

**SUPREME COURT OF NIGERIA**  
12TH DECEMBER, 2008. SC. 274/2007  
**CORAM:- I. L. KUTIGI CJN, A. I. KATSINA-ALU,**  
**N. TOBI, D. MUSDAPHER, A. M. MUKHTAR,**  
**W. S. N. ONNOGHEN, JJSC**

1. ALHAJI UMAR MUSA YAR'DUA	APPELLANTS/
2. DR. GOODLUCK JONATHAN	RESPONDENTS
AND	
1. ALHAJI ATIKU ABUBAKAR, GCON	
2. SENATOR BEN OBI	
3. ACTION CONGRESS	PETITIONERS/
4. PEOPLES DEMOCRATIC	RESPONDENTS
PARTY (PDP) AND 819 ORS.	

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APPEALS - Abuse of process - Issues - Where rendered academic by subsequent events - Continued prosecution of instant appeal - After a subsequent favourable ruling on its substance by the Court of Appeal - Is an abuse of judicial process (H1)

**FACTS**

The petitioners/respondents had sued the respondents/appellants at the Court of Appeal, holden at Abuja, under the original jurisdiction of that court in election petitions. Appellants had, in response, raised a preliminary objection to the jurisdiction of the court. Upon hearing the objection, the court had ruled that the contention of the appellants did not amount to challenge to its jurisdiction and as such should be decided as part of the main suit. The instant appeal is against that ruling of the Court of Appeal .

During the pendency of this appeal, the Court of Appeal heard and determined the petition, taking into account the appellants' contention in their objection. The final judgment of the Court of Appeal encompassing its ruling on the points of objection has been appealed against in a separate appeal. Whereupon the respondents have brought an objection contending that the continued prosecution of the instant appeal amounts to an abuse of the judicial process in the circumstances.

**ISSUE FOR DETERMINATION**

*Whether there is no longer a live issue in interlocutory appeal the issues giving rise to the appeal having been subsequently dealt with by the lower court in its final judgment delivered on the 26th day of February, 2008, which issues so resolved together with others now constitute issues to be resolved by this court in appeal NO. SC/72/2008 arising from the said final judgment of the lower court.*

**HELD** (Unanimously striking out the appeal per **KUTIGI CJN**)  
**APPEALS - Abuse of process - Issues**

1. The Petitioners/Respondents had filed a Notice of Preliminary objection to this interlocutory appeal on the following grounds amongst others -

(a) That Appellants have re-argued the issue that arose in this interlocutory appeal before the lower court while this appeal was pending.

(b) The decision upon the re-argument was in favour of the appellants.

(c) The decision upon the re-arguing the issues were contained in the final judgment of the lower court on 26th February, 2008.

(d) The continued prosecution of this appeal after the favourable judgment to the Appellants in the lower court is an abuse of judicial process.

(e) The abuse constituted in keeping the appeal alive and re-arguing the same issue in the lower court warrants a dismissal of the appeal in line with the decision of this Court in *AGWASIM V OJICHIE* (2004) 10 NWLR (PT.882) 613 at 622-624.

I agree completely with the above submissions of counsel to Petitioners/Respondents. The continued prosecution of this appeal by the Appellants in view of available undisputed facts is clearly academic having been overtaken by events and therefore constituted a gross abuse of judicial process. (p. 3757 A/3758 F)

**REPRESENTATION**

Chief Wole Olanipekun, SAN, with him Dr. Alex A. Iziyon, SAN, Chief Joe Gadzama, SAN, C. P. Oli, Esq., S. I. Bamgbose, D. H. Bwala, Esq., Yusuf Yenfa, Lami Jibrin (Miss), Ezinne Nwaogu (Miss), Audu

Anuga, Esq., Oladele Gbadeyan, Esq., Chinedu Umeh, Kenneth Omoruan, Hannatu Abdurrahman (Mrs.), Friday Iziyon, Ibironke Iziyon (Mrs.), Olugbenga Adeyemi, Kabir Akingbolu, Ezennade Amuche (Miss), Ozoagu Ifeoma (Miss), Farouk Asekoma, for the Appellants.

Prof. Ben Nwabueze, SAN, with him Prof. A. B. Kasunmu, SAN, Alhaji Abdullahi Ibrahim, SAN, Rickey Tarfa, SAN, Chief Adeniyi Akintola, SAN, Chief Emeka Ngige, SAN, Adetunji Oyeyipo, SAN, Chief Titus Ashaolu, SAN, Omar Hitten, Esq., Dr. M. Ladan, Esq., H. A. Nganjiwa, Esq., Wole Iyamu, Esq., A. J. Owonikoko, Esq., J. O. Odubela, Esq., J. O. Babayemi (Mrs.), Gabriel Tsenyen, Esq., Rotimi Oguneso, Esq., Barnidele Aturu, Esq., Festus Keyamo, Esq., Sulaiman Usman, Esq., Abiodun Dada, Esq., R. Okotie-Eboh (Miss), Gbolahan Gabdamosi, Esq., D. Bassi (Mrs.), O. Ampitan (Mrs.) T. Osadare, O. A. Itedjere, Y. Pitan, Esq., E. Okodaso (Mrs.), I. Zuofa (Miss), T. J. Aondo, Esq., W. Afiah, Esq., C. Nwiyi (Miss) for the 1st - 3rd Respondents.

Chief Joe Kyari Gadzama, SAN, with him Chief Bolaji Ayorinde, SAN, Chief Duro Adeleye, SAN, Paul Erokoro, SAN, Prof. Bolaji Owasanoye, Chief Olusola Oke, R. A. Lawal Rabana, Alhaji R. O. Yusuf, A. C. Ozioko, Chief Obi Nbakwe, Z. E. Abudulahi, Akuyibo Owukori, C. P. Oli, S. I. Bamgbose (Mrs.), C. O. Egbase (Miss), D. H. Bwala, Forouk Aselcome. Y. A. Yamfa, Maryam Kyari (Miss) A. U. Ringim, Dayo Babalola, Pauline Saleh (Miss) for the 4th Respondent.

Kanu G. Agabi (CON), SAN, with him A. B. Mahmoud, SAN, Amaechi Nwaiwu, SAN, Bello Fadile, Esq., O. O. Uzzi, Esq., Wole Adebayo, Esq., O. S. Obande, Esq., Musa Elayo, Esq., C. U. Ekomaru, Esq., Lkon Efut, Esq., O. O. Obono-Obla, Esq., Irene Ideva, (Mrs.), P. O. Ofikwu, Esq., R. A. Umiom, Esq., Ayo Akarn, Esq., Chuka Ugwu, Esq., Patience Osagiede (Miss), Rita N. Ogar (Mrs.), Darracott Osawe', Esq., Adam Abdullahi Esq., Egang Agabi, Esq., Igunanya O. Obumselu (Mrs.), John Ochogwu, Esq., A. Ugar (Miss), A. Sadauki, I. S. Utuk, Umar Alhassan for the 4th - 810th Respondents.

**CASES REFERRED TO**

- AGWASIM v. OJICHIE (2006) .10 NWLR (PT. 882) 613  
 ONYEABUCHI V. INEC (2002) 8 NWLR (PT. 769) 417 at 443  
 UNION BANK OF NIGERIA v. ALHAJA BISI EDIONSERI (1988) 2  
 B NWLR (Pt. 74) 93  
 OLADE v. EKWELENJU (1989) 4 NWLR (Pt. 115) 326

**STATUTE REFERRED TO**

- C Constitution of the Federal Republic of Nigeria, 1999, s. 239 (1) (a)

**LEAD JUDGMENT BY KUTIGI CJN**

This is an interlocutory appeal against the Ruling of the Court of Appeal, holden at Abuja delivered on 20th September 2007 in  
 D exercise of its original jurisdiction under section 239(1 )(a) of the Constitution wherein the Court dismissed Respondents/ Appellants' Motion on Notice objecting to the Petitioners/Respondents' Petition and praying the Court to either dismiss or strike it out.

E The Ruling of the lower court being appealed can be found on pages 2004 - 2005 of Volume 5 of the records. It is very short and reads thus -

*"It is trite law that in interlocutory stage, issues that call for  
 F joinder and inconsistent claims are not jurisdictional matters but were irregularity which can be sorted at the hearing of the petition. I see no proper challenge of jurisdiction in the two applications. This Court has full jurisdiction to entertain the petition to enable all parties to ventilate their cases on merit. Accordingly, I dismiss both applica-  
 G tions".*

While this appeal is still pending in this Court the case proceeded to trial in the Court of Appeal and final judgment was entered against the Petitioners/Respondents on 26th February, 2008.

H It is clear from the final judgment that counsel on both sides as well as the Court adverted their minds to the interlocutory Ruling above, and that Respondents/Appellants' motion which was re-argued in fact finally succeed when the Court below struck out the Petitioners/Respondents ALTERNATIVE grounds in the Petition.

I am quite aware of the fact that this aspect of the final judgment is still being challenged in an appeal against the final judgment of the Court of Appeal referred to above. That appeal is not the same as this appeal and I cannot therefore decide the matter here. That is enough by way of introduction.

***The Petitioners/Respondents had filed a Notice of Preliminary objection to this interlocutory appeal on the following grounds amongst others -*** B

***(a) That Appellants have re-argued the issue that arose in this interlocutory appeal before the lower court while this appeal was pending.*** C

***(b) The decision upon the re-argument was in favour of the appellants.***

***(c) The decision upon the re-arguing the issues were contained in the final judgment of the lower court on 26th February, 2008.*** D

***(d) The continued prosecution of this appeal after the favourable judgment to the Appellants in the lower court is an abuse of judicial process.*** E

***(e) The abuse constituted in keeping the appeal alive and re-arguing the same issue in the lower court warrants a dismissal of the appeal in line with the decision of this Court in AGWASIM V OJICHIE (2004) 10 NWLR (PT.882) 613 at 622-624.*** F

There is an affidavit in support of the Notice of Preliminary Objection. It was sworn to by one Osatohanmwun Akpata one of the Counsel representing the Petitioners/Respondents herein. Paragraphs 3, 4, 5, 6, 7, 9 & 10 read as follows -

***"3. That the appeal herein was filed on the 20th day of September, 2007 against the ruling of the court of appeal delivered on the same date wherein the preliminary objection of the Appellants/ Respondents as respondents to the presidential election petition of the respondents/applicants were dismissed.*** G H

***4. That briefs were duly-exchanged in respect of the Appeal ever before trial in the lower court was concluded and the appellants filed their brief on 10/10/07 while respondents' applicants filed Re-***

spondents brief on 22nd October, 2007.

5. That on the 5th day of February, 2008, despite the pendency of this appeal, the appellants re-argued the objection dismissed in the ruling herein appealed against in their final addresses before the court of appeal.

B 6. I'll at the decision upon re-arguing the objection was in favour of the Appellants/Respondents.

7. That the decision upon re-arguing the issues was contained in the final judgment of the lower court delivered on 26th February, 2008. Attached herewith and marked Exhibit "A I" is the judgment of the court of appeal, where at pages 66 - 72, the objections were considered and upheld.

9. That the continued prosecution of this appeal after the favourable judgment to the Appellants in the lower court is calculated against the Respondents/Applicant and this court to vex, irritate and put the judicial machinery-to to needless labour and expense.

E 10. That in the light of the grounds in support of this preliminary objection of which .I depose to this affidavit, it will be in the interest of justice to dismiss the Appellants/ Respondents' appeal as an abuse of court process."

F The Appellants filed a counter-affidavit through one of their counsel, Oladele Gbadeyan, in opposition virtually admitting that the issues for determination in the interlocutory appeal were extensively re-argued and determined by the Court of Appeal in the final judgment but interlocutory appeal.

**I agree completely with the above submissions of counsel to Petitioners/Respondents. The continued prosecution of this appeal by the Appellants in view of available undisputed facts is clearly academic having been overtaken by events and therefore constituted a gross abuse of judicial process** (see for example AGWASIM v. OJICHIE (2006).10 NWLR (PT. 882) 613. One may ask- what kind of order do the Appellants want from this court, now that the trial has been wholly completed and judgment delivered? Nothing, if I may answer. It is an abuse of process of Court for a plaintiff to re-litigate an identical 'issue which had been decided against him (see for example ONYEABUCHI V. INEC (2002) 8 NWLR (PT. 769) 417 at 443. So also where proceedings which were viable

when instituted have by reason of subsequent events become inescapably doomed to failure as in this case. Merely withdrawing the appeal would have saved the appellants from this situation.

The appeal is clearly lifeless, spent, academic, speculative and hypothetical (See *UNION BANK OF NIGERIA v. ALHAJA BISI EDIONSERI* (1988) 2 NWLR (Pt. 74) 93; *OLADE v. EKWELENJU* (1989) 4 NWLR (Pt. 115) 326. The Preliminary Objection therefore Succeeds. It is allowed.

The appeal is accordingly struck out. I make no order as to costs.

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**KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment of my learned brother Kutigi, CJN. I agree entirely with it and for the reasons he has given I too uphold the preliminary' objection and in consequence strike out the appeal. I also make no order as to costs.

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**TOBI JSC**

I have read in draft the judgment of Hon. Justice I. L. Kutigi, CJN, and I entirely agree with him. The preliminary objection succeeds and the appeal is accordingly struck out. I make no orders as to costs

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**MUSDAPHER JSC**

I have read the Ruling of my Lord Kutigi, CJN in this interlocutory appeal before now and I entirely agree with him, that the objection raised by the petitioners/respondents is well founded. The appeal of the appellants clearly is an abuse of the process of the court. The Ruling, the subject matter of the appeal, correctly held that there was "no proper challenge to the jurisdiction" of the Tribunal to deal with the petition of the petitioners. "*The issues of joinder and inconsistent*" grounds of the petition could be properly dealt with at the hearing stage of the petition. It is common ground that the issues were later discussed and a decision was reached. The issues are, as mentioned in ruling of the Chief Justice of Nigeria, subject to a sister appeal now pending in this court.

This appeal is clearly futile and serves no purposes. It is merely speculative and academic. The preliminary objection succeeds and is

allowed. The appeal is therefore incompetent and is struck out. I make no order as to costs.

**OGUNTADE JSC**

B I have had the advantage of reading in draft a copy of the lead judgment just delivered by my learned brother Kutigi C.J.N.

I agree with his reasoning and conclusion. I do not intend to add anything thereto.

C I would also strike out this appeal. I abide by the consequential orders made in the lead judgment of my learned brother Kutigi CJN. including the order on costs.

Appeal struck out.

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**MUKHTAR JSC**

D I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Kutigi, CJN. I agree that the appeal deserves to be struck out, and I hereby strike it out.

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E **ONNOGHEN JSC**

I have had the benefit of reading in draft, the lead judgment of my learned brother KUTIGI, Chief Justice of Nigeria, just delivered.

F I agree with his reasoning and conclusion that *there is no longer a live issue in interlocutory appeal the issues giving rise to the appeal having been subsequently dealt with by the lower court in its final judgment delivered on the 26th day of February, 2008, which issues so resolved together with others now constitute issues to be resolved by this court in appeal NO. SC/72/2008 arising from the said final*  
G *judgment of the lower court.* A resolution of the issues in this interlocutory appeal at this stage will surely serve no useful purpose; it will clearly be an exercise in futility.

H This appeal is therefore struck out. I abide by the consequential orders made in the lead judgment of my learned brother, KUTIGI, CJN including the order as to costs.

Appeal struck out.