

SUPREME COURT OF NIGERIA
13TH FEBRUARY, 2009. SC. 20/2007
CORAM:- D. MUSDAPHER, G. A. OGUNTADE,
I. F. OGBUAGU, P. O. ADEREMI,
M. S. MUNTAKA-COOMASSIE, JJSC

LABOUR PARTY APPELLANT
AND
INDEPENDENT NATIONAL
ELECTORAL COMMISSION RESPONDENT

APPEALS - Grounds - Not based on decision of Court of Appeal - Can not be the basis of an appeal to the Supreme Court - As it does not deal directly with matters from the High Court (H1)

APPEALS - Issues - Resolution of - Contrary to the allegation of the appellant - Court of Appeal did answer question No. 2 - When it held that the order refers to the nullified general election - And that s. 32(7) of the Electoral Act does not apply (H2)

ELECTIONS - Nullification - Effect of - The law regards whatever was purportedly done in the name of an election - As not having taken place at all (H3)

WORDS & PHRASES - Rerun elections - Meaning of - It means the same as fresh elections in place of that which is nullified - The Act need not use the word specifically (H4)

ELECTIONS - Rerun elections - Candidature - Political parties are not entitled to field new candidates - In the absence of evidence that their candidates at the nullified election - Had withdrawn their candidature (H5)

ORDERS OF COURT - Binding effect - Even where it is perverse, a court order must be obeyed - Until it is set aside by a competent court - It is therefore of no moment whether the Court of Appeal was right in making the order (H6)

POLITICS - Political parties - Candidates - Sponsorship of - Appellant cannot exercise its right to field a candidate in the circumstances of this case - As the date & period for calling for nominations has elapsed (H7)

CONSTITUTIONAL LAW - Reference of questions - Court of Appeal - Powers - The court to which the question goes - Is limited to deciding the question referred - The referring court must decide the substance of the case (H8)

FACTS

The plaintiff / appellant had sued the defendant / respondent before the Federal High Court, Katsina. In the course of the hearing, the court, at the instance of the appellant referred three question to the Court of Appeal which, inter alia, included a question as to whether the fresh election ordered after the nullification of the April 14, 2007 governorship election in Adamawa State is a general election under the 1999 Constitution or a bye-election under section 32(7) of the Electoral Act, 2006. This was question number 3 in the reference.

The Court of Appeal gave its answers to the three questions. The appellant, being dissatisfied by the answers given by that court, has brought this appeal against the decision of the Court of Appeal contending that the court failed to answer the above question.

ISSUES FOR DETERMINATION

“(1) Whether the learned Justices of the Court of Appeal were right in holding that the fresh election ordered to be held upon the nullification of the April 14, 2007 governorship election in Adamawa State by the decision of the Court of Appeal in CA/J/EP/GOV/419/2007: Independent National Electoral Commission & Ors. vs. Action Congress & Ors is not a bye-election to which the Appellant is entitled to participate by fielding a candidate of her choice pursuant to section 32(7) of the Electoral Act, 2006, but a “re-run” election.

(2) Whether the learned Justices of the Court of Appeal were right in holding that whenever there is a nullification of a general election and a fresh election is ordered to be held, only the candidates who contested in the nullified election can contest the fresh election”.

HELD (Unanimously dismissing the appeal per OGBUAGU JSC)

APPEALS - Grounds

1. It is now firmly settled, that this Court does not deal directly with matters from the High Court.

I note that the Respondent did not appeal to the Court of Appeal in respect of the granting of the Appellant’s application to refer those questions to it. Rather, the Respondent, participated in the proceedings in the court below and in ground (c) of the Objection, it is stated that,

“The decision from which this appeal arise, (sic) has since been implemented by the Federal High Court, Katsina which made the referral to the Court of Appeal and there has been no appeal from that decision”

This is an admission that this appeal, arises or arose from the decision of the court below. In the circumstance and for the other reasons already stated above, I agree with the Appellant that the Objection, is misconceived. It is accordingly struck out by me. (p. 396 F)

APPEALS - Issues - Resolution of

2. I note that the Appellant who described the judgment as erudite, did not say that the court below, did not “rightly and correctly” answer the second (2nd) question. Rather, it asserts, that it “failed to answer the question”. A perusal by me of the Records, shows clearly and unequivocally, that question No. 2, was in my respectful view, thoroughly and painstakingly, dealt with from page 230 up to page 235. It concluded at page 235 inter alia, as follows:

“just for emphasis, let it be known that the order of the Court of Appeal in respect of Adamawa State governorship election re run refers to the nullified general election and not a bye election. Therefore, Section 32(7) of the Electoral Act 2006, does not apply in the circumstance”.

The above, from all intents and purposes, was/is an answer to the said question. (p. 397 D)

ELECTIONS - Nullification - Effect of

3. In summary, as rightly submitted by the Respondent, once an election is declared null and void, the law regards whatever was purportedly done in the name or guise of an election, as not having

taken place at all. In the eyes of the law, the election is void ab initio, and a fresh election is conducted as if the earlier one did not take place at all. (p. 399 B)

Rerun elections - Meaning of

- B 4. I will therefore, pause here to ask, If the consequence of a nullification of an election, means, on the admission of the Appellant, “fresh election”, “or starting afresh”, is a “re-run”, not the same thing as “re-start”? Must the Act use the word “re-run” in a general election that has been nullified and rendered void? I think not. The Appellant’s submission that the Act recognizes only general elections, new elections and bye-elections and not re-run elections, with respect, is no more than semantics. (p. 399 D)

ELECTIONS - Rerun elections - Candidature

- D 5. The Respondent has submitted at its paragraph 5.07 of its Brief that what the Court of Appeal ordered when it nullified the election, was a general election and that the Appellant, cannot be entitled to field a new candidate their being no evidence that the Appellant’s candidate at the nullified election, had either withdrawn his candidature in the manner provided in Section 36(1) & (2) of the Act, I agree. (p. 400 B)

ORDERS OF COURT - Binding effect

- F 6. As regards Issue (2) of the Appellant, in my respectful view, whether the Court of Appeal was right in making its said order, is of no moment. This is because, that order subsists and must be obeyed by all concerned. It is now firmly settled that a court Order, must be obeyed even if such Order, is perverse, until such a time that the Order is set aside by a competent court. The said order of the Court of Appeal, is very clear and unambiguous. There was/is no appeal against it by the Appellant. (p. 401 B)

Political parties - Candidates - Sponsorship of

- H 7. Perhaps, if I may, the Appellant, on its admission that the court below, admirably, rightly and correctly answered the 1st Question - i.e. that the Appellant, is entitled to submit or nominate and sponsor a candidate or candidates, I respectfully hold that the Appellant, can-

not in the circumstance, exercise that right in an election that was/is nullified and a fresh election ordered. This is because, as rightly and correctly contained in the said order, the date and period for calling for nominations, had elapsed. Period. (p. 401 H)

CONSTITUTIONAL LAW - Reference of questions

B 8. Before concluding this Judgment, I wish to state that Section 295(2) of the Constitution of the Federal Republic of Nigeria, 1999, is mandatory or connotes, a command that when any question is or questions are referred to the Court of Appeal, that Court, shall give its decision upon the question or questions. C

The Court to which the question goes, is limited to deciding upon the question referred to it. Thereafter, it must send its decision to the court in which the question arose and that court is bound to dispose of the case out of which that decision arose. D

Thus, it is the court making the reference, that must decide on the substantiality of the question and not the Court of Appeal or the Supreme Court. (p. 402 B/D)

NOTABLE POINT OF INTEREST

ADEREMI JSC

1. A rerun election entails participation of the same dramatis personae. When a court makes a pronouncement that a thing that took place is null and void, the simple and only reasonable interpretation of such a pronouncement is that the thing never occurred or took place. F
The court, is by implication, ordering that the whole exercise must start afresh with the same dramatis personae participating. It cannot be otherwise if justice will be seen to be done in a situation like the present case where a candidate was adjudged to have been unlawfully excluded. An order of the court commanding a re-run connotes G
nothing other than that the candidate so unlawfully excluded together with those who took part in the election that was voided should start again -they should have a re-run of the election and that is the general election. To have construed the order otherwise would foist H
grave injustice on the parties. (p. 409 C)

REPRESENTATION

T. E. Williams, Esq. (SAN), for the Appellant, with him, C.U. Ekoma-ru, Esq., Dan Anyanwu, Esqr., Tony Okeke, Esqr., Goddy Uche Esqr. and Maduakolam Igere, Esqr.

B Okon Efut Esqr., for the Respondent, with him, Robin A. Umiomi, Esqr., Ifunanya Obimseki (Mrs.); Okwa M. Enebeli (Mrs.), Agbo Ugar (Miss); Ikani Agabi, Esqr., and Mark Chukwu, Esqr.

CASES REFERRED TO

- C Ugwu vs. Ararume (2007) 12 NWLR (1048) 367
 Amaechi vs. INEC & Ors. (2007) 18 NWLR (1065) 98
 Adesanya v. The President (1981) 1 NCLR 386
 Federal Republic of Nigeria v. Lord Chief Ifegwu (2003) 15 NWLR (Pt.842) 113; (2003) 5 SCNJ. 219; (2003) 112 LRCN 2233
 Chief Ehigbe v. Chief Omokhafa & 2 ors. v. The Military Administrator
 D Edo State of Nigeria & 2 Ors. (2004) 12 SCNJ. 106 (2004) 11-12 S.C. 60 (2004) 20 NSCQR 355
 Olawoyin v. Commissioner of Police (No.2) (1961) 2 SCNLR 278; (1961) 1 All NLR 203
 Bamaïyi & ors. v. Attorney-General of the Federation & ors. (2001)
 E 12 NWLR (Pt.327) 468; (2001) 7 SCNJ 346
 Alhaji Atanda (2005) 5 NWLR (Pt.656) 244 (3), 275-276 C.A
 Brigadier General Tosun (Rtd.) v. Hon. Mr. Justice Oputa (Rtd.) & 2 ors. (No.1) (2001) 16 NWLR (Pt.740) 577 @ 592 C.A.

F STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999, ss. 233 & 295
 Electoral Act, 2006, ss. 32 & 36
 Court of Appeal Rules, 2007, O. 5 r. 1

G LEAD JUDGMENT BY OGBUAGU JSC

This is an appeal against that Part of the decision of the Court of Appeal, Kaduna Division (hereinafter called “the court below”) delivered on 10th April, 2008 in respect of a reference of constitutional questions from the Federal High Court, Katsina, to the court below on 12th March, 2008. The Appellant in its Brief states that;

H “The Court of Appeal rightly and correctly answered the 1st Question and part of the 3rd Question, but most respectfully failed to

answer the 2nd Question in accordance with its correct statement of the law in answer to the 1st Question and part (a) of the 3rd Question”

This is the crux of the instant appeal, the determination of which, should have been brief having regard to the two issues of the Appellant. But the Respondent, has raised a Preliminary Objection in its Brief and the Appellant has filed a Reply Brief. I am therefore, B obliged to go into the matter leading to the said reference.

From the Records at pages 10 and 11, by an Originating Summons, at the Federal High Court, Katsina, the Appellant, submitted the following questions for determination:

C “(1) Whether by the combined effect of section 221 of the Constitution of the Federal Republic of Nigeria 1999, Section 32(7) of the Electoral Act 2006, and paragraph 27(3) of the 1st Schedule to the Electoral Act, 2006, the Plaintiff is not entitled to submit to the defendant, and the Defendant mandated to receive from the D Plaintiff, the Plaintiff’s List of Candidates for any bye-election, fresh election or new election into any elective office to be conducted by the Defendant in any part of Nigeria, including Adamawa State of Nigeria.

E (2) Whether by virtue of the Supreme Court decisions in Ugwu vs. Ararume (2007) 12 NWLR (1048) 367 and Amaechi vs. INEC & Ors. (2007) 18 NWLR (1065) 98, it is not the prerogative of the Plaintiff to nominate and sponsor candidates of her choice for any forthcoming bye-election, fresh election or new election to be F conducted in Nigeria or any part thereof, including Adamawa State.

(3) Whether, in the light of the decision of the Court of Appeal in Independent National Electoral Commission & ors. vs. Action Congress & ors. CA/J/EP/GOV/419/2007, delivered on 26th February 2008 upholding the nullification of the April 14, 2007 governorship G election in Adamawa State, and ordering a fresh or bye-election, the Plaintiff is not entitled to submit a List of Candidates for the said fresh, new or bye-election for the office of Governor of Adamawa State of Nigeria as required by section 32(7) of the Electoral Act 2006 “

H It then stated under “STATEMENT OF RELIEFS SOUGHT”, that

“If the answers to the above questions are in the affirmative, the Plaintiff claims against the Defendant as follows:

1. A DECLARATION of this Honourable Court that by the

combined effect of section 221 of the Constitution of the Federal Republic of Nigeria 1999, section 32(7) of the Electoral Act 2006, and paragraph 27(3) of the 1st Schedule to the Electoral Act 2006, the Plaintiff is entitled to submit to the Defendant, and the defendant mandated to receive, the Plaintiff's List of Candidates for any
B bye-election, fresh election or new election into any elective office to be conducted by the Defendant in any part of Nigeria, including Adamawa State of Nigeria.

2. A DECLARATION of this Honourable Court that by virtue
C of the Supreme Court decisions in Ugwu vs. Araraume (2007) 12 NWLR (1048) 367 98, it is the prerogative of the Plaintiff to nominate and sponsor candidates of her choice for any forthcoming bye-election, fresh election or new election to be conducted in Nigeria or any part thereof including Adamawa State.

3. A DECLARATION of this Honourable Court that in the
D light of the decision of the Court of Appeal in Independent National Electoral Commission & Ors, vs. Action Congress & Ors. CA/J/EP/GOV/419/2007. delivered on 26th February 2008 upholding the nullification of the April 14, 2007 governorship election in Adamawa State, and ordering a fresh or bye election, the Plaintiff is entitled to
E submit a List of Candidates for the said fresh, new or bye-election for the office of Governor of Adamawa State of Nigeria as required by section 32(7) of the Electoral Act 2006.

4. AN ORDER of this Honourable Court directing the Defen-
F dant to receive from the Plaintiff her List of Candidates for the said bye-election, fresh election or new election to any elective office in Nigeria, and in particular, the scheduled bye-election, fresh or new election to the office of Governor of Adamawa State of Nigeria, and to allow the Plaintiff to participate in the said bye-election, fresh election or new election by the nomination and sponsorship of a candidate
G of her choice."

The Respondent joined issues with the Appellant and on the said 12 March, 2008, the Appellant, moved the said Federal High Court, to refer three questions to the Court of Appeal for interpretation, namely:

H "(a) Whether having regard to sections 221 and 229 of the Constitution of the Federal Republic of Nigeria, the right of a political party to nominate and sponsor candidates of her choice

for an election is limited to general elections, and does not apply to bye-elections, fresh elections or new elections.

(b) Whether the fresh election ordered to be held after the nullification of the April 14, 2007 governorship election in Adamawa State by the said decision of the Court of Appeal in Independent National Electoral Commission & Ors. vs. Action Congress & Ors.
B CA/J/EP/GOV/419/2007 is a general election under the Constitution of the Federal Republic of Nigeria 1999 or a bye-election under section 32(7) of the Electoral Act 2006.

(c) Whether by the combined effect of section 221 of the
C Constitution of the Federal Republic of Nigeria 1999, section 32(7) of the Electoral Act 2006, and paragraph 27(3) of the 1st Schedule to the Electoral Act, 2006, a political party registered in Nigeria is entitled to submit to the Independent National Electoral Commission, and the Commission mandated to receive from the political party, a
D List of Candidates for any bye-election, fresh election or new election into any elective office to be conducted upon the nullification of a previous election by an Election Tribunal".

As stated above, the court below, on 10th April, 2008, an-
E answered the said questions. The Appellant complains in this Court, that the court below, "failed to correctly answer the question as to the right of the Appellant to participate in the scheduled new or bye-election to the office of Governor of Adamawa State....."

[the underlining mine]

The Appellant has formulated two issues for determination,
F namely,

"(1) Whether the learned Justices of the Court of Appeal were right in holding that the fresh election ordered to be held upon the nullification of the April 14, 2007 governorship election in Ad-
G amawa State by the decision of the Court of Appeal in CA/J/EP/GOV/419/2007: Independent National Electoral Commission & Ors. vs. Action Congress & Ors is not a bye-election to which the Appellant is entitled to participate by fielding a candidate of her choice pursuant to section 32(7) of the Electoral Act, 2006, but a "re-run" election.
H

(2) Whether the learned Justices of the Court of Appeal were right in holding that whenever there is a nullification of a general election and a fresh election is ordered to be held, only the candidates who contested in the nullified election can contest the fresh election".

Although the Respondent has raised a Preliminary Objection urging the Court to strike out the appeal for want of jurisdiction, it has however, formulated a sole issue for determination, namely,

B “Whether the Learned Justices of the Court of Appeal were right in holding that the fresh election ordered to be held upon the nullification of the April 14, 2007 Governorship election in Adamawa State by the decision of the Court of Appeal in CA/J/EP/GOV/419/2007: Independent National Electoral Commission and others vs. Action Congress and others, is a “re-run” general election in which only the candidates who were validly nominated for the nullified election could contest.”

D When this appeal came up for hearing on 17th November, 2008, I.E. Williams, Esq., (SAN) the leading learned counsel for the Appellant, adopted their Brief of Argument and the Reply Brief. He urged the Court to allow the appeal. The leading learned counsel for the Respondent - Efut, Esq, also adopted their Brief. He referred to their Preliminary Objection at pages 6 to 18 of their Brief where he stated that they contend that the appeal, is academic. He however, informed the Court that the trial court had in fact, determined the matter in accordance with the said answers given/supplied by the court below. He therefore, urged the Court to strike out the appeal if their Objection succeeds or on die merits, dismiss the appeal. Thereafter, Judgment was reserved till today.

F I will first deal with the Preliminary Objection because, if it succeeds, that will be the end of the matter. This is because, the issue of jurisdiction is said to be so fundamental, that it can/could be raised at any stage/time by any party or even by the court. See the cases of Adesanya v. The President (1981) 1 NCLR 386; Federal Republic of Nigeria v. Lord Chief Ifegwu (2003) 15 NWLR (Pt.842) 113; (2003) 5 SCNJ. 219; (2003) 112 LRCN 2233 and Chief Ehigbe v. Chief Omokhaye & 2 ors. v. The Military Administrator Edo State of Nigeria & 2 Ors. (2004) 12 SCNJ. 106 (2004) 11-12 S.C. 60 (2004) 20 NSCQR 355 and many others.

The grounds for the Objection, are stated to be as follows:

H “(a) No appeal lies from answers given by the Court of Appeal to constitutional questions presented to that Court for determination by a court of first instance.

(b) This appeal constitutes a gross abuse of the process of this

Honourable Court in that the candidate sponsored by the Appellant in the gubernatorial election held in Adamawa State on the 14th day of April 2007 which election was annulled by the Governorship and Legislative Houses Election Petition Tribunal for Adamawa State, participated in the fresh election ordered by the tribunal, which fresh election was held on the 26th day of April, 2008 and from which Murtala H. Nyako was returned as having been elected and has since been sworn into office. The said candidate participated in the fresh election under the sponsorship of the Appellant.

C (c) The decision from which this appeal arose has since been implemented by the Federal High Court, Katsina which made the referral to the Court of Appeal and there has been no appeal from that decision.

D (d) The outcome of this appeal will be of no benefit to the Appellant”.

E A careful reading of the arguments in respect of the Objection and in the Reply of the Appellant by me, in my respectful view, shows that the merits of the Appeal are also unwittingly included. For instance, in respect of ground (a), the Respondent while arguing the main appeal at page 22 of the Respondent’s Brief, in paragraph 6.00, the following appears;

F “Whether a decision of the Court of Appeal concerning referrals of questions of law from the High Court is a decision from which an appeal lies”.

The above, is substantially in my humble view, the reason in ground (a) of the Objection. I say so, because in the argument in support of ground (a), the following appear at page 7 in paragraph 3.01, inter alia;

G “The decision from which this appeal lies is not a decision in civil or criminal proceedings before the Court of appeal. It is not a decision in a civil or criminal proceeding on questions as to the interpretation of the constitution.....”.

H However, as rightly stated in the Appellant’s Brief under paragraph 2.1, Section 233(2) (b) of the Constitution of the Federal Republic of Nigeria, 1999, provides as follows:

“An appeal shall lie from the decisions of the Court of Appeal to the Supreme Court as of right in the following cases - decisions in any civil or criminal proceedings on questions

as to the interpretation or application of this Constitution”.

The Respondent has not disputed the fact that the matter leading to the instant appeal, arose from or was initiated by an Originating Summons (it did not arise or come from the air or blues), and a decision was given by the Court of Appeal in respect of the questions referred to it by the Federal High Court. See the cases of Olawoyin v. Commissioner of Police (No.2) (1961) 2 SCNLR 278; (1961) 1 All NLR 203; Bamaivi & ors. v. Attorney-General of the Federation & ors. (2001) 12 NWLR (Pt.327) 468; (2001) 7 SCNJ 346.; (2001) 7 S.C. (Pt.II) 62 and FRN v. Ifegwu (infra). The Appellant being aggrieved by the decision, has appealed to this Court.

It is noted by me that at page 18 paragraph 3.23 of the Respondent’s Brief, the following appear, inter alia:

“In the instant case, the pre-conditions for the reference of the constitutional questions to the Court of Appeal were not satisfied. Therefore, the Federal High Court lacked the jurisdiction to have referred those questions in the first place. In the circumstance, we urge Your Lordships to hold that there were no valid questions to refer to the Court of Appeal and therefore the answers to those questions were equally rendered invalid. As the Lower Courts had no jurisdiction to embark on this futile exercise, this Court equally lacks the jurisdiction to entertain this appeal.....”.

It is now firmly settled, that this Court does not deal directly with matters from the High Court. See the case of Chief Olatunde & anor. v. Abidogun & anor. (2001) 12 SCNJ. 225 @ 234.

I note that the Respondent did not appeal to the Court of Appeal in respect of the granting of the Appellant’s application to refer those questions to it. Rather, the Respondent, participated in the proceedings in the court below and in ground (c) of the Objection, it is stated that,

“The decision from which this appeal arise, (sic) has since been implemented by the Federal High Court, Katsina which made the referral to the Court of Appeal and there has been no appeal from that decision”

[the underlining mine]

This is an admission that this appeal, arises or arose from the decision of the court below. In the circumstance and for the other reasons already stated above, I agree with the Appellant that the

Objection, is misconceived. It is accordingly struck out by me.

Now, coming to the above main appeal, at page 134 of the Records, in the said Appeal No. CA/J/EP/GOV/419/2007 delivered on 26th February, 2008, the Court of Appeal - per Salami, JCA stated inter alia, as follows:

“All the candidates on Exhibit P3 are the only fit and proper persons to contest the fresh election the date and period for calling for nomination having lapsed”.

I note that the Appellant who described the judgment as erudite, did not say that the court below, did not “rightly and correctly” answer the second (2nd) question. Rather, it asserts, that it “failed to answer the question”. A perusal by me of the Records, shows clearly and unequivocally, that question No. 2, was in my respectful view, thoroughly and painstakingly, dealt with from page 230 up to page 235. It concluded at page 235 inter alia, as follows:

“just for emphasis, let it be known that the order of the Court of Appeal in respect of Adamawa State governorship election re run refers to the nullified general election and not a bye election. Therefore, Section 32(7) of the Electoral Act 2006, does not apply in the circumstance”.

[the underlining mine]

The above, from all intents and purposes, was/is an answer to the said question.

The Appellant, with respect, did not address its Issue No. 1 in its submissions at pages 9 and 10 -paragraphs 4.1 to 4.4 of its Brief. It is from pages 12 and 13 paragraphs 4.6 to 4.11 and page 14 - paragraphs 4.12 and 4.14 that it did. In summary or in effect, the Appellant contended at the court below and contend to this Court, that the said election ordered by the Court of Appeal, is a bye-election for which Section 32(7) of the Electoral Act, 2006 (hereinafter called “the Act”) applies.

I note that both the court below at page 231 of the Records and the Appellant in paragraph 4.8 of its Brief, referred to the definitions of a general election and a bye-election in Black’s Law Dictionary 8 Edition, which read as follows:

“A general election as/”an election that occurs at a regular interval of time also termed regular election for all seats, as contrasted with a bye-election”

A bye-election as/” an election specially held to fill a vacant post”.

The court below, referred to the definition of a General Election in Section 164 of the Act which read as follows:

“General Election means an election held in the Federation at large which may be at all levels and at regular intervals to select officers to serve after the expiration of the full terms of their predecessors”.

It referred to the case of Chief Ojukwu vs. Chief Obasanjo & Ors. (2004) 12 NWLR (Pt. 886) 169 @ 227 (it is also reported in (2004) 7 SCNJ. 33; (2004) 7 S.C. 117.

The Appellant submits that neither the Constitution of the Federal Republic of Nigeria, 1999 nor the Act, recognizes a “re-run election”. That an election, is either a general election or a bye-election. He cited and relied on the case of Oputeh v. Ishida & 2 Ors. (1993) 3 NWLR (Pt.279) 34 (a), 58 - per Uwaifo, JCA (as he then was) emphasizing on the sentence. “It is a bye-election simply because it is not a general election”

When conceding to the definition in the said Section 164 of the Act, it is still submitted in paragraph 4.6 of the Appellant’s Brief that the court below, was in error, in failing to hold that the said governorship election so ordered by the Court of Appeal, was a bye-election.

I note that in paragraph 4.11 of the Appellant’s Brief, it is conceded that the said general election, was nullified and a fresh election was ordered accordingly. A nullified election, as again conceded by the parties in their respective Brief- the Appellant, in its paragraph 4.9 and the Respondent, in its paragraph 5.03, is voided election leaving a complete void. The consequence of a nullification, as thus conceded, is nothingness. See the case of Oduko v. Government of Ebonyi State (2004) 13 NWLR (Pt.891) 487 (a), 501, referred to by the court below at page 234 of the Records and by the Appellant in its Brief. A “nullity” is defined in the above case, as a void act, an act which has no legal consequence. It is an act which is not only bad, but incurably bad. It is as if nothing happened. See the case of Okafor & Ors. v. The Attorney-General & Commissioner for Justice, Anambra State & Ors. (No.1) 6 NWLR (Pt.200) 659; 7 SCNJ 345. In effect, a nullified election, is completely void. The Appellant submits that the

next election, is an entirely new process. It cited and relied on the case of Nasiru v. Bindawa (2006) 1 NWLR (Pt.961) 355 @ 373.

In summary, as rightly submitted by the Respondent, once an election is declared null and void, the law regards whatever was purportedly done in the name or guise of an election, as not having taken place at all. In the eyes of the law, the election is void ab initio, and a fresh election is conducted as if the earlier one did not take place at all.

I will therefore, pause here to ask, If the consequence of a nullification of an election, means, on the admission of the Appellant, “fresh election”, “or starting afresh”, is a “re-run”, not the same thing as “re-start”? Must the Act use the word “re-run” in a general election that has been nullified and rendered void? I think not. The Appellant’s submission that the Act recognizes only general elections, new elections and bye-elections and not re-run elections, with respect, is no more than semantics. What is more, it is no longer in doubt that the days of technicalities, are over and gone forever of course, for good.

The court below- per Okoro, JCA, at page 232 of the Records, stated inter alia, as follows:

“Where a general election has been held and there is a false start, for example, a candidate who ought to have been part of the election was unlawfully excluded or there was no level playing ground for all the candidates and that election is subsequently either cancelled by the regulating authority like INEC or nullified by an order of a court or tribunal, and a re-run or re-start is ordered, it is my humble view that the re-run or re-start refers to that general election cancelled or nullified, and not a bye-election”.

His Lordship continued inter alia, thus:

“..... The consequence of this is that all the candidates including the one unlawfully excluded would now get back to the starting line for a fair and free contest. It does not admit of any other candidate since as it were the period for nomination and screening of candidates would have elapsed. See Honorable (sic) Mohammed Salisu A. Alwa’u & anor. vs. Abbas M. Yakubu & 2 ors, CA/K/EP/SHA30/2003 (unreported) delivered on 6th November, 2003”

The Respondent has submitted at its paragraph 5.07 of its Brief that what the Court of Appeal ordered when it nullified the

election, was a general election and that the Appellant, cannot be entitled to field a new candidate their being no evidence that the Appellant's candidate at the nullified election, had either withdrawn his candidature in the manner provided in Section 36(1) & (2) of the Act, I agree.

B Coming back to Issue 1 of the Appellant and the sole issue of the Respondent, the court below, at page 234 of the Records, in answer to its poser whether the said election so ordered was a general or bye-election, stated inter alia, as follows:

C "..... The election which took place on 14th April, 2007 had been declared a nullity. The exercise had been voided and it is as if it never took place. See Oduka vs. Govt. of Ebonyj State (2004) 13 N.W.L.R. (Pt.891) 487. The election of that date, to say the least was a void act with no legal consequence. The reason is that the condition precedent for the holding of the election was never met i.e. D that all the candidates lawfully nominated and sponsored by political parties should be included, given a level playing field and allowed to contest. Since one of the candidates was unlawfully excluded, that election was null and void. Therefore, it is that general election that the Court of Appeal in INEC vs. Action Congress (supra) had ordered E a re-run. Certainly, not a bye-election.....".

I also agree.

Although, I have deliberately gone this far, my humble but firm view, is that with the above pronouncement herein reproduced F by me, the said assertion by the Appellant that the court below failed to answer the 2nd Question, with the greatest respect, is unfounded, false, bogus and completely misconceived. I say so, because, it could be seen from the foregoing, that the said question, was as in the other two questions 1 and 3 answered by the court below.

G In respect of the said Issue (1) of the Appellant and the sole issue of the Respondent, the Appellant having conceded that the consequence of a nullification of the said election, meant that the election was void ab initio, I have held that a "re-run" is the same thing as a "fresh election" or "re-start". My answer to the said respective issue of the parties, is in the Affirmative/Positive. Certainly, it cannot be otherwise. I cannot fault the said conclusion of the court below H reproduced above by me.

As regards Issue (2) of the Appellant, in my respectful view,

whether the Court of Appeal was right in making its said order, is of no moment. This is because, that order subsists and must be obeyed by all concerned. It is now firmly settled that a court Order, must be obeyed even if such Order, is perverse, until such a time that the Order is set aside by a competent court. See the case of Oba Ala-degbami v. Oba Fasanmade (1988) 3 NWLR (Pt.81) 131: (1988) 6 SCNJ. 103. The said order of the Court of Appeal, is very clear and unambiguous. There was/is no appeal against it by the Appellant

I agree with the court below when at page 236 of the Records, it stated inter alia, as follows:

C ".....Where there is a nullification of an election, the order of the court will determine the course of the election to follow as no two cases are the same".

This is exactly what happened in this case leading to this appeal. The Court of Appeal, did not order a bye-election which by D the said definition herein reproduced, is "an election specially held to fill a vacant post". There was no vacant post to be filled, no one died and no one was removed as Governor by an impeachment. So, Section 32(7) of the Act, as held by the court below, is inapplicable. E I also so hold. The said nullification of the election, was because of the "unlawful exclusion" of the Action Congress and its candidate by INEC. Since the said election, was void, commonsensically and in fact and in law, it is the same candidates that will "run" in the aborted/nullified election that must go back to run in the fresh election F as ordered by the trial Tribunal which was affirmed by the Court of Appeal.

Perhaps, if I may, the Appellant, on its admission that the court below, admirably, rightly and correctly answered the 1st Question - i.e. that the Appellant, is entitled to submit or nominate and sponsor a G candidate or candidates, I respectfully hold that the Appellant, cannot in the circumstance, exercise that right in an election that was/is nullified and a fresh election ordered. This is because, as rightly and correctly contained in the said order, the date and period for calling H for nominations, had elapsed. Period.

My unequivocal answer to the said Issue 2 of the Appellant, is also rendered in the affirmative.

Before concluding this Judgment, I wish to state that Section 295(2) of the Constitution of the Federal Republic of Nigeria, 1999,

is mandatory or connotes, a command that when any question is or questions are referred to the Court of Appeal, that Court, shall give its decision upon the question or questions. It has no discretion in respect of the said reference. See also the cases of Alhaji Atanda (2005) 5 NWLR (Pt.656) 244 (3), 275-276 C.A. and Brigadier General Tosun (Rtd.) v. Hon. Mr. Justice Oputa (Rtd.) & 2 ors. (No.1) (2001) 16 NWLR (Pt.740) 577 @ 592 C.A.

The Court to which the question goes, is limited to deciding upon the question referred to it Thereafter, it must send its decision to the court in which the question arose and that court is bound to dispose of the case out of which that decision arose. See the case of Togun v. Oputa supra.

Thus, it is the court making the reference, that must decide on the substantiality of the question and not the Court of Appeal or the Supreme Court. See the cases of African Newspapers of Nigeria Ltd. v. The Federal Republic of Nigeria (1985) 2 NWLR (pt. 6) 133; The Federal Republic of Nigeria & anor. v. Lord Chief Ifegwu (2003) 15 NWLR (Pt.842) 113 @ 191; (2003) 5 SCNJ. 217

In the final analysis or conclusion, this appeal, I hold in my respectful but firm view, is unmeritorious. It fails and it is accordingly dismissed.

Costs follow the event. The Respondent is awarded N50,000.00 (fifty thousand naira) costs payable to it by the Appellant.

F

MUSDAPHER JSC

I have read before now the judgment of my Lord Ogbuagu, JSC just delivered with which I entirely agree. In the aforesaid judgment his lordship has meticulously and exhaustively discussed all the relevant issues. I adopt his reasonings as mine and I also find no merit in this appeal. I dismiss it and affirm the answers given by the Court of Appeal in the reference brought to it. I abide by the order for costs proposed in the lead judgment.

H

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Ogbuagu J.S.C. I agree with his treatment of the germane issues and the conclusion arrived at on them. I would also dismiss this appeal and award N50,000.00 costs in favour of the respondent.

B

ADEREMI JSC

This is an appeal against that part of the decision of the Court of Appeal [Kaduna Division] hereinafter referred to as the court below, delivered on the 10th of April 2008 concerning the matter of reference of constitutional questions from the Federal High Court sitting at Katsina made on the 12th March 2008 pursuant to Section 295 (2) of the Constitution of the Federal Republic of Nigeria 1999 D and under Order 5 rule 1 of the Court of Appeal Rules 2007 for interpretation.

The three questions posed before the court below for constitutional interpretation hinge on the interpretation and application of Sections 221 and 229 of the Constitution of the Federal Republic of Nigeria and their application to Section 32 (7) of the Electoral Act 2006 which confers on a political party the right to submit a list of candidates to the Independent National Electoral Commission within 14 days before a fresh or bye-election to be conducted within F three months as provided for by paragraph 27 (2) and (3) of the 1st Schedule to the Electoral Act 2006.

Briefly the facts of this case are thus: the appellant in this appeal is a political party registered in Nigeria under the 1999 Constitution and the Electoral Act 2006 which is entitled to nominate, sponsor and canvass for votes for candidates in any election, bye-election, fresh election or new election to the office of the President, Vice President, Governor, Deputy Governor or a Member of a Federal or State Legislative House or of a Local Government Council. H The respondent on its own, is a body set up by the Constitution of the Federal Republic of Nigeria 1999 and empowered by the said Constitution and by the Electoral Act to conduct such elections afore-mentioned. The respondent had arranged to conduct bye-elections, fresh elections or new elections to certain elective offices such

as the office of Governor of Adamawa State sequel to the decisions of Election Petitions Tribunals and appeals therefrom to the Court of Appeal. The appellant approached the respondent, in its desire to contest the bye-elections and submitted a list of its candidates for the bye-elections as provided for by the Electoral Act 2006; but the respondent informed it that it would conduct the bye-election only with the list of candidates used for the nullified elections thus, refusing to take the new list of candidates from the appellant. Consequent upon the refusal to accept a new list, the appellant, as plaintiff before the court of trial, took out an originating summons submitting the following questions for determination: -

“(1) Whether by the combined effect of Section 221 of the Constitution of the Federal Republic of Nigeria, 1999 Section 32 (7) of the Electoral Act, 2006 and Paragraph 27 (3) of the 1st Schedule to the Electoral Act, 2006 the plaintiff is not entitled to submit to the defendant, and the defendant mandated to receive from the plaintiff, the plaintiff’s list of candidates for any bye-election, fresh election or new election into any elective office to be conducted by the defendant in any part of Nigeria, including Adamawa State of Nigeria.

(2) Whether by virtue of the Supreme Court decisions in UGWU V. ARARUME (2007) 12 NWLR (pt.1048) 367 and AMAECHI V, INEC & ORS (2007) 18 NWLR (pt.1065) 98, it is not the prerogative of the party to nominate and sponsor candidates of her choice for any forthcoming bye-election, fresh election or new election to be conducted in Nigeria or any part thereof including Adamawa State.

(3) Whether, in the light of the decision of the Court of Appeal in Independent National Electoral Commission & Ors V. Action Congress & Ors CA/J/EP/GOV/419/2007, delivered on 26th Feb 2008 upholding the nullification of the April 14, 2007 Governorship Election in Adamawa State and ordering a fresh or bye-election, the plaintiff is not entitled to submit a List of Candidates for the said fresh, new or bye-election for the Office of Governor of Adamawa State of Nigeria as required by Section 32 (7) of the Electoral Act 2006.”

In consequence thereof, the appellant as plaintiff, claimed the following declaratory and injunctive reliefs, namely; -

”(1) A declaration that this Honourable Court that by the combined effect of Section 221 of the Constitution of the Federal Republic of Nigeria 1999, Section 32 (7) of the Electoral Act 2006

and paragraph 27 (3) of the 1st Schedule to the Electoral Act 2006, the plaintiff is entitled to submit to the defendant and the defendant mandated to receive, the plaintiff’s List of Candidates for any bye-election, fresh election or new election into any elective office to be conducted by the defendant in any part of Nigeria including Adamawa State of Nigeria.

(2) A declaration of this Honourable Court that by virtue of the Supreme Court decisions in UGWU V. ARARUME (2007) 12 NWLR (pt.1048) 367 and AMAECHI V. INEC & ORS (2007) 18 NWLR (pt.1065) 98, it is the prerogative of the plaintiff to nominate and sponsor candidates of her choice for any forthcoming bye election, fresh election or new election to be conducted in Nigeria or any part thereof including Adamawa State.

(3) A declaration of this Honourable Court that in the light of the decision of the Court of Appeal in INDEPENDENT NATIONAL ELECTORAL COMMISSION & ORS V. ACTION CONGRESS & ORS CA/J/EP/GOV/419/2007 delivered on 26th February 2008 upholding the nullification of the April 14, 2007 Governorship Election in Adamawa State and ordering a fresh or bye election, the plaintiff is entitled to submit a List of Candidates for the said fresh, new or bye-election for the Office of Governor of Adamawa State of Nigeria as required by Section 32 (7) of the Electoral Act 2006.

(4) An Order of this Honourable Court directing the defendant to receive from the plaintiff her List of Candidates for the said bye-election, fresh election or new election to any elective office in Nigeria, and in particular, the schedule bye-election, fresh or new election to the Office of Governor of Adamawa State of Nigeria and to allow the plaintiff to participate in the said bye-election, fresh election or new election by the nomination and sponsorship of a candidate of her choice.”

The respondent joined Issues with the appellant by filing a counter-affidavit. In the course of the proceedings, the appellant, pursuant to the provisions of Section 295 (2) of the Constitution of the Federal Republic of Nigeria 1999, moved the trial court (Federal High Court) for a reference of three substantial questions of constitutional interpretation and application to the court below (Court of Appeal) namely: -

“(1) Whether having regard to Sections 221 and 229 of

the Constitution of the Federal Republic of Nigeria, the right of a political party to nominate and sponsor candidates of her choice for an election is limited to general elections and does not apply to bye-elections, fresh elections and new elections.

B (2) Whether the fresh election ordered to be held after the nullification of the April 14, 2007 Governorship Election in Adamawa State by the said decision of the Court of Appeal in : INDEPENDENT NATIONAL ELECTORAL COMMISSION & ORS V. ACTION CONGRESS & ORS CA/J/EP/GOV/419/2007 is a general election under the Constitution of the Federal Republic of Nigeria 1999 or a C bye-election, under Section 32 (7) of the Electoral Act, 2006.

D (3) Whether by the combined effect of Section 221 of the Constitution of the Federal Republic of Nigeria 1999, Section 32 (7) of the Electoral Act 2006 and paragraph 27 (3) of the 1st Schedule to the Electoral Act, 2006 a political party registered in Nigeria is entitled to submit to the Independent National Electoral Commission and the Commission mandated to receive from the political party, a List of Candidates from any bye-election, fresh election or new election into any elective office to be conducted upon the nullification of a previous election by an Election Tribunal.”

E After taking arguments of counsel to the parties, the trial court, in a considered ruling, referred the said questions to the court below (Court of Appeal) which dealt with all the references and made its pronouncement, but, according to the appellant, the court below F failed to correctly answer the questions as to the right of the appellant to participate in the scheduled new or bye-election to the Office of Governor of Adamawa State by nomination and sponsorship of a candidate of her choice; on the contrary, the court below, it was contended, held that where there is nullification of a general election and a re-run election is ordered, only candidates who were nominated G to contest in the previous election can contest in the re-run election. The present appeal is predicated on this later part of the decision of the court below. Suffice it to say that the court below affirmed the decision of the trial court. And in so doing, it held per the judgment of Salami JCA at page 134 of the Record: -

H “The sixth respondent to the Petition, Murtala H. Nyako should vacate the office of the Governor of Adamawa State forthwith. The Speaker of the State House of Assembly should be sworn in to

assume the Office of Governor with immediate effect and should retain the office pending the election and return of a Governor at a fresh election to be conducted by the first respondent. All the candidates on Exhibit P3 are the only fit and proper persons to contest the Afresh election; the date and period for calling for nominations having lapsed.” B

It is against this part of the judgment of the court below that an appeal has been lodged and in its brief of argument, the appellant has raised two issues for determination, they are: -

C “ (1) Whether the learned Justices of the Court of Appeal were right in holding that the fresh election ordered to be held upon the nullification of the April 14, 2007 Governorship election in Adamawa State by the decision of the Court of Appeal in CA/J/EP/GOV./419/2007: INDEPENDENT NATIONAL ELECTORAL COMMISSION & ORS V. ACTION CONGRESS & ORS. is not a D bye-election to which the appellant is entitled to participate by fielding a candidate of her choice pursuant to Section 32 (7) of the Electoral Act, 2006, but a “re-run” election.

E (2) Whether the learned Justices of the Court of Appeal were right in holding that whenever there is a nullification of a general election and a fresh election is ordered to be held, only the candidates who contested in the nullified election can contest the fresh election.”

The respondent identified only one issue for determination and as couched in its brief of argument, it is thus: - F

“Whether the learned Justices of the Court of Appeal were right in holding that the fresh election ordered to be held upon the nullification of the April 14, 2007 Governorship Election in Adamawa State by the decision of the Court of Appeal in CA/3/EP/GOV/419/2007: INDEPENDENT , NATIONAL ELECTORAL G COMMISSION & ORS V. ACTION CONGRESS & ORS, is a “re-run” general election in which only the candidates who were validly nominated for the nullified election could contest.”

H I shall refrain from considering the Preliminary Objection taken by the respondent to the hearing of this appeal, contending that it is merely academic. Having regard to the issues raised for determination, it is my view that the Preliminary Objection is of no moment. I consider it to be a waste of time treating same all over. Suffice it to say that this has been exhaustively discussed in the judgment of my

learned brother Ogbuagu JSC. I agree with his conclusion.

When this appeal came before us for argument on 17th November 2008, Mr. T.E. Williams, S.A.N. learned senior counsel for the appellant referred to, relied on and adopted his client's brief of argument filed on 23rd April 2008 and the reply brief filed on 21st October 2008 and urged us to allow the appeal. Mr. Efut, learned counsel for the respondent also referred to, relied on and adopted the respondent's brief deemed properly filed on 7th October 2008. On the preliminary objection contained in the said brief, he urged us to uphold the same and strike out the appeal, but if overruled as it has now been, he urged that on the merit, the appeal should be dismissed.

I have read the arguments contained in the two briefs and it is my view that the issue raised for our determination is a very minor one, which in my respectful view, ought not to be brought here. In other words, it is not worth appealing on. That narrow and minor point is well captured in the only issue raised by the respondent. I have quoted supra the final order of the Court of Appeal in Suit No. CA/J/EP/GOV/419/2007: INEC V. ACTION CONGRESS supra as handed down by Salami JCA. It is that pronouncement that "was the subject-matter of reference to the court below.

Before answering the question subsumed in the reference, Okoro JCA, in the lead judgment, had posed the following questions;

"Is this new election a bye-election envisaged by Section 32 (7) of the Electoral Act 2006? Or is it a general election?"

In answering these questions, the learned justice of the Court of Appeal (court below) reasoned: -

"I hold a firm view that the order does not refer to a bye-election and as such Section 32 (7) of the Electoral Act does not apply. The election which took place on 14th April 2007 had been declared a nullity. The exercise had been voided and it is as if it never took place.

The election of that date, to say the least, was a void act with no legal consequence. The reason is that the condition precedent for the holding of the election was never met i.e. that all the candidates lawfully nominated and sponsored by political parties should be included/ given a level playing field and allowed to contest, since one of the candidates was unlawfully excluded, that election was null and

void. Therefore, it is in respect of that general election that the Court of Appeal in INEC V. ACTION CONGRESS (supra) had ordered a re-run. Certainly not a bye-election."

I cannot agree more with the above pronouncement.

When a court makes a pronouncement that a thing that took place is null and void, the simple and only reasonable interpretation of such a pronouncement is that the thing never occurred or took place. The court, is by implication, ordering that the whole exercise must start afresh with the same dramatis personae participating. It cannot be otherwise if justice will be seen to be done in a situation like the present case where a candidate was adjudged to have been unlawfully excluded. An order of the court commanding a re-run connotes nothing other than that the candidate so unlawfully excluded together with those who took part in the election that was voided should start again -they should have a re-run of the election and that is the general election. To have construed the order otherwise would foist grave injustice on the parties. And so I would reserve the two issues raised by the appellant against it. While I answer the only issue raised by the respondent in the affirmative.

It is for what I have said supra and the reasoning and conclusion reached by my learned brother Ogbuagu JSC that I unhesitatingly say that this appeal is unmeritorious. It must be dismissed and it is hereby dismissed. I abide with all other orders contained in the lead judgment including the order as to costs.

MUNTAKA-COOMASSIE JSC

The case started in the Federal High Court of Katsina concerning the matter of reference vis-a-vis constitutional questions pursuant to Section 295 (2) and (3) of the Constitution of the Federal Republic of Nigeria 1999 and under order 5 Rule 1 of the Court of Appeal Rules 2007 for interpretation.

Section 295 (2) and (3) provides thus:-

"Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Federal High Court, or a High Court and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any

party to the proceedings so requests, refer the question to the Court of Appeal; and where any question is referred in pursuance of this sub -section, the court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision.

B Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Court of Appeal and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court which shall give its decision upon the question and give such directions to the Court of Appeal as it deems appropriate”.

Thereafter Order 5 Rule 1 of the Court of Appeal Rules 2007 explains as follows:-

D “When a lower court refers any question as to the interpretation of the Constitution under the relevant provisions of the Constitution, or reserves any question of law for the consideration of the court in accordance with any written law, the lower court referring or reserving the question of law, as the case may be, shall state a case in Form 1 or 2 in the First Schedule to these Rules, whichever may be appropriate, and the registrar of the lower court shall forward ten copies direct to the Registrar”.

E The trial court took arguments on behalf of the parties and in a considered ruling, referred the said three questions to the Court of Appeal, hereinafter called court below. The latter court considered the question referred to it and gave its decision. The decisions of the court below did not favour the appellant. Appeal was then lodged against the decision of the Court of Appeal. I do not deem it proper to have further dissipated any energy on the preliminary objection as to attempt to treat same is a sheer waste of the time of this court.

G Luckily my learned brother Ogbuagu JSC in the lead judgment had admirably and competently discussed same and resolved it. I have no cause to disagree with his resolutions.

H I read the decisions of the court below times without number and juxtapose them with the conclusions of my learned brother Ogbuagu JSC and discovered that my learned brother did substantial justice to the issues submitted to us for our consideration of the appeal . For the reasons adumbrated in the lead judgment I too hold that

the appeal is unmeritorious. It fails and is hereby dismissed. I abide by the consequential orders including that of costs.

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