

SUPREME COURT OF NIGERIA
WEDNESDAY 19TH NOVEMBER, 2003 SC. 133/2003
**CORAM:- S. M. A. BELGORE, I. L. KUTIGI, A. I. KATSINA-
ALU, A. O. EJIWUNMI, N. TOBI, D. O. EDOZIE,
I. C. PATS-ACHOLONU, JJSC**

1. MUHAMMADU BUHARI
2. CHUBA OKADIGBO APPELLANTS
3. ALL-NIGERIA PEOPLES PARTY)
AND
CHIEF OLUSEGUN AREMU
OBASANJO & 266 OTHERS RESPONDENTS

JUDICIAL PRECEDENTS - Election petitions - Obiter dictum - Effect - Obih v. Mbakwe - The expression of Obaseki JSC in that case law - Is mere obiter dictum - That was never in issue before the court (H1)

CONSTITUTIONAL LAW - Constitution - Electoral Act - By s. 139 1999 Constitution - National Assembly is empowered to enact the Act - That regulates elections generally (H2)

JURISPRUDENCE - Obiter dicta - Weight - Obiter dicta are not conclusive authority - But are mere statements by the way - That have no binding effect on a case (H3)

APPEALS - Injunctions - Grant - Past event - Where the event sought to be prevented has actually taken place - Court will not grant injunction - As doing so will amount to mere academic exercise (H4)

FACTS

Petitioners/appellants petitioned to the Court of Appeal in the court's capacity as the Presidential Election Petition Tribunal for 2003 presidential elections that took place in Nigeria. By the petition, appellants were challenging the return of the 1st and 2nd respondent as president and vice president respectively of the Federal Republic of Nigeria. Following the filing of the petition, appellants also filed a motion on notice praying for an order of the court restraining the 1st

and 2nd respondents from presenting themselves for any swearing-in ceremony towards the commencement of the 2003 - 2007 tenure as president and vice president respectively, pending the determination of the petition.

The basis of appellants' application was that on the authority of the decision in *Collins Obih v. Sam Mbakwe* a returned candidate could not lawfully be sworn-in when his return is being challenged before a competent tribunal unless and until the tribunal pronounces his return to be valid. After hearing on the motion, the tribunal dismissed same as it held that the *res* purportedly sought to be preserved by the order sought was not liable to extinction or destruction and that it would not matter to the outcome of the petition whether or not the 1st and 2nd respondents had been sworn-in. Aggrieved, appellants have brought this appeal against the ruling of the tribunal. By the time of bringing the appeal however, the swearing-in had taken place. So, appellants prayed in the appeal that the swearing-in be set aside.

ISSUES FOR DETERMINATION

"(1) Whether the 1st and 2nd Respondents whose qualification, election and return as the President and Vice President of the Federal Republic of Nigeria were being challenged in a competent court can validly be sworn into office before the determination of the Appellants' Petition before the lower court.

(2) Whether the Court of Appeal was right in holding that the Res will not be destroyed if the application is not granted."

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

Election petitions - Obiter dictum - Effect - Obih v. Mbakwe

1. Learned counsel cited the case of *Collins Obih v. Sam Mbakwe* (1984) 1 SCNLR 192, 202 and 203, a decision of this court on appeal from the decision of Electoral Tribunal sitting in Imo State whereby Obaseki, JSC. opined as follows:

"...the office of the governor is an elective office and that where an election or return is questioned in the competent High Court, the person declared duly elected or returned can-

not take office until the completion of the hearing and determination of the question whether any person has been validly elected to the office.....”.

Impressive as this line of argument may seem, it is a mere obiter dictum of a single Justice out of seven, the full court that heard the appeal. Further, that obiter is not in the lead judgment of this court in that appeal. This means it was never an issue before the court that His Lordship was giving opinion about. (p. 2504 C)

Constitution - Electoral Acts

2. The Constitution, I must point out, is a general statement of how Nigerians wish to be governed and the real way of governing will be found in all the laws, body of laws, that comply with the Constitution. The Constitution provides for elections and in S. 139 vests in National Assembly the power to make provisions, by way of an Act whereby persons may apply to Court of Appeal to determine who may question the election of President or Vice-President etc. The Electoral Act is to regulate the election generally.

These are the provisions laid down by an Act of National Assembly to govern the period of transition between the Election proper and period of challenges before the election tribunals or the court to determine validity of the election and who has been validly elected. This covers all offices.

(p. 2505 A)

Obiter dicta - Weight

3. Those who are familiar with the doctrine of obiter dicta will know their limit in jurisprudence. They are not conclusive authority, they are to be regarded as statements by the way. They arise when a Judge thinks it is desirable to express opinion on some points, though not in issue or necessary to the case before him, this makes obiter dicta not to have binding effect or weight on the case. (p. 2505 H)

Injunctions - Grant - Past event

4. In the present appeal, the subject of the application in the

trial Court of Appeal was for the first and second respondents not to present themselves for swearing-in on 29th day of May, 2003, for the office of President and Vice-President of the Federal Republic of Nigeria. The remedy sought is injunctive, thus equitable. The two respondents aforementioned, on 29th May, 2003, not only presented themselves for swearing-in to the offices, but were sworn-in.

What is this court to do knowing the event sought to be prevented had actually taken place? This appeal is a mere application for this court to embark on adventure into academic discourse; a function not constitutionally our own. (p. 2506 B)

NOTABLE POINTS OF INTEREST

TOBI JSC

D 1. Interlocutory injunctions – Basis for Grant

The balance of convenience (the opposite of balance of inconvenience) between the parties is a basic determinant factor in an application for interlocutory injunction. In the determination of this factor, the law requires some measurement of the scales of justice to see where the pendulum tilts. While the law does not require mathematical exactness, it is the intention of the law that the pendulum should really tilt in favour of the applicant.

In my view, the pendulum can only tilt in favour of the applicant if the court comes to the conclusion that better justice or more justice in the matter will be done if the application is granted. In other words, the advantages of granting the injunction will outweigh the disadvantages which are really the odds. (p. 2521 E/ G)

G 2. Discretion must be exercised judicially and judiciously

The word “fetter” ordinarily means chained up, check, restrain, hamper. It also carries in its aggregate content the combination of capacity, and here it has a figurative usage. My concern is the opposite of reversal of the word, which is “unfetter”. The word “un” as a prefix means contrary to, opposite of, an action.” Therefore the word “unfettered” in the contextual sense of the word “fettered” means unchained, unchecked, unrestrained, and unhampered. It is my view that it is a misnomer to invariably describe the exercise of the discre-

tionary power of a court as unfettered. The moment a trial court is called upon to exercise its discretionary power in accordance with the enabling law, it is not correct to say that the court has an unfettered discretion in the matter. On the contrary, the discretion must be exercised judicially and judiciously. The moment a discretionary power exercised by a trial court is quashed by an appellate court, the discretion is no more unfettered. The discretion can only be unfettered if it cannot be quashed on appeal. (p. 2528 G)

PATS-ACHOLONU JSC

3. Obiter dictum - Meaning

An obiter dictum is a remark or opinion expressed by a Judge by the way in the sense that it is merely incidental or collateral and not directly focused or hinged upon the question to be determined. It can be said to wear the garb of illustration or analogy but essentially it is not binding as a precedent. It may however be used in academic circles to help in engineering development of the law but care must be taken that such a wayside expression of opinion should not be regarded as a determinate factor. (p. 2533 C)

REPRESENTATION

Chief M. I. Ahamba, SAN with A.M. Ladan, V. I. Ikeanu, A. A. Guak, C. A. Nnewube, E. Etteh, Y.J. Nurieh Yoruka, for the Appellant
Chief Afe Babalola, SAN with Chief A.S. Awomolo, D. Maxwell Gidado, P.O. Onokoro, Olaseni Okunloye, Greg Okonkwo, A. Adebeniyi, A.B. Bakare, O. Amao, S. A. Oke and Miss B. Oyeneyin, for the 1st and 2nd Respondents

J.K. Gadzama SAN, R.O. Yusuf, T.N. Ndifu Esq. N.Y. Oghuma (Mrs.) and N.F. Gaffer (Mrs.), for the 3rd to 267th Respondents

CASES REFERRED TO

Yusufu v. Ojo (1958) 1 NSCC 99

Atolagbe v. Awuni (1979) 8 NWLR (Pt. 522) 536

Onyemaizu v. Ojiako (2000) 6 NWLR (Pt. 659) 25

Nfrili v. Akinsumade (2000) 8 NWLR (Pt. 668) 293

University of Ibadan v. Adamolekun (1967) 5 NSCC 210

Ezeanya v. Okeke (1995) 4 NWLR (Pt. 388) 142

Egbuna v. Egbuna (1989) 2 NWLR (Pt. 106) 773

Ajewole v. Adetimo (1996) 2 NWLR (Pt. 431) 391

Nwobosi' v. A.C.B. Ltd. (1995) 6 NWLR (Pt. 404) 658

Opara v. Ihejirika (1990) 6 NWLR (Pt. 156) p. 291

Collins Obih v. Sam Mbakwe (1984) 1 SCNLR 192

United Bank of Kuwait Plc v. Rhodes (2000) 2 NWLR (Pt. 645) 457

B Nwangana v. Military Governor of Imo State (1987) 3 NWLR (Pt. 59) 185

Nigerian Telecommunications Ltd. v. Ugbe (2003) FWLR (Pt. 148) 1300

C **STATUTES REFERRED TO**

Electoral Act 2002, s. 138

Constitution of the Federal Republic of Nigeria 1999, ss. 135 & 239

Evidence Act, s. 137

D

LEAD JUDGMENT BY BELGORE JSC

This is an interlocutory appeal from the ruling of Court of Appeal in a Presidential Election petition before that court challenging the return of 1st Respondent, Chief Olusegun Obasanjo and 2nd respondent, Alhaji Atiku Abubakar as President and Vice-President respectively of the Federal Republic of Nigeria for 2003 - 2007 tenure. The Court of Appeal, by the Constitution of the Federal Republic of Nigeria, 1999, has original jurisdiction to entertain such petition. When the petition was filed, the appellants Muhammadu Buhari, Chuba Okadigbo, the Presidential and Vice-Presidential candidates respectively, and the political party on whose platform they contested the said election brought a Motion on Notice praying as follows:-

G "MOTION ON NOTICE FOR INTERLOCUTORY INJUNCTION UNDER SECTION 6(6) OF THE 1999 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA

H TAKE NOTICE that this Honourable Court shall be moved on...the...day of.....2003 at 9:00 O'clock in the forenoon or so soon thereafter as applicants or counsel on their behalf may be heard for the following relief:

An order of this Honourable Court restraining the 1st and 2nd Respondents from presenting themselves for any Swearing-in Ceremony towards the commencement of the 2003 - 2007 tenure as President and Vice-president respectively of the Federal Republic of

Nigeria on the 29th May, 2003, or any other date pending the determination of the substantive petition.

And for any other order or orders as the Honourable Court may deem fit and proper to make in the circumstance.

AND FURTHER TAKE NOTICE that the grounds upon which this application relies are as follows:

“(a) The petition raises very serious issues of law relating to the breach of the fundamental principles of the rules of natural justice and Section 42 (1) (b) of the 1999 Constitution of the Federal Republic of Nigeria which touch on the fundamental competence of the 3rd Respondent to conduct the election.”

“(b) The petition questions the eligibility of the 1st Respondent to contest the election.”

“(c) The petition raises very serious questions of validity of the election predicated on a prima facie breach of the principles enunciated by the Supreme Court decision in Madukolu v. Nkemdilim (1962) 25 SCNLR 341

“(e) It is in the interest of the just determination of the election Petition that the status quo be maintained.”

The application was filed on 22nd May, 2003. The application was argued before the trial court on the same day, all the necessary parties having been served with the Hearing Notice. In a short ruling delivered on 27th May 2002, by Abudullahi, President, Court of Appeal and concurred to by Oguntade, Mahmud Mohammed, Nsofor and Tabai, JJCA., the application was refused. Learned President held inter alia as follows:-

“...the Res before me in this application by its very nature indestructible or liable to extinction by the fact that the Respondents 1 & 2 are sworn-inI do not see how the swearing-in of the 1st respondent on 29th May, 2003, can derogate from the strength of the petitioners’ cause before this court. Clearly this application cannot be seen as one designed to protect any Res. This court will still be able to fairly and objectively adjudicate on the merit of the petition even if the 1st respondent is sworn in on 29th May, 2003.”

Further in the ruling, it was held that tenure of the 1st respondent (and of course that of 2nd respondent) would terminate on 29th May, 2003, and if nobody was sworn in on that day there would be a vacuum whereby there would be no constitutional government

in Nigeria by 29th May, 2003. This section would be obviated by the provisions of S. 138 of Electoral Act, 2002, reading in subsections (1) and (2) as follows:-

- B “(1) If the Election Tribunal or the Court, as the case may be, determines that a candidate returned as elected was not validly elected, and if notice of appeal against that decision is given within 21 days from the date of the decision, the candidate returned as elected shall, notwithstanding the contrary decision of the Election Tribunal or the court, remain in office pending the determination of the appeal.
- C (2) If the Election Tribunal or the Court, as the case may be, determines that a candidate returned as elected was not validly elected, the candidate returned as elected shall, notwithstanding the contrary decision of the Election Tribunal or the Court, remain in office pending the expiration of the period of 21 days within which an appeal
- D may be brought.”

Against this ruling an interlocutory appeal was lodged in this court on 6th June, 2003, the grounds of appeal attached to the Notice of Appeal complain of:

- E 1. error in law by the Court of Appeal in refusing to grant the injunction sought against 1st and 2nd respondents in that the election of the two respondents was in issue in the petition before trial court. At the competence of 3rd respondent, the Independent National Electoral Commission's competence was being questioned and that the person returned could not in law be sworn to office until the
- F election tribunal had decided one way or the other.

2. error by Court of Appeal in not advertng to decision of Supreme Court in similar cases, especially Collins Obih v. Sam Mbakwe (1984) 1 SCNLR 192, 202 paragraph E whereby, according to the
- G grounds' particulars, a returned candidate should and could not lawfully be sworn-in unless the Election Tribunal or Court seized with jurisdiction to determine such issue had pronounced on the rightful candidate returned.

- H The appeal therefore prayed that the swearing-in that took place on 29th day of May, 2002, be set aside and 1st and 2nd respondents shall continue in office in accordance with S. 135 (1) (a) of the Constitution providing as follows:-

“135(1) subject to the provisions of this Constitution, to a person shall hold the office of President until-

(a) when his successor in office takes the oath of that office;"

By the time this appeal was lodged on 6th of June, 2003, the 1st and 2nd respondents had been sworn-in as President and Vice-President respectively by the Chief Justices of Nigeria at a ceremony on 29th May, 2003. Then one wonders what the appellants were pursuing from that day up to now. The issues formulated by them in this appeal seem to portray their mission, to wit;

"(1) Whether the 1st and 2nd Respondents whose qualification, election and return as the President and Vice President of the Federal Republic of Nigeria was being challenged in a competent court can validly be sworn into office before the determination of the Appellants' Petition before the lower court.

(2) Whether the Court of Appeal was right in holding that the Res will not be destroyed if the application is not granted."

It can be seen from these issues that what the appellants are after is to stop the respondents - Obasanjo and Atiku - from being sworn-in. However, the motion by its very nature is not directed at anybody other than the returned candidates not to present themselves for swearing-in on 29th day of May, 2003. Since the ruling by Court of Appeal refusing the application, a lot of water had passed under the bridge. It is common knowledge that the focus of the motion has been rendered irrelevant as Obasanjo and Atiku had been sworn-in as President and Vice-President respectively by the Chief Justice of Nigeria. The motion was not directed at the Chief Justice not to swear the two persons, but to prevent the two persons from presenting themselves for swearing-in on 29th May, 2003.

The application is injunctive and as such required the equitable discretion of the court; in short it is an equitable remedy that was being sought. It is far from being a constitutional issue despite the argument that it is constitutional. Chief Ahamba, SAN, for the appellants, posited that only persons validly elected can hold office of President or Vice-President of the Federal Republic of Nigeria and that until a person whose election is challenged is declared validly elected by Court of Appeal in an election petition, the person elected or returned cannot validly hold office. He adverted to S. 239 (1) (a) of the Constitution. With greatest respect, I fail to find any help in this submission because that section has not said so. For the benefit of elaboration of this judgment I set out the section reading:

239(1) *subject to the provision of this Constitution the Court of Appeal shall, to the exclusion of any other court of law in Nigeria have original jurisdiction to hear and determine any question as to whether-*

- B (a) *any person has been validly elected to the office of President or Vice President under this Constitution; or*
- (b) *the term of the President or Vice-President has ceased: or*
- (c) *the office of President or Vice-President has become vacant."*

C To my mind this section has not helped the appellants' argument, as could be seen from the clear purpose of the section as quoted above. **Learned counsel cited the case of Collins Obih v. Sam Mbakwe (1984) 1 SCNLR 192, 202 and 203, a decision of this court on appeal from the decision of Electoral Tribunal sitting in Imo State whereby Obaseki, JSC. opined as follows:**

D ***"...the office of the governor is an elective office and that where an election or return is questioned in the competent High Court, the person declared duly elected or returned cannot take office until the completion of the hearing and determination of the question whether any person has been validly elected to the office..."***

E *Further, it was also opined that:*

F *"It can therefore be seen that the crucial task of the qualification to hold office is the validity of the election. Where the question is raised, until its determination by the competent High Court no person can validly hold the office. The election can only be questioned by a petition to the High Court."*

G ***Impressive as this line of argument may seem, it is a mere obiter dictum of a single Justice out of seven, the full court, that heard the appeal. Further, that obiter is not in the lead judgment of this court in that appeal. This means it was never an issue before the court that His Lordship was giving opinion about.*** It is true S. 239 (1) (a) of 1999 Constitution is similar to

H S. 237 (1) of 1979 Constitution but there is no need to embark on simple obiter as if it is the decision of the entire full Court. The Constitution should never be read to say what it has not provided even though it should be liberally construed to giving meaning and effectiveness so as not to have embarrassing anomaly that can result in

vacuum of any office or cause serious crisis in the polity. ***The Constitution, I must point out, is a general statement of how Nigerians wish to be governed and the real way of governing will be found in all the laws, body of laws, that comply with the Constitution. The Constitution provides for elections and in S. 139 vests in National Assembly the power to make provisions, by way of an Act whereby persons may apply to Court of Appeal to determine who may question the election of President or Vice-President etc. The Electoral Act is to regulate the election generally.***

Thus, in S. 138 of Electoral Act, it is provided:

“S. 138 (1) If the Electoral Tribunal or the court, as the case may be, determines that a candidate returned as elected was not validly elected, and if notice of appeal against that decision is given within 21 days from the date of the decision, the candidate returned as elected shall, notwithstanding the contrary decision of the Electoral Tribunal or the court, remain in office pending the determination of the appeal.

(2) If the Electoral Tribunal or the court, as the case may be, determines that a candidate returned as elected was not validly elected, the candidate returned as elected shall, notwithstanding the contrary decision of the Electoral Tribunal or the Court, remain in office pending the expiration of the period of 21 days within which an appeal may be brought.”

These are the provisions laid down by an Act of National Assembly to govern the period of transition between the Election proper and period of challenges before the election tribunals or the court to determine validity of the election and who has been validly elected. This covers all offices. In *Collins Obih v. Sam Mbakwe (supra)*, Chief Ahamba, SAN, for the appellant, quoted with relish the judgment of Obaseki, JSC., that once a petition is filed against an election, the person elected could not be sworn into office not until the electoral tribunal or court, as the case may be, finally decided the validity of the election. That portion of the judgment was the learned Justice’s contribution to decision of the full court of seven. The other six Justices never alluded to this obiter dictum, and it was not the lead judgment.

Those who are familiar with the doctrine of obiter dicta

will know their limit in jurisprudence. They are not conclusive authority, they are to be regarded as statements by the way. They arise when a Judge thinks it is desirable to express opinion on some points, though not in issue or necessary to the case before him this makes obiter dicta not to have binding effect or weight on the case.

In the present appeal, the subject of the application in the trial Court of Appeal was for the first and second respondents not to present themselves for swearing-in on 29th day of May, 2003, for the office of President and Vice - President of the Federal Republic of Nigeria. The remedy sought is injunctive, thus equitable. The two respondents aforementioned, on 29th May, 2003, not only presented themselves for swearing-in to the offices, but were sworn-in. This court has not been told whether the two respondents did so with notice of the application. There is nothing to indicate in the Record of Proceedings that Independent National Electoral Commission, 3rd respondent, was even being asked not to present 1st, and 2nd respondents for swearing-in. It seems to be an application surfacing like a bird from the whirlwind. In normal cases, but this is not a normal case, contempt proceedings would have followed. However, equity that always follows the law, will never do anything in vain. ***What is this court to do knowing the event sought to be prevented had actually taken place? This appeal is a mere application for this court to embark on adventure into academic discourse; a function not constitutionally our own.***

“Assuming swearing-in was not necessary for the 1st and 2nd respondents after they were returned by third respondent, what then was wrong with the surplusage? They would still remain in office pending the determination of Court of Appeal on the petition challenging their return and possible decision on appeal to this court. Instead of concentrating on the vital petition before Court of Appeal, this type of application delays what should be expeditiously heard and disposed of.

I therefore find this appeal totally lacking in merit and I dismiss it.

KUTIGI JSC

This is an interlocutory appeal against the ruling of the Presidential Election Petition Tribunal (hereinafter referred to as the Tribunal) delivered on 27/05/2003. The appellants had by Motion on Notice prayed the Tribunal for -

“An order of this Honourable Court restraining the 1st and 2nd Respondents from presenting themselves for any swearing-in ceremony towards the commencement of the 2003-2007 tenure as the President and Vice-President of the Federal Republic of Nigeria respectively on the 29th May, 2003, or any other date pending the determination of the substantive petition.

The tribunal was addressed by the parties on the merit or otherwise of the appellants’ application. In its ruling, the Tribunal dismissed the appellants’ application when Abdullahi, President Court of Appeal who delivered the lead ruling, concluded thus-

“In the circumstances, the application must be refused and it is accordingly refused...”

Dissatisfied with the ruling, the appellants have now appealed to this court. The Notice of Appeal was filed on 6th June, 2003. They have also filed appellants’ brief. Because of the nature of the order which I intend to make, I will not bother to reproduce the issues in this judgment.

It is of utmost importance to observe here immediately that the 1st and 2nd Respondents had been sworn - in as President and Vice-President respectively at a ceremony on 29th May, 2003. One then wonders what this appeal is all about or what it is intended to achieve. The application as reproduced above is clearly for the 1st and 2nd respondents not to present themselves for swearing -in on 29th May, 2003, for the office of President and Vice-President of the Federal Republic of Nigeria, respectively. The two respondents did present themselves for swearing-in and were duly sworn-in. What can anybody do now knowing fully well that the event sought to be prevented had actually taken place. My answer is clearly nothing. It will be a mere academic exercise now to embark on this fruitless exercise. When this court tried to draw the attention of learned counsel for the appellants Chief Ahamba, SAN, to the futility of this appeal, he insisted that the issue involved here now is a constitutional one. I am unable to agree with him. In my view this is a simple matter

of an interlocutory injunction which fell to be decided solely on settled equitable principles. That the tribunal did.

It is thus obvious from the facts before us that the object for which the injunction was asked for, namely, to restrain the 1st and 2nd Respondents from presenting themselves for swearing-in as President and Vice-President respectively on the 29th day of May, 2003, had already been accomplished before this appeal was lodged. In other words an interlocutory injunction was and is no more a remedy for an act which had already been carried out (see for example John Holt Nigeria Ltd. & Anor. v. Holts African Workers Union of Nigeria & Cameroun (1963) All NLR (Reprint).

The undoubted conclusion I have arrived at is therefore that the appeal has been overtaken by events and is incompetent. It is an invitation to embark on an academic and fruitless exercise which is not a function of a court of law.

It is for the above reasons and those contained in the judgment of my learned brother Belgore, JSC., which I read before now, that I dismiss the appeal. The appeal is hereby dismissed with no order as to costs.

KATSINA-ALU JSC

This is an interlocutory appeal from the ruling of the Court of Appeal, Abuja, in a Presidential Election Petition delivered on 27th May, 2003.

The 1st appellant contested the presidential elections on the platform of the 3rd appellant as presidential candidate at the 19th April, 2003, presidential election.

The 1st respondent also contested the said election on the platform of the Peoples Democratic Party (P.D.P.), and the 1st respondent was declared the winner of the election. The election result was declared on 22nd April, 2003.

The appellants were not satisfied with the election and return of the 1st respondent. Consequently, on 20th May, 2003, they filed a petition challenging the return of the 1st respondent and vice-president respectively.

Meanwhile on 22nd May, 2003, the appellants filed an application before the Court of Appeal wherein they prayed for:

“An order of this Honourable Court restraining the 1st and 2nd Respondents from presenting themselves for any swearing - in ceremony towards the commencement of the 2003-2007 tenure as the President and Vice-President of the Federal Republic of Nigeria respectively on the 29th May, 2003, or any other date pending the determination of the substantive petition.” B

The relief sought by this application was an injunctive relief. The Court of Appeal heard arguments on the application on 27th May, 2003, and in a well considered ruling delivered same day refused the application. C

Dissatisfied with the ruling, the appellants have now appealed to this court. The Notice of Appeal was filed on 6th June, 2003.

I must point out that the application before the lower court was for the 1st and 2nd respondents not to present themselves for swearing-in on 29th May, 2003, for the office of President and Vice-President of the Federal Republic of Nigeria, respectively. The 1st and 2nd respondents presented themselves for swearing-in and were duly sworn-in on 29th May, 2003. Clearly therefore the event the appellants sought to prevent had in fact taken place before this appeal was lodged. E

In my opinion, this appeal does not serve any useful purpose. The reason is this. It is now settled law that an interlocutory injunction is not a remedy for an act which had already been carried out. See John Holt Nig. Ltd. v. Holts African Workers Union of Nigeria & Cameroun; (1963) All NLR 385 (Reprint). The appeal, quite plainly, has been overtaken by the swearing-in of the 1st and 2nd respondents on 29th May, 2003. Courts do not act in vain. This appeal, therefore, is a mere academic exercise. F

It is for the above reasons and for the reasons given by my learned brother, Belgore, JSC. that I too dismiss this appeal. I also make no order as to costs. G

EJIWUNMI JSC

I have had the privilege of reading the draft of the judgment just delivered by my learned brother, Belgore, JSC. This appeal was filed against the ruling of the court below wherein that court refused to grant an order of interlocutory injunction restraining the 1st and H

2nd respondents sought by the appellants before that court. This order sought by the appellants read thus:-

“An order of this Honourable Court restraining the 1st and 2nd Respondents from presenting themselves for any swearing in ceremony towards the commencement of the 2003-2007 tenure as the President and Vice-President of the Federal Republic of Nigeria respectively on the 29th May, 2003, or any other date pending the determination of the substantive petition.”

This application which was filed in that court on the 22nd May, 2003, was heard timeously by the court on the 27th May, 2003, and the ruling against which the appellants are complaining about in this court was delivered on the same date, i.e., 27th May, 2003.

Now, it is necessary in my humble view to observe that it does not appear to me that the appellants approached this matter with the urgency and circumspection it deserves. It is common ground that the date for the swearing in of the 1st respondent as President and the 2nd respondent as Vice-President has been fixed for the 29th of May, 2003. It is also clear that though Section 138 of the Electoral Act, 2002, could be as argued for the appellants be called upon in aid of the appellant’s case, yet I find it difficult to see how this can be considered in the circumstances of this case. This is primarily because the order sought had become otiose, as on the 29th May, 2003, 1st and 2nd respondents had presented themselves at their swearing-in ceremony and had been duly sworn in as President and Vice-President respectively of the Federal Republic of Nigeria.

The appellants for reasons best known to themselves did not file any appeal against the ruling of the court below until the 6th of June, 2003. That clearly was done well after the event which they had sought to prevent had occurred. In my own opinion, it is futile to refer to the reasoning in one of the judgments delivered in *Collins Obih v. Sam Mbakwe* (1984) 1 SCNLR 192 at 202 to support a case which they have failed to set up timeously. I may add that in cases of this nature where an interlocutory order of injunction is sought against the happening of such an event in this case, it is necessary for counsel to act timeously and be very circumspect in the pursuit of the action to achieve the desired result.

I must therefore conclude for the above reasons and the fuller reasons given in the leading judgment that this appeal lacks merit.

And it is dismissed by me.

TOBI JSC

I have read in draft the judgment of my learned brother, Belgore, JSC., and I agree with him that this appeal should be dismissed. I wish to add this bit of mine. B

The 1st appellant and the 1st respondent contested the Presidential Election of 19th April, 2003. The 1st appellant lost the election to the 1st respondent. He did not like the result of the election. C He therefore contested the result by filing an election petition.

While the election petition was pending, the appellants filed a motion on notice for interlocutory injunction under Section 6(6) of the Constitution of the Federal Republic of Nigeria, 1999. The motion prayed as follows:- D

“An order of this Honourable Court restraining the 1st and 2nd Respondents from presenting themselves for any swearing in ceremony towards the commencement of the 2003-2007 tenure as the President and Vice-President of the Federal Republic of Nigeria respectively on the 29th May, 2003, or any other date pending the determination of the substantive petition.” E

The appellants relied on four grounds and an affidavit in support of 16 paragraphs, Bodunde Adeyanju, Special Assistant to the 1st respondent, swore a counter affidavit of 12 paragraphs. F Mohammed Abubakar, the Litigation Officer in the Law Firm of Messrs. J.K. Gadzama, (SAN) and Co., swore a counter affidavit of 4 paragraphs on behalf of the 3rd respondent.

The Court of Appeal after hearing arguments from counsel, refused the application. Abdullahi, PCA., in his short ruling, touched G the major issues in the application. I will quote him in extenso at pages 123 and 124 of the Record:

“It seems to me that the Res before me in this application is by its very nature indistinguishable (this is likely to be a typographical error for indestructible) or liable to extinction by the fact that the 19 (this is likely to be a typographical error for 1st) respondent is sworn in on 29/05/03. I do not see how the swearing of the 1st respondent on 29/05/03 can derogate from the strength (again this is likely to be a typographical error for strength) of the petitioner’s cause before this H

B court. Clearly, this application cannot be seen as one designed to protect any Res. This court will still be able to fairly and objectively adjudicate on the merit of the petition even if the 1st respondent as is sworn in on 29/05/2003..... Further, under the 1999 Constitution, the tenure of 1st respondent as President of Nigeria must terminate
C on 28/05/2003. If I grant the application, the effect will be to create a situation that Section 138 of the of Electoral Act has made provisions as to what the position should be in case like this. The philosophy, behind the provisions is that there should be continuity in the govern-
D nance of the country even if the results of an election are being con- tested before the Tribunal or the court. A vacuum must at all events be guarded against. It is not the contemplative (again this is likely to be a typographical error for contemplation) of S. 138 of the Elec- toral Act that an application for interlocutory injunction or stay of
E execution can be granted. In the circumstances, the application must be refused and it is accordingly refused. Election (again this is likely to be a typographical error for 'Each') party to bear its own costs"(again an this is likely to be a typographical error for 'costs')

E I must pause here to say that the typing staff and the proof readers in the Court of Appeal, Abuja Division, can afford to be more careful in the performance of their duties. They are dealing with record of proceedings which require most accurate production. While I fully appreciate the fact that there would be so much pressure on the
F typing staff and the proofreaders in terms of time, being an election matter, they can still afford to be more careful, particularly when they are typing and going through judgments, rulings and orders. It is sad that in ruling of a bit less than two pages, the typing staff and the proof readers were that careless. I will say no more.

G Dissatisfied with the ruling, the appellants have come to this court. As usual, they filed a brief. The 1st and 2nd respondents also filed a brief. The 3rd, 42nd to 268th respondents also filed a brief. So too the 4th to 41st respondents. The 1st and 2nd respondents had earlier filed an objection. They withdrew it at the hearing and it
H was accordingly struck out.

The appellants formulated the following two issues for determination:

“(1) Whether the 1st and 2nd Respondents whose qualifica- tion, election and return as the President and Vice President of the

Federal Republic of Nigeria was being challenged in a competent court can validly be sworn into office before the determination of the Appellants Petition before the lower court.

(2) Whether the Court of Appeal was right in holding that the Res will not be destroyed if the application is granted.”

The 1st and 2nd respondents adopted the above two issues. B
The 3rd, 42nd to 268th respondents formulated the following issues for determination:

Issue A

“Whether the lower court was right when refused the appellants’ application for injunction.” C

Issue B

“Whether the Court of Appeal was right in holding that the res will not be destroyed if the in application is not granted.”

The two issues formulated by the 4th to 41st respondents are D exactly the same as those formulated by the 3rd, 42nd to 268th respondents. I do not think there was anything wrong for the 4th to 41st respondents to say that they were adopting the issues formulated by the 3rd, 42nd to 268th respondents. Well, I take it as a matter of style. E

The thrust of the argument of learned Senior Advocate for the appellants, Chief Mike Ahamba, is that the Court of Appeal was wrong in refusing the application for interlocutory injunction and that this court should allow the appeal, set aside the swearing-in on 29th May, F 2003, of the 1st and 2nd respondents as President and Vice-President of the Federal Republic of Nigeria respectively, and direct that they should hold office and exercise the full functions of their offices pursuant to Section 135 (1) (a) of the Constitution pending the determination of the appellants petition before the lower court. G

Learned Senior Advocate cited a number of authorities: constitutional and statutory provisions and case law. They include Sections 6(6), 134, 135, 137, 239 and 308 of the 1999 Constitution, Section 237 (1) of the 1979 Constitution, Sections 134 and 138 of the Electoral Act, 2002, and Section 74 of the Evidence Act, 1990. H He also cited the following cases: Obih v. Mbakwe (1984) 1 SCNLR 192; Falobi v. Falobi (1975) 10 NSCC 576; Atolagbe v. Awuni (1979) 8 NWLR (Pt. 522) 536; Onyemaizu v. Ojiako (2000) 6 NWLR (Pt. 659) 25; Nfrili v. Akinsumade (2000) 8 NWLR (Pt. 668) 293; Yusufu

v. Ojo (1958) 1 NSCC 99, University of Ibadan v. Adamolekun (1967) 5 NSCC 210; Ojokolobo v. Alamu (1987) 18 NSCC (Pt. 2) 991; P.D.P. v. INEC (1999) 7 S.C. (Pt. II) 30, (1999) 11 NWLR (Pt. 626) 200; Unongo v. Aku (1983) 14 NSCC 563 and Turaki v. Dalhatu CA/A/9/2003, delivered on 27/2/2003 (unreported).

B The crux of the argument of learned Senior Advocate for the
1st and 2nd respondents, Chief Afe Babalola, is that the Court of
Appeal rightly refused the application for interlocutory injunction.
He dealt in some admirable detail on the principles in the granting of
C interlocutory injunction, particularly the principles of protecting the
res or the status quo, the balance of convenience and delay. He re-
produced paragraphs of the counter affidavit sworn on behalf of the
1st and 2nd respondents at paragraph 6.07, pages 12 to 15 of the
brief. Learned Senior Advocate touched Section 138 of the Electoral
D Act, 2000, and cited the following cases: Obih v. Mbakwe (1984) 1
SCNLR 192 at 203; Williams v. Majekodunmi (1962) All NLR 413;
American Cynamide Co. v. Ethicon Ltd. (1975) AC 396; Ogunyemi
v. Irewole Local Government (1993) 1 NWLR (Pt. 270) 462 at 476;
Government of Imo State v. Anosike (1987) 4 NWLR (Pt. 66) 663;
E Kotoye v. CBN (1989) 2 S.C. (Pt. 1) 1; (1989) 1 NWLR (Pt. 98)
419; Cayne v. Global Natural Resources Plc (1984) 1 All ER 225 at
237; Franume v. Mirror Group Newspapers Ltd. (1984) 1 NLR p.
892; ACB v. Awogboro (1991) 2 NWLR (Pt. 176) p. 771 at 719 and
F Missiri v. Balogun (1968) 1 All NLR p. 318.

The fulcrum of the argument of learned Senior Advocate for
the 3rd, 42nd- 268th respondents, Mr. Joe Gadzama, is that the
Court of Appeal rightly exercised its discretion in refusing the applica-
tion for interlocutory injunction. It was the submission of learned
G Senior Advocate that the decision whether to grant an order of in-
junction is always at the discretion of the court. To the learned Senior
Advocate, once the Court of Appeal has correctly exercised its discre-
tion, this court cannot interfere. He submitted that the lower court
rightly refused the application for injunction because the res which is
H the petition before the court was not capable of being destroyed until
its final determination by the court. The major thrust of the brief of
learned Senior Advocate is the exercise of discretion of the Court of
Appeal, which to him, was properly done. He referred to Section
267 of the 1979 Constitution, Sections 134, 135, 137 and 239 (1)

of the 1999 Constitution, Section 138 of the Electoral Act, 2002, and the following cases; *Perepinmodel v. Miakoro* (1992) 2 NWLR (Pt. 224) p. 483; *Opara v. Ihejirika* (1990) 6 NWLR (Pt. 156) p. 291 at 302; *Clement v. Iwuanyanwu* (1989) 4 S.C. (Pt. II) 89; (1989) 3 NWLR (Pt. 107) p. 39 at 51; *Obih v. Mbakwe* (1984) 1 SCNLR 192 at 203; *Kotoye v. CBN* (1989) 2 S.C. (Pt. I) 1; (1989) All NLR 76 to 95; *Obe Memorial Specialist Hospital v. Attorney-General of the Federation* (1987) 3 NWLR (Pt. 60) p. 235; *Ezebilo v. Chinwuba* (1999) 7 NWLR (Pt. -511) p. 108 pp. 124 -125; *Unongo v. Aku* (1983) 14 NSCC 563 and *Turaki V Dalhatu* (supra) and *Nigerian Telecommunications Ltd. v. Ugbe* (2003) FWLR (Pt. 148) p. 1300 - at 1321. B C

Learned Senior Advocate urged the court to dismiss the appeal.

I realize that the brief of Chief E.O. Sofunde, SAN, for the 4th D to 41st respondents contain virtually the same contents and arguments, if not exactly the same contents and arguments. I shall therefore save myself the trouble of repeating the arguments in the brief.

Chief Ahamba, for the appellant, in his Reply Brief, reacting to the argument of learned Senior Advocate for the 1st and 2nd respondents' in paragraph 6.03 of the brief, in respect of a swearing-in date of 29th May, 2003, submitted that there is no such provisions in the Constitution. What the Constitution provides in Section 135 (2) which is the period of termination of the tenure, is subject to the happening of an event contained in Section 135 (1). It cannot therefore be defined, learned Senior Advocate reasoned. He pointed out that the Nigerian Constitution is different from that of the United States where a definite swearing-in date is provided under the Twentieth Amendment. F G

On the issue of non-perishability of the office of the Presidency as in paragraph 6.02 of the 1st and 2nd respondents' brief, while learned Senior Advocate conceded that the Presidency is not perishable he submitted that any particular tenure is and he cited as an example the tenure immediately following the 1999-2003 tenure. H Counsel reiterated his earlier argument that what the appellants asked the Court of Appeal to preserve is the tenure not the presidency, a point, learned Senior Advocate contended, the respondents appear not to have grasped. Consequently, the res is the tenure and the

authority cited not applicable, counsel argued.

While learned Senior Advocate said that the appellants did not dispute the fact that elaborate preparations for the ceremony had been made and that several dignitaries had already arrived the country, these to him cannot justify the country breaching clear provisions of the Constitution of the Federal Republic of Nigeria or non-application of the provisions. To learned Senior Advocate, our Constitution cannot be subordinate to a set of facts and he urged the court to determine that crucial issue.

On the issue of balance of convenience, learned Senior Advocate submitted that due to the superior status of the Nigerian Constitution vis-a-vis any other law, facts or circumstances, the usual consideration regarding balance of convenience is not applicable in the present circumstance.

On *Obih v. Mbakwe* (supra), while learned Senior Advocate conceded that the main issue was whether an election petition is a civil proceedings in the context of Section 267 of the 1979 Constitution, he submitted that the judgment also stated clearly that Governor Mbakwe was in office on account of the previous election and not the one under contest. It was in that context that the authority was cited in the appellants' brief, counsel clarified.

Let me start with first principles and it is the issue of burden of proof. The question is on whom does the burden of proof lie in the application before the Court of Appeal? Although the case law is articulate on the point that election petitions are *sui generis* and therefore may not be strictly departmentalized into civil or criminal proceedings, I am of the firm view that interlocutory injunction being an equitable remedy falls into the domain of civil proceedings.

Accordingly, I invoke Section 137 of the Evidence Act on the issue of burden of proof. By subsection (1), in civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings. By subsection (2), if such party adduces evidence which ought to be proved is established, the burden lies on the party whom judgment would be given if no more evidence were adduced, and so on successively, until all the issues in the pleadings have been dealt with.

The implication of Section 137 (1) of the Evidence Act in the context of this appeal is that the burden or proof in respect of granting the interlocutory injunction is on the appellant. This is because the are the persons that the judgment of this court will be given against, if no evidence is produced on either side. And this is consistent with the common law principle that the party who asserts has a legal duty to prove the correctness of his assertion, and in most cases that party is the plaintiff, who, in our context are the petitioners/appellants. See generally *Ellas v. Disu* (1962) 1 All NLR 214; *Abiodun v. Adehun* (1962) 2 All NLR 550; *University Press Ltd. v. I.K. Martins Nig. Ltd.* (2000) 4 NWLR (Pt. 654) 584; *Osawaru v. Ezeiruka* (1978) 6 - 7 SC 135; *Attorney -General Anambra State v. Onuselogu* (1987) 4 NWLR (Pt. 66) 457; *Agu v. Nnodi* (2002) 12 S.C. (Pt. II) 173, (2002) 12 NSCQR 128.

By subsection (2), the burden of proof will be shifting between the parties in the course of giving evidence. From the language of the subsection, there is some amount of versatility or flirtation in the shifting process of the burden.

In view of the position of the law that the determination of the burden of proof is mostly on the state of the pleadings in the light of Section 137 (2), I shall go to the petition and affidavits sworn in this case.

It looks clear to me from the petition and the affidavit in support of the motion for interlocutory injunction that the burden of proof of the motion is on the appellants. This is because in both the petition and the affidavit in support of the motion, the appellants are the ones who desire the court to give them judgment as to their legal rights on the existence of facts, which they asserted in both processes. And in the language of Section 135 of the Evidence Act, the burden is on them to prove the petition at this stage. They do not even have a duty to prove the depositions as they affect irregularities in the election in their affidavit. What they are expected to do is to satisfy the court that they have made out a substantial question or substantial issue to be tried at the hearing of the case.

And that takes me to the consideration of some of the relevant principles or factors in the application for interlocutory injunction. And interlocutory injunction which is granted in the litigation process, is basically aimed at maintaining the status quo pending the determi-

nation of the issues submitted for adjudication by the court. It is an equitable jurisdiction which the court is called upon to exercise in the light of the facts presented before it by the applicant. And in order to enable the court exercise its equitable jurisdiction, the applicant must present convincing facts which in themselves vindicate the well laid down principles for granting the injunction as decided in Kotoye v. CBN (1989) 2 S.C. (Pt. I) 1; (1989) 1 NWLR (Pt. 98) 419 and the group of cases. The injunction is not granted as a matter of grace, routine or course. On the contrary, the injunction is granted only in deserving cases, based on hard law and facts.

Some of the principles or factors to be considered in an application for interlocutory injunction are:

1. There must be a subsisting action. See *The Praying Band of C. and S. v. Udokwu* (1991) 3 NWLR (Pt. 182) 716

2. The subsisting action must clearly denote a legal right which the applicant must protect. See *Kotoye v. CBN* (supra), *Woluchem v. Wokoma* (1974) 3 S.C. 153;

Obeya Memorial Hospital v. Attorney - General of the federation (1987) 3 NWLR (Pt. 60) 325.

3. The applicant must show that there is a serious question or substantial issue to be tried. See *Kotoye v. CBN* (supra); *Nigerian Civil Service Union v. Essien* (1985) 3 NWLR (Pt. 12) 36; *Nwosu v. Mbakwe* (1973) 3 ECSLR 136.

4. And because of (3) above, the status quo should be maintained pending the determination of the substantive action. See *Kotoye v. CBN* (supra), *Fellowes v. Fisher* (1975) 3 All ER 829; *American Cyanamid Co. v. Ethican Ltd.* (1975) AC. 396.

5. The applicant must show that the balance of convenience is in favour of granting the application. See *Kotoye v. CBN* (supra), *Obeya Memorial Hospital v. Attorney - General of the Federation* (supra); *Akinlose v. A.I.T. Ltd.* (1961) WNL 116.

6. The applicant must show that there was no delay on his part in bringing the application. See *Kotoye v. CBN* (supra).

7. The applicant must show that damages cannot be adequate compensation for the injury he wants the court to protect. See *Kotoye v. CBN* (supra), *Obeya Memorial Hospital v. Attorney-General of the Federation* (supra)

8. The applicant must make an undertaking to pay damages

in the event of a wrongful exercise of the court's discretion in granting the injunction. See Kotoye v. CBN (supra); Hama v. Osaro-Lai (2000) 6 NWLR (Pt. 661) 515.

I will not take each of the above seriatim. I will only take the principles or factors counsel have canvassed in this appeal. They are the preservation of the res, the balance of convenience, delay in bringing the application for interlocutory injunction and the discretionary power of the court. While learned Senior Advocate for the appellants raised only the issue of the res, learned Senior Advocate for the 1st and 2nd respondents raised three issues. Both Mr. Gadzama and Chief Sofunde pitched their tents more on the discretionary power of the court to grant interlocutory injunction than any of the other principles governing the grant of the application. I shall therefore take the issue of protection of the res, the issue of balance of convenience, delay and the discretionary power of the court in granting application for interlocutory injunction. I take these seriatim.

First, the need to protect the res. In general parlance res means "thing" in reference to a particular thing, known or unknown. It also means affair, matter or circumstances. In our context, res generally refers to subject matter of the right complained of the applicant. In Ladunni v. Kukoyi (1972) 3 S.C. 31; (1972) 1 All NLR 133, Coker, JSC., said:

"Eventually an application for an interim injunction postulates that the applicant has a right, the violation of which he seeks to prevent and in order to do so effectively to ensure at that stage of the proceedings that the subject matter of the right be maintained in status quo."

Chief Ahamba submitted that the res is the 2003-2007 Presidential term. Chief Babalola submitted that the res to be maintained in this case is the peace, order and good governance of this country. With the greatest respect I do not agree with Chief Babalola that the res in this matter is the maintenance of peace, order and good government. That cannot be the res. In my humble view, the res in this matter is the office of the President created under Section 130 within the tenure specified under Section 135 (2) of the Constitution. In other words, for the purpose of this appeal, the res is the period the 1st respondent, the present incumbent of the office, will be in office, beginning from the 29th day of May, 2003, for the period of four

years which will terminate by arithmetical calculation on 28th day of May, 2007. In this respect, I am in agreement with Chief Ahamba who submitted that the res is the 2003-2007 Presidential term. He is right.

While I entirely agree with the submission of Chief Ahamba that the date, 29th May, 2003, is not sacrosanct, not being a constitutional provision, as Section 135 (2) is silent on that, it is my view that for the purposes of computation of the four years term created by the subsection, the date is inevitable, inevitable in the sense that it must be used for the computation of the four years tenure under the subsection.

The Court of Appeal held that the res is indestructible and not liable to extinction. Chief Babalola holds the same view. Relying on the case of *Ogunyemi v. Irewole Local Government* (supra), the learned Senior Advocate submitted at pages 10 and 11 of his brief.

“Applying the above principles to this case, it is submitted that there is no way the res in this case will be destroyed in the unlikely event that the petition of the appellant succeeds... It is submitted that the office of the President of Nigeria is not a perishable commodity. It is not liable to extinction as decided by the lower court. The law is that a court will not at an interlocutory application ask the Oba who has been installed to vacate the stool pending the determination of the suit. See Gov. Imo State v. Anosike (1987) 4 NWLR (Pt. 66) 663 at 672. The above principle of the law was the reason for the enactment of S. 138 of the Electoral Act which provides that the incumbent shall remain in the office even where the incumbent lost the election until his appeal is determined.”

I hold a different view about the indestructibility or non-extinction of the res in this matter. While it may appear so on the face of it, and there are good chances of its indestructibility and non-extinction, a closer look at the Nigerian way of life and the unpredictable Almighty God, the only determinant of our lives, the situation could change. I do not appear to sound clear. Perhaps I can afford to sound clearer by giving appropriate examples. If for any reason, the Constitution abrogates the Office of the President or the 1st respondent stays in office for the full term of four years without the judiciary determining the petition of the appellants, whichever event comes earlier, the res will be destroyed or annihilated. While the second

example is almost impossible, the first example is not impossible, considering the way our Constitutions change like the weather cock in climatology. I do not want to go further on this, hoping that I have sufficiently made myself clear.

There is also the side of the Almighty God which no person can predict. If the present incumbent of the office dies within the meaning of Section 135 of the Constitution (God forbid!), the res is completely destroyed. The above, in my view, are instances when the res can be destroyed. In the circumstances, a blanket statement that the res in this case cannot in anyway be destroyed is, with respect, not correct. The event happening to destroy the res may be remote but that does not mean that the event is incapable of happening.

Let me take the second principle of balance of convenience. In the determination of an application for interlocutory injunction, the trial court is expected to pose one or two questions: who will suffer more inconvenience if the application is granted? The reverse question is also relevant and it is who will suffer more inconvenience if the application is not granted? A trial court has a duty to provide an answer to the above questions and in doing so, it must allow itself to be guided by the facts before it. The balance of convenience (the opposite of balance of inconvenience) between the parties is a basic determinant factor in an application for interlocutory injunction. In the determination of this factor, the law requires some measurement of the scales of justice to see where the pendulum tilts. While the law does not require mathematical exactness, it is the intention of the law that the pendulum should really tilt in favour of the applicant.

I realise that Chief Babalola cited the above which he credited to me in the case of *ACB v. Awogboro* (1991) 2 NWLR (Pt. 176) p. 711 at 719. I do not have any reason to depart from it in this appeal. I should rather take the opportunity to expand the frontiers of what I said in that case. In my view, the pendulum can only tilt in favour of the applicant if the court comes to the conclusion that better justice or more justice in the matter will be done if the application is granted. In other words, the advantages of granting the injunction will outweigh the disadvantages which are really the odds.

I do not think I said in *ACB v. Awogboro* (supra) that the principle or factor of balance of convenience is a strict matter of facts

which must be donated by the affidavit in support. Where the affidavit in support is bereft of relevant facts, the court will refuse to grant the application. See also *Kotoye v. CBN (supra)*; *Nwangana v. Military Governor of Imo State (1987) 3 NWLR (Pt. 59) 185*; *Ajewole v. Adetimo (1996) 2 NWLR (Pt. 431) 391*.

B Let me pause here to examine the affidavit evidence.

Paragraphs 3, 8,9,10,11,12,13 and 14 depose as follows:-

“3. I have read the said Election Petition and it raises very fundamental questions of law which include....

C *8. The parity of votes recorded for the presidential and the Governorship election in some States, and the disparity of votes between the Presidential and Governorship elections in some other States, present an unusual electoral phenomenon. For example, in Rivers State, the 3rd Respondent and its Field Officers, particularly*
D *the Resident Electoral Commissioners, and State Returning Officer, recorded the total number of votes scored in the Presidential and Governorship Elections, as 2, 172,682 on each election while in Ogun State, the 1st Respondent scored 930,000.00 votes more than his governorship counter part. Even the voided votes tallied in Rivers*
E *State at 4,357.*

9. Results were not recorded and announced at the majority of the Polling Stations in the States mentioned in paragraph 5 above. I was so informed by the Chairman of each of the state Chapters therein mentioned, and I believe each of them.

F *10. The bias of the 3rd Respondent and its officials against the 3rd Petitioner was manifest in all the elections ‘conducted’ by the 3rd Respondent so far which includes the National Assembly, Presidential, Governorship and State Assembly Elections. For example,*
G *shown to me now, is a copy of a document in which the increase of a score from 4, 765 votes to 41, 756 votes was authorized by the official of the 3rd Respondent, which documents is (sic) hereto attached as ‘Exhibit A.’*

H *11. The 1st Respondent was Head of State and Commander-in-Chief of the Armed Forces of Nigeria from 1976 to 1979, and has occupied the position a second time from 1999 to 2003. I verily believe that the 1st Respondent is not qualified to hold the same position a third time.*

12. The ends of justice will be served by preserving the status-

quo by restraining the 1st and 2nd Respondents from presenting themselves for Swearing-in-Ceremony on 29th May, 2003.

13. Not granting this application might foist on the Honourable Court a state of helplessness at the end of the hearing, as a new status would have been created in the 1st and 2nd respondents.

14. The validity and credibility of the Electoral Process that led to the declaration of the 1st and 2nd Respondents as winners are seriously in dispute.”

Paragraphs 3 and 4 of the counter affidavit of the 1st and 2nd respondents depose as follows:-

“(3) That the facts to which I depose to in this affidavit where not within my knowledge are from information received from President Olusegun Obasanjo, 1st Respondent herein which I verily believe as follows:-

(i) The facts contained in paragraphs 3(a)-(g), 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of the affidavit in support of the motion are not true.

(ii) The 1st respondent contested and was validly elected by the majority of the voters in Nigeria on the 19th of April, 2003, and he was consequently declared the winner of the election on the 2 1st April, 2003.

(iii) The 1st Respondent, pursuant to his election, was issued a certificate to that effect by the 3rd respondent.

(iv) The 1st respondent has met all constitutional and statutory requirements for him to be sworn in as the President of the Federal Republic of Nigeria.

(v) The tenure of incumbent President will terminate on the 28th of May, 2003, and the new President must be sworn in on the 29th of May, 2003.

(vi) The Independent National Electoral Commission and all federal agencies statutorily invested with powers to conduct the swearing in of the 1st respondent have concluded arrangements to swear in the 1st respondent.

(vii) Many presidents and leaders of countries all over the world have accepted invitation to attend the swearing-in ceremony of the 1st respondent and have made arrangement to come to Nigeria.

(viii) An example of countries that are sending delegation to Nigeria is the United States.

(ix) *That Presidential George Bush has designated Secretary of Education Mr. Road Paige to represent him on May 29th, 2003.*

(x) *That President George Bush has sent a seven-man delegation which will include the U.S. Ambassador to Nigeria, Mr. Howard Jeter.*

B (xi) *That a delegation from the U.S. Congressional Black Caucus Foundation led by Rep. William Jefferson and Ambassador Pamela Bridgewater has left for Nigeria.*

C (xii) *That delegations have left for Nigeria and some have in fact arrived.*

(xiii) *That delegations from other parts of Nigeria too have been arriving in Abuja.*

(xiv) *That students from different parts of the country have started arriving in Abuja since last Sunday.*

D (xv) *That the government has made elaborate arrangements, costing a lost of money.*

(xvi) *That 29th of May, 2003, is statutorily a public holiday purposely made for swearing in of the 1st respondent.*

E (xvii) *That the applicant is aware of the advertised programmes on television and radio which had been going on for weeks.*

(xviii) *That Chief Afe Babalola, SAN, told me and I verily believe him that the applicant is guilty of delay.*

F (xix) *That Chief Afe Babalola, SAN, told me and I verily believe him that it will be unjust and inequitable to grant the order sought.*

(xx) *That the government has spent millions of Naira in preparation for the ceremony.*

G 4. *I was informed by Chief Afe Babalola, SAN, and I verily believe him as follows:-*

(i) *An incumbent President in Nigeria has a tenure of four years form (sic) May, 28th of the fourth year of election.*

(ii) *A New President must be sworn-in in Nigeria on 29th of May of the fourth year of the election of the incumbent.*

H (iii) *A grant of the applicant's application will leave Nigeria without a President as from the 29th of May, 2003.*

(iv) *The applicant's application is an invitation to breach the clear provisions of the Constitution of the Federal Republic of Nigeria."*

Paragraph 3 of the counter affidavit of the 3rd respondent deposes as follows:-

“(3) That I was informed by Mrs. Babalola O. Oluwatoyin an officer of the 3rd Respondent on the 23rd day of May, 2003, at about 10 am in our office at No. 4A, Suez Crescent, Ibrahim Abacha Housing Estate, Wuse Zone 4, Abuja, and I very (sic) believe same to be true as follows:-

(a) That the 3rd Respondent was not biased in its conduct of the Presidential election held throughout Nigeria on the 19th day of April, 2003.

(b) That the 1st and 2nd Respondents were not accorded any privilege or advantage by the 3rd Respondent in the conduct of the Presidential election.

(c) That the 3rd Respondent complied with the procedure for the conduct of the Presidential election in accordance with the provisions of the Electoral Act, 2002, and Guidelines for the conduct of the election.

(d) That contrary to paragraph 3(3) of the affidavit, the conduct of the election was free and fair and no electorate was intimidated by the Army or Police Personnel who were deployed to ensure that there was no breach of peace during and after the conduct of the Presidential election by the 3rd Respondent.

(e) That the 1st Respondent was qualified to contest the presidential election as he was elected President of Nigeria in 1999 and has been re-elected in 2003 for a second term.

(f) There was no general election in Nigeria in 1976.

(g) That contrary to the averments contained in paragraph 5 of the supporting affidavit the agents of all the Political parties that contested the election were present at majority of the polling stations and collation centres in the aforementioned states and polling agents of the 3rd Petitioner were not prevented from the polling stations and collation centres by the Police or Army Personnel.

(h) That paragraphs 6, 7, 8, 9, 10, 12, 13, 14 of the supporting affidavit are not true and the 3rd Respondent avers that the election that complained of in the petition was conducted in substantial compliance with the provisions of the Electoral Act, 2002, and the Guidelines of the 4th Respondent for the conduct of the election.

(i) That the Petitioners/Applicants have nothing to lose if this

application is Refused.

(j) *That arrangements have been made for the Inauguration of the 1st and 2nd Respondents as the President and Vice President respectively of the Federal Republic of Nigeria and many African Heads of States have indicated their intention to attend the inauguration and granting the applicants' prayer will cause a lot of inconvenience to Nigerians who are desirous of ensuring a smooth transition to the next Republic."*

After reading the above affidavits, the learned President of the Court of Appeal, Abdullahi, PCA., came to the following conclusion at page 124 of the Record:

"Another important thing I must bear in mind is the balance of convenience as between the parties. It is well-known that the 29/05/03 has been fixed for the swearing ceremony of the 19 respondent (could this be another typographical error for 1st respondent); and that elaborate arrangements including the invitation of foreign dignitaries have been made for the occasion. It seems to me injunction at this stage to make an order the effect of which is to suspend on council (can this be a typographical error for 'or cancel') these arrangements when such order will not in any case enhance the case of the petitioner before the court."

I do not think I can fault the above conclusion of Abdullahi, PCA., as it is clearly borne out from the affidavit evidence before the court. Paragraph 3 of the affidavit of Bodunde Adeyanju on behalf of the 1st and 2nd respondents clearly deposed to contacts made with presidents and leaders of foreign countries and their acceptance to attend the ceremony. The same paragraph deposed to the fact that millions of naira had been spent for the preparation of the ceremony. Strangely, the depositions were not denied by the appellants and they are deemed admitted. See *Egbuna v. Egbuna* (1989) 2 NWLR (Pt. 106) 773; *FBN Plc v. Tsokwa* (2000) 13 NWLR (Pt. 685) 521; *Agu v. NICON Insurance Plc* (2000) 11 NWLR (Pt. 677) 187; *Commercial Bank Credit Lyonnais v. Unibez (Nig.) Ltd.* (2000) 9 NWLR (Pt. 673) 491; *United Bank of Kuwait Plc v. Rhodes* (2000) 2 NWLR (Pt. 645) 457.

Learned Senior Advocate for the appellants in his reply brief, reacted to the principle of balance of convenience by submitting that the principle is not applicable because of the superior status of the

Nigerian Constitution. I had earlier referred to it. While I apologize for the repetition. I must say that the law is strange and a very new learning to me and I am not prepared to learn it. Why does and how does the Constitution come in here? Is counsel submitting that the balance of convenience principle is unconstitutional? If so, why did he not say so clearly? If not so, what was he saying? In my view the Constitution has nothing to do with the principle of balance of convenience and that sacred document should be left alone. B

Although the appellants deposed in paragraph 3 of their affidavit in support, what I would regard as the need to grant the injunction on grounds of substantial questions of law, learned Senior Advocate did not argue that in the brief. Since the issue was not raised in the brief, this court cannot raise it. I will refrain from making any comments on the other depositions in the affidavits as they, in my view, materially touch on the merits of the petition which is before the Court of Appeal. I hold from the affidavit evidence that the balance of convenience is against the exercise of the discretion to grant the application. C D

I now take the last principle canvassed by learned Senior Advocate for the 1st and 2nd respondents. It is delay in bringing the application. It was held in *Kotoye v. CBN* (supra) that delay will defeat an injunction of this nature. Dealing with the issue of delay, Chief Babalola, after citing *Kotoye v. CBN* (Supra), said in paragraph 6.05 of his brief: E

"In this case, the result of the election was declared on 21st April, 2003. The appellants knew all along that the swearing in of the President was fixed for May 29th, 2003. The appellants did not take any steps until May 22nd, six days to the swearing in ceremony." F

This is a very fundamental submission which I expected learned Senior Advocate for the appellants to respond to in his reply brief. It is possible he forgot to do so. I have always said it that litigation is not a game of chess where the players try tricks at each other to maneuver to get victory. Litigation is rather a judicial process where all the cards must be placed on the table of the judicial process so that parties know in advance the case each has over the other. While the submission of counsel will be kept in his breast, the way the case will be handled, which include pleadings, documents and all other relevant papers should be within the reach of the adverse party, who H

should be free to call for them at the shortest notice.

It is clear from the contention of Chief Babalola and the affidavit evidence that the election results were announced on 21st April, 2003. It was common knowledge that the person who wins as President will be sworn in on 29th May, 2003. Although Chief Ahamba submitted that the date is not sacrosanct, as it is not like the United States of America Constitution, it was clear, in my view, to the applicants that as at 21st April, 2003, when the Presidential election results were announced, giving the office of the President to the 1st Respondent, they, the appellants, knew that he will be sworn in on 29th May, 2003. But they decided to wait for a period of one month to bring the application for interlocutory injunction. I do not want to say that one of the aims was to embarrass the Nigerian Government, a situation which was capable of ruining the amity or comity between Nigeria and the foreign countries invited to the ceremony.

Both Mr. Gadzama and Chief Sofunde dealt with the discretionary power of the court in granting application for interlocutory injunction. In *Chief Adene v. Dantumbu* (1988) 4 NWLR (Pt. 88) 309, the court held that an order of interlocutory injunction is a discretionary order that may be granted or refused by the court after weighing the competing interests of the parties in that imaginary scale of justice. In *Opa v. Ihehirika* (1999) 6 NLR (Pt. 156) 291, the Court of Appeal held that it is settled law that the question as to whether or not to grant an injunction is discretionary, and while the discretion is unfettered, it must be exercised for good reasons.

With the greatest respect, I am in difficulty to agree with this judgment because it contradicts itself. Most courts hold that discretionary power is unfettered. Why is it so? Is it correct to say that a court of law other than the Supreme Court has unfettered discretion to exercise in the judicial process? The word “fetter” ordinarily means chained up, check, restrain, hamper. It also carries in its aggregate content the combination of capacity, and here it has a figurative usage. My concern is the opposite of reversal of the word, which is “unfetter”. The word “un” as a prefix means contrary to, opposite of, an action.” Therefore the word “unfettered” in the contextual sense of the word “fettered” means unchained, unchecked, unrestrained, and unhampered. It is my view that it is a misnomer to invariably describe the exercise of the discretionary power of a court as unfet-

tered. The moment a trial court is called upon to exercise its discretionary power in accordance with the enabling law, it is not correct to say that the court has an unfettered discretion in the matter. On the contrary, the discretion must be exercised judicially and judiciously. The moment a discretionary power exercised by a trial court is quashed by an appellate court, the discretion is no more unfettered. B The discretion can only be unfettered if it cannot be quashed on appeal. But that is not the situation in respect of this application for interlocutory injunction. I have no doubt in my mind that the Court of Appeal properly exercised its discretion in refusing the application C for interlocutory injunction.

Let me take the case of Obih v. Mbakwe (supra) heavily relied upon by Chief Ahamba. With respect, I do not see the relevance of that decision in this appeal. I think the main issue in that case was whether the election petition was maintainable against the Governor D in the light of the immunity provisions of the 1979 Constitution as they related or affected the Office of Governor. In the case, Obaseki, JSC., in his concurring judgment said at pages 202 and 203.

"....the office of the Governor is an elective office and that where an election or return is questioned in the competent High E Court, the person declared duly elected or returned cannot take office until the completion of the hearing and determination of the question whether any person has been validly elected to the office.... It can therefore be seen that the crucial test of the qualification to F hold the Office is the validity of election. Where the question is raised, until the determination by the competent High Court no person can validly hold the office. The election can only be questioned by a petition to the High Court."

A statement by a Judge, either by way of a ratio decidendi or G an obiter dictum is determined in the context of the facts of the case before the court. A ratio or an obiter cannot be determined outside the facts of the case or in vacuo. And in that exercise, a court will be able to determine whether what the Judge said is a ratio or a dictum. While a ratio of a superior court is binding, an obiter of a superior H court is generally not binding on inferior courts. An obiter of the Supreme Court is not binding on that court. The only binding pronouncement is the ratio. In the light of the facts of the case, what Obaseki, JSC., said is clearly an obiter dictum which is not at all bind-

ing on this court. I so treat it.

Another fundamental aspect is that the obiter dictum of Obaseki, JSC., is clearly contrary to the provision of Section 138 of the Electoral Act. By the provision, the incumbent, in our context, the 1st respondent, shall remain in office even where he lost the
B election petition until his appeal is determined. Learned Senior Advocate, Chief Ahamba, submitted that Section 138 of the Electoral Act is unconstitutional, as it is inconsistent with the provisions of Sections 134, 137 and 239 (1) (a) of the Constitution. He also submitted that the section curtails the powers of the lower court under
C section 6(6)(A) of the Constitution.

*With the greatest respect, I do not agree with Chief Ahamba that Section 138 is unconstitutional. It is a transitional or transient provision designed to take care of a contingency which will definitely
D phase out or fade away on the completion of the election petition on appeal. Such a provision cannot be said to be unconstitutional. And what is more, both Section 138 of the Act and Section 6(6)(a) of the Constitution involve the court system and it is unthinkable for counsel to come to the conclusion that Section 138 is unconstitutional,*
E *particularly when the provision does not in any way detract or subtract from the judicial powers duly entrenched in Section 6(6)(a) of the Constitution. The much I see in this is that an otherwise equitable remedy or relief of an interlocutory injunction is unduly raised to the status of a constitutional matter to win the strength, power and sym-*
F *pathy of the Constitution. This ought not to the situation.*

I do not think the constitutional issues, particularly the provisions of the Constitution raised by Chief Ahamba can change the position I have taken in this judgment, whether it is Section 135(1) or
G 135 (2) of the Constitution. In my humble view, Section 135 has nothing to do with an otherwise innocuous application for interlocutory injunction and I so hold. I shall therefore not take my time in interpreting the section. I shall do so when the Section properly arises in the future for interpretation.

H Assuming, without conceding, that the Court of Appeal is wrong, is this a proper time to grant the motion? It is trite law that an interlocutory order by way of injunction is not a proper remedy for an act which has already been carried out. See *John Holt Nigeria Ltd. v. Holts African Workers Union of Nigeria and Cameroun* (1963) 2

SCNLR 383, Chief Anosike v. The Governor of Imo State (1987) 4 NWLR (Pt. 66) 663; The Attorney-General and Commissioner for Justice, Anambra State v. Okafor (1992) 2 NWLR (Pt. 224) 396.

By the motion dated 22nd May, 2003, which I reproduced at the beginning of this judgment, the act to be restrained was the swearing-in of the 1st and 2nd respondents on the 29th May, 2003, or any other date pending the determination of the substantive petition. It is common knowledge that the 1st and 2nd respondent, were sworn-in on 29th May, 2003. Accordingly, there is no act to which the application for interlocutory injunction can restrain or stop.

It is elementary law that courts of law, like nature, do not act in vain but for a purpose and the purpose must exist and be identifiable and identified. Courts of law do not embark on academic exercise because they are not academic institutions. Courts of this country are enjoined to exercise their judicial functions within the provisions of Section 6 of the constitution and the section does not anticipate exercise of their equitable jurisdiction of interlocutory injunctions in respect of completed acts. I am afraid, the appellants do not have remedy either way.

It is for the above reasons and the more detailed reasons given by my learned brother that I too dismiss the appeal. I make no order as to costs.

EDOZIE JSC

I had a preview of the lead judgment read by my learned brother, Belgore, JSC., and I am in agreement with him that the appeal lacks substance. The act which the appellants sought to restrain, id est, the swearing-in on 29th May, 2003, of the 1st and 2nd Respondents as the President and Vice-President respectively of the Federal Republic of Nigeria for a second tenure had already been consummated. The learned senior counsel for the appellant while urging that the swearing-in be set aside argued forcefully that even without the swearing-in, the 1st and 2nd respondent could still continue in office pursuant to Section 135 (4) (a) of the 1999 Constitution. By this reasoning the Latin maxim *surplusagium non nocet* applies and as the court does not act in vain, the appeal becomes a mere academic exercise, which courts are loathe to entertain, vide

Nwobosi v. A.C.B. Ltd. (1995) 6 NWLR (Pt. 404) 658; Ezeanya v. Okeke (1995) 4 NWLR (Pt. 388) 142; Overseas Construction Co. Nig. Ltd. v. Creek Enterprises Nig. Ltd. (1985) 3 NWLR (Pt. 13) 407; Fawehinmi v. Akilu (1987) 4 NWLR (Pt. 67) 797.

For the foregoing reasons in addition to those set out in the
B lead judgment, I also dismiss the appeal with no order as to costs.

PATS-ACHOLONU JSC

C I have read in advance the draft of the leading judgment by my learned brother, Belgore, JSC., and I agree with him.

The appellants in this case had applied to the lower court for an order restraining the 1st and 2nd Respondents from presenting themselves from being sworn-in on the 29th of May, 2003. This was
D after they had filed an election petition challenging the election of the 1st and 2nd respondents as President and Vice President of the country. This application was premised on the grounds that the petition filed in the lower court arising out of the Presidential election raises “serious issues of law relating to the breach of the fundamental principles
E of the rules of natural justice, the eligibility of the 1st respondent to contest the election etc.” In its very short ruling delivered on 27th May, 2003, the Court of Appeal in disagreeing with the argument of the appellant as applicant held that the res in question is incapable of
F being dislodged and further that the court would still be able to give an objective and reasoned adjudication on the hearing of the main matter without making the order sought.

Not satisfied with the ruling of the court below the appellants appealed to this court. By the time the appeal was lodged and the
G deliberations of the appeal made, the 1st and 2nd respondents had been sworn-in.

The appellants obviously not put off-by the situational premise that the 1st and 2nd respondents have been sworn in as President and Vice President respectively, continued to pray the Court to set
H aside the swearing in that took place on 29th of May, 2003. The appellants placed undue reliance on Sections 134, 137 and 139 (i)(a) of the Constitution of the Federal Republic of Nigeria as well as on the observations or comments by Obaseki, JSC., in *Obi v. Mbakwe* (1984) 1 S.C.; NWLR 192 at 203 which was on a petition question-

ing the validity of the Election of Chief Mbakwe. In that case Obaseki, JSC., stated in his concurring judgment that where the question of the validity of an election petition is raised no person could validly hold the office being the subject of contest until the petition has been determined by the High Court. I must observe in passing that the observation of the learned Jurist whose comments the appellants put great reliance did not in fact form the main issue which the Supreme Court was called upon to adjudicate. It was purely tangential and did not form the crux of the matter in dispute. In other words it might be safe to regard it as an obiter dictum. Thus it was held in *Noel v. Olds* 78 U.S. App. D.C 155, 138 F. Ed 58 at 586 that an obiter dictum is a remark or opinion expressed by a Judge by the way in the sense that it is merely incidental or collateral and not directly focused or hinged upon the question to be determined. It can be said to wear the garb of illustration or analogy but essentially it is not binding as a precedent. It may however be used in academic circles to help in engineering development of the law but care must be taken that such a wayside expression of opinion should not be regarded as a determinate factor.

This does not mean that an obiter has no strength or teeth. Indeed no lower court may treat an obiter of the Supreme Court with careless abandon or disrespect but the Supreme Court could ignore it if it does not firm up or strengthen the real issue in controversy. Sometimes an obiter may have the ungainly characteristic of an unguided missile and counsel appearing in the apex court should exercise due care in allowing it to form or be the bulwark of their case.

The court is being called upon to set aside the oath of office already taken. It is important to stress that there is a limit to effective legal action. There are certain things the court should avoid doing so as not to ridicule itself and make itself a laughing stock. The order the appellants are seeking this court to make is with the greatest respect to the appellants like asking mathematicians to make a square circle in the context of Nigerian political milieu and thus persuade the court to make a decision which could possibly or conceivably throw this fragile administration into a turmoil. I would here refer of the counter affidavits of the 1st and 2nd Respondents.

(i) Many Presidents and leaders of Countries all over the world

have accepted invitation to attend the swearing in ceremony of the 1st Respondent and have made arrangements to come to Nigeria.

(ii) An example of Countries that are sending delegation to Nigeria is the United States of America.

(iii) That President George Bush has designated Secretary of Education, Mr. Rod Paige to represent him on May 29th, 2003.

(iv) That President George Bush has sent a seven- man delegation which will include the U.S. Ambassador to Nigeria, Mr. Howard letter.

(v) That a delegation from the U.S. Congressional Black Caucus Foundation led by Rep. William Jefferson and Ambassador Pamela Bridgewater has left for Nigeria. Were the Court of Appeal to set aside or jettison the oath of office hitherto taken as non event, I cannot help but wonder how the International Community will take us.

The most important matter which I believe the appellants should verily concern themselves with is the issue of the election now pending before the lower court. The governance of the people must go on at all times. It seems to me that regardless of the needless attempt by the appellants to rope in certain provisions of the Constitution and unwittingly attempting to convert a mere prayer for injunctive order into a quasi or even full blown constitutional matter, it will be asinine for this court or indeed for any court to set aside the oath of office on the erroneous belief that because an important issue would be raised in the election petition, the court should pretend that the oath of office already taken was a non issue, and set it aside without taking into consideration the harm and injury to the body politics of this nation. The beauty of law in a civilized society is that it owes its respect and due observance to the society. It should be progressive and

act as a catalyst to social engineering. Where it relies on mere technicality or out-moded or incomprehensible procedures and immerses itself in a jacket of hotchpotch legalism that is not in tune with the times, it becomes anachronistic and it destroys or desecrates the temple of justice it stands on. As an aside I would however strongly opine that in the on-going exercise to restructure the Constitution of the Federal Republic of Nigeria, an amendment should be seriously considered to make provision that all petitions arising out of future elections should be disposed of before the 29th of May of the year that a new Government will take over. This will remove uncertainty, delay

and needless acrimony which accompanies long delayed hearings. The practice adopted in 1999 should be re-visited and incorporated in the newly contemplated Constitutional Revision.

This case is a simple matter and I believe that since the election petition is still going on in the Court of Appeal, this court or any court for that matter should not lend itself to bring chaos to the nation state called Nigeria and I hold that nothing would be lost by not acceding to the prayers of the appellants. B

Accordingly, I too reject the argument of the appellants and dismiss the appeal and affirm the ruling of the Court below. C

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