeal is disposed of. There is need for the expeditious disposal of this application. H

The appellant/respondent also filed a counter-affidavit through one Oris Onyiri the Secretary of the People's Democratic Party, Rivers State, in opposition to the application. He said in paragraphs 2,

3, 4, 5, 6 and 7 thus-

“2. *That I have the consent and authority of the appellant/respondent to swear to this counter affidavit.*

3. *That I have read the affidavit in support of the Motion to strike out the appeal deposed to by the respondent/appellant herein.*

B 4. *That the Court of Appeal that heard the appeal of petitioner/respondent/applicant herein had no jurisdiction to adjudicate on the appeal -because the appeal was not on any question whether any person (i.e. the appellant/1st respondent) was duly elected to the Office of Governor or Deputy Governor.*

C 5. *That the appeal of the appellant/1st respondent is of a constitutional nature and it touches on the jurisdiction of the Court of Appeal*

D 6. *That the appellant/1st respondent herein has not filed the appeal before this Honourable Court to annoy, irritate or frustrate the petitioner or to delay the hearing of the petition.*

7. *That in view of the infringement of the constitution by the Court of Appeal, it would be in the interest of justice to determine the appeal as stipulated by law.”*

E None of the remaining 2nd to 327th respondents filed any counter affidavit.

F Before the hearing date counsel for the applicant, the appellant/respondent, and the 2nd to 327th respondents respectively filed briefs of argument in support of or in opposition to the motion as the case may be.

G At the hearing of the application, learned counsel for the applicant, Chief Ahamba, SAN, moving the motion, said he relied on the affidavit filed by the applicant as well as the brief he filed in support. He was also relying on the 3 grounds for the application as stated in the motion paper. He said the 1999 Constitution has provided in Section 246(1) that appeals against decisions of the Election Petition Tribunals in respect of elections to the office of members of the National Assembly, Governor of a State and members of State Houses of Assembly, shall to the Court of Appeal. That Section 246(3) further provides that-

“*The decision of the Court of Appeal in respect of appeals arising from election petitions shall be final.*”

*That the Supreme Court therefore lacks the jurisdiction to en-*

*tertain an appeal from the Court of Appeal in the instant case. He said the pendency of the appeal herein has stalled the hearing of the Governorship Election Petition in Rivers State which the Court of Appeal had ordered to be heard since 31/7/2003. He said the appeal is a nullity and an abuse of process. Learned counsel referred to the recent unreported decision of this court in S.C. 194/2003 Buhari & Ors. v. Obasanjo & Ors. delivered on 14/11/ 2003 wherein this court decided that by virtue of the provisions of Section 233(2)(e)(i) and the definition of "decision" in Section 318 of the 1999 Constitution read together, an appeal, whether interlocutory or final lies as of right to this court from the Court of Appeal in a Presidential Election Petition. The Court of Appeal therefore had jurisdiction to hear the appeal in the election petition. He urged us to grant the application and strike out the appeal.*

Mr. Sofola, learned senior counsel for the appellant/ respondent, in reply said he adopted the counter-claim affidavit and his brief of argument in the motion. He said he was not opposing prayer (1) for accelerated hearing of the appeal. He however vehemently opposed prayer (2) for striking out the appeal. He said the interest of justice demanded the appeal to be heard on the merit to enable the court interpret the provisions of Section 246 of the 1999 Constitution. That the appeal of the appellant/ respondent is of a constitutional nature which touched on the jurisdiction of the Court of Appeal. Reacting to the recent decision of this court in Buhari Ors. v. Obasanjo & Ors. (Supra), learned Senior Advocate of Nigeria contended that it has long been settled that there is no right of appeal to the Court of Appeal in respect of interlocutory decisions in election petitions. He relied on the authority of Orubu v. N.E.C. & Ors. (1988) 12 S.C. (Pt.III) 1, (1988) 3 NSCC 333; (1988) 5 NWLR (Pt. 94) 323 where it was decided that there was no right of appeal to the Court of Appeal from interlocutory decisions of Election Petition Tribunals. He said if Orubu v. N.E.C. & Ors. (Supra), had been cited to the court, the decision in Buhari & Ors. v. Obasanjo & Ors. (Supra), would have been different. The court was urged to follow the earlier decision in Orubu v. N.E.C. & Ors. (supra), and hold that the Court of Appeal lacked jurisdiction when it entertained the appeal from the Election Petition Tribunal in an interlocutory matter. The court was urged to dismiss prayer (2).

Mr. Kalipa who appeared for the 2nd to 268th respondents also adopted his brief. He said he was not opposing prayer (1) but opposed prayer (2). He said the Court of Appeal has no jurisdiction to entertain the appeal which did not arise from a decision on any question as to whether any person had been validly elected to the office of Governor or Deputy Governor. That the appeal herein are within the confines of Section 233(2)(a) and (b) of the Constitution and this raises a serious question of law relating to the interpretation of Section 246 of the Constitution. The court was urged to dismiss prayer (2).

Chief Ahamba responding said that the case of *Orubu v. N.E.C. & Ors.* (supra) relied upon heavily by Mr. Sofola had to do with the interpretation of paragraph 27(1) of Schedule 3 to Decree No. 37 of 1987 which reads:-

“27 (1) *All interlocutory question and matters shall be heard and disposed of before a judge who shall have the same control over the proceedings as a judge in the ordinary proceedings of the High Court.*”

He said the provisions above are different from the present provisions in the Constitution. I think he is right. He said this court was right in the decision it took in *Buhari & Ors. v. Obasanjo & Ors* (supra) and has not contradicted itself even though the court had not been referred to the case of *Orubu v. N.E.C. & Ors.* (supra). I agree with him. He said the two cases deal with two different laws and that we should follow our recent decision in *Buhari & Ors v. Obasanjo & Ors.* (supra), which allows interlocutory appeals in presidential election petition.

Now, the facts which gave rise to this application are clearly and amply stated in the affidavit of the applicant set out above. They are simple. The question which we are required to answer now is; whether the decision of the Appeal Tribunal (Court of Appeal) on 31/7/2003 remitting the petition back to the Governorship Election Tribunal for hearing on merit, is not appealable; and not whether or not the Appeal Tribunal (Court of Appeal) had the jurisdiction to entertain the appeal in the first place. In my view the latter question will be for the appeal proper when we get there if this application to strike out the appeal should fail.

All the respondents herein do not oppose prayer (1) for accel-



erated hearing of the appeal. Under normal circumstances I would have instantly granted it. But because granting prayer (10 will not serve any useful purpose except if prayer (2) fails or is refused, I will in the circumstances proceed to treat prayer (2) first before returning to prayer (1).

I now return to the question of whether the decision of the Appeal Tribunal (Court of Appeal) on 31/7/2003 was not appealable. The 1999 Constitution had provided in Section as follows-

*“246 (1) An appeal to the Court of Appeal shall lie of right from:*

*(a) .....omitted.....*

*(b) decisions of the National Assembly, Election Tribunals and Governorship and Legislative Houses Election Tribunal on any question as to whether:*

*(i) .....omitted.....*

*(ii) any person had been validly elected to the office of Governor of Deputy Governor, or*

*(iii) .....omitted.....*

*(2) .....omitted.....*

*(3) The decisions of the Court of Appeal in, respect of appeals arising from election petition shall be final.”*

It is common ground that the suit PETITION NO. NAGLHEP/RV/I/2003 herein is a Governorship Election Petition. The petitioner applicant said so clearly in his affidavit above. That much is also clear from the Enrolled Order of the Court of Appeal, Exhibit AA, attached to the affidavit in support of the motion, which reads in part-

*“(3) That the petition is remitted back to the tribunal to be heard on merit.”*

It will be noted that the Governorship Election Tribunal had on a notice of preliminary objection held that there was no valid election petition before it and consequently struck out the petition.

***Under Section 246(b) (ii) of the Constitution above an appeal would ordinarily lie to the Court of Appeal from that decision striking out the applicant’s petition. Also under Section 246(3) above, the decision of the Court of Appeal in respect of an appeal arising from an election petition as in this case, is final. I have not the slightest doubt that the Constitution has in clear and unambiguous language made the Court***

**of Appeal a final court in respect of appeals arising from election petitions as in the matter before us now.**

**It must be emphasized here now that whether the decision of the Governorship Election Tribunal striking out the petition was interlocutory or not, is a matter to be raised and decided in the Court of Appeal itself and not in this court. So also is the question whether the Court of Appeal has or has not the jurisdiction to entertain an interlocutory appeal in respect of an Election Petition as contended by Mr. Sofola. It is certainly true that matters of jurisdiction can be raised at any time even at the last stage in the apex court. The Court of Appeal being the final apex court in this matter ought to be the place to raise the issue of its jurisdiction. Not in this court. An appeal does not lie from the Court of Appeal to this court in the instant case.** It is only in respect of presidential election petition that an appeal lies from the Court of Appeal to this court, (see Section 233(2) (e)(i) of the Constitution, Buhari & Ors. v. Obasanjo & Ors. (supra).

Having held that the decision of the Court of Appeal herein is final as prescribed by the Constitution and not appealable to; this court, the cases of Buhari & Ors. v. Obasanjo & Ors. (Supra) and Orubu v. N.E.C. & Ors. (supra) are of no assistance here. The provisions of the Constitution are clear and unambiguous. I have no choice, but to give effect to them as such.

I therefore find merit in the application. It therefore succeeds and I allow the preliminary objection.

It is hereby ordered as follows:-

1. Prayer (2) is granted. The appeal No. S.C. 205/2003 pending in this court is incompetent and it is struck-out.

2. Prayer (1) for accelerated hearing of the appeal cannot now be granted. It has been overtaken by prayer (2). It is therefore struck-out.

3. There is no order as to costs.

### ONU JSC

I had the opportunity of reading in draft the lead ruling just delivered by my learned brother, Kutigi, JSC. I am in complete agree-

ment with his reasoning and conclusion therein contained.

It needs to be stressed by way of amplification that whether the decision of the Governorship Election Tribunal striking out the petition in this matter was interlocutory or not, is a matter to be raised and ruled upon in the Court of Appeal itself and not in this court. Similarly, is the question whether the Court of Appeal has or has no jurisdiction to entertain an interlocutory appeal in respect of an Election Petition as contended by learned counsel for respondent/appellant/respondent, Mr. Sofola, SAN,. It is indubitable that matters of jurisdiction can be raised at any time, even at the last stage in the final court which in the matter herein under consideration, is the Court of Appeal. In other words, the Court of Appeal being the final apex court in this matter ought to be the place to raise the issue of its jurisdiction not in this court, it being the law that since the coming into force of the 1999 Constitution, an appeal does not lie from the Court of Appeal to this court but it is the court of final resort. See *Onuaguluchi v. Ndu*, (2001) 3 S.C. 49, (2001) 7 NWLR (Pt. 712) 309. It is therefore only in respect of the presidential (not governorship) election petition that an appeal lies from the Court of Appeal to this court. Vide Section 233(2)(e)(i) of the 1999 Constitution. See also *Buhari & Ors. v. Obasanjo & Ors.*, yet to be reported case No. SC. 194/2003 delivered on 23/9/2003 by this court.

My learned brother having held that the decision of the Court of Appeal herein is final as prescribed by the Constitution and that it is not appealable to this court, the case of *Buhari & Ors. v. Obasanjo & Ors.* (supra) and *Orubu v. N.E.C. & Ors.* (1988) 12 S.C. (Pt.III) 1; (1988) 5 NWLR (Pt. 94) 323 which are clear and admit of no ambiguity, must be given effect to.

In the former case, the full panel of this court ruled, correctly in my view, that “decision” as defined under Section 318 of the 1999 Constitution include interlocutory ruling in any proceedings.

It is for the brief reasons proffered by me above and the more overwhelming reasons given by my learned brother, Kutigi, JSC., in his lead ruling with which I entirely agree, that I too find merit in this application; strike out the appeal and make similar orders as contained therein. Parties to bear own costs.

**IGUH JSC**

I have had the privilege of reading in draft the ruling just delivered by my learned brother, Kutigi, JSC., and I agree entirely that there is merit in this preliminary objection and that this court has no jurisdiction to entertain this appeal.

B The full facts that gave rise to this appeal have already been fully set out in the leading ruling of my learned brother. I need only state that the single issue for determination is whether the appeal filed by the 1st respondent to this court against the decision of the Court of Appeal on the 31st July, 2003, remitting the election petition back to the Election Tribunal for hearing on the merit is competent and, if not, whether the appeal should be struck out in limine on the ground of want of jurisdiction.

D It is desirable for a better appreciation of the issue raised for determination in this appeal to set out the relevant section of the Constitution of the Federal Republic of Nigeria, 1999, which has now come up for interpretation. This is Section 246, subsections (1)(b)(i) and (ii) and (3) of the 1999 Constitution which provide as follows:-

E *“246 (1) An appeal to the Court of Appeal shall lie as of right from:*

*(a) ...*

*(b) decision of the National Assembly Election Tribunals and Governorship and Legislative Houses Election Tribunals on any question as to whether-*

F *(i) any person had been validly elected as a member of the National Assembly or of a House of Assembly of a State under the Constitution,*

G *(ii) any person has been validly elected to the office of Governor or Deputy Governor, or*

*(3) The decisions of the Court of Appeal in respect of appeals arising from election petition shall be final.”*

H It is apparent that Section 246(1) of the 1999 Constitution provides inter alia that appeals from decisions of the National Assembly Election Tribunals and Governorship and Legislative Houses Election Tribunals on any question as to whether any person has been validly elected as a member of the National Assembly or a House of Assembly or to the office of Governor or Deputy Governor, shall lie as of right to the Court of Appeal. There is then Section 246 subsec-

tion (3) of the same Constitution which in the clearest possible terms provides that the decisions of the Court of Appeal in respect of such appeals arising from the relevant Election Petitions stipulated under Section 246(1) aforementioned shall be final.

In making provision in respect of “decisions” of the Court of Appeal in election petition matters, Section 246(3) of the 1999 Constitution makes no distinction between “interlocutory” and/or “final” decisions of the court. In my view, the language of Section 246(3) of the 1999 Constitution is so clear and unambiguous that it institutionalized the Court of Appeal as the final court of appeal in respect of appeals arising from elections to the office of member of the National Assembly or of a House of Assembly of a State and Governor or Deputy Governor of a State. I cannot, with the greatest respect to the learned appellant’s counsel, accept that Section 246(3) of the 1999 Constitution by any stretch of the imagination, confers this court with jurisdiction to entertain appeals from the decisions of the Court of Appeal in respect of appeals arising from election petitions specifically mentioned under that section of the Constitution, inclusive of the election petition in issue in the present case.

The conclusion I have just reached is fully in line with the recent decision of this court in *Onuaguluchi v. Ndu* (2001) 3 S.C. 49; (2001) 7 NWLR (Pt. 712) 309. What called for decision in that case is the interpretation of Section 81(1) and (3) of Decree No. 5 of 1999 which provides thus:-

*“81(1) Notwithstanding the provisions of the ton 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 decisions of the Court of Appeal, on an appeal brought under subsection (1) of this section shall be final.”*

There can be no doubt that the provisions of the said section 81(1) and (3) of Decree No. 5 of 1999 are substantially in *pari materia* with those subsection (1)(b)(i) and (ii) and (3) of Section 246 of the 1999 Constitution now under consideration. This court in the *Onuaguluchi* case was of the view that by virtue of Section 81(3) of the National Assembly (Basic Constitutional and Transitional Provisions) Decree No. 5 of 1999, so long as the substance of an appeal from the Court of Appeal to the Supreme Court is complaint against the decision of the Court of Appeal arising from an election petition

brought under the said Decree No. 5 of 1999, the Supreme Court will not entertain the appeal as there is no right of appeal to the Supreme Court against such a decision of the Court of Appeal. The simple reason for this is that Section 81(3) of Decree No. 5 of 1999 makes the decision of the Court of Appeal on any question relating  
B to senatorial election under the Decree final and does not give the Supreme Court appellate or supervisory jurisdiction over such a decision. See too *Esewe v. N.T. Gbe* (1988) 5 NWLR (Pt. 93) 134 and *Eco Consult Ltd v. Pancho Villa Ltd* (1999) 1 S.C. 83; (1999) 1 NWLR  
C (Pt. 588) 507 where this court considered the provisions of Section 213 of the Constitution of the Federal Republic of Nigeria, 1979, (as amended) and Section 36(2) of the Local Government Election Decree No. 37 of 1987, the provisions of which are in pari materia with those of Section 81(3) d of Decree No. 5 of 1999.

D It is therefore now well settled that pursuant to the provisions of Section 246(1)(b)(i) and (ii) and (3) of the 1999 Constitution, the Court of Appeal acting within its jurisdiction in deciding an appeal arising from an election petition as stipulated under the said section of the Constitution is the final court of appeal. Whether it did so  
E rightly or wrongly in its decision cannot be questioned on appeal in this court by virtue of the express provisions of the said Section 246(3) of the 1999 Constitution which stipulates that the decisions of the Court of Appeal in respect Of appeals arising from the relevant election petitions shall be final. It is only in respect of presidential election  
F petition that an appeal lies from the Court of Appeal to this court pursuant to the express provisions of Section 233(2)(e)(i) of the Constitution of the Federal Republic of Nigeria, 1999. See too *Buhari and Ors. v. Obasanjo & Ors.* S.C. 194/2003, delivered on 14/11/  
G 2003.

In view of the above, it is crystal clear that the purported appeal filed by the 1st respondent to this court against the decision of the Court of Appeal arising from the governorship election petition in which the return of the said 1st respondent to the office of Governor of Rivers State is being challenged is incompetent and unconstitutional. Accordingly, the purported appeal must be and it is hereby  
H struck out for want of jurisdiction. No question is of the accelerated hearing of the incompetent appeal now arrises and the prayer in this regard is also struck out.

It is for the above and the more detailed reasons contained in the leading ruling that I, too, uphold the preliminary objection of the petitioner/ respondent/ applicant to the effect that this court has no jurisdiction to entertain this appeal. I abide by all the orders contained in the leading ruling.

B

### **UWAIFO JSC**

I had the opportunity to read in advance the ruling of my learned brother, Kutigi, JSC. which I entirely agree with, that the appeal is incompetent. I shall express similar views in my own words by way of supporting the said ruling.

C

On 19th April, 2003, election to the office of Governor of Rivers State was held. The appellant/respondent (hereinafter referred to as the respondent) in this motion as well as the respondent/applicant (hereinafter referred to as the applicant), contested the election. The applicant contested under the platform of the All Nigeria Peoples' Party (ANPP) while the respondent contested under the platform of the Peoples' Democratic Party (PDP). The respondent was returned as duly elected.

E

The applicant then filed a petition in the Governorship and Legislative Houses Election Tribunal, Rivers State (Tribunal), challenging the return of the respondent. The respondent was served and he entered an appearance on 23<sup>rd</sup> May, 2003. On 26th May, he filed a notice of preliminary objection to the petition that it was fundamentally defective and should be struck out on the grounds that:

F

*"1 The petition is not in accordance with the provisions of the provisions (sic) of part VII of the Electoral Act, 2002, and the provisions of the 1st Schedule to the Act.*

G

*2. The petition does not state the names of all the candidates at the election and the votes of each candidate and the person returned as the winner of the election as required by the provisions of paragraph 4(1)(c) of the 1st Schedule of the Electoral Act, 2002.*

H

*3. The candidates at the said election were more candidates mentioned in paragraph of the said petition."*

On 11th June, 2003, the Tribunal ruled on the preliminary objection. It upheld the objection and struck out the petition. The

applicant appealed to the Court of Appeal, Port Harcourt Division.

On 31st July, 2003, in a reserved ruling, the Court of Appeal unanimously allowed the appeal, reversed the tribunal and ordered that the petition be remitted to the Tribunal to be heard on the merits.

B The respondent filed a Notice of Appeal to this court on 11th August, 2003, to challenge the decision of the Court of Appeal. The applicant in reaction filed a motion on notice seeking two prayers:

1. *An order of court for accelerated hearing of the appeal and an interlocutory application arising therein.*

C 2. *An order of court striking out the appeal in limine for incompetence."*

In the argument in support of the preliminary objection, the applicant did not argue prayer 2. That prayer is accordingly regarded D as having been abandoned.

The substance of the argument by Chief Ahamba, SAN, in respect of prayer 1 is that the provisions of Section 246(3) of the 1999 Constitution having made the decision of the Court of Appeal in respect of appeals arising from election petition final, it was an E abuse of court process for the 1st appellant/respondent to have appealed against such a decision in the present petition. He cited *Eris v. Idika* (1987) 4 NWLR (Pt. 66) 503 at 512, 518; and *Onuaguluchi v. Ndu* (2001) 3 S.C. 49; (2001) 7 NWLR (Pt. 712) 309 at 321.

F Mr. Sofola, SAN, argued in the first instance as contained in the respondent's brief to the preliminary objection that the two prayers sought in the motion were contradictory or inconsistent and that a party should be consistent in stating his case and consistent in proving it, relying on the obiter dictum of Oputa, JSC., in *Ajide v. Kelani* G (1985) 3 NWLR (Pt. 12) 248 at 269. With due respect, I do not think that dictum applies here. In the present case, the applicant sought two prayers, one for an order of accelerated hearing of the appeal and the other an order to strike out the appeal in limine. Both orders, in my view, could be pursued together without one contradicting the other. This may be done by listing the appeal for hearing; and H just as this had been done, the argument to have it struck out in limine, that is, before argument on the appeal is gone into, can be taken and determined. I see nothing inconsistent about that.

Both in *Ajide v. Kelani* (supra), the appellant presented a case



along a given course at the High Court. On appeal to the Court of Appeal, he took a totally different course. One further appeal to the Supreme Court, Oputa, JSC., rightly observed that that could not be permitted particularly in view of the essence of pleadings which must define the issues between the parties throughout the journey of the proceedings right down to conclusion on appeal, if the journey included appeal. A party cannot therefore present a case on appeal different from what he presented at the trial. It was in that light the learned Justice observed thus:

*“A party should be consistent in stating his case and consistent in proving it. He will not be allowed to take one stance in his pleadings; then turn Somersault during the trial; then assume nonchalant attitude in the Court of Appeal; only to revert to case as pleaded in the Supreme Court. Justice is much more than a game of hide and seek. It is an attempt, our human imperfections notwithstanding, to discover the truth.”*

This observation is no more than a play on word to say simply that a party is bound by his pleadings at the trial and this is what defines his case throughout up to the highest court. This observation is, with due respect, utterly inapplicable to the circumstances of the present motion. Notwithstanding, it ought to be made clear that even in the present case, Mr. Ahamba abandoned the prayer for an order of accelerated hearing of the appeal, having possibly considered that prayer 2 could be taken without further ado.

The further argument of Mr. Sofola was made on the basis of an appellant’s brief which he filed in anticipation of the hearing of the appeal. In his argument in support of his brief in response to the preliminary objection, he argued:

*“A comprehensive Appellant (sic) Brief of Argument has been filed and the appellant/respondent intends to rely on the submissions therein contained in order to avoid an unnecessary repetition of these arguments.”*

It was on this basis he went into full argument in answer to Mr. Ahamba’s objection as he might have done in the argument of the merit of the appeal, relying strongly on this court’s decision in *James Orubu v. National Electoral Commission* (1988) 12 S.C. (Pt.III) 1; (1988) 5 NWLR (Pt. 94) 323. That decision interpreted paragraph 27(1) of Schedule 3 to the Local Government Elections Decree No.

37 of 1987.

Just as in *Oyekan v. Akinjide* (1965) 1 All NLR 200, in which the Federal Supreme Court was faced with a provision in *pari materia* with paragraph 27(1) mentioned above, this court in *Orubu v. NEC* (supra), held that an appeal did not lie from an interlocutory decision of the High Court to the Court of Appeal. When this court in the present case told Mr. Sofola that in the recent case in SC. 194/2003; *Buhari & Ors. v. Obasanjo & Ors.* delivered on 23 September, 2003, (unreported), appeal from an interlocutory decision of the Presidential Election Tribunal was permitted to be argued in view of the definition of the word “decision” in Section 318(1) of the 1999 Constitution read along with Section 233(2)(e)(i) thereof, the learned Senior Advocate’s argument was that the said recent decision was wrong in view of *Orubu’s* case. He invited us to overrule it and also *Onuaguluchi v. Ndu* (supra).

I do not think *Orubu’s* case supports Mr. Sofola’s position in this matter. This is because the present case and that case are to be seen from different statutory and constitutional provisions. In *Oyekan*, as it was in *Orubu*, there was no comparable applicable provision which defined “decision” in both the 1979 and 1999 Constitutions in Sections 277(1) and 318(1) respectively which is:

“‘Decision’ means, in relation to a court, any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation”

That definition does not distinguish between an interlocutory decision and a final decision in an election petition. It is no surprise, therefore, that in view of the provisions of paragraphs 27(1) of the 3rd Schedule to the Decree No. 37 of 1987 which had an overriding effect upon the definition of “decision” in Section 277(1) of the 1979 Constitution and rendered it inapplicable to local government election petitions, *Orubu’s* case was decided the way it was. The said paragraph 27(1) provided as follows:

“27 (1) all interlocutory questions and matters shall be heard and disposed of before a judge, who shall have the control over the proceedings as a judge in the ordinary proceedings of the High Court.” These provisions which were in *pari materia* with Section 125(1) of the Electoral Act, 1962, were interpreted in *Oyekan v. Akinjide* (supra), to mean that the trial Judge completely took charge of and

finally concluded interlocutory matters in the election petitions brought pursuant to that Act; and permitted of no appeal from the trial Judge's decision on interlocutory questions it was these considerations that influenced the judgment of this court in the case of Orubu v. NEC (supra). Hence, in that case at page 349, Uwais, JSC., (now CJN.), in his leading judgment said inter alia: B

*"It follows, therefore, that the fact that the Local Government Elections Decree, 1987, has made specific provisions on election to Local Government Councils is sufficient indication that the un-suspended or modified provisions of the 1979 Constitution, .....are not to apply to matters connected with local government elections. The maxim genera specialibus non derogant applies."* C

Later at page 351, the learned Justice said;

*"Since the provisions of a Decree override those of the 1979 Constitution, then it is incontrovertible that the general provisions of D the Constitution will apply to an appeal from the High Court, unless of courses, the Decree makes no provision in that respect. In the present case there was no right of appeal to the Court of Appeal by virtue of the provisions of paragraph 27(1) of Schedule 3 of the 1987 Decree."* E

Now, if Section 220(1)(f) of the 1979 Constitution had been applicable, it would have given the Court of Appeal jurisdiction to hear appeals in interlocutory decisions of the High Court in Orubu's case, when read along with the definition of "decision" in Section 277(1) of that Constitution. The said Section 220(1)(f) is similar in F intendment to Section 246(1)(b)(i) and (ii) of the 1999 Constitution. It provided as follows:

*"220 (1) An appeal shall lie from decisions of a High Court to the (Federal) Court of Appeal as of right in the following cases- G*  
*(f) decisions on any question whether any person had been validly elected office under this Constitution, to the membership of any legislative house..."*

The provisions of Section 246(1)(b)(i) and (ii) of the 1999 Constitution read: H

*"246 (1) An appeal to the Court of Appeal shall lie as of right from -*

*(b) decisions of the National Assembly Election Tribunals and Governorship and Legislative Houses Election Tribunals on any ques-*

tion as to whether -

(i) any person has been validly elected as a member of the National Assembly or of a House of Assembly of a State under this Constitution,

B (ii) any person has been validly elected to the office of Governor or Deputy Governor.”

See also Section 233(2)(e)(i) and (ii) which makes similar provisions in regard to petition proceedings challenging the election of a person to the office of President or Vice-President. It was under that section that the case of Buhari & Ors. v. Obasanjo & Ors. (supra) was decided.

The definition of “decision” in Section 318(1) of the 1999 Constitution gives a wide implication to any ‘determination’ by a court. This obviously includes any interlocutory decision. It follows that the Court of Appeal has jurisdiction to entertain an appeal from interlocutory decision of the Election Tribunals set up under Section 246 of the 1999 Constitution. The decisions reached therein by the Court of Appeal shall be final by virtue of subsection (3) of that section. The case of Onuaguluchi v. Ndu (2001) 3 S.C. 49, (2001) 7 NWLR (Pt. 712) 309 was decided along the same line on the basis of the provisions of Section 81(1) and (3) of Decree No. 5 of 1999 which 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.

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

See also Esewe v. Gbe (1988) 5 NWLR (Pt. 93) 134; Ecoconsult Ltd v. Pancho Villa Ltd. (1999) 1 S.C. 83; (1999) 1 NWLR (Pt. 588) 507.

In view of the foregoing discussion of the legal position and the reasons stated and those stated in the ruling of my learned brother, Kutigi, JSC., I too uphold the preliminary objection to the effect that this court has no jurisdiction to entertain this appeal. I accordingly strike it out as being incompetent. I make no order for cost.

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**EJIWUNMI JSC**

I was privileged to have read before know the draft of the

ruling just delivered by my learned brother, Kutigi, JSC. I unhesitatingly agree with him that this appeal is incompetent for the reasons given in the said ruling. However, may I be permitted to add a few words of my own?

The application which has led to this decision, was brought by the applicant for the following reliefs:-

“1. *An order of court for accelerated hearing of the appeal and an interlocutory application arising therein.*

2. *An order of court striking out the appeal in limine for incompetence.*

3. *Making any other order of orders as the Honourable Court may deem fit and proper in the circumstances of this appeal.*

And further take notice that the grounds upon which this application is brought are as follows:-

(a) *Under Section 246(3) of the 1999 Constitution of the Federal Republic of Nigeria, the decision of the Court of Appeal in an election is final.*

(b) The Notice of Appeal is a deliberate abuse of judicial process intended to delay and *Pervert the cause of justice.*

(c) *The Notice of Appeal is a nullity.*”

The applicant also deposed to a 14-paragraphed affidavit, which were attached Exhibits “AA”; “AB”; “AB1” and “AB2”. I do not intend to reproduce them as they have been fully set down in the lead judgment. However, it is sufficient for my own purposes to set down paragraphs 4, 5, 6 and 7 of the said affidavit. The applicant who deposed to it contested the 19th of April 2003, Gubernatorial Election for the Rivers State against the respondent/appellant. The respondent/appellant won the said election. The applicant then petitioned against his election to the Election Tribunal ruling at Port Harcourt. The said paragraphs 4, 5, 6 and 7 of the applicant’s affidavit are as follows:-

4. After service of the petition on the appellant/respondent, a Notice of Preliminary was filed on his behalf challenging the competence of the petition.

5. After hearing argument on the Notice of Preliminary Objection, the Election Tribunal sitting at Port Harcourt struck out the petition.

The petitioner/respondent/applicant, appealed to the Court of Appeal.

6. On 31st July 2003, the Court of Appeal allowed the appeal and remitted the petition back to the Tribunal for hearing on merit. Copy of the enrolled order of the Court of Appeal is hereto exhibited and marked Exhibit "AA".

7. On 11th August 2003, the appellant/respondent filed a  
 B Notice of Appeal to this Honourable Court challenging the decision of the Court of Appeal on the election petition matter. It is this Notice of Appeal that is the subject of this application.

The application and its grounds were refused by the 1st re-  
 C spondent in a nine paragraph counter-affidavit sworn to on his behalf by one Oris Onyiri, who described himself as a "politician" and the secretary of the Peoples Democratic Party, Rivers State. In my view, I consider paragraphs 4, 5, 6 and 7 as germane to my decision in this matter. They read thus:- ,

D *"4. That the Court of Appeal that heard the appeal of the petitioner/respondent/applicant herein had no jurisdiction to adjudicate on the appeal because the appeal was not on any question whether any person (i.e., the appellant/1st respondent) was duly elected to the- Office of Governor or Deputy Governor.*

E *5. That the appeal of the appellant/1st respondent is of a Constitutional nature and it touches on the jurisdiction of the Court of Appeal.*

F *6. That the appellant/1st respondent herein has not filed the appeal before this Honourable Court to annoy, irritate or frustrate the petitioner or to delay the hearing of the petition.*

*7. That in view of the infringement of the Constitution by the Court of Appeal, it would be in the interest of justice to determine the appeal as stipulated by law"*

G The 2nd-327th respondents did not file any affidavit, but in keeping with the Rules of this court, their learned counsel, John Kalipa filed a respondent's brief on their behalf. The applicant also had filed for him an applicant's brief by his learned counsel, Chief M. I. Ahamba, SAN. For the 1st respondent, his brief was filed by Mr. Kehinde Sofola,  
 H SAN.

At the hearing of this application, the thrust of the argument of Chief Ahamba, SAN, for the applicant, is that the appeal of the 1st respondent/applicant to this court is incompetent and should be struck out. For this argument to be sustained he referred to the provisions

of Section 246(3) of the 1999 Constitution and to the following cases Erisi v. Idika (1987) 4 NWLR (Pt. 66) 503 at 512, 518, Onuaguluchi v. Ndu (2001) 3 S.C. 49; (2001) 7 NWLR (Pt. 712) 309 at 321. And also to the recent unreported decision of this court in SC. 194/2003 Buhari & Ors. v. Obasanjo & Ors delivered on 14/11/2003.

Mr. Sofola, SAN, for the 1st respondent, opened his argument by referring to the preliminary objection raised against the twin reliefs sought by the applicant. And then submitted that as the prayers are in contradiction to each other, the application should be struck out. Following the view of the court that the 1st prayer cannot be considered without first considering the merit in respect of the 2nd prayer, Mr. Sofola continued with his argument against the granting of the 2nd prayer. The thrust of the argument of Mr. Sofola appears to be that the appeal filed in respect of the decision of the Court of Appeal is competent. And in support of that argument, he referred to the decision of this court in James Orubu v. National Electoral Commission (1988) 12 S.C. (Pt.III) 1; (1988) 5 NWLR (Pt. 94) 323. He also asked that the court should not follow its recent unreported decision in SC. 194/2003, Buhari & Ors. v. Obasanjo & Ors. delivered on 14th November, 2003.

In my humble view, as close reading of James Orubu v. National Electoral Commission (supra), would reveal that the court was in that case interpreting paragraphs 27(1) of Schedule 3 to the Local Government Elections Decree No. 37 of 1987. It must be noted that this court in the determination of that appeal was concerned with the interpretation of the provisions of paragraph 27(1) of Schedule 3 to the Local Government Elections Decree. It was not concerned with the provision of Section 271 of the 1979 Constitution, which is also in pari materia with Section 318(1) of the 1999 Constitution,. Hence, Uwais, JSC., (as he then was), said thus:-

*“It follows, therefore, that the fact that the Local Government Elections Decree, 1987, has made specific provisions on election to Local Government Councils is sufficient indication that the un-suspended or modified provisions of the 1979 Constitution,... Are not to apply to matters connected with Local Government elections. The maxim generalia specialibus non derogant applies.”*

*Continuing, the learned Justice said;*

*“Since the provisions of a Decree override those of the 1979*

*Constitution, then it is incontrovertible that the general provisions of the Constitution will not apply to an appeal from the High Court, unless, of course, the Decree makes no provision in that respect. In present case there was no right of appeal to the Court of Appeal by virtue of the provisions of paragraph 27(1) of Schedule 3 the 1987*  
 B *Decree.*”

That decision in my respectful view cannot provide comfort to the respondent to support the view canvassed that its appeal to this court is competent. It is no doubt clear that all the Courts of Record  
 C in the Federation from the High Court to this court are creations of the Constitution and have various jurisdiction carefully set out accordingly in the Constitution.

Hence, in the Constitution of Nigeria, 1999, when dealing with where an appeal would lie from the decision of Governorship Election  
 D Tribunals, and also the effect of such decisions in the event of an appeal, it provided thus in Section 246(1)(b)(ii) and (3) as follow:-

“246 (1) An appeal to the Court of Appeal shall lie as of right from:

(b) decision of the National Assembly Election Tribunals and  
 E Governorship and Legislative Houses Election Tribunals on any question as to whether

(ii) any person has been validly elected to the office of Governor or Deputy Governor, or

(3) The decisions of the Court of Appeal in respect of appeals  
 F arising from election petition shall be final.”

Bearing in mind the argument of the 1st respondent that the jurisdiction of the Court of Appeal is limited only to hearing appeals from the decision of the Governorship Election Tribunals, as to  
 G whether any person has been validly elected to the Office of Governor or Deputy Governor, it is pertinent in the context of this question to took more carefully at the wording of Section 246(1) which when read together is as follows:

“An appeal to the Court of Appeal shall lie as of right from the  
 H decision of the Governorship Election Tribunal on any question as to whether any person has been validly elected to the Office of Governor.” (Underlining mine)

Though the word “any” when used as an adjective is defined in Longman Dictionary of the English Language thus: “one or some



indiscriminately, whichever is chosen". It would appear that the word "any" qualifying "question" was deliberately used by the lawmakers to indicate that an appeal to the Court of Appeal was not limited only to hearing appeals only as to whether any person has been validly elected to the office of Governor (underlining mine). It follows therefore that the provisions of Section 246(1) allow appeals to lie to the Court of Appeal in respect of interlocutory decision of the Governorship election tribunals and the other tribunals named in that section of the Constitution. Be that as it may, the provision of Section 318(1) of the 1999 Constitution leaves no one in doubt as to the meaning of decision. It reads:

*"decision" means, in relation to a court, any determination of that court and includes judgment, degree, order, conviction, sentence.*

And upon that premise an appeal surely lies to the Court of Appeal in respect of the interlocutory decision of the Governor's Election Tribunal sitting in Port Harcourt. I only wish to add that the agreement offered that the recent unreported decision of this court should not be followed is, with the respect, untenable and it is rejected accordingly. It only remains for me to say that there is no question that an appeal in respect of decision by a Governorship Election Tribunal lies to the Court of Appeal, and by virtue of the clear provisions of Section 246(3) of the 1999 Constitution, the decision of that court is final.

I would therefore also make orders by granting prayer (2) and hereby strike out Appeal No. SC. 205/2003 pending in this court. Having granted prayer (2), prayer (1) cannot now be granted. It is struck out accordingly. I make no order as to costs.

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