

SUPREME COURT OF NIGERIA

30TH MAY, 2008 SC. 183/2007

**CORAM:- N. TOBI, D. MUSDAPHER, G. A. OGUNTADE,
W. S. N. ONNOGHEN, F. F. TABAI, JJSC**

1. CHIEF ALBERT ABIODUN ADEOGUN

2. ALHAJI ADEMOLA RASAQ APPELLANTS/
(CHAIRMAN PEOPLES DEMOCRATIC PARTY, OSUN STATE) RESPONDENTS

AND

1. HON. JOHN OLAWOLE 1ST RESPONDENT/
FASHOGBON APPELLANT

2. PEOPLES DEMOCRATIC PARTY

3. INDEPENDENT NATIONAL 2ND & 3RD
ELECTORAL COMMISSION RESPONDENTS

ELECTIONS - Judicial precedents - Distinguishing - Badejo case is distinguishable - From the facts of the instant case - Seeing that in Badejo - Interest of the entire nation was at stake - Unlike in this case (H1)

JURISDICTION - Abatement - Subsequent act of defendant - A Court which has jurisdiction to entertain an action - Would not subsequently lose jurisdiction - By reason of defendant's completion of the act - Sought to be prohibited by the suit (H2)

FACTS

The 1st Respondent, as plaintiff, had commenced an action at the Abuja Division of the Federal High Court against the rest of the parties as Defendants. 1st Respondent contended that 2nd Respondent political party had no power to substitute his name with that of the 1st Appellant as its candidate for the Ife Federal Constituency in the April 2007 general elections. 1st Respondent's claim was premised on the fact that he and not 1st Appellant was the candidate legitimately nominated to contest the House of Representatives Election as PDP candidate for Ife Federal Constituency in Osun State. According to the 1st Respondent, there was a PDP primary election

for which he was sole candidate and scored a total of 1,425 votes. The 1st and 2nd Appellants however deny that there was any such election. Rather they say that the 1st Respondent was only selected by consensus. By its judgment on 19th March 2007, the learned trial judge dismissed the suit.

Dissatisfied, the 1st Respondent had appealed to the Court of Appeal. While the appeal was still pending, the April 2007 general elections were held on 21st April 2007. Whereupon, the Appellants filed a motion at the Court of Appeal praying the court to strike out the pending appeal on the grounds that the court no longer had jurisdiction to entertain the same and that the appeal had become purely academic, having been overtaken by the event of the election of 21st April, 2007. The court heard the motion and by its ruling on 7th June 2007, dismissed the application. This Appeal is brought by the Appellants against that ruling. In arguing this instant appeal, the counsel for the appellant relied mainly on the case of Badejo v. Federal Ministry of Education, while the counsel for the 1st Respondent relied on the case of Amaechi v INEC.

ISSUE FOR DETERMINATION

"Whether the lower court gave proper consideration to the challenge of its jurisdiction to continue to exercise jurisdiction to determine the appeal before it?"

HELD (Unanimously dismissing the appeal per **TABAI JSC) ***ELECTIONS - Judicial precedents - Distinguishing*****

1. The main thrust of the argument of Chief Olujinmi, SAN., is that although election into the House of Representatives was the sole issue on the 16/2/2007, when the action was filed and remained so only up to the 21/4/2007, when the election was held; that after the election for which candidacy the suit was filed, there ceases to be any live issue for trial, same having abated. He relied mainly on Badejo v. Federal Ministry of Education (supra).

I have taken the pains to look at Badejo v. Federal Ministry of Education (supra), in detail to demonstrate its distinction from the present case. I have earlier above reproduced the reliefs claimed by the plaintiffs/respondents in this case. He claims a declaration that his substitution or proposed substitution with the 1st defendant/appel-

lant as the PDP candidate for Ife Federal Constituency was unconstitutional, null and void. He also claims some injunctive reliefs. The grant of any or all of these reliefs would have had no devastating effect on the election fixed for the 21/4/97. He did not even seek a postponement of the said election. As can be garnered from the Statement of Claim and the affidavit evidence, the plaintiff/1st respondent claims that by virtue of the provisions of Section 65 of the Constitution and Section 32 of the Electoral Act, 2006, he sought and obtained the nomination of his political party, PDP, as its candidate for the House of Representatives, representing the Ife Federal Constituency; that his substitution with the 1st defendant/appellant did not comply with the provisions of Section 34(2) of the Electoral Act and therefore null and void. The question for determination before the court therefore is who, as between the plaintiff and 1st defendant, is the duly nominated candidate of the PDP for the Ife Federal Constituency for the 21/4/2007 election. It is a straight fight between two individuals, that is, the plaintiff/respondent and the 1st defendant/appellant with no other third party interests really involved in the outcome of the case. Not even any of the 2nd, 3rd and 4th defendants has any stake on the contingent outcome of the suit. The reliefs sought, if granted inure only for the benefit of the plaintiff and to the detriment only of the 1st defendant. Conversely, if the claim fails, only the plaintiff suffers, while the 1st defendant alone takes the benefit of the failed action. This case is therefore clearly distinguishable from Badejo's case where the interest of the entire nation was at stake. A grant of the reliefs sought therein for the alleged breach of the plaintiff/appellant's right to be invited for interview would have affected the interview examination and admission of tens of thousands of children throughout the country. I hold therefore that Badejo's case does not apply to this case. (pp. 2217 B/2219 H)

JURISDICTION - Abatement - Subsequent act of defendant

2. In my view, the fact of the election of the 21/4/07 notwithstanding, the dispute as to whether the 1st defendant/appellant was rightly substituted for the plaintiff/respondent still remains a live issue for determination by the court. A court which has jurisdiction to entertain an action would not subsequently lose that jurisdiction simply

because a defendant, in some vantage position and in complete disregard for the outcome of the pending suit, goes ahead to do that which is sought to be prevented in the suit. Put in another way, a defendant in a cause has no legal authority to determine the outcome of the claim against him by purporting to complete the very act sought to be prohibited in the suit. That would amount to the court's abdication of its constitutional and sacred duty of dispensing justice in disputes between persons or between Government or other authorities. It will send a rather dangerous signal to a genuinely aggrieved plaintiff that he cannot obtain redress for a wrong committed by a defendant in some vantage position. If the argument, so forcefully advocated by Chief Olujinmi, SAN., is accepted, then a defendant in a matter for title to land who, during the pendency of the suit, rushes to complete a building thereon acquires good title and can, as in this case, proceed to ask the case to be struck out for incompetence or that the matter has, by the very fact of the completion of the building become merely academic. I am, with respect, not persuaded by that argument. (p. 2222 E)

NOTABLE POINTS OF INTEREST

TABAI JSC

1. Courts must jealously guard their jurisdiction

In my view, once a person who is aggrieved or injured by the action of another comes to court to seek redress, the court must jealously guard its jurisdiction to hear and determine the case to its finality. It cannot surrender and subject its jurisdiction to the dictates and manipulations of the defendant.

On the court's duty to guard its jurisdiction jealously at all times the pronouncement of this court in Dr. O. G. Sofekun v. Chief N.O.A. Akinyemi & Ors. (1980) 5-7 S.C. 1 at 18-19; (1980) 5-7 S.C. (Reprint) 1, is apposite. The court, per Aniagolu, JSC., said:-

"It is essential in a constitutional democracy such as we have in our country, that for the protection of the rights of citizens, for the guarantee of the rule of law which includes according fair trial to the citizen under procedural regularity, and, for checking arbitrary use of power by the Executive or its agencies, the power and jurisdiction of the courts under the Constitution must not only be kept intact and

unfettered but also must not be nibbled at. To permit any interference with or a usurpation of the authority of the courts as aforesaid, is to strike at the bulwark which the Constitution gives and guarantees to the citizen, of fairness to him against all arbitrariness and oppression. Indeed so important is this preservation of, and non-interference with the jurisdiction of the courts that our present Constitution (Decree No. 25 of 1978), has specifically provided (see Section 4(3), that neither the National Assembly nor a House of Assembly shall "enact any law that ousts or purports to oust the jurisdiction of a court of law or a judicial tribunal established by law."

(Underlining mine) (p. 2223 F)

TOBI JSC

2. A suit is academic when merely theoretical

In Plateau State of Nigeria v. Attorney-General of the Federation (2006) 1 S.C. (Pt.I) 1; (2006) 2 NWLR (Pt.967) 346, I defined academic and hypothetical suits at page 419:-

"A suit is academic where it is merely theoretical, makes empty sound, and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situation of human nature and humanity. A suit is hypothetical if it is imaginary and not based on real facts. A suit is hypothetical if it looks like a mirage to deceive the defendant and the court as to the reality of the cause of action. A suit is hypothetical if it is a semblance of the actuality of the cause of action or relief sought."

In Chief Olafisoye v. Federal Republic of Nigeria (2004) 4 NWLR (Pt.864) 580, I also said at pages 654 and 655:-

"Courts of law, as most serious and sacred institutions, do not build upon hypothesis; which is an idea suggested as a possible way of explaining facts or providing argument. The adjective hypothetical really means that which has not been proved or shown to be real. It also connotes imaginary..... Hypotheses by their very nature generally have no limitation and courts of law by their judgments have limitations."

Academic and hypothetical issues or questions do not help in the determination of the live issues in a matter. They are merely on a frolic or they are frolic-some; not touching or affecting the very tan-

gible and material aspects in the adjudication process. As a matter of law, they add nothing to the truth searching process in the administration of justice. This is because they do not relate to any relief. (p. 2229 A)

B 3. *Courts should not as a rule formulate issues suo motu*

I should take the issue whether the Court of Appeal formulated a different issue in the matter. The case law is divided on the matter. While some cases approve the practice, others do not. In Nwokoro v. Onuma (1990) 5 S.C. (Pt.1) 124; (1990) 3 NWLR (Pt.136) 22, the Brief of the appellants did not contain issues for determination. The Court of Appeal formulated the issues arising from the Brief as they appeared to the court. The Supreme Court described the practice as dangerous:-

D *"In the first place there was a valid Brief before the court which was not used, and secondly, it was a dangerous practice for the court to formulate issues for the parties. It is within the province of the parties to indicate the issues they wish the court to resolve and the court taking upon itself the formulation of issues for the parties may*
 E *unwittingly be setting a destructive trap for itself to be accused not of jumping into the fray but forcing issues down the parties throats"- per Belgore, JSC, at page 35."*

The rules do not provide that the courts can suo motu formulate issues for determination. Viewed from this angle, the position taken by the Supreme Court in Nwokoro v. Onuma (supra), is valid and unassailable. That apart, it does not appear that the formulation of issues by the court is consistent with the principle of fair hearing. There could however be compelling circumstances where the court should formulate issues for determination. In such circumstances, the principles of fair hearing and in particular, the natural justice rule of audi alteram partem demand that the parties be heard on the proposed issues by the court for the determination of the appeal. Generally, the court takes the decision to formulate issues for determination of the appeal at the stage of writing judgment. In order to avoid delay in the writing of judgment, it is suggested that the court takes the decision before the appeal is heard

In such a situation, the proposed issues by the court will be

exposed for reaction by counsel. This could be a hybrid solution to the fairly difficult problem. It is necessary to mention that the courts can resort to the formulation of issues as a last resort. It will be an abuse of the judicial process for the Justices to formulate issues for determination merely because they do not agree with those formulated by the parties. The appeal is not theirs. Not even the response to the appeal. They belong to the appellant and the respondent respectively. There must be a compelling cause, so much so that justice will not be done to the appeal if issues are not formulated by the court. It is not a routine power but an inherent power which should be exercised judicially and judiciously. There is need to mention that the mind of the Justice must be free at the time he formulates the issues, in the sense that he does not take any side in the appeal at that stage. This is a matter which is beyond the determination of another Justice. The Justice, the owner of his conscience, is the best Judge, and let him exercise it properly. I have taken the trouble to go into the available jurisprudence because of its vexed nature. (pp. 2233 H/2235 G)

4. Issue - Definition - It is the question in dispute

An issue is that which, if decided in favour of the plaintiff, will in itself give a right to relief or would but from some other consideration, in itself give a right to relief; and if decided in favour of the defendant, will in itself be a defence. An issue is the question in dispute between the parties necessary for determination by the court. A conclusion reached by a court cannot be described as an issue. (p. 2237 A)

REPRESENTATION

Akinlolu Olujinmi, SAN., (with him; W. Adetoro, O. Olujinmi, Akinsola Olujinmi and O. Atetedaye), for the Appellants.

L.O. Fagbemi, SAN., (with him; Soji Olowolafe, O.O. Popoola, I.G. Araraume and O. O. Ogunmola), for 1st Respondent.

No appearance for 2nd and 3rd respondents though reportedly served on 14/1/08.

CASES REFERRED TO

Okotie Eboh v. Manager (2004) 11-12 S.C. 174; (2004) 18 NWLR

(Pt.905) 242

Amaechi v. INEC (2007) 7-10 S.C. 172; (2007) 18 NWLR (Pt. 1065) 42

Akinfolarin v. Akinola (1994) 3 NWLR (Pt.335) 659

Adeyemi v. Opeyori (1976) 9-10 S.C. 31;(1976) 9-10 S.C. (Re-print) 18

Oilfield Supply Centre Ltd. v. Johnson (1987) 2 NWLR (Pt.58) 625;(1987) 2 NSCC 725

Sodipo v. Lamminkainen (No.1) (1985) 2 NWLR (Pt.8) 547

African Petroleum Ltd. v. Owodunni (1991) 11-12 S.C. 56; (1991) 8 NWLR(Pt.220) 391

Dr. O. G. Sofekun v. Chief Adeyemi & Ors. (1980) 5-7 S.C. 1 at 18-19

NDIC v. CBN (2002) 3 S.C. 1; (2003) 1 NWLR (Pt.801) 311

Oladoye v. Administrator Osun State (1996) 10 NWLR (Pt.476) 38
Bamigboye v. University of Ilorin (1999) 6 S.C. (Pt.11) 72 (1999) 10 NWLR(Pt.622) 290

Anyankpele v. Nigerian Army (2000) 13 NWLR (Pt.684) 209

Moriki v. Adamu (2001) 15 NWLR (Pt.137) 666

Adewumi v. The Attorney-General of Ekiti State (2002) 1 S.C. 47;(2002) 2 NWLR (Pt.751) 474

Kentebe v. Isangedighi (2002) 8 NWLR (768) 134

STATUTES REFERRED TO

Constitution Decree (No.25 of 1978)

Constitution of the Federal Republic of Nigeria 1999, ss. 36, 42(1), 65, 178(2), 182(1) & 285(1) & (2)

Electoral Act, 2006, ss. 32, 34(1)(2) & (5), 144 & 145

BOOK REFERRED TO

Black's Law Dictionary

LEAD JUDGMENT BY TABAI JSC

H The action which has given birth to this appeal was commenced at the Abuja Division of the Federal High Court on the 16/2/2007, when the Writ of Summons was issued. The plaintiff is the appellant in the substantive appeal pending at the court below but the 1st re-

spondent in this appeal before us. The 1st and 2nd defendants are also the 1st and 2nd respondents in the said substantive appeal at the court below but are the appellants before us.

In their motion filed on the 23/4/2007, at the court below the two defendants/respondents prayed the court for:-

“An order striking out this appeal on the grounds;

‘(a) that the court no longer has jurisdiction to entertain or determine same.

(b) that the appeal has become purely academic or hypothetical”

The grounds for the application are contained in paragraphs 3, 4, and 5 of the affidavit in support. The said paragraphs state:-

“3. That the claims of the appellant (plaintiff) relate to his aborted candidature for election to the House of Representatives which election was held on Saturday 21st April, 2007.

4. That even if the appellant (plaintiff) succeeds in this appeal it cannot be of any benefit to him since the election has been held.

5. That the 1st respondent (1st defendant) told me and I verily believe that he won the election to the House of Representatives as the candidate of the Peoples Democratic Party (PDP).”

By its ruling on the 7/6/2007, the court below refused the application and same was dismissed.

This appeal is against that ruling. The parties have, through their counsel, filed and exchanged their Briefs of Argument. Chief Akin Olujinmi, SAN., prepared the appellants' Brief which was filed on the 21/9/2007. He also prepared the appellants' Reply Brief and it was filed on the 24/12/2007. The plaintiff/1st respondent's Brief was prepared by L.O. Fagbemi, SAN., and same was filed on the 28/11/07. In their respective Briefs each of the learned senior counsel formulated only one issue for determination and it is whether the lower court gave proper consideration to the challenge of its jurisdiction to continue to exercise jurisdiction to determine the appeal before it?

In his argument, Chief Olujinmi, SAN., referred to the fact that the appeal before the lower court, if successful, was to enable the plaintiff/appellant/respondent participate as a candidate in the election fixed for the 21/4/07 and submitted that since the election for

which he wanted to be a candidate has already been held, the appeal had become a mere academic exercise, contending that even if he wins the pending appeal it cannot be of any benefit to him. It is settled law that, the court will not spend its valuable time to deal with academic or hypothetical issues, counsel argued. He relied on Badejo v. Federal Ministry of Education (1996) 8 NWLR (Pt.464) 15 at 41, Agbonna v. President Federal Republic of Nigeria (1997) 5 NWLR (Pt.504) 281 at 187, Okotie Eboh v. Manager (2004) 11-12 S.C. 174; (2004) 18 NWLR (Pt.905) 242 at 285. It was further submitted that an applicant and the court are bound by the prayers in the application before the court and that it was not open to the court to formulate and determine issues not submitted to it by the parties. For this submission learned senior counsel relied on Commissioner For Works Benue State v. Devcon (1988) 7 S.C. (Pt.1) 29; (1988) 407 at 420, Tukur v. Gongola State Solicitor-General (1989) 9 S.C. 1; (1989) 4 NWLR (Pt.144) 592 at 604, NDIC v. C.B.N. (2002) 3 S.C. 1; (2003) 1 NWLR (Pt.801) 311, at 385-386.

In the Reply Brief, Chief Olujinmi, SAN., referred to the admission in the 1st respondent's Brief that the suit deals with election to the House of Representatives and contended that the candidature of that election was no longer a live issue before the court below, the same having abated after the 21/4/2007, when the election was held. According to counsel, any question concerning candidature for the election is, by the combined effect of Section 285(1) of the Constitution and Sections 144 and 145 of the Electoral Act, 2006, exclusively vested in the tribunal constituted for that purpose. Learned senior counsel distinguished Amaechi v. INEC & Ors. (2007) 7-10 S.C. 172, saying that the abatement of jurisdiction in this case is not based on expulsion of the respondent from the party but rather on the fact of the election having been held pursuant to the law. It was further submitted that there is no rule of law or decision of this court that a pre-election matter must be heard to conclusion notwithstanding that the election to which it relates has been held. The cases of Awojugbagbe Light Industry Ltd. v. Chinukwe (supra) and Attorney-General of the Federation v. A.N.P.P. (2003) 12 S.C. (Pt.11) 146; (2003) 18 NWLR (Pt.851) 182 at 210- 211, support the main complaint of the appellant, counsel argued. He relied particularly on the

statement of Uwaifo, JSC., in Attorney-General of The Federation v. A.N.P.P at 215.

The totality of the submissions of L.O. Fagbemi, SAN., is that on the authority of Amaechi v. INEC & Ors. (supra) pre-election cases still have live issues after the election.

For a proper understanding of the case, let me, at the risk of some repetitions, relate the facts of the case up to the application which ruling has given rise to this appeal. Both in the Writ of Summons and in the Statement of Claim filed on the 16/2/2007, the plaintiff claims the following reliefs:-

“(i) Declaration that the 2nd defendant has no right and/or power to recommend the substitution of the plaintiff with the 1st defendant as candidate of the PDP for Ife Federal Constituency.

“(ii) Declaration that the proposed substitution or replacement of the plaintiff with the 1st defendant as the candidate of Peoples Democratic Party for the Ife Federal Constituency by the 2nd and 3rd defendants is unlawful, illegal, unconstitutional, null and void and of no effect whatsoever.

“(iii) Declaration that the proposed selection of the 1st defendant as the candidate of PDP for Ife Federal Constituency is fraudulent, unlawful, illegal, unconstitutional, null and void and of no effect whatsoever.

“(iv) Perpetual Injunction restraining the 1st defendant from allowing himself to be substituted, or presented to the 4th defendant as the candidate of Peoples Democratic Party for the Ife Federal Constituency in the 2007 general election.

“(v) Perpetual Injunction restraining the 2nd and 3rd defendants from substituting and/or presenting the 1st defendant to the 4th defendant as candidate of Peoples Democratic Party for the Ife Federal Constituency in the 2007 general election.

“(vi) Perpetual Injunction restraining the 4th defendant from recognising and/or accepting the 1st defendant as candidate of Peoples Democratic Party for the Ife Federal Constituency in the 2007 general election.”

The 1st and 2nd defendants/appellants filed a joint Statement of Defence of 21 paragraphs. In response thereto the plaintiff/respondent filed a 7 paragraph Reply.

On the same 16/2/2007, when the plaintiff/respondent filed the Writ of Summons and Statement of Claim, he also filed a Motion Exparte and another on notice for interlocutory injunction. He sought the following reliefs:-

- B *1. Interlocutory Injunction restraining the 2nd and 3rd defendants/respondents from removing or giving any effect or any further effect to the purported removal of the plaintiff/appellant as a candidate of the Peoples Democratic Party for the Ife Federal Constituency pending the determination of the substantive suit.*
- C *2. Interlocutory Injunction restraining the 2nd and 3rd defendants/respondents from substituting, replacing, given any effect or any further effect to any purported substitution or replacement of the plaintiff/appellant with the 1st defendant/respondent as a candidate of the Peoples Democratic Party for the Ife Federal Constituency*
D *pending the determination of the substantive suit.*
- E *3. Interlocutory Injunction restraining the 4th defendant/respondent from accepting, recognising, giving any effect or any further effect to any purported acceptance or recognition of the 1st defendant/respondent as a candidate of the Peoples Democratic Party*
E *for the Ife Federal Constituency pending the determination of the substantive suit."*

In support of their motion, the plaintiffs/respondents deposed to a 26 paragraph affidavit restating the essential facts averred in the Statement of Claim. And attached thereto were Exhibits "A" "B" "C" "D" and "E" authenticating the facts deposed. The 1st defendant/appellant also deposed to a 23 paragraph counter-affidavit for himself and on behalf of the 2nd defendant/appellant. Attached thereto were also Exhibits A, B, C, D, E, F, G, and H in verification of the facts asserted. The plaintiff/1st respondent asserted that there was a PDP primary election for the selection of its candidate for the Ife Federal Constituency and that he was the sole candidate and scored 1,425 votes. This assertion was denied by the 1st and 2nd defendants/appellants. According to them, there was no such PDP primary election. And that the 1st respondent was only selected by consensus. Besides this, all the other facts were essentially uncontroverted. Apparently because of this essentially uncontroverted nature of the affidavit evidence, no oral evidence was taken and on the orders of

the trial court written addresses were submitted. Counsel for the parties also made oral submissions on the 7/3/2007. The motion for interlocutory injunction was not taken. By its judgment on the 19/3/2007, the trial court dismissed the suit. The plaintiff/1st respondent then went on appeal to the court below. That appeal is still pending at the court below when the application resulting in this appeal was filed. B

The main thrust of the argument of Chief Olujinmi, SAN., is that although election into the House of Representatives was the sole issue on the 16/2/2007, when the action was filed and remained so only up to the 21/4/2007, when the election was held; that after the election for which candidacy the suit was filed, there ceases to be any live issue for trial, same having abated. He relied mainly on Badejo v. Federal Ministry of Education (supra) and that Amaechi v. INEC (supra), does not apply. Fagbemi, SAN., submitted on the other hand that Amaechi's case applies. C D

In Badejo v. Federal Ministry of Education (supra), the appellant, suing by her father as next friend, on the 29/9/88, at the High Court of Lagos, brought an application under the Fundamental Rights (Enforcement Procedure) Rules, for the enforcement of her fundamental rights. She claimed (i) a declaration that she is entitled to freedom from discrimination on the basis of her state of origin with regard to cut off marks and marks scored by her and her eligibility to be called for interview for admission into Federal Government Colleges and (ii) a declaration that the decision of the respondents not to call her for interview based on her state of origin was discriminatory, faulty, irregular, unconstitutional, null and void. The appellant also sought an injunction in the following terms:- E F G

"An interim order restraining the respondents, their agents and privies from conducting the interview for admission into Junior Secondary 1 for the 1989 Session at Queens College Yaba, Lagos, Federal Government College, Ijanikin, Lagos and all other designated interview centres throughout Nigeria on Saturday, October 8th, 1988 or an order directing a stay of all actions on matters relating to admission of students for the 1989 session at Queens College Yaba, Federal Government College, Ijanikin, Lagos, and all other Federal Gov- H

ernment Colleges in Nigeria, for which the interview mentioned in this application is planned until the final determination of the application of the applicant for an order enforcing and hearing the enforcement within Lagos State of the applicant's rights to freedom from discrimination on the ground of her State of Origin."

B And after the interview scheduled for the 8th October, 1988, had been held, the applicant, by an amendment granted, added the following relief:-

C *"An interlocutory order restraining the 1st, 2nd and 3rd respondents and/or their agents and privies from marking the scripts of candidates for and/or collating and/or releasing the results of the interview examination held all over Nigeria on 9th October, 1988, in respect of the admission of candidates into Junior Secondary School 1 in all Federal Government Colleges in Nigeria including Queens*
D *College Lagos by any form of publication, issuance and despatch of letters of admission until the final determination of the applicant's application....."*

By its ruling on the 4/11/88, the learned trial Judge struck out the suit on the ground that the appellant failed to show that she
E suffered injuries greater than those suffered by all other successful candidates who were not called for interview. Her appeal to the Court of Appeal was allowed, with the court holding that the appellant had the *locus standi* to bring the action. The court however struck out the
F suit on the ground that the matters complained of had been completed and overtaken by events such that there was nothing left to be remitted back to the trial court for trial.

Her further appeal to this court was dismissed by a majority decision of three to two (Ogundare and Ogbuwegu, JJSC., dissenting.) In his leading judgment Kutigi. JSC., (as he then was), at pages 40-41 had this to say:-

H *"Certainly if the declarations and the order sought by the appellant's eligibility to be called for interview on the 8/10/88, for admission into Secondary 1 in Federal Government Colleges in 1987, the Court of Appeal must be right when on 8/1/90, some 15 months after the interview, it held that the subject matter of the appeal had been overtaken by events and that there was nothing left for the High Court to try and therefore struck out the suit in its entirety. I*

endorse the action..... It will in my view be subversive for a court of law to claim to determine disputes where none existed or had ceased to exist.”

Chief Olujinmi, SAN., relying on the above pronouncements argued that the suit, having been overtaken by the event of the election of the 21/4/07, has abated. B

It needs to be pointed out that the two declaratory reliefs and the two injunctive reliefs called for the court’s exercise of its discretion. And like every other exercise of a court’s discretion, it had to be exercised both judicially and judiciously, and dictated by the peculiar facts and circumstances of the case. It is, for this reason, perhaps necessary to reproduce other pronouncements of Kutigi, JSC., (as he then was), to highlight the circumstances that influence his decision. At the same page 41 he further said:- C

“Chief Ajayi, ought to have realised that for a court of law to have proceeded in the way he suggested would amount to putting the entire Federal Republic of Nigeria at the mercy of one aggrieved individual. A total brutalisation of the people’s Fundamental Right when compared with the infringement of the appellant’s Fundamental Rights. That to me would again amount to a subversion.” D

The above pronouncements demonstrate clearly, that the all pervading consideration of the court was the far reaching and devastating consequences of a grant of the reliefs sought by the appellant. Because of the alleged violation of her right to be invited for interview for admission into Federal Government Colleges scheduled for the 8/10/88, she sought an injunction restraining the respondents from conducting the said interview examination for admission of candidates into all Federal Government Colleges throughout the country. And after the interview, the appellant sought an injunction restraining the respondents from marking the scripts of candidate and/or collating and/or releasing the results of any candidate from all the Federal Government Colleges through out the country. Even if there was a breach of the appellant’s right to be invited for the interview, a grant of the reliefs sought would have had monumental consequences, affecting tens of thousands of candidates throughout the country. As Kutigi, stated, it would have been “*chaos all over the country.*” E

I have taken the pains to look at Badejo v. Federal Min- F

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istry of Education (supra), in detail to demonstrate its distinction from the present case. I have earlier above reproduced the reliefs claimed by the plaintiffs/respondents in this case. He claims a declaration that his substitution or proposed substitution with the 1st defendant/appellant as the PDP candidate for Ife Federal Constituency was unconstitutional, null and void. He also claims some injunctive reliefs. The grant of any or all of these reliefs would have had no devastating effect on the election fixed for the 21/4/97. He did not even seek a postponement of the said election. As can be garnered from the Statement of Claim and the affidavit evidence, the plaintiff/1st respondent claims that by virtue of the provisions of Section 65 of the Constitution and Section 32 of the Electoral Act, 2006, he sought and obtained the nomination of his political party, PDP, as its candidate for the House of Representatives, representing the Ife Federal Constituency; that his substitution with the 1st defendant/appellant did not comply with the provisions of Section 34(2) of the Electoral Act and therefore null and void. The question for determination before the court therefore is who, as between the plaintiff and 1st defendant, is the duly nominated candidate of the PDP for the Ife Federal Constituency for the 21/4/2007 election. It is a straight fight between two individuals, that is, the plaintiff/respondent and the 1st defendant/appellant with no other third party interests really involved in the outcome of the case. Not even any of the 2nd, 3rd and 4th defendants has any stake on the contingent outcome of the suit. The reliefs sought, if granted inure only for the benefit of the plaintiff and to the detriment only of the 1st defendant. Conversely, if the claim fails, only the plaintiff suffers, while the 1st defendant alone takes the benefit of the failed action. This case is therefore clearly distinguishable from Badejo's case where the interest of the entire nation was at stake. A grant of the reliefs sought therein for the alleged breach of the plaintiff/appellant's right to be invited for interview would have affected the interview examination and admission of tens of thousands of children throughout the country. I hold therefore that Badejo's case does not

apply to this case.

Now, does this case then come within the principle in *Amaechi v. INEC* (2007) 7-10 S.C. 172; (2007) 18 NWLR (Pt.1065) 42? In that case, at the PDP Governorship primaries conducted for Rivers State, the plaintiff/appellant emerged the winner and his name duly submitted to INEC as the PDP candidate for the Governorship election in Rivers State. Sometime thereafter, the PDP, (3rd defendant/respondent) substituted the name of the 2nd defendant/respondent for the plaintiff/appellant as the party's Rivers State Governorship candidate for the April, 2007 election. The 2nd defendant/respondent did not contest the party's primaries where the plaintiff/appellant was elected. The appellant was aggrieved and then filed an action at the Federal High Court, claiming that he was the duly nominated candidate of the PDP for the Governorship election and sought injunctive relief to restrain the substitution. The trial court dismissed the action, holding however that the substitution was wrong, same having been made in breach of Section 34(2) of the Electoral Act, 2006. There was an appeal and cross-appeal to the Court of Appeal. While the appeals were pending, the PDP (3rd respondent) purportedly expelled the plaintiff/appellant from the party. Both the 2nd and 3rd respondents each filed a motion for striking out or dismissing the action on the grounds that:-

“(a) The appeal is now incompetent by reason of the expulsion of the appellant/respondent from the Peoples Democratic Party (PDP) thereby making the outcome of the suit a mere academic exercise.

(b) By reason of the expulsion of the appellant/respondent from the Peoples Democratic Party he has lost locus standi to prosecute this appeal.”

By its unanimous decision, the Court of Appeal held that the applications had merit and both the appeal and cross-appeal were struck out for incompetence. Plaintiff/appellant appealed to this court. By its unanimous decision, this court allowed the appeal, holding, in substance, that the purported expulsion of the plaintiff/respondent notwithstanding, the court still had the jurisdiction to hear and determine the appeal. In my little contribution at page 48 of the report I had this much to say:-

“The Court of Appeal erred in law when it declined jurisdiction to hear and determine the appeals pending thereat. A court which hitherto had the jurisdiction to hear and determine a matter cannot, by the subsequent precipitate action of the defendant lose that jurisdiction simply because the defendant wants it so. After all, it is settled law that it is the plaintiff’s claim in a matter that determines the jurisdiction of the court. See *Akinfolarin v. Akinola* (1994) 3 NWLR (Pt.335) 659, *Adeyemi v. Opeyori* (1976) 9-10 S.C. 31 at 51; (1976) 9-10 S.C. (Reprint) 18. The 3rd defendant/respondent therefore cannot by its expulsion of the plaintiff/appellant prevent the court from hearing and determining the complaints against it. I hold that the Court of Appeal has the jurisdiction to hear and determine the appeals.....”

It is my considered view that the principle embodied in the above statement applies with equal force to this case, the different factual situations notwithstanding. The motion which ruling has resulted in this appeal was filed on the 23/4/2007 - two days after the election of the 21/4/07, to terminate the appeal on the grounds (i) that by virtue of the election of the 21/4/2007, the court which originally had jurisdiction no longer had any to hear and determine the appeal and (ii) that the appeal has, by reason thereof become merely academic. I do not think I have any cause to depart from the views I expressed in *Amaechi’s case* (supra). **In my view, the fact of the election of the 21/4/07 notwithstanding, the dispute as to whether the 1st defendant/appellant was rightly substituted for the plaintiff/respondent still remains a live issue for determination by the court. A court which has jurisdiction to entertain an action would not subsequently lose that jurisdiction simply because a defendant, in some vantage position and in complete disregard for the outcome of the pending suit, goes ahead to do that which is sought to be prevented in the suit. Put in another way, a defendant in a cause has no legal authority to determine the outcome of the claim against him by purporting to complete the very act sought to be prohibited in the suit. That would amount to the court’s abdication of its constitutional and sacred duty of dispensing justice in disputes between persons or between Government or other authori-**

ties. It will send a rather dangerous signal to a genuinely aggrieved plaintiff that he cannot obtain redress for a wrong committed by a defendant in some vantage position. If the argument, so forcefully advocated by Chief Olujinmi, SAN., is accepted, then a defendant in a matter for title to land who, during the pendency of the suit, rushes to complete a building thereon acquires good title and can, as in this case, proceed to ask the case to be struck out for incompetence or that the matter has, by the very fact of the completion of the building become merely academic. I am, with respect, not persuaded by that argument.

The defendants/appellants in this case cannot, by persevering in the very substitution which is being challenged, fetter the jurisdiction of the court to make its final pronouncement on the issue presented to it for adjudication. The corollary of this is that an unlawful act which illegality is being pursued in a judicial proceeding cannot metamorphose into a legitimate one by a plea of the defendant that the act has been completed. After all, it is settled principle of law that, a party committing an illegality cannot be allowed by the court to benefit from the self-same illegality, lest the court will portray itself as an instrument of injustice. See Oilfield Supply Centre Ltd. v. Johnson (1987) 2 NWLR (Pt.58) 625; (1987) 2 NSCC 725 at 739, Sodipo v. Lamminikainen (No.1) (1985) 2 NWLR (Pt.8) 547 at 557, African Petroleum Ltd. v. Owodunni (1991) 11-12 S.C. 56; (1991) 8 NWLR (Pt. 220) 391 at 421.

In my view, once a person who is aggrieved or injured by the action of another comes to court to seek redress, the court must jealously guard its jurisdiction to hear and determine the case to its finality. It cannot surrender and subject its jurisdiction to the dictates and manipulations of the defendant.

On the court's duty to guard its jurisdiction jealously at all times the pronouncement of this court in Dr. O. G. Sofekun v. Chief N.O.A. Akinyemi & Ors. (1980) 5-7 S.C. 1 at 18-19; (1980) 5-7 S.C. (Reprint) 1, is apposite. The court, per Aniagolu, JSC., said:-

"It is essential in a constitutional democracy such as we have in our country, that for the protection of the rights of citizens, for the guarantee of the rule of law which includes according fair trial to the

citizen under procedural regularity, and, for checking arbitrary use of power by the Executive or its agencies, the power and jurisdiction of the courts under the Constitution must not only be kept intact and unfettered but also must not be nibbled at. To permit any interference with or a usurpation of the authority of the courts as aforesaid, is to strike at the bulwark which the Constitution gives and guarantees to the citizen, of fairness to him against all arbitrariness and oppression. Indeed so important is this preservation of, and non-interference with the jurisdiction of the courts that our present Constitution (Decree No. 25 of 1978), has specifically provided (see Section 4(3), that neither the National Assembly nor a House of Assembly shall “enact any law that ousts or purports to ousts the jurisdiction of a court of law or a judicial tribunal established by law.”

(Underlining mine)

See also Adeyemi (Alafin of Oyo) & Ors. v. Attorney-General Oyo State & Ors. (1984) 397 at 454-455, this court per Aniagolu, JSC., re-emphasised:-

“It cannot be too often repeated, and I had once before drawn attention to this in Dr. O. G. Sofekun v. Chief Adeyemi & Ors. (1980) 5-7 S.C. 1 at 18-19; (1980) 5-7 S.C (Reprint) 1; that the jurisdiction of courts must be Jealously guarded if only for the reason that the beginnings of dictatorship in many parts of the world had often commenced with usurpations of authority of the court and many dictators were often known to become restive under the procedural and structural safeguards employed by the courts for the purpose of enhancing the rule of law and preserving the personal and proprietary rights of individuals. It is in this vein that courts must insist, wherever possible, on the rigid adherence to the Constitution of the land and curb the tendency of those who would like to establish what virtually are kangaroo courts under different guises and smoke-screens of judicial regularity. This, the courts, in the discharge of their appointed duties must sternly endeavour to resist.....it is not permissible to remove judicial functions from the courts and confer them upon a non-judicial body.....”

In this case, a grant of the application filed on the 23/4/07, would amount to the court’s surrender of this constitutional function and allow the defendants to take over the control of the proceedings.

That cannot and should not be.

On the whole, I hold that the election of the 21/4/07 notwithstanding, the propriety or otherwise of the plaintiff's substitution with the 1st defendant remains a live issue for determination in the judicial process. In the event, I fully endorse the ruling of the court below and resolve the only issue in favour of the plaintiff/respondent. The appeal is accordingly dismissed with costs which I assess at N50,000.00 against the appellants.

TOBI JSC

Hon. John Olawole Fashogbon commenced action at the Federal High Court, Abuja against Chief Albert Abiodun Adeogun, Alhaji Ademola Rasag, (Chairman Peoples Democratic Party, Osun State), Peoples Democratic Party and the Independent National Electoral Commission. In a 16-paragraph Statement of Claim, Hon. Fashogbon asked for the following six reliefs:-

i. Declaration that the 2nd defendant has no right and/or power to recommend the substitution of the plaintiff with the 1st defendant as candidate of the PDP for Ife Federal Constituency.

ii. Declaration that the proposed substitution or replacement of the plaintiff with the 1st defendant as the candidate of Peoples Democratic Party for the Ife Federal Constituency by the 2nd and 3rd defendants is unlawful, illegal, unconstitutional, null and void and of no effect whatsoever.

iii. Declaration that the proposed selection of the 1st defendant as the candidate of PDP for Ife Federal Constituency is fraudulent, unlawful, illegal, unconstitutional, null and void and of no effect whatsoever.

iv. Perpetual Injunction restraining the 1st defendant from allowing himself to be substituted, or presented to the 4th defendant as the candidate of Peoples Democratic Party for election into Ife Federal Constituency in the 2007 general election.

v. Perpetual Injunction restraining the 2nd and 3rd defendants from substituting, and/or presenting the 1st defendant to the 4th defendant as candidate of Peoples Democratic Party for the Ife Federal Constituency in the 2007 general election.

vi. *Perpetual Injunction restraining the 4th defendant from recognizing and/or accepting the 1st defendant as candidate of Peoples Democratic Party for the Ife Federal Constituency in the 2007 general election.*”

Dismissing the suit Ogie, J., said at page 128 of the record:-

B “The manner in which plaintiff was substituted leaves a sour taste in the mouth, having scaled through rigorous test of nomination even though by consensus plaintiff went through screening, took the form, incurred expenses, made publication and now he is unceremoniously removed in unclear circumstance, its physiologically
C bruised and frustrated.

It’s unfortunate that the Electoral Act, does not make provision for a rule of natural justice or damages nor did the PDP Constitution and Section 34 does not accommodate an entry into how the
D substitution began, it only recognize the final stage of application.

On this note, the court can only recommend in line with section (sic) decision that adequate compensation be paid to such candidate as the plaintiff in this case.

On the whole, I make the necessary order on the relief sought.”

E On 23rd April, 2007, Chief Adeogun, Alhaji Rasaaq, Peoples Democratic Party and INEC filed a motion in the Court of Appeal for the following orders:-

“(i) An order striking out this appeal on the grounds:-

F ‘(a) that the court no longer has jurisdiction to entertain or determine same.

(b) The appeal has become purely academic or hypothetical.’

(ii) Such further orders.”

Dismissing the motion, the Court of Appeal said at page 30 of
G the record:-

“In conclusion, this court has jurisdiction to entertain this appeal on substitution of a candidate for an election which is a pre-election matter. This application lacks merit and it is hereby dismissed.”

Dissatisfied, the appellants have come to the Supreme Court.
H Briefs were filed and duly exchanged appellants formulated the following issue for determination:-

“.....whether the lower court gave appropriate or proper consideration to the challenge of its jurisdiction to continue to exer-

cise jurisdiction to determine the appeal before it which had become purely academic?”

The respondents formulated the following issue for determination:-

“Whether the lower court gave proper consideration to the objection of the appellant to her jurisdiction and/or power to continue to exercise jurisdiction over the matter.”

Learned Senior Advocate for the appellants, Chief Akin Olujinmi, submitted that the respondents appeal before the Court of Appeal was, if it succeeded, to enable him participate as a candidate in the election fixed for 21st April, 2007, has become purely academic since the election had been held on 21st April, 2007. Even if he wins his pending appeal today, it cannot be of any benefit to him since the election he wanted to be a candidate has been held, learned Senior Advocate argued. He cited Badejo v. Federal Ministry of Education (1996) 8 NWLR (Pt.464) 15, Ogbonna v. President FRN (1997) 5 NWLR (Pt.504) 281, Okotie-Eboh v. Manager (2004) 11-12 S.C. 174; (2004) 18 NWLR (Pt.905) 242, Obi -Odu v. Duke (2005) 10 NWLR (Pt.932) 105.

Taking the concluding part of the ruling of the Court of Appeal, learned Senior Advocate submitted that the court completely misunderstood the appellants application. He said that the prayer of the appellants as formulated in the motion paper implicitly conceded that the court had jurisdiction, but queried whether the Court of Appeal should continue to exercise such jurisdiction having regard to the principle of law expressed in the case of Badejo v Federal Ministry of Education, (supra).

Relying on Commissioner for Works, Benue State v. Devcon (1988) 7 S.C. (Pt.I) 29; (1988) 3 NWLR (Pt.83) 407, Tukur v Gongola State Government (1989) 9 S.C. 1; (1989) 4 NWLR (Pt.144) 592 and NDIC v. CBN (2002) 3 S.C. 1; (2003) 1 NWLR (Pt.801) 311, learned Senior Advocate submitted that an applicant and the court are bound by the prayer raised in the application before the court and it is not open to the court to formulate and consider a different issue. He urged the court to allow the appeal.

Learned Senior Advocate for the respondents, Mr. L. O. Fagbemi, explained that the objection of the appellants at the Court

of Appeal did not challenge the jurisdiction of the court to adjudicate over the matter, but it is to the effect that there has been an event that caused the jurisdiction of the Court of Appeal to abate; and the event in question is the election to the House of Representatives the candidature in which the appeal at the Court of Appeal touches upon.

- B There is a difference between outright lack of jurisdiction and abandonment of jurisdiction as alleged in the case, learned Senior Advocate contended. Learned Senior Advocate submitted that the appeal is a sheer academic exercise as it bothers on mere semantics and choice of words, as pre-election cases still have live issue after the election. He cited Amaechi v Independent National Electoral Commission. (2007) 7-10 S.C. 172, Awojugbagbe Light Industry Limited v Chinukwe (1995) 4 NWLR (Pt.390) 379, Attorney-General of the Federation v All Nigeria Peoples Party (2003) 12 S.C. (Pt.II) 146; D (2003) 18 NWLR (Pt.851) 182.

On the issue of formulation of issue, learned Senior Advocate submitted that a court of law has power to formulate an issue which in its own opinion, can resolve the matter before the court and meet the justice of the case before it. He urged the court to dismiss the appeal.

Learned Senior Advocate for the appellants in his Reply Brief found it difficult to appreciate the submission of the 1st respondent that the appeal is a mere academic exercise in the light of his admission that the appeal deals with abatement of jurisdiction. Abatement of jurisdiction, counsel contended, is a well recognized incident which must be given effect when it occurs. He called in aid the definition of abatement in Black's Law Dictionary. An abatement of jurisdiction is an entire overthrow or destruction of jurisdiction when it occurs, G learned Senior Advocate submitted.

Learned Senior Advocate submitted that the case of Amaechi v. INEC supra, Dada v. Dosunmu supra, are inapplicable and that the cases of Awojugbagbe Light Industry Ltd. v. Chinukwe and Attorney-General of the Federation v. ANPP supra, cited by counsel for the 1st H respondent support the main complaint of the appellants. He relied heavily on the decision of this court in Attorney-General of the Federation v. ANPP, supra.

This appeal centres on whether the issue or issues involved in

the matter are now academic and hypothetical or are still live issues. In Plateau State of Nigeria v. Attorney-General of the Federation (2006) 1 S.C. (Pt.I) 1; (2006) 2 NWLR (Pt.967) 346, I defined academic and hypothetical suits at page 419:-

“A suit is academic where it is merely theoretical, makes empty sound, and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situation of human nature and humanity. A suit is hypothetical if it is imaginary and not based on real facts. A suit is hypothetical if it looks like a mirage to deceive the defendant and the court as to the reality of the cause of action. A suit is hypothetical if it is a semblance of the actuality of the cause of action or relief sought.”

In Chief Olafisoye v. Federal Republic of Nigeria (2004) 4 NWLR (Pt.864) 580, I also said at pages 654 and 655:-

“Courts of law, as most serious and sacred institutions, do not build upon hypothesis; which is an idea suggested as a possible way of explaining facts or providing argument. The adjective hypothetical really means that which has not been proved or shown to be real. It also connotes imaginary..... Hypotheses by their very nature generally have no limitation and courts of law by their judgments have limitations.”

Academic and hypothetical issues or questions do not help in the determination of the live issues in a matter. They are merely on a frolic or they are frolic-some; not touching or affecting the very tangible and material aspects in the adjudication process. As a matter of law, they add nothing to the truth searching process in the administration of justice. This is because they do not relate to any relief. See further Oladoye v. Administrator Osun State (1996) 10 NWLR (Pt.476)38, Bamigboye v. University of Ilorin (1999) 6 S.C. (Pt.11) 72; (1999) 10 NWLR (Pt.622) 290, Anyankpele v. Nigerian Army (2000) 13 NWLR (Pt.684) 209, Moriki v. Adamu (2001) 15 NWLR (Pt.137) 666, Adewumi v. The Attorney-General of Ekiti State (2002) 1 S.C. 47; (2002) 2 NWLR (Pt.751) 474. Kentebe v. Isangedighi (2002) 8 NWLR (768) 134.

Is the issue involved in this appeal academic and hypothetical? That is the pertinent question. It is a matter on the substitution of one candidate for another. Hon. Fashogbon is substituted with Chief Adeogun. It is the case of Hon. Fashogbon that he contested the

primary election and won having polled 1,425 votes. He was issued with Certificate of Return. He was thereafter substituted.

In the determination of the issue, the important point is whether the substitution is an election matter in the sense that it took place on the election day or a pre-election matter in the sense that it took place before the election day. The Court of Appeal went into detailed examination of the issue at pages 16 to 22 of the record by making copious reference to the pleadings and the letter of substitution and came to the conclusion that it was a pre-election matter.

I am not in a position to fault the Court of Appeal. That court is correct in coming to the conclusion that the matter is a pre-election matter. The dictionary meaning of “pre” is before and the substitution which took place by the letter dated 5th February, 2007, is certainly before the election which was held on 20th April, 2007. The decisions of this court in Ugwu v. Ararume (2007) 6 S.C. (Pt.I) 88; (2007) 12 NWLR (Pt.1048) and Amaechi v. INEC, clearly justify the position taken by the Court of Appeal in this matter.

Learned Senior Advocate cited some cases. Let me examine them. The first is Badejo v. Federal Ministry of Education (supra). In that case, the appellant as applicant, through her father as next friend, prayed for an order granting her leave under the Fundamental Rights (Enforcement Procedure) Rules, 1979, to apply to the court to enforce and secure her fundamental right to freedom from discrimination as enshrined in the Constitution on the refusal to call her for interview at designated interview centres for admission into Junior Secondary 1 for the 1989 academic session in the Federal Government Colleges. As at the time the application for leave to apply for the order was being heard on 20th October, 1988, it was on common ground that the interview for the successful candidates had already been held on 8th October, 1988. It was in that circumstance the court, by a majority decision, dismissed the appeal. Learned Senior Advocate quoted at page 5 of appellant’s Brief, the following passage from the judgment of Kutigi, JSC, (as he then was):-

“Certainly if the declarations and the orders sought by the appellant were all founded and based on the appellants eligibility to be called for interview on 8/10/88, for admission into Secondary 1 in Federal Government Colleges in 1989, the Court of Appeal must be

right when on 8th January, 1990, some 15 months after the interviews, it held that the subject matter of the appeal had been overtaken by events and that there was nothing left for the High Court to try and therefore struck out the suit in its entirety. ...It will in my view be subversive for a court of law to claim to determine disputes where none existed or had ceased to exist." B

The case is clearly inapplicable. In Badejo the act that the appellant wanted to enforce by a restraining order was already completed at the time of her action. That is what Kutigi, JSC., (as he then was), said and correctly too for that matter. C

In Ogbonna v The President, Federal Republic of Nigeria (supra), where the appellants sought reliefs for their release, the Court of Appeal held that the issues raised were merely academic as the reliefs sought by the appellants have long ceased to be of any relevance when they were released from custody. I entirely agree with the Court of Appeal because the moment they are released the reliefs sought could not avail them. Some other reliefs could have availed the appellants but certainly not the relief of releasing them from detention. D

In Okotie-Eboh v Manager (supra), this court held that having dismissed the appellant's appeal the determination of the respondents cross-appeal could not add to or detract from the decision. Consequently, the issue raised in the cross-appeal became academic. In the case, this court, in dealing with the main appeal, has made the cross-appeal superfluous and accordingly held that it became merely academic to take the cross-appeal. That is not the situation in this appeal. E F

Both counsel rely on the case of Attorney-General of the Federation v ANPP (supra). In that case, the Governorship election which was the basis of the action was conducted and concluded. This apart, the 2nd and 3rd respondents who were directly involved in the matter notified the court that they were no longer interested in the appeal and withdrew from it. It was in these circumstances that this court held that the matter had become academic. H

Learned counsel relied on the following passage by Uwais, CJN., (as he then was), in the judgement:

"Any judgment which does not decide a living issue is academic

or hypothetical. It stands in its best quality only as an advisory opinion. This court, and indeed any court in Nigeria, will not engage in rendering such a judgment... There cannot be said to be a live issue in a litigation if what is presented to the court for a decision, when decided, cannot affect the parties thereto in any way either because of the fundamental nature of the reliefs sought or of changed circumstances since after the litigation started."

Learned Senior Advocate for the appellants sent to us the case of Dr. Agagu v. Esanmore, CA/A/122/107 delivered on 8th January, 2008, after this appeal was adjourned for judgment. In compliance with the rules of court, counsel sent a copy of the judgment to his colleague, Mr. Fagbemi. It is a decision of the Abuja Division of the Court of Appeal.

In that case, the 1st to 4th respondents sought the following five reliefs against the appellant:-

"1. A declaration that the 1st defendant is not qualified for election to the office of the Governor of Ondo State having been indicted by the Obiora Nwazota Judicial Commission of Inquiry which indictment was accepted by the Federal Government pursuant to Section 182(1)(1) of the Constitution of the Federal Republic of Nigeria, 1999.

2. A declaration that the 1st defendant is disqualified from contesting for election to the office of Governor of Ondo State having given false information in his affidavit contrary to Section 32(5) of the Electoral Act, 2006.

3. A declaration that the purported clearance given to the 1st defendant by the 2nd defendant to contest for the office of the Governor of Ondo State on April 14th, 2007, is discriminatory, illegal and unconstitutional as it contravenes Section 42(1) of the Constitution of the Federal Republic of Nigeria, 1999.

4. An order directing the 2nd defendant to delete forthwith the name of the 1st defendant from the list of candidates cleared for election to the office of the Governor of Ondo State fixed for April 14th, 2007.

5. An order of perpetual injunction restraining the 1st defendant from further parading himself as a candidate in the Governorship Election fixed for April 14th, 2007, in any manner whatsoever

and howsoever.”

The Court of Appeal held that the matter before the Federal High Court was an academic exercise. Peter Odili, JCA., said at pages 31 to 33 of the judgment:-

“What has cropped up is whether or not this current exercise is not one that should be taken in an academic discussion group. It is true that issues relating to the interpretation of the Constitution, which is a living document are serious issues and cannot be regarded as academic, speculative or hypothetical. The prevailing circumstance from all the facts available and the authorities related thereto have squarely positioned this matter as an academic exercise which this court cannot easily or successfully conclude the way the 1st-4th respondents are asking. I have no difficulty in agreeing with the views of the appellant’s counsel that indeed the exercise is a time wasting one in view of the proper forum, the Election Tribunal that has the capacity to answer the questions have and also the election proper. The suit of the 1st-4th respondents in the court below cannot be entertained by the usual High Court or Federal High Court in this matter of the appellant’s qualification to contest, with the evidence of the Election Tribunal which is the correct forum.”

With respect, I do not see how the case is useful to the appellants. In the first place, the reliefs sought in Dr. Agagu are quite different from the ones sought in this case on appeal. While the reliefs in this case are on substitution, those in Dr. Agagu are on qualification and disqualification. In the second place, the Court of Appeal dealt with the issue of jurisdiction of the Federal High Court. And it is in that restricted content that the Court of Appeal described the matter as academic. There is no such issue in this appeal. I do not think I should go further on Dr. Agagu because it is not on appeal and I should mind what I say on the case at this stage. I am not feeling comfortable discussing Dr. Agagu at this stage, a decision which is not on appeal before us. The correctness or otherwise of the decision will be taken if and when the time or need arises. I drop it now for good and I am happy that I have done so.

I have so much temptation to stop here. I will not succumb to the temptation. I should take the issue whether the Court of Appeal formulated a different issue in the matter. The case law is divided on

the matter. While some cases approve the practice, others do not. In *Nwokoro v. Onuma* (1990) 5 S.C. (Pt.1) 124; (1990) 3 NWLR (Pt.136) 22, the Brief of the appellants did not contain issues for determination. The Court of Appeal formulated the issues arising from the Brief as they appeared to the court. The Supreme Court described the practice as dangerous:-

"In the first place there was a valid Brief before the court which was not used, and secondly, it was a dangerous practice for the court to formulate issues for the parties. It is within the province of the parties to indicate the issues they wish the court to resolve and the court taking upon itself the formulation of issues for the parties may unwittingly be setting a destructive trap for itself to be accused not of jumping into the fray but forcing issues down the parties throats"- per Belgore, JSC, at page 35."

In *Allie v. Chief Uzorka* (1993) 8 NWLR (Pt.309) 1, the Supreme Court, relying on *Nwokoro v. Onuma* (1990) 5 S.C. (Pt.1) 124; (1990) 3 NWLR (Pt.136) 22 and *Ugo v. Obiekwe* (1989) 2 S.C. (Pt.11) 41; (1989) 1 NWLR (Pt.99) 566, held that "*it is now well settled that it is not right for a court to suo motu formulate or single-handedly raise issues for the parties*" (per Onu, JSC., at page 16). See also *Adediran v. Interland Transport Limited* (1991) 9 NWLR (Pt.214) 155, *Onwo v. Oko* (1996) 6 NWLR (Pt.456) 584, *BON Ltd. v. Na'Bature* (1994) 1 NWLR (Pt.319) 235, *Amojaine v. Eguegu* (1996) 1 NWLR (Pt.424) 341.

The courts reached different decisions in some other cases. In *Labiya v. Anretiola* (1992) 8 NWLR (Pt.258) 139, the Supreme Court approved the formulation of issues by the Court of Appeal:-

"The court below was free either to adopt the issues so formulated by learned counsel or to formulate such issues that are consistent with the grounds of appeal filed by the appellant. It is in the observance of this principle in pursuit of the proper administration of justice that the court below considered an appropriate formulation of the issue consistent with the grounds of appeal filed when it was observed that although the grounds of appeal were inelegantly drafted, the complaints therein were clear and not misleading. Per Karibi-Whyte, JSC., at page 159."

In *Aduku v Adejoh* (1994) 5 NWLR (Pt.346) 582, the Court

of Appeal held that the court can formulate appropriate issues in an appeal:-

"I must however here show our repugnance to the appellant's grounds of appeal filed... In the instant case, the respondent's counsel did not take any objection to the prolix nature of the appellant's issues for determination. Indeed, respondent's counsel's knowledge on the issues is as faint as that of the appellant's counsel. Where this is the case as in the instant case, the court is free to formulate issue(s) as are appropriate and consistent with the grounds of appeal filed. In observance of this principle in pursuant of the proper administration of justice by the court in the instant case, I consider it appropriate to formulate issues consistent with the 3 grounds of appeal filed as they are relevant to the decision appealed against."

In *Ikegwuoha v. Ohawuchi* (1996) 3 NWLR (Pt.435) 146, the Court of Appeal adopted the decision in *Aduku v. Adejoh* (1994) 5 NWLR (Pt.346). 582:-

"Thus, in my view, the Brief of the respondent is defective in form, but be that as it may, I will still consider the appeal on the basis of the Briefs of the parties. It must be mentioned that the Court of Appeal is free to formulate issues as are appropriate and consistent with the grounds of appeal filed in pursuit of the proper administration of justice. See Aduku v. Adejoh (1994) 5 NWLR (Pt.346) 582. I therefore from the grounds of appeal formulate two issues which I consider appropriate for the just determination of this appeal."

In *Ogunbiyi v. Ishola* (1996) 6 NWLR (Pt.452) 12, the Supreme Court held that the court can "*formulate issues suo motu where the issues formulated by the parties would not advance the interest of justice.*" See also *Erhahon v. Erihahon* (1997) 6 NWLR (Pt.510) 667, *NEPA v. Isieveore* (1997) 17 NWLR (Pt.511) 135.

The rules do not provide that the courts can suo motu formulate issues for determination. Viewed from this angle, the position taken by the Supreme Court in *Nwokoro v. Onuma* (supra), is valid and unassailable. That apart, it does not appear that the formulation of issues by the court is consistent with the principle of fair hearing. There could however be compelling circumstances where the court should formulate issues for determination. In such circumstances, the principles of fair hearing and in particular, the natural justice rule of

audi alteram partem demand that the parties be heard on the proposed issues by the court for the determination of the appeal. Generally, the court takes the decision to formulate issues for determination of the appeal at the stage of writing judgment. In order to avoid delay in the writing of judgment, it is suggested that the court takes the decision before the appeal is heard.

In such a situation, the proposed issues by the court will be exposed for reaction by counsel. This could be a hybrid solution to the fairly difficult problem. It is necessary to mention that the courts can resort to the formulation of issues as a last resort. It will be an abuse of the judicial process for the Justices to formulate issues for determination merely because they do not agree with those formulated by the parties. The appeal is not theirs. Not even the response to the appeal. They belong to the appellant and the respondent respectively. There must be a compelling cause, so much so that justice will not be done to the appeal if issues are not formulated by the court. It is not a routine power but an inherent power which should be exercised judicially and judiciously. There is need to mention that the mind of the Justice must be free at the time he formulates the issues, in the sense that he does not take any side in the appeal at that stage. This is a matter which is beyond the determination of another Justice. The Justice, the owner of his conscience, is the best Judge, and let him exercise it properly. I have taken the trouble to go into the available jurisprudence because of its vexed nature.

Did the Court of Appeal formulate any issue or a different issue in its Ruling of 7th June, 2007? I ask this question in the light of the following submission by learned Senior Advocate in paragraph 4.14 page 6 of the appellant's Brief:-

"It is settled law that both an applicant and the court are bound by the prayer raised in the application before the court. It is not open to court to formulate and consider a different issue."

In view of the fact that I have reproduced the motion, I will not repeat the exercise. The motion inter-alia asked the Court of Appeal to strike out the appeal on the ground that the court no longer had jurisdiction to entertain or determine it. It is in the light of the above prayer that the Court of Appeal said at page 30, a passage I will quote here at the expense of prolixity:-

“In conclusion, this court has jurisdiction to entertain this appeal on substitution of a candidate for an election which is a pre-election matter.”

Where is the different issue formulated by the Court of Appeal? An issue is that which, if decided in favour of the plaintiff, will in itself give a right to relief or would but from some other consideration, in itself give a right to relief; and if decided in favour of the defendant, will in itself be a defence. An issue is the question in dispute between the parties necessary for determination by the court. A conclusion reached by a court cannot be described as an issue. Accordingly, it is my view that learned Senior Advocate is not correct in branding the above conclusion of the Court of Appeal as an issue, a ‘fortiori’, formulating and considering a different issue.

It is for the above reasons and the more detailed reasons given by my learned brother, Tabai, JSC., that I too dismiss the appeal. I abide by his order as to cost.

MUSDAPHER JSC

I have read before now, the judgment of my Lord, Tabai, JSC., just delivered with which I entirely agree. For the same reasons contained in the aforesaid judgment which I respectfully adopt as mine, I too, dismiss the appeal and affirm the decision of the court below. I abide by the order for costs proposed in the said judgment.

OGUNTADE JSC

On 16th February, 2007, the 1st respondent as plaintiff in Suit No. FHC/ABJ/CS/75/07, at the Federal High Court, Abuja issued his Writ of Summons claiming against the 1st and 2nd appellants and the 2nd and 3rd respondents the following reliefs:-

- “i. Declaration that the 2nd defendant has no right and/or power to recommend the substitution of the plaintiff with the 1st defendant as candidate of the PDP for the Federal Constituency.*
- ii. Declaration that the proposed substitution or replacement of the plaintiff with the 1st defendant as the candidate of Peoples Democratic Party for the Ife Federal Constituency by the 2nd and*

3rd defendants is unlawful, illegal, unconstitutional, null and void and of no effect whatsoever.

iii. *Declaration that the proposed selection of the 1st defendant as the candidate of PDP for the Ife Federal Constituency is fraudulent, unlawful, illegal, unconstitutional, null and void and of no effect*
B *whatsoever.*

iv. *Perpetual Injunction restraining the 1st defendant from allowing himself to be substituted, or presented to the 4th defendant as the candidate of Peoples Democratic Party for election into Ife*
C *Federal Constituency in the 2007 general election.*

v. *Perpetual Injunction restraining the 2nd and 3rd defendants from substituting and/or presenting the 1st defendant to the 4th defendant as candidate of Peoples Democratic Party for the Ife Federal Constituency in the 2007 general election.*

vi. *Perpetual Injunction restraining the 4th defendant from recognizing and/or accepting the 1st defendant as candidate of Peoples Democratic Party for the Ife Federal Constituency in the 2007 general election.*"

Parties filed and exchanged pleadings. On 19-03-07, the trial
E Judge, Ogie, J., dismissed 1st respondent's suit. Dissatisfied, the 1st respondent brought an appeal before Court of Appeal, Abuja (hereinafter referred to as the court below). Whilst the said appeal was pending before the court below, the appellants and the 2nd and 3rd
F respondents brought an application before the court below praying for the following:

"(1) An order striking out this appeal on the grounds:

'(a) that the court no longer has jurisdiction to entertain or determine same.

(b) the appeal has become purely academic or hypothetical."

In paragraphs 3 to 5 of the affidavit in support of the application, the applicants deposed thus:-

"3. That the claims of the appellant relate to his aborted candidature for election to the House of Representatives which election
H *was held on Saturday, 21st April, 2007.*

4. That even if the appellant succeeds in this appeal it cannot be of any benefit to him since the election has been held.

5. That the 1st respondent told me and I verily believe that he

won the election to the House of Representatives as the candidate of the Peoples Democratic Party (PDP).”

The court below, after hearing arguments on the application delivered its ruling on 7-06-07. In the leading ruling by Aboki, JCA., the court below concluded in the following words:-

“The provisions of Section 34(1) and (2) of the Electoral Act, 2006, have created and placed an extra duty on INEC in its supervisory and monitoring roles over the conduct of the affairs of political parties. By the above provisions, cogent and verifiable reasons must be given by the political parties when substituting their candidates. To ensure fairness in this regard, the procedure engaged by the political parties and INEC can be challenged in court for the interpretation of the provisions of the section. See the unreported Supreme Court case of *Engr. Charles Ugwu v. Senator Ifeanyi Ararume & 2 Ors.* (2007) 6 S.C. (Pt.1) 88.

In conclusion, this court has jurisdiction to entertain this appeal on substitution of a candidate for an election which is a pre-election matter. This application lacks merit and it is hereby dismissed. There will however be no order made as to costs.”

The applicants before the court below have now come before this court on appeal against the dismissal of their application. In the appellants’ Brief filed, only one issue is raised for determination in this appeal. The issue is:-

“Whether the lower court gave appropriate or proper consideration to the challenge of its jurisdiction to continue to exercise jurisdiction to determine the appeal before it which had become purely academic.”

Earlier in this judgment, I set out in full the claims made before the trial court by the 1st respondent. Now in paragraphs 6 -7 of his Statement of Claim, the 1st respondent averred thus:-

i. Declaration that the 2nd defendant has no right and/or power to recommend the substitution of the plaintiff with the 1st defendant as candidate of the PDP for the Federal Constituency.

ii. Declaration that the proposed substitution or replacement of the plaintiff with the 1st defendant as the candidate of Peoples Democratic Party for the Ife Federal Constituency by the 2nd and 3rd defendants is unlawful, illegal, unconstitutional, null and void

and of no effect whatsoever.

iii. Declaration that the proposed selection of the 1st defendant as the candidate of PDP for the Ife Federal Constituency is fraudulent, unlawful, illegal, unconstitutional, null and void and of no effect whatsoever.

B iv. Perpetual Injunction restraining the 1st defendant from allowing himself to be substituted, or presented to the 4th defendant as the candidate of Peoples Democratic Party for election into Ife Federal Constituency in the 2007 general election.

C v. Perpetual Injunction restraining the 2nd and 3rd defendants from substituting and/or presenting the 1st defendant to the 4th defendant as candidate of Peoples Democratic Party for the Ife Federal Constituency in the 2007 general election.

D vi. Perpetual Injunction restraining the 4th defendant from recognizing and/or accepting the 1st defendant as candidate of Peoples Democratic Party for the Ife Federal Constituency in the 2007 general election.”

Now, it is settled law that whether or not a court has jurisdiction to entertain plaintiffs claim is a matter to be determined by reference to the plaintiffs’ claims on the Writ of Summons and Statement of Claim. See: *Adeyemi v. Opeyori* (1976) 9-10 S.C 31; (1976) 9-10 S.C. (Reprint) 18, *Tukur v. Govt. of Gongola State* (1989) 9 S.C. 1; (1989) 4 NWLR (Pt. 117) 517.

F The appellants had not challenged the jurisdiction of the Federal High Court to hear the 1st respondent’s suit. The suit was heard and judgment given against the 1st respondent by the High Court. Dissatisfied with the judgment of the High Court, the 1st respondent brought an appeal before the court below. It must be stated clearly G that the right of a party in a case to appeal against the judgment given against is constitutional and such right must be jealously guarded and protected by the court. The 1st respondent’s claim was premised on the fact that he and not the 1st appellant was the candidate legitimately nominated to contest the House of Representatives Election H as the PDP candidate for Ife Federal Constituency in Osun State. The membership of the House of Representatives confers a tenure of four years.

The standpoint of the appellants as argued in their Brief is based

on the fact that since the said elections had been conducted and concluded on 21-04-07, the court below had lost its jurisdiction to determine the appeal brought to it by the 1st respondent who lost at the High Court. The question is - if the Federal High Court had a jurisdiction which it exercised when it gave judgment against the 1st respondent, what is the basis to deny to the 1st respondent his right to contest on appeal the correctness of the judgment of the High Court? In his written Brief, appellant's counsel Chief Akin Olujinmi, SAN., submitted thus:-

"4.6. In *Badejo v. Fed. Ministry of Education* (1996) 8 NWLR (Pt. 464) 15 at 41 BD, the facts were as follows:-

The applicant/appellant had sought for an order of the trial court to compel the defendant to permit her to be interviewed for admission into one of the Unity Colleges of the Federal Government. As at the time the application for leave to apply for the order was being heard on 20th October, 1988, it was common ground that the interview for the successful candidates had already been held on 8th October, 1988. Based on the facts the trial court dismissed the application. The Court of Appeal affirmed the judgment of the trial court.

4.7. In disposing of the further appeal to it the Supreme Court per Kutigi, JSC., (as he then was), *inter alia* held at pages 40 to 41 paragraph A to B as follows:-

'Certainly if the declarations and the orders sought by the appellant were all founded and based on the appellants eligibility to be called for interview on 8/10/88, for admission into Secondary 1 in Federal Government Colleges in 1989, the Court of Appeal must be right when on 8th January, 1990, some 15 months after the interviews, it held that the subject matter of the appeal had been overtaken by events and that there was nothing left for the High Court to try and therefore struck out the suit in its entirety..... It will in my view be subversive for a court of law to claim to determine disputes where none existed or had ceased to exist.'

4.8. Submit in the same vein, since the election the respondent wanted to participate in as a candidate if he won his pending appeal had undeniably, been held on 21st April, 2007, no further useful purpose would be served if the lower court were to continue to exercise its jurisdiction to determine the pending appeal.

4.9. Further authorities in the same point are:

Ogbonna v. President FRN (1997) 5 NWLR (Pt.504), 281 at 287 ED.

Okotie Eboh v. Manager (2004) 11-12 S.C. 174; (2004) 18 NWLR (Pt.905), 242 at 284 FH and 285 AB.

B *Obi-Odu v. Duke* (2005) NWLR (Pt.932) 105 at 136 AC.”

It seems to me that the case of *Badejo v. Federal Ministry of Education*, referred to above is inappropriate in the present circumstances. Strictly speaking, the inability of the Supreme Court to adjudicate in the *Badejo case* was more because the subject matter of the suit no longer existed and not because the court lost its jurisdiction. It is a settled principle of law that, a court would not act in vain or give an order which cannot be enforced. There was a clear impossibility involved in asking the court to make an order to reverse an event D that had taken place. In the present case, there was still an unexhausted tenure to be served in the House of Representatives in respect of which the court below could give a valid order.

In *Amaechi v. INEC & 2 Ors.* (2008) 1 S.C. (Pt.1) 36 at 105-106, I observed:-

E “Section 178 above is a provision of the 1999 Constitution intended to ensure a smooth transition from one administration to another. It is not a provision to destroy the right of access to the court granted to a citizen under Section 36 of the same Constitution. In F the same way Section 285(2) relied upon by senior counsel cannot be construed to destroy the jurisdiction which the ordinary courts in Nigeria have in pre-election matters. Were the court to construe Section 285(2) as having the effect of ousting the jurisdiction of the ordinary court in pre-election matters, all that a defendant would need to G do to frustrate a plaintiff is to stall for time and obtain adjournment to ensure that a plaintiff’s case is ‘killed’ once an election is held. It is settled law, that the court in interpreting the provisions of a statute or Constitution, must read together related provisions of the Constitution in order to discover the meaning of the provisions. The court H ought not to interpret related provisions of a statute or Constitution in isolation and then destroy in the process the true meaning and effect of particular provisions: See *Obayuwana v. Governor Bendel State & Anor.* (1982) 12 S.C. 47 at 211; (1982) 12 S.C. (Reprint)

67 and Awolowo v. Shagari (1979) 6-9 S.C. 51 at 97; (1979) 6-9 S.C. (Reprint) 37.

As I shall shortly show, it is my view that the approach of the respondents to this case was to ‘kill’ Amaechi’s case in the misconceived notion that once elections were held the court would lose its jurisdiction. It is my firm view that the jurisdiction of the ordinary courts to adjudicate in pre-election matters remains intact and unimpaired by Sections 178(2) and 285(2) of the 1999 Constitution.”

The court below, if it thought it fit to allow the appeal by the 1st respondent had the necessary jurisdiction and power to order that the 1st respondent and not the 1st appellant ought to be deemed the legitimate candidate of the 2nd respondent. See Amaechi v. INEC & Ors. (supra). I am therefore of the firm view that the court below was correct in its’ views that it had the jurisdiction to entertain the 1st respondent’s suit.

I would dismiss this appeal as unmeritorious. I award N50,000.00 costs in 1st respondent’s favour against the appellants.

ONNOGHEN JSC

This is an appeal against the ruling of the Court of Appeal holden at Abuja in appeal No. CA/A/81/07, delivered on the 7th day of June, 2007, overruling the objection of the appellants as to the jurisdiction of the lower court to hear and determine an appeal pending before it.

By a Statement of Claim filed in Suit No. FHC/ABJ/CS/75/07, the 1st respondent in the appeal, who was the plaintiff in that court, claimed the following reliefs:-

“1. Declaration that the 2nd defendant has no right and/or power to recommend the substitution of the plaintiff with the 1st defendant as candidate of the PDP for Ife Federal Constituency.

ii. Declaration that the proposed substitution or replacement of the plaintiff with the 1st defendant as the candidate of Peoples Democratic Party for the Ife Federal Constituency by the 2nd and 3rd defendants is unlawful, illegal, unconstitutional, null and void and of no effect whatsoever.

iii. Declaration that the proposed selection of the 1st defen-

dant as the candidate of PDP for the Ife Federal Constituency is fraudulent, unlawful, illegal, unconstitutional, null and void and of no effect whatsoever.

iv. Perpetual Injunction restraining the 1st defendant from allowing himself to be substituted, or presented to the 4th defendant as the candidate of Peoples Democratic Party for election into Ife Federal Constituency in the 2007 general election.

v. Perpetual Injunction restraining the 2nd and 3rd defendants from substituting, and/or presenting the 1st defendant to the 4th defendant as candidate of Peoples Democratic Party for the Ife Federal Constituency in the 2007 general election.

vi. Perpetual Injunction restraining the 4th defendant from recognizing and/or accepting the 1st defendant as candidate of Peoples Democratic Party for the Ife Federal Constituency in the 2007 general election.”

In a judgment delivered by the trial court on the 19th day of March, 2007, the court dismissed the suit of the plaintiff resulting in an appeal to the Court of Appeal. While the appeal was pending, the 1st and 2nd respondents to that appeal filed a motion before the Court of Appeal holden at Abuja praying the court for the following orders:-

“(i) An order striking out this appeal on the grounds:-

‘(a) that the court no longer has jurisdiction to entertain or determine same.

(b) The appeal has become purely academic or hypothetical.

(ii) Such further orders.”

The application is supported by an affidavit of 6 paragraphs which deposed as follows:-

“1. That I am one of the legal practitioners in the chambers of Olujinmi & Akeredolu, solicitors to the 1st and 2nd respondents.

2. That by virtue of that position I know the facts of this case and I have the authority of the respondents applicants to swear to the affidavit.

3. That the claims of the appellant relate to his aborted candidature for election to the House of Representatives which election was held on Saturday 21st April, 2007.

4. That even if the appellant succeeds in this appeal it cannot

be of any benefit to him since the election has been held.

5. That the 1st respondent told me and I verily believe that he won the election to the House of Representatives as the candidate of the Peoples Democratic Party (PDP).

6. That I swear to this affidavit in good faith."

On the 7th day of June, 2007, the lower court delivered its ruling on the application holding that it has jurisdiction to entertain the appeal as the appeal concerns a pre-election matter and dismissed the application resulting in the instant appeal to this court, the ground of which is as follows:-

"(1) The learned appellate Justices erred in law in dismissing the appellant's objection without giving appropriate consideration to same.

Particulars of Error in Law

(a) The appellant's objection was as to whether the lower court should continue to exercise jurisdiction over an appeal that has become purely academic or hypothetical.

(b) Instead of considering this issue what the lower court considered and determined was whether the lower court has jurisdiction to entertain substitution disputes.

(c) The jurisdiction of the lower court to entertain substitution disputes was never raised by the appellant as shown clearly in the arguments in support of the objection as captured by the lower court.

(d) The failure to consider the objection on the ground it was premised has occasioned a miscarriage of justice."

In the appellants' Brief of Argument filed on the 21st day of September, 2007, by Chief Akin Olujinmi, SAN., the following issue has been identified for determination as arising from the above ground of appeal:-

"Whether the lower court gave appropriate or proper consideration to the challenge of its jurisdiction to continue to exercise jurisdiction to determine the appeal before it which had become purely academic?"

In arguing the issue learned senior counsel for the appellants, Chief Akin Olujinmi, SAN., submitted that since the 1st respondent's appeal before the lower court was, if successful, to enable him participate as a candidate in an election fixed for 21st April, 2007, which

election had already come and gone, the appeal before that court had become academic; that the court will not spend its valuable time dealing with hypothetical case; that the issue admits the jurisdiction of the court but queries whether in the event of the election haven taken place the court could properly continue to exercise that jurisdiction.

Learned counsel cited and relied on the case of Badejo v. Fed. Min. of Education (1996) 8 NWLR (Pt.464) 15 at 41, Ogbonna v. President FRN (1997) 5 NWLR (Pt.504) 281 at 287, Okotie Ebo v. Manager (2004) 11-12 S.C. 174; (2004) 18 NWLR (Pt.905) 242 at 284 and 285, Obi-Odu v. Duke (2005) NWLR (Pt.932) 105 at 136, that rather than considering the issue on the basis of the principle laid down by this court in the Badejo's case, supra, the lower court considered a different issue, to wit:-

"Whether the appeal filed by the appellant/respondent in this court is a pre-election or post-election matter?"
and concluded thus:-

"In conclusion, this court has jurisdiction to entertain this appeal on substitution of a candidate for an election which is a pre-election matter."

When the appellant's prayer before the court implicitly conceded that the court had jurisdiction but queried whether the lower court should continue to exercise that jurisdiction in the circumstance of the case and having regards to the principle of law stated in the Badejo's case (supra); that both the parties and the court are bound by the prayer raised in an application and that it is not open to the court to formulate and consider a different issue, relying on Commissioner for Works, Benue State v. Devcon (1988) 7 S.C. (Pt.I) 29; (1988) 3 NWLR (Pt.83) 407 at 420, Tukur v. Gongola S.G. (1989) 9 S.C. 1; (1989) 4 NWLR (Pt.144) 592 at 604, NDIC v. CBN (2002) 3 S.C. 1; (2003) 1 NWLR (Pt.801) 311, 385-386. Finally learned senior counsel urged the court to resolve the issue in favour of the appellants and allow the appeal.

On his part, learned senior counsel for the 1st respondent, L.O. Fagbemi, Esq., SAN., in the 1st respondent's Brief of Argument filed on 28/11/07, conceded that the objection of the 1st appellant at the lower court did not challenge the jurisdiction of that court to

adjudicate over the matter, but that it is to the effect that there has been an event that caused the jurisdiction of the court to abate; that the argument of the 1st appellant at the lower court is to the effect that election having been held, the jurisdiction of the lower court had abated thereby rendering the appeal academic and hypothetical; that in answering the issue, the lower court relied on the decision of this court in Amaechi v. INEC & Ors. (2007) 7-10 S.C. 172, and held that the court has jurisdiction since the matter before it is a pre-election matter which still has live issue for determination after the election; that the court has the power to formulate its own issue(s) which in its opinion, can resolve the matter and meet the justice of the case, relying on Dada v. Dosunmu (2006) 9 S.C. 1; (2006) 18 NWLR (Pt. 1010) 134 at 156; that in the instant case, the issues formulated by appellants and the court are the same though stated in different words, citing and relying on the case of Awojugbagbe Light Industry Ltd. v. Chinukwe (1995) 4 NWLR (Pt.390) 379 at 410, A-G of Federation v. All Nigeria People's Party (2003) 12 S.C. (Pt.II) 146; (2003) 18 NWLR (Pt.851) 182 at 210-211, learned senior counsel submitted that the question raised in this appeal bothers on semantics or choice of words and urged the court to hold that the appeal is merely forensic and academic and resolve the issue against the appellants and dismiss the appeal.

In the Reply Brief filed on the 24th day of December, 2007, the learned senior counsel for the appellants submitted that since both parties agree that the election in question was held on 21st April, 2007, the jurisdiction to decide any question concerning candidature for the election is by the combined effect of Section 285(1) of the 1999 Constitution and Sections 144 and 145 of the Electoral Act, 2006, exclusively vested in the election tribunal constituted for that purpose; that "with the activation of the jurisdiction of the election tribunals no other court in the land has jurisdiction to pronounce on or decide any issue concerning candidature for the said April 21st, 2007 election."

It should be noted that the above argument is different from the initial position of the appellants which is that by virtue of the holding of the election in issue the appeal of the 1st respondent before the lower court has become academic and hypothetical. In other

words, there is no longer a live issue to be determined by that court whereas the present argument admits of the existence of a live issue in the appeal but contends that the proper forum or venue for its determination is the election tribunal!!!

B However, continuing with his submissions, the learned senior counsel stated that Amaechi's case is not relevant to the determination of the issue in this case as "the issue of abatement of jurisdiction is not based on expulsion of the respondent from the party but rather on the fact that the election in question having been held pursuant to the law, any dispute concerning candidature for same can only by law lie at the election tribunal." It should be pointed out that Amaechi's case was not based on expulsion of Amaechi but on substitution of his candidature for an election without assigning cogent and verifiable reasons for same. In fact, the expulsion of Amaechi from the D party (PDP) never featured as an issue in the appeal before this court.

E I have carefully gone through the record of appeal, arguments of counsel on the issue raised for determination and the authorities cited and relied upon in support of their contending positions. To me the issue before the lower court is very clear and straight forward. Did the holding of the election of 21st April, 2007, render the appeal of the 1st respondent before the lower court an academic exercise? To answer the question properly one has to take a look at the reliefs claimed by the 1st respondent at the trial court, which reliefs had F earlier been reproduced in this judgment. The very relevant reliefs are (ii) and (iii) which claim as follows:-

G *"(ii) Declaration that the proposed substitution or replacement of the plaintiff with the 1st defendant as the candidate of Peoples Democratic Party for the Ife Federal Constituency by the 2nd and 3rd defendants is unlawful, illegal, unconstitutional, null and void and of no effect whatsoever."*

H *"(iii) Declaration that the proposed selection of the 1st defendant as the candidate of PDP for the Ife Federal Constituency is fraudulent, unlawful, illegal, unconstitutional, null and void and of no effect whatsoever."*

From the above, it is clear that the 1st respondent is challenging his substitution as a candidate of the PDP for the 21st April, 2007 election to Ife Federal Constituency of the House of Representatives

with the 1st appellant as well as the selection of the said 1st appellant as candidate for the said election. There is no doubt that these are pre-election matters which the relevant courts have jurisdiction to handle separate from the election tribunals. It should be noted that the trial court dismissed the suit of the 1st respondent in respect of the reliefs resulting in the appeal. The first issue is whether in fact, the issue as formulated and determined by the lower court is different from the issue arising from the objection of the 1st appellant before the lower court?

I do not think so particularly when one looks at relief (ii) reproduced supra. That relief challenges 1st respondent's substitution by the 3rd respondent with the 1st appellant. That is the main issue in the case. That being the case, it is my considered view that for one to contend that following the election of 21st April, 2007, the appeal of the 1st respondent challenging the decision of the trial court challenging his substitution as a candidate of the PDP with the 1st appellant had thereby become academic leading to the abatement of the jurisdiction of the lower court is clearly the same thing as saying that following the said ejection, the lower court no longer has the jurisdiction to hear and determine the appeal on the issue of substitution of the 1st respondent. The substantive reliefs sought in the trial court are declaratory as to the right and status of the 1st respondent, which declaration are not affected by the holding of the election of 21st April, 2007. To me, the fact of the holding of the said election does not adversely affect the challenge to the candidature of the 1st appellant in the said election as the holding of that election is no confirmation of the validity or otherwise of the 1st appellant's candidature in that election.

The issue of the consequential orders to be made by the lower court in case the appeal of the 1st respondent succeeds is irrelevant to the consideration of the issue before that court particularly as that court is possessed of the requisite jurisdiction to make the necessary orders as the justice of the case may demand.

It should always be remembered that the issue as to whether the substitution of a candidate in an election is within Section 34 of the Electoral Act, 2006 or qualification of a candidate for an election remains a live issue before or after an election, that is why a candi-

date who losses an election, is empowered to raise, as a ground for the nullification of the said election, the issue of the qualification of a candidate for the election which is by law assigned to the election tribunal as a post election matter for determination. - See Section 145(1)(a) of the Electoral Act, 2006. I do not agree with the learned senior counsel for the appellants in his submission that the activation of the election tribunals after an election robs the regular courts of their jurisdiction to hear and determine pre-election matters touching and concerning the candidature for the election pending before the courts prior to the holding of the election to which the action relates.

To accept the argument of the learned senior counsel for the appellants to the effect that following the election of 21st April, 2007, it is only the election tribunal that now has the jurisdiction to hear and determine the issue of candidature of the 1st appellant at that election is to fall into a very dangerous error, or rather trap, deliberately set to ensnare the 1st respondent who was obviously not a candidate representing any political party at the said April 21st, 2007 election and consequently is without *locus standi* to challenge the election of the 1st appellant on any ground whatsoever. In effect, circumstance and the argument appear to be scheming to frustrate the 1st respondent in his efforts at enforcing his rights through the judicial process which ought not to be encouraged by the right thinking members of the society. The above position is supported by the provisions of Section 144(1) of the Electoral Act, 2006, which provides as follows:-

“144 (1) An election petition may be presented by one or more of the following persons:-

- G *“(a) a candidate is (sic) an election;*
- (b) a political party which participated in the election.”*

It is not in dispute that the 1st respondent did not participate in the election as a candidate neither is he a political party!! Yet learned senior counsel has submitted that the proper forum for the ventilation of the complaints of the 1st respondent, after the holding of the election, is the election tribunal and not the regularly courts clothed with the jurisdiction to hear and determine pre-election matters such as qualification for participation in an election and appeals arising

therefrom.

That apart, since learned senior counsel, by that argument, has admitted that the 1st respondent may have a right which could only be vindicated at the election tribunal and has not denied the jurisdiction of the lower court to deal with the substantive matter before it, and since the 1st respondent would have no locus to petition the election tribunal on the matter, it is only reasonable and just that the 1st respondent continues his case before the regular courts which admittedly are clothed with the requisite jurisdiction. B

The facts of this case are clearly very different from those of the case of Badejo v. Fed. Min. of Educ. supra, cited and relied upon by learned senior counsel for the appellants particularly in view of the reliefs claimed in this action and earlier reproduced in this judgment. In the instant case, the issue for determination remains very much alive either under the normal civil process or under Section D 145(1) of the Electoral Act, 2006. C

It is for these and the fuller reasons assigned in the leading judgment of my learned brother, Tabai, JSC, which I have had the privilege of reading before now, that I too dismiss the appeal as lacking in merit and abide by the consequential orders contained in the said leading judgment including the order as to costs. E

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