

**IN THE SUPREME COURT OF NIGERIA**  
4TH JUNE, 2010, SC. 32/2010  
**CORAM:- M. MOHAMMED, F. F. TABAI,**  
**M. S. MUNTAKA-COOMASSIE, O. O. ADEKEYE,**  
**I. T. MUHAMMAD, JJSC**

1. ALHAJI MUHAMMADU  
MAIGARI DINGYADI ..... APPELLANTS  
2. DEMOCRATIC PEOPLES PARTY  
AND  
1. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION  
2. ALIYU MAGATAKARDA WAMAKKO ..... RESPONDENTS  
3. PEOPLES DEMOCRATIC PARTY

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APPEALS - Supreme Court - Withdrawal without court order - Requirements - A document signed by or for all the parties - Signifying their consent to the withdrawal - Must be filed in the Court's Registry (H1)

PRACTICE & PROCEDURE - Parties - Exercise of right - Limited by rule of practice - Where exercise of a right is limited by a rule of practice - Such rule must be complied with - Unless it is waived (H2)

COURTS - Duties - Pending applications - Determination - Courts have a duty to consider and determine all pending applications - Before determining an action or appeal in its finality (H3)

COURTS - Interlocutory applications - Refusal to hear pending motion - Effect - It amounts to a breach of fair hearing - Nullifies subsequent proceedings - And entitles injured party to have same set aside (H4)

ORDERS OF COURT - Order pending an event - Lapse of - Once the event has taken place - Such order lapses - It requires no order subsequent to the event - To set it aside (H5)

APPEALS - Interlocutory - Parties - Duty to compile record - Under O. 7 of Supreme Court Rules - Compilation of primary record is the

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duty of appellant - But where he fails - Respondent has option of either doing so or asking for dismissal (H6)

COURT PROCESSES - Abuse - Characteristics - It may lie in both a proper or an improper use of judicial process - It includes the initiation of multiple actions on the same issues and subject matter - Against the same opponent (H7)

ACTIONS - Duplicate actions - Vacation on grounds of abuse - Sequence - Where two actions of similar nature - Are being prosecuted concurrently - It is the later in time that vacates (H8)

**FACTS**

Following the Governorship Election which was held in Sokoto State on 14th April 2007, wherein the 2nd respondent/applicant was returned as the winner, the appellants/applicants/respondents petitioned the Governorship and Legislative Houses Election Tribunal, Sokoto, challenging the declaration and return of 2nd respondent as the winner. The petition was dismissed by the tribunal whereupon appellants appealed to Court of Appeal, Kaduna. That court allowed the appeal, nullified the election and ordered fresh election between the same candidates and the same political parties as appeared in the statement of result sheet. During the preparations for the conduct of the fresh election, 1st appellant filed an originating summons before the Federal High Court, Abuja praying inter alia, for an interpretation of the judgment of Court of Appeal, Kaduna. It was his contention that by that judgment, 2nd respondent was disqualified from contesting in the fresh election. The Federal High Court declined jurisdiction whereupon appellants appealed to Court of Appeal, Abuja. During the pendency of that appeal appellants applied to that court for leave to raise a fresh issue i.e. that the Federal High Court had power to enforce the judgment of Court of Appeal Kaduna. The application was refused by that court whereupon appellants filed this interlocutory appeal to the Supreme Court.

Meanwhile, 1st respondent had conducted the rerun election ordered by Court of Appeal Kaduna and again returned 2nd respondent as the winner. Dissatisfied with the result, appellants again petitioned the 2nd Sokoto State Governorship Election Tribunal con-

tending that upon a proper interpretation of the judgment of Court of Appeal Kaduna on the earlier election petition appeal, 2nd respondent was not qualified to contest the rerun election. The tribunal declined jurisdiction over the petition as it held that it lacked competence to interpret the judgment of Court of Appeal and that the petition was an abuse of process as the issue of interpretation of the judgment was already pending at Court of Appeal, Abuja as a pre-election issue. Appellants in reaction appealed to Court of Appeal, Sokoto which appeal was still pending at time of this judgment. Following the filing of the instant interlocutory appeal, several motions were filed by the parties. Appellants had failed to ensure the compilation and transmission of the record of appeal as required of them. So 2nd respondent had compiled a record and filed a motion for a departure from the rules to enable him compile the record. While the motion was pending, appellants filed and served a notice of withdrawal of the appeal in response to which some of the respondents filed a notice of opposition to the withdrawal. Yet the court subsequently dismissed the appeal in chambers without hearing the respondents on 10/3/2010. In reaction more motions were filed including one for an order setting aside the order in chambers dismissing the appeal. This is a comprehensive ruling on all the pending motions.

### **ISSUES FOR DETERMINATION**

1. Whether the withdrawal of the appellant' appeal was in accordance with the law.
2. Whether the order staying proceedings in the election petition Appeal No. CA/S/GOV/10/2009 ought not to be vacated.
3. Whether a respondent can compile the record of appeal in an interlocutory appeal from Court of Appeal.
4. Whether the appellants' appeal in Court of Appeal Sokoto in Appeal No. CA/S/EP/GOV/10/09 is an abuse of Court process.

***HELD*** (Restoring the dismissed appeal and vacating the appeal before Court of Appeal Sokoto, *etc.*, by a majority decision per **MUHAMMAD JSC**, Mohammed JSC dissenting in respect of the appeal before Court of Appeal Sokoto)

### ***Withdrawal without court order - Requirements***

1. Both the motion on Notice and the Notice of opposition to with-

drawal of appeal filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents/applicants respectively, were brought pursuant to Order 8 Rules 6 (2) and (4) of the Supreme Court Rules (as amended).

The Rules referred to above as I understand them, made provision for the withdrawal of an appeal by an appellant even where there is  
 B no order of court where the following requirements are fulfilled:

a) all the parties must consent to the withdrawal

b) that there must be filed in the court's Registry the document or documents signifying such consent.

c) that such document or documents must be signed by all  
 C the parties or their legal representatives and

d) the appeal shall then be deemed to have been withdrawn and shall be struck out of the list of appeals pending before the court.

It is true that the appellants/respondents filed in this court a  
 D Notice of withdrawal of appeal as per Exhibit 6 exhibited in paragraph 15 of the affidavit in support of the motion on Notice filed by the 2<sup>nd</sup> respondent.

It is my observation that the above Notice of withdrawal has fallen short of the above requirements of Order 8 Rule 6(2) and (4) of the  
 E Rules of this court. Nowhere has any of the respondents in the appeal indicated his consent to the withdrawal of the appeal. This makes the Notice of withdrawal incompetent. (pp. 1890 C/G/1891 E/H)

### ***Parties - Exercise of right - Limited by rule of practice***

2. Although it is a Constitutional right of the appellant to decide not to proceed against any of the respondents, as submitted by Mr. Tarfa, SAN, it must be appreciated that where the exercise of a right is circumscribed or limited by a rule of practice, and except where it is  
 G satisfactorily shown that compliance with such a rule has been waived, then that rule must be complied with. Court Rules are meant to be obeyed.

Where there is non-compliance, such non-compliance may result into any step taken being declared a nullity. (p. 1892 A)

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### ***COURTS - Duties - Pending applications***

3. Now, by the provisions of Order 8 Rule 6(2) as shown above, it is incumbent upon this court to determine all pending issues/matters in one way or the other before determining the appeal in its finality.

This court, in the case of Irolo v. Uka (2002) 14 NWLR (Pt.786) 195 at 225 D-F, held, inter alia:

*“it is the duty of a court, whether of first instance or appellate to consider all the issues that have been joined by parties and raised before it for determination. If the court failed to do so, without a valid reason, then it has certainly failed in its duty, for in our judicial system, it is a fundamental principle of administration of justice that every court has a duty to hear, determine and resolve such questions.”* B

Thus, it would be wrong of a court to proceed to treat an appeal to its final conclusion when other processes are pending. (p. 1892 H) C

### ***Refusal to hear pending motion - Effect***

4. A refusal of a court to hear a motion pending is a breach of the right to a fair hearing guaranteed under the Constitution and an essence of the AUDI ALTERAM PARTEM rule of natural justice. D

This court and any other court are enjoined by the Constitution and the Rules of natural justice to observe such rules that ensure a fair hearing/trial and this includes chamber sittings where parties are absent and unrepresented. Their submissions on the issue/matter under consideration are presented by the processes and their accompanying attachments. E

I pointed out earlier that no fair hearing was granted to the 1<sup>st</sup> and 2<sup>nd</sup> respondents/applicants when the appeal was dismissed by this court in chambers. That amounts to a nullity. I accordingly set aside, ex-debito justitiae, all the proceedings including of course, the judgment given on 10<sup>th</sup> March, 2010. The Notice of Appeal filed at the court below on 14/12/2009 is hereby restored. (pp. 1894 G/1895 A) F  
G

### ***Order pending an event - Lapse of***

5. It is clear that the order of stay of proceedings was made subject to the determination of the motions filed in this court. The final day for the determination of all the motions filed in respect of this matter is today when rulings are delivered on the several motions. This means that at the end of delivery of our rulings, that order lapses. In my view, such an order which is made subject to an event happening, once the event has taken place, the order lapses. It is rather self- H

executory requiring no formal order of the court to set it aside. But for the avoidance of doubt, that order is hereby vacated. (p. 1898 C)

**APPEALS - Interlocutory - Parties - Duty to compile record**

6. The responsibility of compiling a record of appeal in respect of an interlocutory appeal from the Court of Appeal to this court falls squarely on the shoulders of the appellant within the time limit specified for him by the rules. The respondent, under Order 7 Rule (2), is at liberty to file what I regard as a supplementary record or documents or proceedings within 7 days only after the appellant has served him with the record he has compiled. What happens, then where the appellant, as in this case, fails to compile such a record? Is asking for the dismissal of the appeal the only option adequate and available to the respondent? Or, can the respondent just fold up his arms to watch helplessly what will happen, or when will anything happen to the appeal to which he is whilly-nilly dragged into? I think there should be something more to this.

Although the responsibility was entirely that of the appellant to compile the record, I think where the appellant fails to do so and the respondent is desirous of compiling such a record the question of 14 days or 7 days within which to compile same does not arise as he is not the appellant. And, as no time limit has been given by the Rules for the compilation of a record of appeal by the respondent by way of departure from the Rules, the question of extension of time to do so by the respondent does not arise. (p. 1902 C/H)

**COURT PROCESSES - Abuse - Characteristics**

7. The nature and characteristic of an abuse of court process were explicitly set out by this court in the case of *Saraki v. Kotoye* (1992) 9 NWLR (Pt. 264) 156 at page 188-189, where the court stated:

*"It is recognized that the abuse of the process may lie in both a proper or improper use of the judicial process in litigation. But the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent, and the efficient and effective administration of justice. This will arise in initiating a multiplicity of actions on the same subject matter against the same opponent on the same issues."* Per Karibi-Whyte, JSC, at pp 188-189.

(underlining for emphasis)

Looking at the antecedents of the matter on hand, this is what exactly the appellants/respondents had attempted to do. (p. 1915 E)

***Duplicate actions - Vacation on grounds of abuse - Sequence*** <sup>B</sup>

8. The appeal in the Abuja division of the Court of Appeal was filed in 2008. The appeal in the Sokoto Court of Appeal was filed on the 5<sup>th</sup> of March, 2009. It is trite law that where two actions of similar or same nature and between same parties and subject matter are being prosecuted concurrently before same court or different courts, it is the later in time that vacates. <sup>C</sup>

In the matter on hand, it is clear that it is the appeal before the Sokoto Division of the Court of Appeal that is later in time. It is the one to vacate. (p. 1916 F/H) <sup>D</sup>

**NOTABLE POINTS OF INTEREST**

**MUHAMMAD JSC**

*1. Court may refuse to hear a contemnor's motion*

It was further emphasized that it is not only essential but mandatory for a court before which a motion (or application) has been brought to hear and determine it at the appropriate time. It has no right to refuse to hear it unless possibly in a proper circumstance in the exercise of its punitive jurisdiction against a contemnor of a court order who is expected to purge himself of the contempt before he could be heard. Otherwise the court must set the motion down and hear and determine it one way or another even if it might be of the opinion that the motion was brought late and that what it seeks is downright irregular and frivolous. It has to give the applicant a hearing. It is a basic right. (p. 1894 C) <sup>E</sup> <sup>F</sup> <sup>G</sup>

**MOHAMMED JSC (DISSENTING)**

*2. Failure to move a motion called for hearing means abandonment* <sup>H</sup>

As for the motion on Notice filed by the 3<sup>rd</sup> Respondent/Applicant on 4<sup>th</sup> April, 2010 for extension of time to file a cross-appeal in this matter and to deem the same Notice of cross-appeal as duly filed and served, the fact that this motion was not moved for determination in the course of the hearing of the applications by the parties, the mo-

tion is deemed abandoned and the same is also hereby struck-out. (p. 1933 E)

*3. Respondent needs enlargement of time to file record*

As a party preparing the record of appeal where the Appellants/Applicants/Respondents have failed to do so in their interlocutory appeal, the 2<sup>nd</sup> Respondent/Applicant is bound to act in accordance with the requirements of the rule where the record is prepared outside the time given under the rule being 14 days from date of filing the Notice of appeal which is 14 December, 2009. Therefore to comply with the requirement of the rule, the reliefs sought in the present application for departure from the rules ought to have included a relief for extension of time within which to file and serve the record and to deem the record filed on 12<sup>th</sup> February, 2010, as duly filed and served. Thus, in the absence of this essential relief for extension of time within which to file and/or receive the record of appeal filed in this Court on 11<sup>th</sup> February, 2010, the present relief to simply file the record and accept the same for the purpose of the appeal without an enlargement of time within which to do so, is incompetent and the same is hereby struck-out. (p. 1937 B)

*4. No stay pending determination of appeal where there is none*

Let me say it quite clearly that there is no appeal from any decision of the Court of Appeal Sokoto pending in this Court in this matter. The only appeal pending in this Court is the one filed by the Appellants/Applicants/Respondents on 14<sup>th</sup> December, 2009 at the Court of Appeal Abuja Division which arose from the decision of the Federal High Court Abuja in a pre-election matter instituted by the Appellants/Applicants/Respondents by Originating Summons. A condition precedent for a Court to assume jurisdiction to consider any application for stay of proceedings pending the determination of appeal, is the existence of a valid appeal itself. Where there is no appeal of any kind against any decision of the Court of Appeal Sokoto, this Court is without jurisdiction to consider and grant the 2<sup>nd</sup> Respondent/Applicant's application. (p. 1939 C)



### **REPRESENTATION**

L. O. Fagbemi, SAN; for the appellants/applicants with him; Rickey Tarfa, SAN, Abeni Mohammed, H. A. Nganjiwa, A. J. Owonikoro, Olusegun Ojotalaawo, H. O. Afolabi, K. O. Fagbemi, Sulaiman Usman, A. O. Popoola, Regina Okotie -Eboh (Miss.), Ejike Ekwenibe, Deborah Bassi (Miss.) Yemi Ditan, B. A. Oyun, Akeem Umoru, Ifeanyi Ugboaja, Victor Giwa, Austin J. Ottah.

Yahaya Mahmood for the 1st respondent/applicant with him; Vivian Bosah.

Chief Wole Olanipekun, SAN for the 2<sup>nd</sup> respondent with him; A. F. Afolayan, Olugbenga Adeyemi Esq., Aisha Ali (Miss), J. U. Ajii.

Dr. Alex Izinyon SAN for the 3<sup>rd</sup> respondent/applicant with him; B. K. Abu, Hannatu Abdulrahman (Mrs.).

### **CASES REFERRED TO**

Agidi v. Kelani (1985) 3 NWLR (Pt.1 2) 248

Doma v. Adamu (1999) 4 NWLR (Pt. 589) 311

Ezegbu v. FATB Ltd (1992) 1 NWLR (Pt.216) 197

Iroegbu v. Okwordu (1990) 6 NWLR (Pt.159) 643

Harrods Ltd. Anifalaje (1986) 5 NWLR (Pt.43) 603

Odofoin v. Olabanji (1996) 3 N.W.L.R. (Pt. 435) 126

Chime v. Ude (1996) 1 N.W.L.R. (Pt. 461) 379 at 387

Igwe v. Kalu (2004) 14 NWLR (Pt.787) 435 at 453-454

Eguamwense v. Amaghizemwen (1986) 5 NWLR (Pt.41) 282

Ajomale v. Yaduat (No.2) (2003) FWLR (Pt.182) 1913 at 1925

Benaplastic Industries v. Vasilyev (1999) 10 NWLR (Pt.624) 620

Abubakar v. Unipetrol Plc (2002) 8 NWLR (Pt.769) 242 at 253

Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) 156 at page 188-189

Umana v. Attah (2006) 17 N.W.L.R. (Pt. 1009) 503 at 527 - 528

Commissioner for Works Benue v. Devcon (1988) 3 NWLR (Pt.83) 407 at 420

### **STATUTES & RULES REFERRED TO**

Court of Appeal Rules, O . 18 R. 4

Supreme Court Rules, O . 2 r . 31, O. 7 r. 5 and O. 8 r. 6

Constitution of the Federal Republic of Nigeria, 1999, s. 287

Supreme Court Act, Cap S15, L.F.N., 2004, s. 22

***LEAD JUDGMENT BY MUHAMMAD JSC***

The salient facts giving rise to the applications pending before this court are that Governorship Election was held in Sokoto State on the 14<sup>th</sup> day of April, 2007. The 2<sup>nd</sup> respondent herein Aliyu B Magatakarda Wamakko, who was fielded by the PDP was returned as the winner of the said election having scored the highest number of votes cast. The 1<sup>st</sup> appellant/applicant, Alhaji Muhammadu Maigari Dingyadi, who had contested the same election as the candidate of the Democratic Peoples Party DPP, scored the second highest number of votes. He was not satisfied with the results of the election and he filed a petition before the Governorship and Legislative Houses Election Tribunal, Sokoto, challenging the declaration and return of the 2<sup>nd</sup> respondent as the winner. The petition was dismissed. There D was an appeal by the appellants to the Court of Appeal Kaduna. The appeal was allowed. The election of the 14<sup>th</sup> day of April, 2007, was nullified. The Court of Appeal, Kaduna ordered fresh election between the same candidates and same parties as appeared in the statement of result sheet. Fresh election was accordingly conducted on E the 24<sup>th</sup> of May, 2008. The 2<sup>nd</sup> respondent still won with overwhelming votes. Dissatisfied with this result, the appellants filed a petition before the Sokoto Governorship Tribunal in petition No.SS/EPT/GOV/1/2008.

F At the end of hearing, the Tribunal dismissed the petition on lack of jurisdiction to interpret the judgment of the Court of Appeal Kaduna. The appellants appealed to the Court of Appeal Sokoto in Appeal No.CA/S/EP/GOV/10/09, which is still pending in that court.

Meanwhile, the appellants had filed on 25/8/08 a suit before G the Federal High Court, Abuja, through originating summons in suit No. FHC/ABJ/CS/260/08 praying for the interpretation of the judgment of the Court of Appeal, Kaduna Division. On the 17<sup>th</sup> of July, 2008, the Federal High Court, Abuja, dismissed the suit on the ground that it has no jurisdiction to interpret the judgment of the Court of H Appeal, Kaduna. The appellants were further dissatisfied with the said judgment of the Federal High Court, Abuja, and they appealed to the Court of Appeal, Abuja Division, in appeal No. CA/A/278/08. While this appeal was pending, the appellants filed an application in the Court of Appeal Abuja for leave to raise fresh issue not raised at

the Federal High Court i.e. the Federal High Court Abuja had jurisdiction to enforce the judgment of the Court of Appeal, Kaduna. The application was opposed and in its ruling of 30<sup>th</sup> November, 2009, the Court of Appeal Abuja Division, refused to grant the prayer to raise fresh issues. It is against this ruling that the appellants appealed to this court vide their Notice of Appeal dated 14<sup>th</sup> day of December, 2009. The appeal before this court is thus an interlocutory appeal. B

Since the filing of the Notice of Appeal as aforesaid, which was also done on the 14<sup>th</sup> of December, 2009, this court has been inundated with series of processes ranging from motions, affidavits and counter affidavits; Notice of withdrawal of appeal, Notice of opposition to withdrawal of appeal etc. Below are the processes I have noticed in the appeal file made available to me by the Registry: C

i. Motion on Notice dated 18/3/2010, filed by the appellants/applicants on the 19/3/2010 for an order of this court bringing forward the next adjourned date in this matter etc D

ii. Motion on Notice dated 23/3/2010 filed by the 1<sup>st</sup> respondent on same date. It is for an order directing the parties to file written briefs etc.

iii. Motion on Notice dated 29/3/2010 and filed on same date by the 1<sup>st</sup> respondent for an order of this court preserving the RES etc. E

iv. Notice of opposition to withdrawal of appeal dated and filed by the 1<sup>st</sup> respondent on 1/3/2010.

v. Motion on Notice dated and filed on 12/2/2010 by the 2<sup>nd</sup> respondent for an order granting a departure from the Rules etc. F

vi. Motion on Notice dated and filed on 10/3/2010 by 2<sup>nd</sup> respondent for an order of this court striking out the Notice of withdrawal of appeal filed by the appellants on 12/2/2010 but dated 22/1/2010. G

vii. Motion on Notice for an order setting aside the Ex-parte order made by this court in chambers on 10/3/2010. The motion was dated and filed by the 2<sup>nd</sup> respondent/applicant on 12/3/2010.

viii. Motion on Notice dated and filed by the 2<sup>nd</sup> respondent/applicant for an order extending the time for the 2<sup>nd</sup> respondent/applicant to file a cross-appeal. H

ix. Motion on Notice dated 7/4/2010 and filed on 8/4/2010 by 3<sup>rd</sup> respondent for an order setting aside the ex-parte order made

by this court in chambers on 10/3/2010 etc.

Several affidavits and counter affidavits were filed by the parties affected.

Thus, except the process in no. (iv) all other processes are motions on Notice. Motion on Notice reflected in No. (ii) above was  
B withdrawn and struck out.

The motion indicated in No. (viii) above is left in suspense by the 3rd respondent/applicant pending the determination of other applications. The other motions and processes are for consideration by  
C this court.

I will begin my consideration by stating that this court took oral submissions from the respective learned Senior counsel/counsel for the parties before this court on the 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> of April, 2010. I will take motions and the processes in numbers (iv), (vi),  
D (vii), (ix).

Process in no (iv) and motion on Notice in No. (vi) above.

In number (iv), it is a Notice of opposition to withdrawal of appeal under Order 8 Rule 6[4] of the Supreme Court Rules (as amended).

E In his oral submissions on the 19/4/2010, learned counsel for the 1<sup>st</sup> respondent/applicant, Mr. Y. Mahmood, stated that the notice of opposition filed on 1/3/2010 is supported by a 27 paragraph affidavit. He relied on all the paragraphs. He submitted that  
F after filing the Notice of opposition, it was not proper for the court to dismiss the appeal in chambers. He cited and relied on Order 8 Rule 6(4) of this court's Rules which provides that pending matters must be heard before final determination of an appeal. The appeal was wrongly dismissed. The grounds for the opposition were set out as  
G follows:

a) The Notice of withdrawal was filed in bad faith to defeat the cause of justice.

b) In the circumstance of the appeal, it is against the interest of the 1<sup>st</sup> respondent and the interest of justice to allow the appeal to  
H be withdrawn.

In his motion on Notice (indicated in (vi) above), the learned senior counsel for the 2<sup>nd</sup> respondent/applicant, Chief Olanipekun, SAN, prayed for an Order striking out the Notice of withdrawal of appeal filed by the appellants dated 22/1/2010 and filed 12/2/2010, pursu-

ant to Order 8 Rule 6 of this court's Rule, 1999. The following grounds were set out by the learned SAN, upon which the motion on Notice rested.

*"GROUNDS OF THE APPLICATION*

*i. Appellants appealed to this court against an interlocutory decision at the Court of Appeal delivered on 13<sup>th</sup> November, 2009 vide their Notice of Appeal filed on 14<sup>th</sup> December, 2009.*

*ii. While appellants did not make efforts to compile and transmit the record of proceedings to the Supreme Court, respondent/applicant compiled the said record and filed a motion before this court on 11<sup>th</sup> February, 2010 praying amongst others for a departure from the Rules by allowing the record so compiled by him to be used for the purpose of this appeal.*

*iii. Appellants have purportedly filed a Notice of Withdrawal of their appeal pursuant to Order 8 Rule 6 of the Supreme Court Rules.*

*iv. The conditions precedent to the Supreme Court taking cognizance of any Notice of Withdrawal of an appeal by the appellants have not been complied with and/or not just available.*

*v. The Notice of Withdrawal filed by the appellants, apart from being premature is abusive of the processes of this Honourable Court."*

In his oral submissions on the 20/4/2010 before this court, the learned SAN for the 2<sup>nd</sup> respondent/applicant, stated that the motion is supported by a 19 paragraph affidavit to which there is no counter affidavit from the appellants/respondents. He urged this court to take it that all the points are admitted by the respondents. He made reference to paragraphs 5, 6, 8, 9, 10, 11, 12, 13, 14 and 15 of the affidavit in support. He referred also to several authorities including *Ajomale v. Yaduat* (No.2) (2003) FWLR (Pt.182) 1913 at 1925 D-E; *Okoebor v. Police Council* (2003) 12 NWLR (Pt.834) 444 at 483 B-C. He submitted that it is incumbent on all courts to take all applications pending before a matter is determined one way or the other and failure to do that amounts to infringement on the part of the other party. The fact that the 2<sup>nd</sup> respondent was not heard on such fundamental issues amounts to a breach of his fundamental right to fair hearing. He urged us to grant the application.

The learned senior counsel for the appellants/respondents, Chief Fagbemi, SAN, sought leave from the court to allow his colleague Mr. Tarfa, SAN to handle the motion. Leave was accordingly granted.

In his submission Mr. Tarfa, SAN, made reference to Order 8 Rule 6 of this court's Rules where two sets of withdrawals are recognized. Withdrawal by consent of the parties and withdrawal without the consent of the parties. The orders to be made, he said, are one of dismissal of the appeal and the other for striking out of the appeal. He argued that the right to withdraw appeal is constitutional and cannot be taken away by anyone. He urged this court to refuse and dismiss the application.

***Both the motion on Notice and the Notice of opposition to withdrawal of appeal filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents/applicants respectively, were brought pursuant to Order 8 Rules 6 (2) and (4) of the Supreme Court Rules (as amended).*** The Order provides:

“(2) If all parties to the appeal consent to the withdrawal of the appeal without order of the court, the appellant may file in the Registry the document or documents signifying such consent and signed by the parties or by their legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list of appeal by the court, and in such event any sum lodged in court as security for the costs of the appeal shall be paid out to the appellant.

(4) If all the parties do not consent to the withdrawal of the appeal as aforesaid, the appeal shall remain on the list, and shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties, and for the making of an order as to the disposal of any sum lodged in court as security for the costs of appeal.

(underlining supplied for emphasis)

***The Rules referred to above as I understand them, made provision for the withdrawal of an appeal by an appellant even where there is no order of court where the following requirements are fulfilled:***

- a) all the parties must consent to the withdrawal
- b) that there must be filed in the court's Registry the

**document or documents signifying such consent.**

**c) that such document or documents must be signed by all the parties or their legal representatives and**

**d) the appeal shall then be deemed to have been withdrawn and shall be struck out of the list of appeals pending before the court.** B

(That is the requirement of Order 8 Rule 6(2)).

Order 8 Rule 6 (4) provides that:

a) where all the parties do not consent to withdrawal of the appeal,

b) the appeal shall remain on the list (pending before the court)

c) the appeal shall come as for the hearing of:

i. any issue as to costs;

ii. any issue/matter otherwise remaining outstanding or pending between the parties, issue of costs aside, and

iii. for the court to make any Order, as appropriate, for the disposal of any sum lodged in court as security for the costs of appeal.

**It is true that the appellants/respondents filed in this court a Notice of withdrawal of appeal as per Exhibit 6 exhibited in paragraph 15 of the affidavit in support of the motion on Notice filed by the 2<sup>nd</sup> respondent.** That exhibit reads as follows: E

“NOTICE OF WITHDRAWAL OF APPEAL PURSUANT TO ORDER 8 RULE 6 OF THE SUPREME COURT RULES 1999. F

Take Notice that the appellants herein intend and doth hereby wholly withdraw their appeal against all the respondents in the above mentioned appeal. Dated at Abuja this 22<sup>nd</sup> day of January, 2010. G

Signed by

Olusegun Jolaawo, Esq.,

Messrs Rickey Tarfa & Co.,

(The appellant’s counsel),

No. 2 Libreville Street,

Off Aminu Kano Crescent,

Wuse II, Abuja.” H

**It is my observation that the above Notice of withdrawal has fallen short of the above requirements of Order 8 Rule 6(2)**

**and (4) of the Rules of this court. Nowhere has any of the respondents in the appeal indicated his consent to the withdrawal of the appeal. This makes the Notice of withdrawal incompetent.**

Secondly, **although it is a Constitutional right of the appellant to decide not to proceed against any of the respondents, as submitted by Mr. Tarfa, SAN, it must be appreciated that where the exercise of a right is circumscribed or limited by a rule of practice, and except where it is satisfactorily shown that compliance with such a rule has been waived, then that rule must be complied with. Court Rules are meant to be obeyed.** See: Ezegbu v. FATB Ltd (1992) 1 NWLR (Pt.216) 197; Iroegbu v. Okwordu (1990) 6 NWLR (Pt.159) 643; CCB (Nig.) Plc v. A-G Anambra State (1992) 8 NWLR (Pt.261) 528.

**Where there is non-compliance, such non-compliance may result into any step taken being declared a nullity.**

Thirdly, by our Ruling of 10<sup>th</sup> March, 2010, this court, sitting in Chambers, dismissed the appeal. As at the date of that ruling, the following processes were pending before the court:

a) Notice of opposition to withdrawal of appeal Order 8 Rule 6(4) Supreme Court Rules as amended in 2008, filed by the 1<sup>st</sup> respondent/applicant.

b) A motion on Notice filed by the 2<sup>nd</sup> respondent on 15/2/2010 and fixed for hearing on 15/2/2010. It was for an Order for departure from the rules of this court pertaining to compilation of Records of appeal.

c) The appellants/respondents, as per Exh.1 attached to the affidavit in support of the motion by 2<sup>nd</sup> respondent/applicant, were aware that the 2<sup>nd</sup> respondent was objecting to the withdrawal of the appeal.

d) Motion on Notice by 3<sup>rd</sup> respondent filed on 4/3/10 for extension of time to file a cross-appeal (fixed for hearing on 1 5/3/10).

**Now, by the provisions of Order 8 Rule 6(2) as shown above, it is incumbent upon this court to determine all pending issues/matters in one way or the other before determining the appeal in its finality. This court, in the case of Irolo v. Uka (2002) 14 NWLR (Pt.786) 195 at 225 D-F, held, inter alia:**



***“it is the duty of a court, whether of first instance or appellate to consider all the issues that have been joined by parties and raised before it for determination. If the court failed to do so, without a valid reason, then it has certainly failed in its duty, for in our judicial system, it is a fundamental principle of administration of justice that every court has a duty to hear, determine and resolve such questions.”*** B

***Thus, it would be wrong of a court to proceed to treat an appeal to its final conclusion when other processes are pending.*** C

Though Order 8 Rule 6 of this court’s Rules empowers this court to consider any application under any such rules and determine it in chambers without oral arguments, the rule does not empower the court to obliterate or gloss over pending processes validly filed before the court. This will certainly amount to infringement of the respondents right to fair hearing. Where a decision has been found to be a nullity, this court has every power to set it aside. See the case of Mobil Prod. (Nig.) Ltd. v. Monokpo (2003) 18 NWLR (Pt.852) 346 at PP 412 - 413, Uwaifo, JSC, stressed the point lucidly as follows: D

*“it has been laid down in many decisions that it is the duty of a court to entertain and decide on the merit of any application brought before it by any party notwithstanding the perceived strength or weakness of such an application. It seems to me that this principle of law has been solidly laid down by the Court of Appeal. There are very many of its decided cases on it, a few may be cited thus: Eguamwense v. Amaghizemwen (1986) 5 NWLR (Pt.41) 282; Harrods Ltd. Anifalaje (1986) 5 NWLR (Pt.43) 603; Kotoye v. Saraki (1991) 8 NWLR (Pt.211) 638; Mokwe v. Williams (1997) 11 NWLR (Pt.528) 309; Okoro v. Okoro (1998) 3 NWLR (Pt.540) 65; Eriobuna v. Obiorah (1999) 8 NWLR (Pt.616) 622. Of the six cases cited above, Tobi JCA made pronouncements in the last four in regard to the principle of law in question which I think well projected the principle. Whether in his leading judgments or his contributions in those cases, the learned Justice of Appeal made a consistent observation. To quote what he said in his leading judgment in Eriobuna v. Obiorah (supra) at page 642:* F

*‘A court of law or a tribunal has a legal duty in our adjectival*

*law to hear any court process, including a motion before it. The process may be downright stupid, unmeritorious or even an abuse of court process. The court must hear the party or parties and rule one way or the other. A judge, whether of a court of law or tribunal, has no jurisdiction to come to a conclusion by resorting to his own wisdom outside established due process that a motion cannot be heard because it has no merit. That does not lie in the mouth of a judge in our adversary system of adjudication. The failure on the part of the learned tribunal to hear the motion of the 1<sup>st</sup> appellant filed on 1<sup>st</sup> May, 1999 is against the provisions of section 33(1) of the 1979 Constitution on fair hearing, and particularly the natural justice rule of audi alteram partem."*

It was further emphasized that it is not only essential but mandatory for a court before which a motion (or application) has been brought to hear and determine it at the appropriate time. It has no right to refuse to hear it unless possibly in a proper circumstance in the exercise of its punitive jurisdiction against a contemnor of a court order who is expected to purge himself of the contempt before he could be heard. Otherwise the court must set the motion down and hear and determine it one way or another even if it might be of the opinion that the motion was brought, late and that what it seeks is downright irregular and frivolous. It has to give the applicant a hearing. It is a basic right. If for any reason the motion was not expeditiously drawn to the attention of the court by the court officials who ought to do so, that could be no excuse for simply discountenancing it when later the court came to learn of its existence and instead proceeding to give judgment or make some order more particularly when a decision on the motion was likely to have had a bearing on the judgment or order. The adversarial system of our justice administration demands no less. **A refusal of a court to hear a motion pending is a breach of the right to a fair hearing guaranteed under the Constitution and an essence of the AUDI ALTERAM PARTEM rule of natural justice.** It is perhaps important to add that if a judge or court were at liberty to decide to ignore any motion or process filed in court it would raise a fundamental issue. The danger inherent therein, is that instead of allowing the administration of justice to be done upon a compulsory even keel, it may now be left to the tyranny of the arbitrary or selective decision of a particular

judge or court as to if, and when, any motion will be considered at all.

***This court and any other court are enjoined by the Constitution and the Rules of natural justice to observe such rules that ensure a fair hearing/trial and this includes chamber sittings where parties are absent and unrepresented. Their submissions on the issue/matter under consideration are presented by the processes and their accompanying attachments.*** B

***I pointed out earlier that no fair hearing was granted to the 1<sup>st</sup> and 2<sup>nd</sup> respondents/applicants when the appeal was dismissed by this court in chambers. That amounts to a nullity. I accordingly set aside, ex-debito justitiae, all the proceedings including of course, the judgment given on 10<sup>th</sup> March, 2010. The Notice of Appeal filed at the court below on 14/12/2009 is hereby restored. This,*** settles as well, the Notice of opposition to withdrawal of appeal filed by 1<sup>st</sup> respondent/applicant; Relief D 1 and the alternative relief prayed by the 3<sup>rd</sup> respondent/applicant in its motion on Notice filed on 5/4/10.

B - processes in number (i) above.

This is a motion on Notice filed by the appellants/applicants. E It prays for the following reliefs:

1) *“AN ORDER of this Honourable Court bringing forward the next adjourned date in this matter from the 1<sup>st</sup> of April, 2010 to a much earlier date convenient to this Honourable Court;*

2) *AN ORDER of this Honourable Court setting aside or otherwise vacating its earlier order made/dated 15<sup>th</sup> day of March, 2010 which order stayed the delivery of the judgment of Court of Appeal in Appeal No. CA/S/GOV/10/2009 which was made pending the hearing and determination of the motions filed in the Supreme Court and adjourned to the 1<sup>st</sup> day of April, 2010 for hearing;* F

3) *AN ORDER of this Honourable Court dismissing or otherwise striking out all other pending applications filed by any of the other respondents to the appeal of the Appellants/Applicants which was dismissed on 10<sup>th</sup> March, 2010 but more specifically an order dismissing or otherwise striking out;* G

i. *2<sup>nd</sup> Respondent/Applicant Motion dated 11/2/2010 filed 11/2/2010 seeking;* H

a) *Departure from the Rules*

*b) Stay of proceedings in Appeal No. CA/A/276/08 from which the appeal in this court emanated.*

*c) Stay of proceedings in CA/S/EP/GOV/10/09 which is an election petition appeal and in respect of which the Court of Appeal is the final Court of Appeal.*

B *d) Accelerated hearing of the appeal*

*e) Omnibus prayer;*

*ii. 1<sup>st</sup> Respondent's undated motion filed on 1/3/10 in opposition to withdrawal of appeal pursuant to Order 8 Rule 6 (4) Supreme Court Rules;*

C *iii. 3<sup>rd</sup> Respondent's motion dated 4/3/10 filed same date seeking:*

*a) Extension of time for Respondent/Applicant to file cross appeal.*

D *b) Order deeming notice of cross appeal filed as duly filed and served.*

*AND FOR SUCH FURTHER ORDER(S) as this Honourable Court may deem fit to make in the circumstances of this application."*

Relief No.1 was abandoned and it was struck out.

E On relief No. 2, the learned SAN for the appellants/applicants, L. O. Fagbemi argued orally on the 19<sup>th</sup> day of April, that the application was supported by a 31 paragraph affidavit, premised on 12 grounds. He made reference to the judgment of the Federal High Court, Abuja which declined jurisdiction. None of the respondents  
F appealed against that decision, but the appellants did.

In the Court of Appeal Abuja, the appellants/applicants asked for leave to amend their Notice of Appeal by raising fresh points on appeal. The Court of Appeal refused them leave. It was against that  
G refusal for leave to effect amendment as proposed that made the applicants to appeal to this court.

In the meantime, appellants withdrew the appeals they filed in the Court of Appeal and in this court. He cited Exh.E annexed to the affidavit in support. Learned SAN made further submissions that  
H the appeal in this court has been withdrawn by Exh. F and Exhs. J1-J3 which bear testimony to that effect.

The grounds in support of relief (2) of the application are as follows:

*"5. The Order made by the Supreme Court on 15<sup>th</sup> March,*

*2010 which stayed the proceedings before the Court of Appeal Sokoto was made in respect of a gubernatorial election petition appeal, over which the Supreme Court has no jurisdiction, whatsoever.*

*6. No decision had been given in the said gubernatorial appeal, and no notice of appeal, however unconstitutional or incompetent, had been filed by any of the respondents to the Supreme Court in respect of the said gubernatorial election petition appeal to vest jurisdiction in the Supreme Court to hear and determine any interlocutory applications appertaining to the said gubernatorial appeal;*

*7. The appeal and proceedings pending before Court of Appeal, Sokoto which the order of this Honourable Court dated the 15<sup>th</sup> March, 2010 stayed are an appeal and proceedings from a decision of a tribunal in a governorship election petition which by its nature is Sui generis and cannot be stayed.*

*8. The order of this Honourable Court dated 15<sup>th</sup> March, 2010 was made to stay an election petition appeal which had been adjourned for judgment and which judgment the panel had issued hearing notice to deliver; and the order was made in anticipation of the judgment.*

*9. The Supreme Court did not have the minimum constitutional quorum of five justices, and was thus not duly constituted as a court known to law, as at the time the order staying proceedings of the gubernatorial appeal on 15<sup>th</sup> March, 2010 was made, because the presiding justice (Hon. Justice Dahiru Musdapher) who wrote the lead ruling comprising the order had already disqualified himself PRIOR TO THE RULING.*

*10. In the absence of an appeal from the court of appeal Sokoto Division in the gubernatorial election petition in appeal no. CA/S/2008 to the Supreme Court, the proceedings of 15<sup>th</sup> May, 2010, and the issues raised in the several pending motions filed by each of respondents concerning that appeal, amounted to an unconstitutional activation of the original jurisdiction of the Supreme Court contrary to section 232 of the Constitution of the Federal Republic of Nigeria, 1999."*

Learned SAN submitted that the point still remains that the court was improperly constituted. Section 233 of the Constitution does not apply in respect of election matters in respect of which Court of Appeal is the terminus.

Happily, the Ruling of this court on the 15<sup>th</sup> day of March, 2010 has been annexed as Exh. K (1-2). It reads as follows:

*“Delivered by DAHIRU MUSDAPHER, JSC*

*The matter cannot go on today in view of the reasons stated earlier. But in the interest of justice and fair play, the oral application to pre-*  
*B serve the rest is hereby granted. All proceedings in this matter now*  
*pending before the Court of Appeal Sokoto in suit No.CA/S/EP/GOV/*  
*10/09 is hereby stayed pending the determination of the motions*  
*filed in this court, which motions are now adjourned to 1/4/2010 for*  
*C hearing.” (underlining supplied)*

Other justices that sat with Musdapher, JSC on that matter, concurred with him on the ruling he delivered in open court.

***It is clear that the order of stay of proceedings was made subject to the determination of the motions filed in this***  
***D court. The final day for the determination of all the motions***  
***filed in respect of this matter is today when rulings are deliv-***  
***ered on the several motions. This means that at the end of***  
***delivery of our rulings, that order lapses. In my view, such an***  
***E event has taken place, the order lapses. It is rather self-ex-***  
***ecutory requiring no formal order of the court to set it aside.***  
***But for the avoidance of doubt, that order is hereby vacated.***

The relief claimed in relief No.3 of the said motion on Notice  
**F** cannot be granted. This is because each of the processes listed therein has been taken care of in this ruling. Relief No. 3 of the said motion is hereby struck out.

C- Processes in (v)

This is a motion on Notice filed by the learned SAN for the  
**G** 2<sup>nd</sup> respondent. It prays for the following reliefs:

“1. AN ORDER granting a departure from the Rules of this Honourable court by:

i. Allowing and/or directing parties to make use of the record of proceedings of the lower court as compiled by the applicant for the  
**H** purpose of this appeal.

ii. Accepting for the purpose of this appeal the record of proceedings of the lower court as compiled by the applicant, with liberty to any party to file a supplementary record if he considers that the record as compiled by the applicant is inaccurate/inadequate.

2. AN ORDER staying proceedings at the Court of Appeal, Abuja Judicial Division in Appeal No. CA/A/276/08 which relates to and concerns the subject matter of this appeal until the final determination of this appeal.

3. AN ORDER staying proceedings at the Court of Appeal, Sokoto Judicial Division, in Appeal No. CA/S/EP/GOV/10/09 which relates to the subject matter of this appeal until the final determination of the appeal by the apex court. B

The grounds upon which relief 1 is predicated are as follows:

*“xi. Appellants whose appeal is pending before this court have refused to compile the record of proceedings or ensure its compilation and transmission to the Supreme Court, while forum-shopping on the same subject before two different divisions of the Court of Appeal.”* C

*xii. Applicant has in the interest of justice compiled the record and certified same for expeditious use at the Supreme Court.”* D

It is to be noted that this application was brought pursuant to Order 2 Rule 31 (1) and Order 7 Rule 5(1) of the Supreme Court Rules. (As amended in 1999).

Order 2 Rule 31 (1) provides: E

*“The Court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these Rules in any other way when this is required in the interest of justice.”*

Order 7 Rule 5(1) provides: F

*“The court may in any case in which it considers it necessary or expedient so to do in the interest of justice, or in any case in which it makes an order for accelerated hearing of the appeal, direct a departure from rules 2,3 and 4 of this order.”* G

*Order 2 Rule 31(1) deals principally with enlargement of time for the doing of anything to which these rules apply. Order 7 Rule 5(1) largely, is on departure from the rules of court but especially rules 2, 3 and 4 of Order 7.*

*In his affidavit in support the learned SAN for the 2<sup>nd</sup> respondent through a counsel in his chambers Mr. Adeyemi, Who swore to the affidavit deposed to the following facts:* H

*“9. I also know as a fact that while appellants were/are vigorously pursuing their appeal at the Sokoto Division of the Court of*

*Appeal, they have refused to ensure the compilation and transmission of the record of proceedings from the Court of Appeal to the Supreme Court."*

There is no counter-affidavit from the appellants/respondents as to why no record of appeal has been transmitted to this court. The response of the appellants/respondents to this, as submitted by Mr. Tarfa, SAN, is that the appellants/respondents did not file a counter affidavit but they would oppose the application on points of law relying on the facts presented in the applicants' affidavit in support and no need to file a counter affidavit. He relied on the case of Royal Exchange Assurance Ltd v. Vaswani Trading Co. Ltd. (1992) 3 NWLR (Pt. 227) 1 at 13D. He made further submissions that where a statute creates rights and obligations, it is only through that statute that one can bring an application. He relied on the Rules of this court, Order 2 Rule 31 (1) which provides for a departure from the Rules and for extension of time. He argue that no application had been made by the applicant for extension of time as required by Order 7 Rule 5(1). Rules 6 and 7, he said, apply to interlocutory decisions from the Court of Appeal. The appeal from the Court of Appeal to this court is an interlocutory one and the provisions of Order 7 Rules 6 and 7 are applicable for the transmission of record to this court. He submitted that Order 7 Rules 2, 3 and 4 relate to final decisions of the Court of Appeal. But under Order 7 Rules 6 and 7, it is an appellant who will compile the record not any of the parties. The application must be done within 14 days. Learned counsel argued further that the only right available to the applicant is to apply for the dismissal of the appeal and not to compile record by themselves.

It is to be appreciated from the outset that Order 7 Rule 1 (1) stipulates that the provisions of rules 2, 3 and 4 of that Order shall apply to appeals to this court from final decisions of the Court of Appeal in civil and criminal cases. Sub rule 2 states that the provisions of rules 6 and 7 of the same Order shall apply to any decision of the Court of Appeal in respect of matters relating to interlocutory decisions such as the one on hand. Now Order 7 Rules 6 and 7 provide as follows:

*"6. it shall not be necessary for the Registrar of the Court of Appeal to prepare a record in respect of an appeal of the type mentioned in sub-rule (2) of rule 1 of this Order unless the court other-*



*wise directs, and accordingly, the record for the purpose of such appeals shall be prepared in the manner set forth in rule 7 of this Order.*

7. (1) *The appellant shall, in appeals to which this rule applies either simultaneously with filing his notice of appeal or within 14 days thereafter, prepare for the use of the justices a record comprising-*

a) *The index;*

b) *Office copies of documents and proceedings which the appellant considers relevant to the appeal; and*

c) *A copy of the notice of appeal.*

(2) *If the respondent considers that the documents and proceedings filed by the appellant are inaccurate or are not sufficient for the purposes of the appeal, he shall, within a period of 7 days after service on him of the record filed by the appellant, file any further or other documents that he wishes to file.*

(3) *All documents filed by either party shall be verified by the affidavit of a person who has read them and compared them with authentic or certified true copies.*

(4) *In the case of the documents and proceedings mentioned in rule 7(1)(b) and (c) of this Order, the party filing them shall lodge certified true copies thereof with the Registrar of the Court.”*  
(underlining for emphasis)

It is clear to me from the above that:

a) *It is not necessary for the Registrar of the court below to prepare a record in respect of an interlocutory appeal except where the court otherwise directs.*

b) *it is the primary obligation of an appellant to file record of interlocutory appeal.*

c) *Record of Appeal in respect of interlocutory appeals from the Court of Appeal to this Court shall be prepared in the manner set forth in rule 7 of Order 7 of the Rules of this court.*

The requirements of Order 7 Rule 7 are that:

i. *the appellant in an interlocutory appeal shall file along with his Notice of Appeal (simultaneously) a record of his appeal or alternatively;*

ii. *shall file the record of appeal 14 days from the date of filing his Notice of Appeal.*

iii. *the record shall comprise of index, office copies of docu-*

ments and proceedings which he considers relevant to the appeal and a copy of the Notice of appeal.

d) The respondent is at liberty, within a period of 7 days after service on him of the record filed by the appellant, to file any further or other documents that he considers necessary, if he finds the documents and proceedings filed by the appellant to be inaccurate or insufficient (supplementary record).

e) all documents filed by either the appellant or the respondent shall be verified by a verifying affidavit of a person who has read and compared them with authentic or certified true copies thereof.

f) documents and proceedings in respect of provisions made pursuant to rule 7(1)(b) and (c), the party filing them shall lodge certified copies thereof with the Registrar of this court.

From the above therefore, ***the responsibility of compiling a record of appeal in respect of an interlocutory appeal from the Court of Appeal to this court falls squarely on the shoulders of the appellant within the time limit specified for him by the rules. The respondent, under Order 7 Rule (2), is at liberty to file what I regard as a supplementary record or documents or proceedings within 7 days only after the appellant has served him with the record he has compiled. What happens, then where the appellant, as in this case, fails to compile such a record? Is asking for the dismissal of the appeal the only option adequate and available to the respondent? Or, can the respondent just fold up his arms to watch helplessly what will happen, or when will anything happen to the appeal to which he is whilly-nilly dragged into? I think there should be something more to this.***

I have noticed that the Notice of Appeal in this appeal was filed on the 14-12-2009 and the motion for departure from the rules was filed on 12/2/2010, a period of almost two month with none of the parties filing the record of appeal. It would have been within time if the appeal was on a final decision of the court below which allows for six months within which to compile and transmit record of appeal. ***Although the responsibility was entirely that of the appellant to compile the record, I think where the appellant fails to do so and the respondent is desirous of compiling such a record the question of 14 days or 7 days within which to com-***

***pile same does not arise as he is not the appellant. And, as no time limit has been given by the Rules for the compilation of a record of appeal by the respondent by way of departure from the Rules, the question of extension of time to do so by the respondent does not arise.*** Even if it arises, it shall be left to the discretion of the court. I am therefore disposed to granting 2<sup>nd</sup> B respondent's reliefs on compilation of record of appeal in respect of this interlocutory appeal now that the appeal is fully restored. If there is any non-compliance with any of the Rules of court in that respect, I think that can be waived under Order 10 Rules [1] and [2] of our C Rules in the interest of justice and in Order to allow the appeal to be decided on merit, more especially when the 2<sup>nd</sup> respondent has already filed two volumes of certified true copies of the record of appeal from the court below.

D - Process in number (viii) above D

This is a motion on Notice for an Order extending the time for the 3<sup>rd</sup> respondent to cross-appeal etc. It was dated and filed on 4/3/2010.

On 21/4/2010, when this motion was called for hearing, the learned SAN for the 3<sup>rd</sup> respondent, Dr. Izinyon, stated among other E things and in respect of this motion as follows:

*"On my 2<sup>nd</sup> application, the application is not ripe for hearing until ruling is delivered on these applications i.e. the motion of 4/3/2010 because this court must decide whether there is an appeal sub-* F *sisting or not. It will be premature to move it."*

I think this amounts to abandoning the motion as of now. It will serve no purpose to allow it to be in limbo in our files. I hereby strike out the motion.

E- Process in number (iii) and other related reliefs G

This is a motion on Notice dated and filed on 29/3/2010. It was filed by the learned counsel for the 1<sup>st</sup> respondent, Y. Mahmood Esq. The motion prays for the following reliefs:

*"(1) AN ORDER of this Honourable Court preserving the RES and/or subject matter of this appeal which is the Sokoto State Governorship 2007 and 2008 election and re-election dispute.* H

*(2) AN ORDER of this Honourable Court directing the Court of Appeal, Sokoto to suspend and/or stay the delivery of judgment in Appeal No. CA/S/EP/GOV/10/09 on the same subject matter pend-*

*ing the completion of investigations into serious allegations against the Hon. President of the Court of Appeal and the Hon. Justices hearing the appeal.*

*(3) SUCH OTHER OR FURTHER ORDER(S) as the Honourable Court shall deem fit to make in the circumstances.”*

B The learned SAN for the 3<sup>rd</sup> respondent asked for same reliefs. This is contained in his relief- No. 3 of the motion on Notice dated 7/4/10 but filed on 8/4/10. His alternative relief in prayer 2 thereof is deemed abandoned in view of my holding on his relief C No.1 which I earlier on considered along with same reliefs by the other respondents.

The learned SAN for the 2<sup>nd</sup> respondent in his application of 11/2/2010, couched his reliefs 2 and 3 as follows:

D *“2. AN ORDER staying proceedings at the Court of Appeal, Abuja Judicial Division in Appeal No. CA/A/276/08 which relates to and concerns the subject matter of this appeal until the final determination of this appeal.*

E *3. AN ORDER staying proceedings at the Court of Appeal, Sokoto Judicial Division in Appeal No. CA/S/EP/GOV/10/09 which relates to the subject matter of this appeal until the final determination of the appeal by the apex court.”*

F Several grounds in support of the applications were raised. They are almost similar in nature and effect. I think it will suffice if I cite the grounds raised by the 2<sup>nd</sup> respondent in support of his reliefs 2 and 3. They are as follows:

G *i. “The subject matter of the proceedings before the Court of Appeal, Abuja Judicial Division in Appeal No. CA/A/276/2/08 and the one before the Court of Appeal, Sokoto Judicial Division, in appeal No. CA/S/EP/GOV/10/09 is one and the same.*

H *ii. The said subject matter relates to and concerns the Governorship seat/election of Sokoto State, more particularly concerning the participation of the applicant as directed by the Court of Appeal, Kaduna Judicial Division in its judgment in Appeal No. CA/K/EP/GOV/60/07 dated 11<sup>th</sup> April, 2008.*

*Appellants herein went to the Federal High Court, Abuja in suit No. FHC/ABJ/CS/260/08 praying for the interpretation of the said judgment of the Court of Appeal, Kaduna Judicial Division, but the Federal High Court’s judgment dated 17<sup>th</sup> July, 2008 was/is given*

against them.

iv. Dissatisfied with the judgment of the Federal High Court, appellants appealed to the Court of Appeal, Abuja Judicial Division in Appeal No. CA/A/276/08, praying the court principally to declare that as per the judgment of the Court of Appeal, Kaduna Judicial Division aforementioned, 2<sup>nd</sup> respondent/applicant was/is disqualified B from contesting the Sokoto State Governorship re-run election held on 24<sup>th</sup> May, 2008.

v. While the appellant's appeal was/is still subsisting at the Abuja Judicial Division of the Court of Appeal, appellants again filed C a petition before the Election Petition Tribunal, Sokoto in petition No. SS/EPT/GOV/1/08 praying in the main for the same relief, to wit, that as per the judgment of the court of Appeal, Kaduna Judicial Division afore-mentioned, applicant was not qualified to contest the said Sokoto State Governorship re-run election held on 24<sup>th</sup> May, D 2008.

vi. Appellants were dissatisfied again with the judgment of the Election Tribunal, Sokoto delivered on 18<sup>th</sup> February, 2009 and appealed to the Court of Appeal, Sokoto Judicial Division, in appeal E No. CA/S/EP/GOV/10/09.

vii. While the appeal at the Court of Appeal, Sokoto was/is subsisting, appellants kept on pursuing their appeal vigorously at the Court of Appeal, Abuja Judicial Division and applied to the court to raise a fresh issue, to wit, on the enforcement of the judgment of the Court of Appeal, Abuja Judicial Division (sic) by the Federal High F Court relating to the disqualification of the applicant.

viii. The ruling of the Court of Appeal, Abuja Judicial Division given on 30<sup>th</sup> November, 2009 went against the appellants and they have appealed to this court as per their Notice of Appeal filed on G 14/12/09.

ix. In the Notice of Appeal to this court, appellants are praying the court to invoke section 22 of the Supreme Court Act to determine the substantive appeal on the merits, a prayer which the applicant does not wish to oppose. H

x. The determination of this appeal and resolution of the simple issue involved therein, to wit, construction of the judgment of the Court of Appeal, Kaduna Judicial Division in Appeal No. CA/K/EP/GOV/60/07 date 11<sup>th</sup> April, 2008 on whether or not by that judg-

*ment 2<sup>nd</sup> applicant could rightly participate in the re-run Governorship election held on 24<sup>th</sup> May, 2008 will dispose off all the pending appeals at the Court of Appeal at both Abuja and Sokoto Judicial Divisions and save the lower court from giving conflicting judgments in three Judicial Divisions, to wit Kaduna, Abuja and Sokoto.”*

B Each of the applications is supported by copious depositions of facts in their supporting affidavits. The appellants/respondents filed a counter-affidavit in respect of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents motions on Notice containing the reliefs in question.

C In his oral submissions, the learned counsel for the 1<sup>st</sup> respondent argued that paragraphs 1-10 of his affidavit in support show that the appellants were in forum shopping as matters between the two courts in Sokoto Division and Abuja Division of the Court of Appeal are the same. He asks that this court should grant the application and that a final order be made in the interest of justice.

D In his submissions, the learned SAN for the 2<sup>nd</sup> respondent stated that he is in support of the motion moved by the learned counsel for the 1<sup>st</sup> respondent. He stated further that as an officer of the court, he would address this court in respect of the prayers contained in that motion. He drew attention to Exb. B - judgment of Court of Appeal, Kaduna of 11/4/08, particularly to page 69 thereof, Orders 3 and 4. They are orders made by a superior court. He referred also to Exh. C. The appellants never applied for a review of the judgment neither at Court of Appeal Abuja nor at Sokoto Court of Appeal under Order 18 Rule 4 of the Court of Appeal Rules. If there was any ambiguity, that particular court would have clarified it. Further, the appellants did not go back to the Court of Appeal Kaduna for interpretation of its earlier judgment. The learned SAN argued further that if the appellants had succeeded in the Federal High Court, Abuja in suit No. FHC/ABJ/CS/260/2008 filed on 25/4/08, whether on interpretation or construction of the judgment of the Court of Appeal Kaduna, the 1<sup>st</sup> appellant would have become the governor of Sokoto State while 2<sup>nd</sup> respondent would have been disqualified. Petition No. SS/PPT/GOV/01/08 filed by the appellants wouldn't then, have been filed. By the same token, he argued further, if the appeal CA/A/276/2008 at Abuja Court of Appeal succeeded, the appellants would not have filed same appeal before same Court of Appeal Sokoto Division a later in appeal No. CA/S/GOV/10/

2009. The cases are the same in substance and in-form. This court's duty, he stated, is to find out the truth. He cited the case of Agidi v. Kelani (1985) 3 NWLR (Pt.1 2) 248, per Oputa, JSC.

Submitted further on behalf of the 2<sup>nd</sup> respondent is that the latter action before the Sokoto Court of Appeal and Tribunal is the RES. This court has a right to stop the drift by granting the motion. He cited the case of Igwe v. Kalu (2004) 14 NWLR (Pt.787) 435 at 453-454 G-H. Learned SAN submitted that the appellants are guilty of abuse of Court processes and blockage from access to court. He made reference to section 22 of the Supreme Court Act, relied by this court in the case of Skenconsult (Nig.) Ltd. v. Ukey (1981) 1 SC 6 at 38 - 39. He urged this court to invoke its power under section 22 of its Act as there is no room for forum shopping and in order to arrest judicial anarchy, otherwise administration of justice will be brought to disrepute.

The learned SAN for the 3<sup>rd</sup> respondent/applicant in his submissions, stated that he adopted in toto the submissions made by the learned SAN for the 2<sup>nd</sup> respondent. He referred to Order 8 Rule 6(4), the word "otherwise" used therein to include abuse of court process, forum shopping which the court can make an order to stop the abuse. The action which is later in time is the one to be dismissed in any case of abuse of court's process. It is one and the same issue in all the matters before the two Courts of Appeal of Abuja and Sokoto.

In his submission in opposition to the motions/reliefs afore stated, the learned SAN for the appellants/respondents, Mr. Fagbemi, drew this court's attention that what brought the appellants to this court is the refusal of the Court of Appeal Abuja to grant them leave for amendment of their Notice of Appeal. No way by which this court can make an order to affect the substance of the appeal before the Sokoto court of Appeal which is pending for decision. He said that he filed a counter affidavit of 30 paragraphs on 15/4/10. He relied on the counter affidavit and the exhibits attached. He submitted that an applicant is bound by the reliefs he seeks in his motion papers. He cited the case of Commissioner for Works Benue v. Devcon (1988) 3 NWLR (Pt.83) 407 at 420.

Learned SAN submitted further that invoking section 22 of the Supreme Court Act will not alter the decision of the Federal High Court and the Court of Appeal. He distinguished the case of Amechi

v INEC (supra) from the appeal on hand. Further submissions are that the respondents realized there is a pending appeal in the Sokoto Division in respect of a Governorship Election Petition. It is not in dispute that it is an election matter and this court will not tamper with that jurisdiction, nor any order which will frustrate the Sokoto matter.

B Learned SAN stated that he attached a copy of the brief filed by the respondents i.e. Exh. 3 attached to the counter-affidavit in which the creation of abuse was raised on an election petition and all arguments were canvassed therein. He urged this court to dismiss the application.

C Now, the 2 respondent is asking for an order staying the proceedings at the Court of Appeal, Abuja in Appeal No. CA/A/276/08 and also for an order staying proceedings at the Court of Appeal, Sokoto in Appeal No. CA/S/EP/GOV/10/09. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents ask for an order directing the Court of Appeal, Sokoto to preserve the RES and to suspend and or stay the delivery of judgment in CA/S/EP/GOV/10/09.

What is the genesis of the appeal before the Court of Appeal, Abuja? Equally, what is the genesis of the appeal before the Court of Appeal Sokoto? From the Record of appeal before me, election into the office of the Governor of Sokoto State was, held on the 14<sup>th</sup> of April, 2007 and INEC returned the 2<sup>nd</sup> respondent, who was fielded by the PDP as the winner of the election, having scored 392,258 votes against other contestants. The 1<sup>st</sup> appellant who was fielded by PDP, polled 296,416 votes filed a petition before the Sokoto State Governorship Election Tribunal in petition No. SS/EPT/GOV/1/2007 challenging the election on the grounds of disqualification of the 2<sup>nd</sup> respondent, based on double nomination. The tribunal dismissed the petition on the 29/12/2007 holding that 2<sup>nd</sup> respondent was properly nominated and he won the election by majority of lawful votes. The 1<sup>st</sup> appellant appealed against the tribunal's decision to the Court of Appeal, Kaduna in Appeal No. CA/K/EP/GOV/60/2007. The Court of Appeal Kaduna, allowed the appeal, nullified the election and ordered that fresh election between the same parties and the same candidates be conducted within 90 days. Before the said election or re-run election could take place, the 1<sup>st</sup> appellant filed an originating summons before the Federal High Court Abuja on 20<sup>th</sup> day of April, 2008 praying among other things for the interpretation of the judg-



ment and the disqualification of the 2<sup>nd</sup> respondent from contesting the re-run election as ordered by the Court of Appeal, Kaduna. The 1<sup>st</sup> appellant appealed to the Court of Appeal Abuja and while the appeal was pending, his counsel filed an application for leave to raise fresh issue i.e. the Federal High Court Abuja had power to enforce the judgment of the Court of Appeal, Kaduna. The application was refused by the Court of Appeal, Abuja. 1<sup>st</sup> appellant appealed further to this court. That is the appeal on hand. B

Meanwhile INEC, 1<sup>st</sup> respondent, conducted the re-run election as ordered by the Court of Appeal, Kaduna and the 2<sup>nd</sup> respondent again won by 562,395 votes as against the 1<sup>st</sup> appellant who scored 124,046 votes. Dissatisfied again, the 1<sup>st</sup> appellant filed a petition before the 2<sup>nd</sup> Sokoto State Governorship Election Tribunal. The 2<sup>nd</sup> Election Tribunal in Sokoto dismissed the petition on the premises that it had no jurisdiction to interpret the judgment of the Court of Appeal, Kaduna and that the petition was an abuse of process as the same issue of interpretation, enforcement or construction of the judgment of the Court of Appeal, Kaduna was still pending at the Court of Appeal, Abuja as a pre-election issue. The 1<sup>st</sup> appellant appealed further to the Court of Appeal Sokoto. C D E

The 2<sup>nd</sup> respondent/applicant is asking this court to stay proceedings at the Court of Appeal, Abuja Judicial Division in Appeal No.CA/A/276/08. In addition to this, the 1<sup>st</sup> and 3<sup>rd</sup> respondent ask this court to stay or suspend proceedings or delivery of judgment at the Court of Appeal Sokoto Division in Appeal No.CA/S/EP/GOV/10/09, all pending the determination of this appeal. The bone of contention is that the appeals in both Abuja and Sokoto Divisions of the Court of Appeal relate to and concern same subject matter. F

But, what are subject matters filed and pending for a decision before each of these courts? G

The initiating process for an appeal before an appellate court is the Notice of Appeal. The Notice of Appeal contains what the subject matter of that appeal is. The Notice of Appeal filed at the Federal High Court Abuja against its judgment of 17<sup>th</sup> July, 2008 contains grounds of appeal which challenged the pronouncements of the Learned trial judge of the Federal High Court on the questions submitted by the plaintiffs to that court for determination and the reliefs sought. Quoting from the judgment of the Federal High Court Abuja H

of 17<sup>th</sup> July, 2008, the learned trial judge set out the questions submitted by the plaintiffs for determination and the reliefs sought:

“Whether the 1<sup>st</sup> defendant or any of its officers can lawfully issue fresh nomination forms to the 2<sup>nd</sup> defendant, or allow the 3<sup>d</sup> defendant to nominate and or sponsor any candidate for the fresh elections for the office of the Governor of Sokoto State of Nigeria ordered by the Court of Appeal in its decision in *ALHAJI MUHAMMADU MAIGARI DINGYADI & ANOR V. ALIYU MAGATAKARDA WAMAKKO & 42 ORS* Appeal No. CA/K/EP/GOV/60/2007 delivered on the 11<sup>th</sup> day of April, 2008.

Whether, the 2<sup>nd</sup> defendant having been declared not qualified to contest the gubernatorial elections of 14/4/07 held in Sokoto State, in the decision of the Court/of Appeal in CA/K/EP/GOV/60/07 delivered on 11/4/08 and the said elections declared nullified on the ground of the 2<sup>nd</sup> defendant’s non-qualification to contest same, the 2<sup>nd</sup> defendant can contest in the fresh elections ordered by the Court of Appeal to be conducted by the 1<sup>st</sup> defendant in the said decision.

Whether in the light of the decision of the Court of Appeal in CA/K/69/2008, *LABOUR PARTY V. INDEPENDENT NATIONAL ELECTORAL COMMISSION* (unreported) delivered on 10/4/08 confirming the earlier decision of the same court in Honourable. *MOHAMMED SALISUA. ALAWU & ANOR V. ABBAS M. YAKUBU & 2 ORS* or CA/K/EP/SHA/30/2003 (unreported) delivered on 6/11/03, the 3<sup>d</sup> defendant has the right to nominate and or put forward the 2<sup>nd</sup> defendant or any other candidate for the fresh elections ordered to, be conducted by the 1<sup>st</sup> defendant in Sokoto State by virtue of the decision of the Court of Appeal in CA/K/EP/GOV/2007, between *ALHAJI MUHAMMADU MAIGARI DINGYADI & 1 ORS V. ALIYU MAGATAKARDA WAMAKKO & 42 ORS* on 11/4/08.

Whether the list of candidates ordered by the Court of Appeal in its decision in CA/K/EP/GOV/60/07 to contest the fresh elections to be conducted by the 1st defendant as contained in Exhibit R8, contemplates or includes a person judicially and legally disqualified in the self same decision which is a final and subsisting decision of a Court of competent jurisdiction.

Whether by virtue of the decision of the Court of Appeal in Appeal No. CA/K/EP/GOV/60/07, particularly the judgment orders thereof, the 3rd defendant can lawfully nominate any candidate for

*the fresh elections ordered by the Court of Appeal, their original candidates having been declared by the court in the said decision not to be qualified to contest elections as at 14/4/07.*

*Upon the determination of these questions, the plaintiffs sought the reliefs set out below*

*A DECLARATION that neither the 1st defendant nor any of its officers can lawfully issue fresh nomination forms to the 2nd defendant or allow the 3rd defendant to nominate and or sponsor any, candidate(s) for the fresh elections ordered by the Court of Appeal in its decision of 11/4/08 in CA/K/EP/GOV/60/07.*

*A DECLARATION that the 2nd defendant having been not qualified to contest the Sokoto State Gubernatorial elections of 14/4/07 by virtue of invalid nomination and double nomination, he cannot lawfully contest in the fresh elections ordered by the Court of Appeal in its decision in CA/K/EP/GOV/60/07 by virtue of his said disqualification.*

*A DECLARATION that the 3rd defendant does not have the right to nominate or put forward the 2nd defendant or any other candidate for fresh gubernatorial elections ordered to be conducted by the 1st defendant in Sokoto State by virtue of the decision in CA/K/EP/GOV/60/07 ALHAJI MUHAMMADU MAIGARI DINGYADI & 1 OR V. ALIYU MAGATAKARDA WAMAKKO & 42 ORS ON 11/4/07.*

*A DECLARATION that the list of candidates ordered by the Court of Appeal in its decision of 11/4/08 to contest the fresh elections as contained in exhibit R8 in ALHAJI MUHAMMADU MAIGARI DINGYADI & 1 OR V. ALIYU MAGATAKARDA WAMAKKO & 42 ORS Appeal No. CA/K/EP/GOV/60/2007, does not contemplate or include a person judicially and legally disqualified from contesting the election in the self same decision which is a subsisting judgment of a competent court.*

*A DECLARATION that the 3<sup>rd</sup> defendant, its gubernatorial candidate for the elections of 14/4/07 having been declared not qualified to contest the said elections, cannot now nominate fresh candidate[s] for the fresh elections, the time statutorily stipulated for the nomination of candidates for the gubernatorial election having elapsed.*

*A PERPETUAL INJUNCTION restraining the 1<sup>st</sup> defendant*

*from allowing the 2<sup>nd</sup> and 3<sup>d</sup> defendants to contest in the fresh elections ordered by the Court of Appeal in CA/K/EP/GOV/60/2007 the court of appeal having held that the 2<sup>nd</sup> defendant was not qualified to contest the gubernatorial election as at 14/4/07, and the time for nomination of candidates having elapsed well before 14/4/07.*

B *AN ORDER OF MANDATORY INJUNCTION setting aside any or all steps taken by the 1<sup>st</sup> defendant to enable the 2<sup>nd</sup> and 3<sup>d</sup> defendants to participate in the fresh elections ordered by the Court of Appeal in its decision of 11/4/08 in CA/K/EP/GOV/60/2007."*

C At the conclusion of hearing, the trial court held, inter alia:

"I have no option than to toe the line drawn by the superior Court and hold that in so far as the originating summons herein is calling for the interpretation of judgment of the Court of Appeal CA/K/EP/GOV/60/2007 between ALHAJI MUHAMMADU MAIGARI DINGYADI & 1 OR. V. ALIYU MAGATAKARDA WAMAKKO & 42 ORS; it is incompetent and the court lacks the jurisdiction to embark of the interpretation of the judgment in question."

(underlining for emphasis)

E Thus, it is beyond dispute that the issue placed before the Federal High Court, Abuja, as found by the Learned trial judge was on the subject matter of interpretation of the judgment of the Court of Appeal, Kaduna. Although none of the parties herein exhibited the original Notice and Grounds of Appeal from the Federal High Court, Abuja to the Court of Appeal, Abuja, it is clear from the proposed Amended Notice of Appeal as analysed by the Abuja Court of Appeal (page 3 of its ruling of 30/11/09 delivered by Bada, JCA) and as exhibited in the various processes in support or in opposition of grant of this motion that the fresh point sought to be filed and argued but which was refused by the Court of Appeal, Abuja reads as follows:

"8(d) that he further discovered that there is a need to argue a fresh point on appeal, not raised before the trial court to wit:

H *"that the lower court has the jurisdiction vested in it by virtue of section 287(2) of the Constitution of the Federal Republic of Nigeria, 1999 to enforce the judgment of the Court of Appeal, being a court of subordinate jurisdiction to it."*

It is clear from the (proposed) Amended Notice of Appeal filed by the appellants/respondents, Exhibited as Exh. G, in the ap-

plication filed by 3<sup>rd</sup> respondent/applicant that the other grounds were challenging the pronouncement of the learned trial judge where he said he agreed with the position of the defendants, now respondents, that the subject matter of the plaintiffs case is the interpretation of the judgment of the Court of Appeal Kaduna in the suit referred to above. (see page 880 of that motion on Notice).

The Court of Appeal Abuja, itself before which the decision of the Federal High Court Abuja was appealed against made a finding as follows:

*“in this application under consideration, a careful perusal of the records of proceedings and the sworn affidavits of the appellants at the lower court showed unequivocally that what the appellants sought at the lower court was the interpretation of the judgment of this Court in suit No. FHC/ABJ/CS/200/08.”*

(underlining for emphasis)

Bada, JCA, cited instances from the affidavits, which, I too, consider relevant for the determination of this application. The learned JCA stated:

*“In my humble view, to accede to the appellant’s prayers, to argue fresh point on appeal not raised before the lower court to wit jurisdiction to enforce decisions of Court of Appeal contrary to interpretation of the decision of the Court of Appeal earlier brought before the lower court would amount to this court taking a fresh cause of action and assuming jurisdiction contrary to the provisions of section 240 of the 1999 Constitution. In effect what the appellants/applicants want to do in this court with the leave being sought is to change the subject of the case which they brought before the lower court. Whereas an appeal is generally a continuation of hearing and it should not be an invention of a new cause of action.”*

Thus, with the refusal of the Court of Appeal Abuja to grant amendment of Notice of Appeal in respect of the enforcement sought, the subject matter before it still remains as found by that court i.e. interpretation of the Court of Appeal, Abuja, on the judgment of the Kaduna Court of Appeal in CA/K/EP/GOV/60/2007 of 11/4/2008.

In the Court of Appeal Sokoto, the 1<sup>st</sup> appellant herein, was said to have filed an appeal in Appeal No. CA/S/EP/GOV/10/09 against the decision of the Election Petition Tribunal, Sokoto in petition No. SS/EPT/GOV/1/08 between the same parties herein. There was a

petition before the Election Tribunal, Sokoto (which was set up later) by the petitioners/appellants against the 2<sup>nd</sup> respondent and others. After the Election Tribunal had considered all the issues raised, it declined jurisdiction to hear the petition on merit as it lacked jurisdiction and as it found that the appellants were guilty of abuse of judicial process. This, together with the issue of lack of jurisdiction, is what gave rise to the appeal now before the Court of Appeal, Sokoto division, in Appeal No. CA/S/EP/GOV/10/09.

Yes, it is true that one appeal was filed by the appellants/respondents and is pending at the Court of Appeal, Abuja division, in Appeal No. CA/A/276/08. There is also another one filed by the same appellants/respondents and is pending at the Court of Appeal, Sokoto division, in Appeal No. CA/S/EP/GOV/10/09. As has been seen through the analysis rendered earlier in this ruling, the appeal at the Court of Appeal, Abuja division is on the decision of the Federal High Court, Abuja, whereas the appeal at the Court of Appeal Sokoto division, from the documents before this court, is on the decision of an Election Petition Tribunal, Sokoto. The two adjudicating bodies, that is, the Federal High Court and the Election Petition Tribunal are two independent bodies created of course, by the same constitution; empowered by the same constitution and other relevant statutes. They decide different matters and their jurisdictions differ. Ordinarily, a matter before one of these adjudicating bodies may not be presented for a decision before the other as they are polls apart and operate, rather, in parallel dimensions. Any decision of the Federal High Court, is appealable up to the Supreme Court. An appeal from an Election Tribunal relating to the election of gubernatorial candidates has its final bus-stop at the Court of Appeal. However, the bone of contention of the learned counsel for the 1<sup>st</sup> respondent/applicant and the learned Senior Advocates of Nigeria for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in this matter is riot from where the appeal/process to the court or tribunal emanated but whether the law and practice in our adversarial system of adjudication allows for multiplicity of actions/appeals in either same court/tribunal or in different courts/tribunals between same parties pursuing same subject matter simultaneously. This is what authorities call multiplicity of actions which usually gives rise to an abuse of court process. This court, in the case of *ATTORNEY GENERAL OF ANAMBRA STATE V. UBA* (2005). All FWLR (part 277),

defined the term abuse of court process in the following words:

*“An abuse of Court process has been defined in CBN v. Ahmed...per Ogundare, JSC...quoting Karibi-Whyte, JSC... as (the concept of abuse of judicial process) is imprecise. It involves circumstances and situation of infinite variety and conditions. Its one common feature is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice. It is recognized that the abuse of the process may lie in both a proper or improper use of the judicial process in litigation. But the employment of judicial process is only regarded generally as an abuse when a party improperly uses the judicial process to the irritation and annoyance of his opponent, and the efficient and effective administration of justice. This will arise in instituting a multiplicity of actions on the same subject matter against the same opponent on the same issue.”*

Also, in the case of Arubo v. Aiyeleri (1993) 3 NWLR (Pt. 280) 126 at 142 and 146, “abuse of court process” is defined simply to connote that the process of the court has not been used BONAFIDE and properly. It also connotes the employment of judicial process by a party in improper use to the irritation and annoyance of his opponent and Efficient and effective administration of justice. ***The nature and characteristic of an abuse of court process were explicitly set out by this court in the case of Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) 156 at page 188-189, where the court stated:***

***“It is recognized that the abuse of the process may lie in both a proper or improper use of the judicial process in litigation. But the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent, and the efficient and effective administration of justice. This will arise in initiating a multiplicity of actions on the same subject matter against the same opponent on the same issues.” Per Karibi-Whyte, JSC, at pp 188-189.***

***(underlining for emphasis)***

***Looking at the antecedents of the matter on hand, this is what exactly the appellants/respondents had attempted to do.*** They went to the 1<sup>st</sup> Election Tribunal at Sokoto, they lost; they

went to the Court of Appeal, Kaduna, they partially succeeded; they went to the Federal High Court for interpretation of Kaduna Court of Appeal Judgment, they lost; they went to the Sokoto 2<sup>nd</sup> Election Tribunal, they lost; they now appealed simultaneously to the Abuja Division, Court of Appeal and Sokoto Division, Court of Appeal. These  
 B appeals are both pending in the respective Divisions of the Court of Appeal. Both appeals, from the records, are between the same parties and on same subject matter. Haba! Can there be anything more irritating and more frustrating than this FORUM PROSTITUTION, to  
 C borrow the words of my learned brother, Adekeye, JSC? Where this happens, the courts do not take it lightly as it is not a mere irregularity. It is a much more fundamental vice which is usually punished with dismissal. It is rooted in public policy as expressed in the Latin maxim “NEMO DEBET BIS VEXARI PRO UNA EADEM CAUSA”  
 D i.e. no one shall be subjected to defend the same cause twice. This should not be allowed as it amounts to a flagrant abuse of court process. It is to be noted that in all the matters instituted by the appellants/respondents at the various courts or tribunals, the constant question, like the northern star, is on whether the 2<sup>nd</sup> respondent was not  
 E disqualified to contest election into the office of Governorship of Sokoto State. This, to me, is the recurrent decimal or RES in all the courts or tribunals which at one time or the other hosted the parties herein. The appeals now pending at the Court of Appeal Abuja and  
 F the Court of Appeal Sokoto, as pointed out earlier, are both on the interpretation of the decision of the Court of Appeal Kaduna and or, on whether the 2<sup>nd</sup> respondent/applicant was qualified to stand the election that returned him as the Governor of Sokoto State. ***The appeal in the Abuja division of the Court of Appeal was filed***  
 G ***in 2008. The appeal in the Sokoto Court of Appeal was filed on the 5<sup>th</sup> of March, 2009. It is trite law that where two actions of similar or same nature and between same parties and subject matter are being prosecuted concurrently before same court or different courts, it is the later in time that vacates.***  
 H See: Doma v. Adamu (1999) 4 NWLR (Pt. 589) 311; Benaplastic Industries v. Vasilyev (1999) 10 NWLR (Pt.624) 620; Abubakar v. Unipetrol Plc (2002) 8 NWLR (Pt.769) 242 at 253 - H-C; Ikena v. Edjerode (2001) 18 NWLR (Pt.745) 446 at 485 - 486.

***In the matter on hand, it is clear that it is the appeal***



**before the Sokoto Division of the Court of Appeal that is later in time. It is the one to vacate.** Before I make an order in that respect, I still need to state the importance of a preservative order of court of law. It is akin to what the medical discipline calls preventive care. They say, “prevention is better than cure.”

Thus, where there is need to prevent the occurrence of a sickness or calamity such as AIDS or fire incidence in a neighbourhood house, the doctrine of necessity creeps in to help salvage the unaffected persons or houses in the same neighbourhood. People do not have to be invited to render all necessary and possible assistance to control the AIDS or the fire or its imminent expansion to other neighbouring structures. They give spontaneous reactions in order to arrest the situation. Where the havoc is allowed to happen, then calamity has taken place and the RES is destroyed. The Supreme Court, by virtue of its being the apex court and in exercise of the general powers conferred upon it by the constitution, the Supreme Court Act and the Rules, has a duty to arrest an unnecessary drift by any person pursuing a litigation before any court or courts against which a complaint has been brought to the apex court. That, exactly, is what Ayoola, JCA (as he then was) said in the case of *Globe Motors Holdings Ltd. v. Honda Motor Co. Ltd.* (1998) 5 NWLR (Pt.550) 373 at 381 - 382:

*“An instance of such abuse is in the form of vexatious and oppressive actions. Another instance is when an action is instituted deliberately to circumvent the cause of justice and to bring the judicial process into ridicule and contempt. The Constitution can never be seen to be protecting the use of judicial process to undermine respect for law and order and the integrity of the courts. Any action or course of conduct that is seen designed to introduce anarchy into the judicial system must be dealt with appropriately. In the instant case, the plaintiff while the order of the court still subsists rushed to the court below to seek orders which are in direct conflict with the subsisting order of this court not disclosing to that court the subsisting order of this court and the fact the defendant may have made preparations to clear the cars from the ports pursuant to the unconditional order of this court. If new fact have emerged since the making of our order the proper honorable path of action is for the plaintiffs to have sought a variation or discharge of our order or to appeal to the Su-*

preme Court if dissatisfied with the order. The plaintiffs conduct in this case prima-facie shows that they have manifested scant regard for the proper use of the judicial process and may have determined to abuse that process. In my view this court will be remiss in its duties if it does not bring it home to abuse that parties that while all sorts of unethical behaviour may be regarded as cleverness in the market place, such is not permissible in the legal system of our country. In the present case, the conduct of the plaintiffs prima facie indicated a determination of the plaintiffs to frustrate and abuse the judicial process. In the result I would grant the injunction as sought.”

I am in perfect agreement with the above dictum.

The attention of this court has been drawn to the issue of abuse of process of court in the matter on hand. See for instance, depositions in paragraphs 7(i) and (ii) of the affidavit in support of the application of the 2<sup>nd</sup> respondent:

“7[i]. The main issue in all the pending litigations/appeals relates to the construction of the judgment of the Court of Appeal, Kaduna delivered on 11<sup>th</sup> April, 2008 as to whether or not applicant was/is excluded in the re-run election of 24<sup>th</sup> May, 2009.

7[ii]. Appellants are litigating the same issue in two different divisions of the Court of Appeal at the same time.”

The 3<sup>rd</sup> respondent/applicant deposed to the following facts:

“gg. That the appellants/respondents having elected to pursue CA/A/276/08 and CA/S/EP/GOV/10/09 paripassu on the same subject matter, same issue, same relief have triggered off gross abuse of the judicial process.

3(m) That the present application has bearing on CA/S/EP/GOV/10/09 and should be decided one way or the other as a matter of urgency.

15. That it will not serve the interest of justice for judgment to be delivered in CA/S/EP/GOV/10/09 when the Appeal No. CA/S/EP/GOV/10/09 is being challenged as constituting abuse before this Honourable Court.”

The 2<sup>nd</sup> respondent/applicant deposed to the following facts:

“15. As at April, 2009, there were 2 appeals before Courts of Appeal Abuja and Sokoto both on the interpretation, enforcement or construction of the judgment of the Court of Appeal, Kaduna, on the NOMINATION OF ALIYU MAGATAKARDA WAMAKKO to con-

*test the fresh election as ordered by the court (see Exhibits INEC 1 & 2).*

*27. That if the Court of Appeal, Sokoto is not restrained, they will render nugatory:*

*a. ....*

*b. The process before this Honourable Court and Court of Appeal Abuja and allow for full trial of all the issues on the merits.*

*28. That, clearly, the appellants were on FORUM SHOPPING and that in aid of the appellants the court of appeal Sokoto are in a Hurry to prevent the determination of the issue on its merits before Court of Appeal Abuja and this Hon Court.*

*29. that it will be in the interest of all the parties, interest of justice and interest of the people of Sokoto State who voted twice to elect a Governor to have this matter decided by this Hon. Court on its merits or by another impartial panel of the Court of Appeal.”*

Section 22 of the Supreme Court Act, Cap. S15 Laws of the Federation of Nigeria, 2004, empowers this Court to make any order necessary for determining the real question in controversy in an appeal. Furthermore, Order 2 Rule 12 [2], [3] and [5] of the Supreme Court Rules, (2002 as amended) have conferred on the Supreme Court general powers to give any judgment and make any order which ought to have been given or made and to make such further or other order as the case may require. The court shall have power to make order by way of injunctions or the appointment of a receiver manager and such other necessary orders for the protection of property or person pending the determination of an appeal to it even though no application for such an order was made in the court below. Subsection 5 of the order provides:

*“12(5) The powers of the court under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal has been given in respect of any particular party to the proceedings in that court; or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the court may make any order on such terms as the court thinks just to ensure the determination on the merits of the real question in controversy between the parties.”*

In view of the enormous powers of this court as shown above, and in view of the fact that I already made a finding that there is an

abuse of court process in the multiplicity of actions/appeals filed in different courts, especially in the Court of Appeal Abuja Division in Appeal No.CA/A/276/08 and Court of Appeal Sokoto Division in Appeal No. CA/S/EP/GOV/10/09, between same parties and same subject matter, being prosecuted simultaneously, it is necessary for  
 B this court to arrest the drift. To that effect, and in respect of the applications/reliefs sought by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents/applicants to stay proceedings at the Court of Appeal, Abuja Division and or for an order of stay of proceeding or directing the Court of Appeal, Sokoto  
 C to suspend and or stay the delivery of judgment in CA/S/EP/GOV/10/09, all pending the determination of prayer 1 and the alternative prayer by the 3<sup>rd</sup> respondent/applicant or, as prayed by the 1<sup>st</sup> respondent, pending the completion of investigations into serious allegations against the Hon. President of the Court of Appeal and the  
 D Hon. Justices hearing the appeal. It is the 2<sup>nd</sup> respondent who asks that the reliefs be granted pending the determination of this appeal.

Let me quickly observe that the grant of the reliefs asked by the 1<sup>st</sup> respondent “pending the completion of investigations into serious allegations against the President of the Court of Appeal and the  
 E Hon. Justices hearing the appeal is hinged on what appears to be an administrative order which emanated from an administrative body. It will appear difficult for me to grant orders that will pending the outcome of investigation mounted by an administrative body. Further,  
 F as I pointed out earlier, where an abuse of court process relates to multiplicity of actions/appeals being prosecuted in the same court or even in different courts simultaneously, the letter in time will abate. I accordingly make the following orders:

i. Relief No. 2 from the application dated 11/2/2010 and  
 G filed on the same date by the 2<sup>nd</sup> respondent to wit: “AN ORDER staying proceedings at the Court of Appeal, Abuja Judicial Division in appeal No. CA/A/276/08” is hereby refused.

ii. Relief No. 3 from the 2<sup>nd</sup> respondent’s/applicant’s motion referred to in (i) above to wit:  
 H AN ORDER staying proceedings at the Court of Appeal, Sokoto Judicial Division in Appeal No. CA/S/EP/GOV/10/09 until the final determination of the appeal by the apex court” and as prayed also by the 3<sup>rd</sup> respondent/applicant, is hereby granted pending the determination of this appeal.

This appeal, as I stated earlier is still pending as it has just been restored.

Thus, in view of what Order 2 Rule 30 of the Rules of this court provides:

*“An appeal shall be deemed to have been brought when the Notice of Appeal has been filed in the Registry of the court below.”* B  
The interlocutory appeal is pending. Furthermore, Order 8 Rule 11 of the Rules provides:

*“11. After an appeal has been entered and until it has been finally disposed of, the Court shall be seized of the whole of the proceedings as between the parties thereto, and except as may be otherwise provided in the Order, every application therein shall be made to the court and not to the court below, but any application may be filed in the court below for transmission to the court”.* C

In the final result, I will summarize below the orders I have made on all the applications: D

i. Application dated 18/3/2010 and filed on 19/3/2010 by the appellants/applicants:

Relief No.1 is for striking out the Notice of Withdrawal of the appellant’s appeal which is now taken care of by the order which set aside our judgment of 10/3/2010 restoring the appeal to the cause list of this court. E

ii. Relief No. 2 is for an order vacating our order made on 15/3/2010 which stays the delivery of judgment of Court of Appeal Sokoto in Appeal No. CA/S/EP/GOV/10/09 pending the determination of motions pending in this court. This order is hereby vacated. F

iii. Motion on Notice dated 23/3/2010 and filed on same date by the 1<sup>st</sup> respondent:

The only relief in this motion is for an order directing the parties to file written briefs in respect of all the pending motions. This motion was withdrawn and struck out as this court decided to hear the parties orally. G

iv. Motion on Notice date 29/3/2010 and filed on same date by the 1<sup>st</sup> respondent for an order of this court preserving the RES H and/or SUBJECT MATTER OF THIS APPEAL and for an order of this court directing the Court of Appeal Sokoto to suspend or stay the delivery of judgment in Appeal No. CA/S/EP/GOV/10/09; AND  
v. The 3<sup>rd</sup> respondent’s relief No. 3 in his motion on Notice dated 7/4/

2010 and filed on 8/4/2010 which is on same subject matter with (iv) above and

vi. 2<sup>nd</sup> respondents prayer in his motion in Notice of 11/2/2010, same subject matter as in No. (iv) above, have all been granted as prayed pending the determination of the appeal in this court.

B vii. 2<sup>nd</sup> respondent's relief No. (i) in his motion dated and filed on 11 /2/2010 for staying proceedings at the Court of Appeal Abuja has been refused. Whereas his relief for an order for accelerated hearing of this appeal has been granted, which resulted into the hearing of the appeal on 19<sup>th</sup> - 21<sup>st</sup> of April, 2010.

C viii. Reliefs (i) and (ii) of the motion dated and filed on 11/2/2010 by the 2<sup>nd</sup> respondent for an order for departure etc are granted as prayed.

ix. Notice of opposition of withdrawal of appeal dated 26/2/2010 and filed on 1/3/2010 by the 1<sup>st</sup> respondent; motion on Notice dated and filed on 10/03/2010 by the 2<sup>nd</sup> respondent; motion on Notice dated 12/3/2010 and filed by the; 2<sup>nd</sup> respondent and motion on Notice dated 7/4/2010 and filed on 8/4/2010 by the 3<sup>rd</sup> respondent, all asking for an order setting aside the Ex-parte Order made by this court dismissing the appeal on 10/3/2010 in chambers are granted and the appeal is restored to the general cause list of the court.

F x. Motion on Notice dated 4/3/2010 and filed by the 3<sup>rd</sup> respondent for an order extending the time to cross-appeal seems abandoned and same is struck out.

These are my rulings on all the applications/processes filed by the respective parties.

I make no order as to costs.

G \_\_\_\_\_

***MOHAMMED JSC (DISSENTING)***

H The dispute between the parties in this matter started in April, 2007 when the parties contested the election for the office of the Governor of Sokoto State. The election was conducted by the 1<sup>st</sup> Respondent which returned the 2<sup>nd</sup> Respondent as duly elected. The Appellants/Applicants/Respondents, challenged the return in the Sokoto Election Tribunal and the Court of Appeal Kaduna where they were successful in that the election of the 2<sup>nd</sup> Respondent was

nullified by that Court which ordered 1<sup>st</sup> Respondent to conduct a fresh election between the same candidates that contested the nullified election including the 2<sup>nd</sup> Respondent/Applicant.

Meanwhile before the fresh election could be conducted, the Appellants/Applicants went to the Federal High Court Abuja and filed an action No. FHC/ABJ/CS/260/08 by Originating Summons, challenging the conduct of the fresh election with the 2<sup>nd</sup> Respondent/Applicant participating as a candidate. The action was struck-out by the Federal High Court on the ground that it lacked jurisdiction to entertain and determine the action. The Appellants/Applicants then appealed against that decision to the Court of Appeal Abuja in appeal No.CA/A/276/08. When an attempt by the Appellants/Applicants to amend their notice of appeal to raise a fresh issue in their appeal was refused by the Court of Appeal, the Appellants/Applicants filed a notice of appeal against the interlocutory ruling to this Court on 14<sup>th</sup> December, 2009.

Meanwhile following the conduct of the fresh election as ordered by the 1<sup>st</sup> Respondent/Applicant in which the Appellants/Applicants again lost, the Appellants/Applicants challenged the election at the Election Tribunal Sokoto where they again lost when their petition was dismissed. Their appeal to the Court of Appeal Sokoto in appeal No.CA/S/EP/GOV/10/09 was awaiting determination when the Appellants/Applicants filed Notices of withdrawal of their appeals at the Court of Appeal and this Court on 12<sup>th</sup> February, 2010. The Notice of withdrawal of the Appellants/Applicants appeal came before this Court in Chamber on 10<sup>th</sup> March, 2010 for hearing while the 1<sup>st</sup> Respondent/Applicant's Notice opposing the withdrawal of appeal filed on 1<sup>st</sup> March, 2010, the 2<sup>nd</sup> Respondent/Applicant's Motion for Departure from the Rules of this Court filed on 11<sup>th</sup> February, 2010 and the 3<sup>rd</sup> Respondent's motion for extension of time to file a cross-appeal filed on 4<sup>th</sup> March, 2010, were pending and fixed for hearing on 15<sup>th</sup> March, 2010 in this Court. All the same this Court proceeded and dismissed the Appellant's interlocutory appeal on 10<sup>th</sup> March, 2010 before the Respondents/Applicants pending applications were heard. When the Respondents/Applicants' application came up for hearing in this Court on 15<sup>th</sup> March, 2010 and it turned out that the appeal had already been dismissed, this Court granted an oral application of the Respondents/Applicants to stay

proceedings before the Sokoto Court of Appeal which was scheduled for 16<sup>th</sup> March, 2010. The application was granted and the proceedings before that Court in appeal No. CA/S/EP/GOV/10/09, were stayed pending the determination of the Respondents/Applicants motions then adjourned to 1<sup>st</sup> April, 2010 for hearing.

B However, subsequent to the order of this Court of 10<sup>th</sup> March, 2010 dismissing the Appellants/Applications' appeal, the Respondents/Applicants have also filed applications in this Court for the setting aside of the order of dismissal. The Appellants/Applicants on being  
C served with the motions, reacted by another application urging this Court to set aside its order of stay of proceedings in the Court of Appeal Sokoto given on 15<sup>th</sup> March, 2010 and dismiss all the applications filed by the Respondents/Applicants challenging the withdrawal of the appeal and stay of proceedings in the Court of Appeal  
D Abuja and Sokoto Divisions. All these applications were taken together on 19<sup>th</sup> April, 2010, 20<sup>th</sup> April, 2010; and 21<sup>st</sup> April, 2010 respectively. Rulings in these applications have been fixed for delivery today 4<sup>th</sup> June, 2010.

1. Appellants/Applicants/Respondents Application filed on 19<sup>th</sup>  
E March, 2010

I am starting with this application because it is in the nature of preliminary objection to the Respondents/Applicants' applications which the Appellants/Applicants/Respondents are urging this Court  
F to dismiss or strike out.

The main reliefs (2.) and (3.) sought in this motion are -  
“(2.) *AN ORDER of this Honourable Court setting aside or otherwise vacating its earlier order made/dated 15<sup>th</sup> day of March, 2010 which order stayed the delivery of the judgment of Court of  
G Appeal in Appeal No. CA/S/GOV/10/2009 which was made pending the hearing and determination of the motions filed in the Supreme Court and adjourned to the 1<sup>st</sup> day of April, 2010 for hearing;*

(3.) *AN ORDER of this Honourable Court dismissing or otherwise striking out all other pending applications filed by any of the  
H other Respondents to the appeal of the Appellants/Applicants which was dismissed on 10<sup>th</sup> March, 2010 but more specifically an order dismissing or otherwise striking out:-*

(i.) *2<sup>nd</sup> Respondent/Applicant's: Motion dated 11/2/2010 filed 11/2/2010 seeking:*



(a.) *Departure from the Rules*

(b.) *Stay of proceedings in Appeal No. CA/A/276/08 from which the appeal in this Court emanated*

(c.) *Stay of proceedings in CA/S/EP/GOV/10/2009 which is an election petition appeal and in respect of which the Court of Appeal is the final Court of Appeal* B

(d.) *Accelerated hearing of the Appeal*

(e.) *Omnibus prayer*

(ii.) *1<sup>st</sup> Respondent's Undated motion filed on 1<sup>st</sup> March, 2010 in opposition to withdrawal of appeal pursuant to Order 8 Rule 6(4) Supreme Court Rules;* C

(iii.) *3<sup>d</sup> Respondent's Motion dated 4th March, 2010 filed same date seeking:*

(a.) *Extension of time for Respondent/Applicant to file Cross-appeal.*" D

The motion is supported by a 30 paragraph affidavit to which a number of documents were exhibited in support of the application. Learned Senior Counsel for the Appellants/Applicants explained that the Appellants/Applicants' appeal arose from the decision of the Federal High Court Abuja declining jurisdiction to entertain the Appellants/Applicants' action by Originating Summons; that the Appellants/Applicants' appealed against the decision of the Federal High Court to the Court of Appeal Abuja which refused their application to file additional grounds of appeal to raise new issues in the appeal; that it was against this interlocutory decision that the Appellants/Applicants appealed to the Supreme Court and that there was no appeal against the decision of the Abuja Court of Appeal by any of the Respondents/Applicants. It was contended by the learned senior Counsel that the Appellants/Applicants' appeal having been withdrawn, there is nothing pending before this Court to support the applications filed by the Respondents/Applicants. A number of cases including *Chime v. Ude* (1996) 1 N.W.L.R. (Pt. 461) 379 at 387, were relied upon in support of this argument. With regard to the Respondents/Applicants' application for stay of proceedings before the Court of Appeal Sokoto, in the absence of any appeal from the decision of that Court in the Gubernatorial election petition appeal No.CA/S/EP/GOV/10/09 to this Court, this Court has no power to stay proceedings in the Sokoto Court of Appeal if the decision of this Court in *Umana v. Attah* (2006) E F G H

17 N.W.L.R. (Pt. 1009) 503 at 527 - 528, is taken into consideration.

This application was opposed by the 1<sup>st</sup> Respondent/Applicant mainly on the ground that since its application filed since 1<sup>st</sup> March, 2010 opposing the withdrawal of the Appellants/Applicants' appeal was awaiting hearing before this Court when this Court gave effect to the Notice of withdrawal resulting in the dismissal of the appeal, the Respondents have been denied a fair hearing, citing and relying on the case of Newswatch Communications Limited v. Aliyu Ibrahim Atta (2006) 7 Monthly Judgments of Supreme Court 88.

From the 2<sup>nd</sup> Respondent/Applicant, his Learned Senior Counsel also opposed the Appellants/Applicants' application which he described as pre-mature on the face of the Respondents/Applicants respective applications seeking to set aside the dismissal of the Appellants/Applicants' appeal made on 10<sup>th</sup> March, 2010. As for the order of this Court on 15<sup>th</sup> March, 2010 which the Appellants/Applicants are urging this Court to set aside, learned senior Counsel stressed that the order was made to preserve the res pending the determination of the Respondents/Applicants' application filed before the Appellants/Applicants' Notice of withdrawal and which applications could not have been ignored before dismissing the Appellants/Applicants' appeal.

Learned senior Counsel for the 3<sup>rd</sup> Respondent/Applicant also opposed the Appellants/Applicant application. Adopting the arguments presented on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants, learned Senior Counsel described the Appellants/Applicants' application as unknown in law pointing out that since the Respondents/Applicants applications were pending on 10<sup>th</sup> March, 2010 when the Appellants/Applicants appeal was dismissed by this Court, the Respondents/Applicants are entitled to be heard; that having regard to the applications to the set aside the order of dismissal of the appeal by all the Respondents/Applicants, the order made by this Court on 15<sup>th</sup> March, 2010, was merely to preserve the res in the two appeals pending between the parties at the Court of Appeal in Abuja and Sokoto and therefore urged this Court to dismiss the Appellants/Applicants application.

In a short reply, learned senior Counsel for the Appellants/Applicants remarked that the need for the preservation of the res should have come from the Appellants/Applicant rather than from

the Respondents who are not losers at the trial Federal High Court Abuja or the Court of Appeal. He also reminded the Respondents/Applicants that section 233(1) of the 1999 Constitution does not give the Supreme Court jurisdiction to stay proceedings in Court of Appeal in matters arising from the decisions of Election Tribunals.

As the first relief of the Appellants/Applicants is seeking accelerated hearing of their application filed on 19<sup>th</sup> March, 2010, the fact that this application was heard on 19<sup>th</sup> April, 2010, means that the relief had been granted. B

As for the 2<sup>nd</sup> relief asking for the setting aside of the Order of this Court made on 15<sup>th</sup> March, 2010, staying proceedings pending before the Court of Appeal, Sokoto in Suit No. CA/S/EP/GOV/ 10/ 09, pending the determination of the motions filed in this Court which were adjourned for hearing on 1<sup>st</sup> April, 2010, the fact that these pending motions have now been heard and are merely awaiting determination, I am of the view that the determination of this relief shall await the determination of these motions today. C

With regard to the Appellants/Applicants' 3<sup>rd</sup> relief to dismiss or strike out all the Respondents/Applicants application particularly those filed before 10<sup>th</sup> March, 2010 when the Appellants/Applicants' appeal was dismissed, the Appellants/Applicants have reasoned that the dismissal of their appeal had terminated all other matters hanging on the dismissed appeal. It is quite clear that even on the face of the Appellants/Applicants' application itself that some of the Respondents/Applicants applications which are being sought to be struck out or dismissed, were filed even before the Appellants/Applicants' Notice of withdrawal of their appeal was filed on 12<sup>th</sup> February, 2010, not to talk of when their appeal was dismissed on 10<sup>th</sup> March, 2010. These applications are therefore pending applications before this Court awaiting hearing and determination before the Appellants/Applicants' appeal was dismissed. The applications therefore must be heard and determined one way or the other notwithstanding the dismissal of the appeal which is also being challenged by the Respondents/Applicants in their applications. For the foregoing reasons therefore, the Appellants/Applicants' application to strike out or dismiss all the pending applications by the Respondents/Applicants in this matter, is hereby refused and the same is hereby dismissed. F

Taking into consideration that the judgment of this Court de- G H

livered on 10<sup>th</sup> March, 2010 dismissing the Appellants/Applicants' appeal following the filing of their Notice of withdrawal of the appeal on 12<sup>th</sup> February, 2010 is being challenged in separate applications by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents/Applicants who are asking this Court to set aside that judgment on the ground that it was a nullity having  
B regard to the circumstances surrounding the proceedings resulting or leading to the delivery of the judgment, I shall now consider the two applications together.

In the application filed by the 2<sup>nd</sup> Respondent/Applicant on  
C 12<sup>th</sup> March, 2010, the first relief sought reads -

*"1. An order setting aside the ex-parte order made by this Honourable Court in Chambers on 10<sup>th</sup> March, 2010."*

In similar application filed by the 3<sup>rd</sup> Respondent/Applicant on 8<sup>th</sup> April, 2010, the relief sought is -

D *"An order setting aside the ex-parte order made by this Honourable Court in Chambers on 10<sup>th</sup> March, 2010 and restoring the appeal back to the Cause List."*

The main grounds upon which the reliefs were sought include -

E (i) The 2<sup>nd</sup> Respondent had filed a motion for an order striking out the Appellants/Respondents' Notice of withdrawal of appeal dated 22<sup>nd</sup> January 2010 and filed on 12<sup>th</sup> February, 2010.

(ii) The Respondents/Applicant's motion was filed on 10<sup>th</sup>  
F March, 2010.

(iii) On the same date of 10<sup>th</sup> March, 2010 this Court acted on the Appellants/Respondents' Notice of withdrawal of their appeal and dismissed the appeal while the 2<sup>nd</sup> Respondents/Applicant's motion attacking the Notice of withdrawal was fixed for hearing on 15<sup>th</sup>  
G March, 2010 thereby completely frustrating the 2<sup>nd</sup> Respondents/Applicant's application.

(iv) The proceedings of this Court in Chambers on 10<sup>th</sup> March, 2010 and the order made on the Appellants/Respondents' Notice of withdrawal denied the 2<sup>nd</sup> Respondent/Applicant a hearing and violated his right of fair hearing resulting in depriving this Court of jurisdiction.  
H

(v) The earlier motion filed by the 2<sup>nd</sup> Respondent/Applicant on 11<sup>th</sup> February, 2010 for departure from the rules of this Court to file record of appeal to facilitate the hearing of the appeal following

the failure of the Appellants/Respondents to prepare and file the record as required by the rules of this Court was also fixed for hearing on the 15<sup>th</sup> March, 2010 and therefore was a pending matter in the appeal when the appeal was dismissed in the proceedings of the Court on 10<sup>th</sup> March, 2010.

(vi) The 2<sup>nd</sup> Respondents/Applicants' motion for departure filed on 11<sup>th</sup> February, 2010 and fixed for hearing on 15<sup>th</sup> March, 2010 was in fact served on the Appellants/Applicants before their Notice of withdrawal of their appeal was acted upon by this Court on 10<sup>th</sup> March, 2010.

The application is supported by a 19 paragraph affidavit and a further affidavit in reply to the Appellants/Respondents counter affidavit. Learned Senior Counsel for the 2<sup>nd</sup> Respondent/Applicant pointed out that with the number of the Respondents/Applicants' motions fixed for hearing including one filed on 11<sup>th</sup> February, 2010 before the Notice of withdrawal was filed, the Court ought to have afforded the Respondents/Applicants a hearing before acting on the Notice of withdrawal resulting in the dismissal of the appeal in violation of the Respondents/Applicants' right of fair hearing if the decision of this Court in Mobil Production (Nigeria) Limited v. Morokpo (2003) N.W.L.R. (Pt. 852) 346, is taken into consideration; that the dismissal of the appeal in Chambers without the record of appeal filed in accordance with the rules, is a nullity since a condition precedent to the exercise of jurisdiction to consider the Notice of withdrawal was not fulfilled as required in *Madukolu v. Nkemdilim* (1962) 2 S.C.N.L.R. 341; that this Court has inherent jurisdiction or power to set aside its own decision which is a nullity on the authority of many cases including *Odojin v. Olabanji* (1996) 3 N.W.L.R. (Pt. 435) 126. Learned Senior Counsel concluded by urging this Court to set aside the order of 10<sup>th</sup> March, 2010, as it was given in breach of the Respondents/Applicants' right of fair hearing under Section 36(1) of the Constitution.

In his response to this application, learned senior Counsel to the 1<sup>st</sup> Respondent/Applicant is in full support of the application. In the same vein, learned senior Counsel to the 3<sup>rd</sup> Respondent/Applicant who also had filed similar application asking for the same relief of setting aside the order of this Court given on 10<sup>th</sup> March, 2010, urged the Court to grant the application and restore the Appellants/

Respondents' appeal to the cause list of this Court so as to give the Respondents/Applicants, the opportunity of being heard on the withdrawal of the appeal.

However, learned Counsel to the Appellants/Applicants/Respondents are opposing the applications for the reason that the Notice of withdrawal of the appeal having been filed under Order 8 Rule 6, whether or not the Respondents/Applicants have given their consent to the withdrawal of the appeal, the appeal is deemed dismissed under sub-rule (5) of Rule 6 of the Rules of this Court; that the appeal having been dismissed, the judgment of this Court to that effect given on 10<sup>th</sup> March, 2010, cannot be set aside because the right of the Appellant given under the Constitution to appeal or withdraw the appeal, cannot be taken away the rules of Court.

The facts that gave rise to the proceedings of this Court of 10<sup>th</sup> March, 2010 leading to the dismissal of the Appellants/Respondents' appeal based on their Notice of withdrawal of the appeal filed on 12<sup>th</sup> February, 2010, are not at all in dispute. The Notice of appeal in the interlocutory appeal against the decision of the Abuja Division of the Court of Appeal was filed at the Court of Appeal on 14<sup>th</sup> December, 2009. By Order 7 Rule 7(1) of the Rules of this Court, the Appellants/Respondents are required to file their notice of appeal simultaneously with the prepared record of appeal or prepare and file one within 14 days of filing the Notice of appeal and lodge the same with the Registrar of this Court. However, apart from filing their notice of appeal at the Court of Appeal, the Appellants/Respondents took no steps to prepare the record of appeal up to the time when they filed their notice of withdrawal of their appeal on 12<sup>th</sup> February, 2010. As at the date this notice was filed in this Court, in the absence of the record of appeal, there was already a motion on notice by the 2<sup>nd</sup> Respondent/Applicant for departure from the rules of this Court to file a record of appeal prepared by him to facilitate the hearing of the appeal and other reliefs sought in the application. The motion was filed on 11<sup>th</sup> February, 2010. Meanwhile as at the date of 10<sup>th</sup> March, 2010 when this Court acted on the Notice of withdrawal of the appeal to dismiss the appeal, there were other pending processes in the matter comprising a Notice by the 1<sup>st</sup> Respondent filed on 1<sup>st</sup> March, 2010 opposing the withdrawal of the appeal, 3<sup>rd</sup> Respondent/Applicant's motion for leave to file Notice of cross-appeal filed

on 4<sup>th</sup> March, 2010 and the 2<sup>nd</sup> Respondent/Applicant's motion filed on 10<sup>th</sup> March, 2010 for an order striking out the Notice of withdrawal of the appeal. Consequently, these matters were also fixed for hearing on 15<sup>th</sup> March, 2010.

On these undisputed facts therefore, it is quite clear that the dismissal of the Appellants/Respondents appeal by this Court in its proceedings in Chambers on 10<sup>th</sup> March, 2010 was done without affording the 2<sup>nd</sup> Respondent/Applicant and other Respondents/Applicants a hearing as required by Section 36(1) of the 1999 Constitution as complained in the present applications. This no doubt constitutes a breach of the 2<sup>nd</sup> Respondent/Applicant and other Respondents/Applicants' right of fair hearing. The law is trite that the effect of breach of the right of fair hearing in any proceedings of Court as happened in the instant case rendered the proceedings including the judgment of 10<sup>th</sup> March, 2010 dismissing the appeal, a complete nullity. See *Rasaki Salu v. Taiwo Egeibon* (1994) 6 S.C.N.J. 223 also reported in (1994) 6 N.W.L.R. (Pt. 348) 23 at 44 Adio JSC (of blessed memory) said -

*"It also had to be remembered that the denial of a fair hearing was a breach of one of the rules of natural justice, that is the requirement that a party must be given a fair hearing. The consequence of a breach of the rule of natural justice of fair hearing is that the proceedings in the case are null and void."*

See also *Adigun v. Attorney-General of Oyo State* (1987) 1 N.W.L.R. (Pt. 53) 678. All Courts including this Court are bound to observe the rule of natural justice in all their proceedings including proceedings in Chambers where parties and their Counsel are not present. This cannot be achieved unless and until all parties are heard or given the opportunity of being heard. See *Alhaji Yekini Otapo v. Chief R. O. Sunmonu & Others.* (1987) 5 S.C.N.J. 57 also reported in (1987) 2 N.W.L.R. (Pt. 58) 587. In the present case not only the 2<sup>nd</sup> Respondent/Applicant was not heard or given the opportunity of being heard in his pending motions before the order of dismissal of the appeal was made but equally affected parties who were not afforded the opportunity of being heard in the matter are the 1<sup>st</sup> and 3<sup>rd</sup> Respondents/Applicants who were also challenging the Notice of withdrawal of the appeal and whose right of fair hearing was equally breached by the proceedings of 10<sup>th</sup> March, 2010. The result of course

is obvious. These proceedings are a nullity including the judgment that emerged from the void proceedings.

The next question is what is to be done in the circumstances. The law regarding the position of any judgment or order of Court which is a nullity for any reason whatsoever, is that the Court in its inherent jurisdiction is entitled *ex-debito justitiae* to have that judgment or order set aside on the application of an affected or aggrieved party or even *suo-motu* by the Court itself. See *Ademuluyi & Anor. v. African Continental Bank Limited* (1965) N.M.L.R. 24; *Obinmonure v. Erinoshio* (1966) 1 All N.L.R. 250; *West African Automobile & Engineering Company Limited v. Ajanaku* (1972) U.I.L.R. 335; *Skenconsult (Nigeria) Ltd v. Ukey* (1981) 1 S.C. 6 and *Adegoke Motors Limited v. Adesanyei* (1989) 3 N.W.L.R. (Pt.109) 250. In the case at hand therefore, the 2<sup>nd</sup> Respondent/Applicant having shown that his Constitutional right of fair hearing has been breached in the proceedings of this Court of 10<sup>th</sup> March, 2010 leading to a judgment dismissing the appeal in this matter, the application filed on 2<sup>nd</sup> March, 2010 is granted in relief No.1 in that the proceedings of this Court taken in Chambers leading to the dismissal of the Appellants/Respondents' appeal, are hereby declared a nullity and consequently, the proceedings including the judgment given on 10<sup>th</sup> March, 2010, are hereby set aside. The Notice of Appeal as filed at the Court of Appeal on 14<sup>th</sup> December, 2009 without the appeal number of this Court SC.32/2010 wrongly assigned by the Registry of this Court, remains as it is in the absence of the record of appeal to accompany the notice of appeal to this Court to facilitate the entering of the appeal in accordance with Order 8 Rule 11 of the Rules of this Court. Meanwhile the 2<sup>nd</sup> relief in the 2<sup>nd</sup> Respondent/Applicant's application for order preserving the res or subject matter of this application fixed for hearing on 15<sup>th</sup> March, 2010, is deemed granted on the hearing and determination of the application in the first relief which has just been granted.

2ND RESPONDENTS/APPLICANT'S APPLICATION FILED ON 10TH MARCH, 2010 - RULING

This application is seeking the order of this Court striking out the Notice of withdrawal of appeal filed by the Appellants/Respondents dated 22<sup>nd</sup> January, 2010 and filed on 12<sup>th</sup> February, 2010 pursuant to Order 8 Rule 6 of the Supreme Court Rules 1999. Fol-



lowing the granting of the 2<sup>nd</sup> Respondent/Applicant's application to set aside the order of this Court of 10<sup>th</sup> March, 2010 dismissing the Appellants/Applicants/Respondents' appeal given pursuant to the Notice of withdrawal, the present application is no longer a live issue with the restoration of the appeal resulting in sweeping away the Notice of withdrawal of the appeal. B

RULING ON THE 3RD RESPONDENT/APPLICANT'S APPLICATION FILED ON 8TH APRIL, 2010 TO SET ASIDE THE ORDER OF THIS COURT GIVEN ON 10TH MARCH, 2010

The ruling in the terms just granted in the 2<sup>nd</sup> Respondent/Applicant's application to set aside the order of this Court of 10<sup>th</sup> March, 2010, also takes care of the 3<sup>rd</sup> Respondent/Applicant's application filed on 8<sup>th</sup> April, 2010 for same relief of the setting aside of the order of this Court given on 10<sup>th</sup> March, 2010. The relief accordingly is hereby granted. Thus, having granted the 3<sup>rd</sup> Respondent/Applicant's first prayer setting aside the order of this Court granted in Chambers on 10<sup>th</sup> March, 2010 in the application filed on 8<sup>th</sup> April, 2010, there is no need for me to go into the remaining two reliefs which were only sought in the alternative to relief one which has just been granted. Accordingly reliefs 2 and 3 in the 3<sup>rd</sup> Respondent/Applicant's motion on notice filed on 8<sup>th</sup> April, 2010 which are no longer for determination having regard to the grant of the 1<sup>st</sup> prayer, are hereby struck-out. C D E

As for the motion on Notice filed by the 3<sup>rd</sup> Respondent/Applicant on 4<sup>th</sup> April, 2010 for extension of time to file a cross-appeal in this matter and to deem the same Notice of cross-appeal as duly filed and served, the fact that this motion was not moved for determination in the course of the hearing of the applications by the parties, the motion is deemed abandoned and the same is also hereby struck-out. F G

1ST RESPONDENT'S NOTICE FILED ON 1ST MARCH, 2010 IN OPPOSITION TO WITHDRAWAL OF APPEAL

Similarly, the Ruling on the application by the 2<sup>nd</sup> Respondent/Applicant setting aside the proceedings of this Court on 10<sup>th</sup> March, 2010, has also disposed off the 1<sup>st</sup> Respondent's notice filed on 1<sup>st</sup> March, 2010 in opposition to the withdrawal of the Appellants/Respondents' appeal which has now been restored. H

RULING ON THE 2ND RESPONDENT/APPLICANT'S MOTION ON

NOTICE FILED ON 11TH FEBRUARY, 2010 FOR DEPARTURE FROM THE RULES OF THIS COURT AND OTHER TWO RELIEFS

In the application filed by the 2<sup>nd</sup> Respondent/Applicant on 11<sup>th</sup> February, 2010 which was pending before this Court and which was fixed for hearing on 15<sup>th</sup> March, 2010 and also served on the parties when the Appellants/Applicants/Respondents' Notice of withdrawal of their appeal was filed on 12<sup>th</sup> February, 2010, the following reliefs were sought.

*"1. An order granting departure from the Rules of this Honourable Court by:*

*(i) Allowing and/or directing parties to make use of the record of proceedings of the lower Court as compiled by the Applicant for the purpose of this appeal.*

*(ii) Accepting for the purpose of this appeal the record of proceedings of the lower Court as compiled by the Applicant, with the liberty to any party to file a supplementary record if he considers that the record as compiled by the Applicant is inaccurate/inadequate.*

*2. An order staying proceedings at the Court of Appeal, Abuja Judicial Division in appeal No. CA/A/276/08 which relates to and concerns the subject matter of this appeal until the final determination of this appeal.*

*3. An order staying proceedings at the Court of Appeal, Sokoto Judicial Division in appeal No. CA/S/EP/GOV/ 10/09 which relates to the subject matter of this appeal until the final determination of the appeal by the apex Court.*

*4. An order of accelerated hearing of this appeal."*

The main ground for bringing this application is that the subject matter of the proceedings before the Court of Appeal, Abuja Judicial Division in appeal No. CA/A/276/08 and the one before the Court of Appeal Sokoto Judicial Division in appeal No. CA/S/EP/GOV/ 10/09 is one and the same. The application is supported by affidavit of 17 paragraphs to which no counter-affidavit was filed and the learned senior Counsel for the 2<sup>nd</sup> Respondent/Applicant relied on all paragraphs of the affidavit in support of the application. The application is to allow parties to use the record compiled by applicant to hear the appeal; that without the record of appeal, it was not possible for even the Appellants/Applicants/Respondents to file their Notice of withdrawal of the appeal as without the record of appeal, it was not

possible to file the Notice of withdrawal not to talk of the dismissal of the appeal; that the Deputy Chief Registrars of the Abuja and Sokoto Divisions of the Court of Appeal have been put on notice of the application for stay of proceedings in both Courts. Learned senior Counsel referred to the Ruling of Bada JCA at pages 873 - 874 of Volume II of record of the Court of Appeal showing that the interpretation of the Judgment of the Court of Appeal Kaduna delivered in 2007, is the RES or subject matter of the appeals before the Abuja and Sokoto Divisions of the Court of Appeal to justify stay of proceedings in both Courts pending the determination of the appeal in this Court. B C

Learned Counsel to the 1<sup>st</sup> Respondent/Applicant is in full support of the 3 reliefs sought in this application, emphasizing that the subject matter in the appeals pending before the Abuja and Sokoto Divisions of the Court of Appeal, are the same being the interpretation of the judgment of the Court of Appeal Kaduna given in 2007 which ordered the 1<sup>st</sup> Respondent to conduct a fresh election in which both the 1<sup>st</sup> Appellant/Applicant/Respondent and the 2<sup>nd</sup> Respondent/Applicant were to participate as candidates of their respective political parties in the election. Although learned Counsel recognized that the two appeals pending at the Divisions of the Court of Appeal in this matter are governed by Sections 233 and 246 of the 1999 Constitution respectively, he maintained that the subject matter in the appeals is the same to support the grant of the application. Learned Counsel urged the Court to grant the application for departure to facilitate the hearing of the appeal on the record compiled by the 2<sup>nd</sup> Respondent/Applicant. D E F

Learned senior Counsel for the 3<sup>rd</sup> Respondent/Applicant is also in full support of the application by the 2<sup>nd</sup> Respondent/Applicant for the grant of the 3 reliefs sought in this application in order to avoid forum shopping and abuse of process of Court by the Appellants/Applicants/Respondents in pursuing identical reliefs in the two Divisions of the Court of Appeal in their respective appeals. G

For the Appellants/Applicants/Respondents however, their learned senior Counsel strongly oppose this application filed on 11<sup>th</sup> February, 2010 on points of law as no counter-affidavit was filed by them; that the facts deposed in the affidavit in support of the application, are not enough to support the grant of the reliefs. In relief for H

departure from the Rules of this Court it, was argued that Order 2 Rule 32(1), and Order 7 Rule 7(1), are not complied with in the application which allows only the Appellant to prepare record and file same within 14 days being an interlocutory appeal; that in the absence of relief for extension of time to file the record, the relief for departure cannot be granted; that as for the reliefs for stay of proceedings not being supported by the facts in the affidavit, they are deemed to have been abandoned as no formal order is required after the withdrawal of the appeal from the Abuja Division of the Court of Appeal; that for the second appeal pending at the Sokoto Division of the Court of Appeal, it arose from the decision of Election Tribunal in Governorship election in which no appeal lies to this Court. Learned senior Counsel concluded that the matter before the Court of Appeal Sokoto does not involve or deal with matters of interpretation as assumed by the Respondents/Applicants because the dissenting judgment of the Sokoto Election Tribunal is not part of the documents in support of the present application.

In his response on point of law, learned senior Counsel for the 2nd Respondent/Applicant observed that there is no law prohibiting a Respondent from compiling record of appeal where the Appellant fails to do so; that the Appellants/Applicants/Respondents having benefited from the record of appeal, cannot now turn round to oppose the application because their Notice of withdrawal of their appeal was not supported by the required record of appeal.

Starting with the relief for departure from the Rules of this Court allowing the parties to use the record of proceedings of the Court of Appeal as compiled by the 2<sup>nd</sup> Respondent/Applicant for the purpose of this appeal, it is observed that although the compiled record was made pursuant of Order 7 Rule 7(1) of the Rules of this Court with the present application on 11<sup>th</sup> February, 2010 in an interlocutory appeal from the Court of Appeal Abuja to this Court, no relief for extension of time within which to file the record was sought by the Applicant. Taking into consideration that the Appellants/Applicants/Respondents' Notice of appeal in their interlocutory appeal was filed at the Court of Appeal on 14<sup>th</sup> December, 2009, going by sub-rule (1) of Rule 7 of Order 7 of the Rules of this Court, if the Notice of appeal was not accompanied by the record of appeal, the Appellants/Applicants/Respondents shall have 14 days from the date of

filing their Notice of Appeal to prepare and file the record in the manner specified under the rule. Since the Appellants/Applicants/Respondents have not complied with the rule within the time allowed and having regard to the right of the 2<sup>nd</sup> Respondent/Applicant also to prepare and file supplementary record under sub-rule (2) of Rule 7 within 7 days of being served with the record by the Appellants/Applicants/Respondents, the steps taken by the 2<sup>nd</sup> Respondent/Applicant in bringing the present application is quite in order. However, as a party preparing the record of appeal where the Appellants/Applicants/Respondents have failed to do so in their interlocutory appeal, the 2<sup>nd</sup> Respondent/Applicant is bound to act in accordance with the requirements of the rule where the record is prepared outside the time given under the rule being 14 days from date of filing the Notice of appeal which is 14 December, 2009. Therefore to comply with the requirement of the rule, the reliefs sought in the present application for departure from the rules ought to have included a relief for extension of time within which to file and serve the record and to deem the record filed on 12<sup>th</sup> February, 2010, as duly filed and served. Thus, in the absence of this essential relief for extension of time within which to file and/or receive the record of appeal filed in this Court on 11<sup>th</sup> February, 2010, the present relief to simply file the record and accept the same for the purpose of the appeal without an enlargement of time within which to do so, is incompetent and the same is hereby struck-out.

The consequence of striking-out the application for departure from the rules of this Court is quite obvious. The Appellants/Applicants/Respondents' appeal tagged 'SC.32/2010' in the absence of the record to facilitate the appeal being entered in this Court to allow its being prepared and used for the withdrawal of the appeal or otherwise dealt with by the Respondents to the appeal, is not properly before this Court. What remains is only the Notice of Appeal as filed by the Appellants/Applicants/Respondents at the Court of Appeal on 14<sup>th</sup> December 2009 without the number of appeal in this Court. Meanwhile, having regard to the determination of this application for departure from the rules of this Court filed on 11<sup>th</sup> February, 2010, the activities of the parties in this interlocutory appeal, have shifted to the Court of Appeal Abuja Division where the bare Notice of appeal is lodged.

Next for determination in this application is the second relief for an order staying proceeding at the Court of Appeal Abuja Division in appeal No.CA/A/276/08 which relates to and concerns the subject matter of this appeal until the final determination of this appeal. The law is well settled that there must be a valid appeal pending in Court before an application for stay of proceedings pending determination of an appeal can be considered by taking into consideration the substance of the grounds of appeal contained in the notice of appeal. Where the appeal is frivolous or oppressive, the application will be refused. See *Olawunmi v. Mohammed* (1991) 4 N.W.L.R. (Pt. 186) 516; *National Bank of Nigeria Ltd. v. Nigerian External, Telecommunications Ltd* (1986) 3 N.W.L.R. (Pt. 31) 667 and *General Oil Ltd. v. Oduntan* (1990) 7 N.W.L.R. (Pt. 163) 423. It is also the law that such application for stay of proceedings pending appeal can only be granted where special and exceptional circumstances exist. See *Akilu v. Fawehinmi* (No. 2) (1989) 2 N.W.L.R. (Pt.102) 122. Stay of proceedings pending appeal may also be granted where preserving the RES or subject matter of the appeal is the basis of the application to avoid a situation if the appeal succeeds it will not be rendered nugatory. See *Kigo (Nig.) Ltd. v. Holman Bros (Nig.) Ltd.* (1980) 5-7 S.C. 60. Although in the present application the need to preserve the res or subject matter of the appeal was urged as the main reason for the application, it is difficult to perceive any threat to the RES in this interlocutory appeal against the refusal of the Court of Appeal to allow the Appellants/Applicants/Respondents to amend their Notice of appeal by filing additional grounds of appeal raising fresh issues in the appeal which was in fact opposed by the present 2<sup>nd</sup> Respondent/Applicant. As the successful party in the ruling of the Court below now on appeal in this Court refusing the Appellants/Applicants/Respondents' application, it is difficult to see how stay of proceedings in the Court below will benefit the present 2<sup>nd</sup> Respondent/Applicant who was satisfied with the ruling and against which he has not appealed. In addition, the 2<sup>nd</sup> Respondent/Applicant himself has disclosed in no uncertain terms in this matter that he had challenged by a motion on Notice fixed for hearing on 3<sup>rd</sup> May, 2010, the alleged withdrawal of the appeal by the Appellants/Applicants/Respondents, at the Abuja Court of Appeal. The steps taken by the 2<sup>nd</sup> Respondent/Applicant who would have rather urged for the expedi-

tious disposition of that motion so as to know the status of the appeal, is rather strange. Therefore even for the purpose of allowing the Court below the opportunity to determine the status of the Appellants/Applicants/Respondents' appeal which gave rise to the interlocutory appeal from which this application was filed, I see no special and exceptional circumstances in the present application. The relief B is refused and the same is dismissed.

The third and last relief sought in the present application is for an order staying proceedings at the Court of Appeal Sokoto Judicial Division in Appeal No. CA/S/EP/GOV/10/09, which relates to the subject matter of this appeal until the final determination of the appeal C by the apex Court. Let me say it quite clearly that there is no appeal from any decision of the Court of Appeal Sokoto pending in this Court in this matter. The only appeal pending in this Court is the one D filed by the Appellants/Applicants/Respondents on 14<sup>th</sup> December, 2009 at the Court of Appeal Abuja Division which arose from the decision of the Federal High Court Abuja in a pre-election matter instituted by the Appellants/Applicants/Respondents by Originating Summons. A condition precedent for a Court to assume jurisdiction to consider any application for stay of proceedings pending the determination of appeal, is the existence of a valid appeal itself. Where E there is no appeal of any kind against any decision of the Court of Appeal Sokoto, this Court is without jurisdiction to consider and grant the 2<sup>nd</sup> Respondent/Applicant's application.

Although all the Respondents/Applicants in this matter have F painted a picture showing that what is at stake in both appeals between the parties pending at the Court of Appeal Abuja Division and the Court of Appeal Sokoto Division is the battle between the 1<sup>st</sup> Appellant/Applicant/Respondent and the 2<sup>nd</sup> Respondent/Applicant to G occupy the seat of the Governor of Sokoto State which is the RES or subject matter in both appeals, the two matters are entirely different in law. While appeal No. CA/A/276/08 pending at the Court of Appeal Abuja has its root or origin from the decision of the Federal High Court Abuja in exercise of its original jurisdiction in a pre-election H matter under Section 32(4) and (5) of the Electoral Act, 2006, appeal from which lies to the Court of Appeal and terminates at the Supreme Court, the appeal awaiting determination at the Court of Appeal Sokoto in appeal No. CA/S/EP/GOV/10/09, is clearly traced

to the Election Tribunal Sokoto decision appeal from which terminates at the Court of Appeal pursuant to the provisions of Section 246(3) of the 1999 Constitution. It can be seen quite clearly that even though the two appeals are between the same parties, the appeals are far apart in terms of their source or origin and the law governing the exercise of the respective rights of appeals by the parties aggrieved by the decisions of trial Federal High Court or the trial Election Tribunal.

The Respondents/Applicants in this matter have attempted to fuse the two separate appeals between the same parties into one by hiding behind their stand that the interpretation of the judgment of the Court of Appeal, Kaduna in appeal No. CA/K/EP/GOV/60/07 which on 11/4/2008 allowed the Appellants/Applicants/Respondents' appeal, nullified the election of the 2<sup>nd</sup> Respondent/applicant and ordered fresh election between the same candidates and political parties as contained in the statement of result, is the RES and subject matter in both appeals. This situation could indeed be so but that alone in itself, does not give this Court the jurisdiction to look into any decision of the Election Tribunal Sokoto on how it resolved the issue of the alleged interpretation of the judgment of the Court of Appeal Kaduna Division, the appeal in which by the provisions of the Constitution, terminates at the Court of Appeal. Therefore in the circumstances in which the third relief for stay of proceedings in appeal No. CA/E/EP/GOV/10/09 now pending or awaiting determination at the Sokoto Division of the Court of Appeal arose from or linked with the decision of an Election Tribunal, this Court has no jurisdiction to even look into the relief not to talk of considering it and determining it one way or the other in the absence of jurisdiction to do so. The importance of jurisdiction in the adjudicating processes of Courts was stressed by Oputa JSC in Attorney General Lagos State v. Dosunmu (1989) 3 N.W.L.R. (Pt. 111) 552-567 where he said -

*"It is essential for jurisdiction that the point to be decided is within the power off the court. The emphasis is on the expression 'power.' For jurisdiction is sometime defined as the power of the Court to entertain the pending action. Courts are creature of statutes. All our superior Courts of records are created and invested with defined jurisdiction by our Constitution."*

Yes, this Court being one of the superior Courts of record cre-



ated by the Constitution and invested with defined jurisdiction under Sections 232 and 233 thereof prescribing original and appellate jurisdiction of this Court, it in the same Constitution in the combined effects of the provisions Section 246(1) and (3) and 285 thereof that the jurisdiction of this Court in matters arising from the decisions of Election Tribunals other than the decision of the Court of Appeal in Presidential Election Petition had been ousted. See *Awuse v. Odili* (2003) 18 N.W.L.R. (Pt. 851) 116 and *Onuaguluchi v. Ndu* (2001) 7 N.W.L.R. (Pt. 712) 309. In the instant application therefore, since this Court has no jurisdiction to entertain the reliefs of stay of proceedings in the Court of Appeal Sokoto, the relief is hereby struck out.

With the determination of this last application by the 2<sup>nd</sup> Respondent/ Applicant and particularly to striking out of the third relief of stay of proceeding in the Court of Appeal Sokoto from which apparently the interim order of stay of proceedings in the same Court was made by this Court on 15<sup>th</sup> March, 2010 pending the hearing and determination of the pending applications in this matter including the last application which has just been determined, the interim order of stay given by this Court on the same date has today and now lapsed and the same order made on 15<sup>th</sup> March, 2010 is accordingly hereby vacated.

On the whole, below is the summary of the results of the applications determined in this matter.

1. In the Appellants/Applicants/Respondents application filed on 19<sup>th</sup> March, 2010 for 3 reliefs:-

(a.) Relief for accelerated hearing is granted.

(b.) With the hearing and determination of all the applications pending in this matter the interim order made by this Court on 15<sup>th</sup> March, 2010 staying proceeding in the Court of Appeal Sokoto in appeal No. CA/S/EP/GOV/10/09 had lapsed and the same is accordingly hereby vacated.

(c.) Application to dismiss or strike out all applications filed by the Respondents/Applicants in this matter is refused and same is dismissed.

2. Application by 2<sup>nd</sup> Respondent/Applicant filed on 12<sup>th</sup> March, 2010 to set aside the order of dismissal of Appellants/Applicants/Respondents appeal on 10<sup>th</sup> March, 2010

(a.) Application to set aside the order of this Court made in

Chambers on 10<sup>th</sup> March, 2010 dismissing the Appellants/Applicants/Respondents' appeal is hereby granted. The proceedings of this Court of 10<sup>th</sup> March, 2010 including the judgment are declared a nullity and the same are hereby set aside.

(b.) Reliefs 2 and 3 in this application for stay of proceedings in Abuja and Sokoto Divisions of the Court of Appeal pending the determination of this application which has just been determined, are deemed granted with the determination of the application today.

3. Application of the 2<sup>nd</sup> Respondent/Applicant filed on 10<sup>th</sup> March, 2010 for order striking out the Notice of withdrawal of the Appellants/Applicants/Respondents appeal

The granting of the order setting aside the order of this Court of 10<sup>th</sup> March, 2010 dismissing the Appellants/Applicants/Respondents' appeal has taken care of the relief in this application.

4. Application by 3<sup>rd</sup> Respondent/Applicant to set aside the order of this Court of 10<sup>th</sup> March, 2010 filed on 8<sup>th</sup> April, 2010 and 2 other reliefs for stay of proceedings in Court of Appeal Abuja and Sokoto

(a.) The application in the first relief is granted. The proceedings of this Court of 10<sup>th</sup> March, 2010, including the judgment are declared a nullity and same are hereby set aside.

(b.) Reliefs 2 and 3 having been sought in the alternative to relief 1, are therefore struck-out.

(c.) Application by the 3<sup>rd</sup> Respondent/Applicant for extension of time to file a cross-appeal having been abandoned is hereby struck-out.

5. 1<sup>st</sup> Respondents' Notice filed on 1<sup>st</sup> March, 2010 opposing the withdrawal of the Appellants/Applicants/Respondents' appeal.

This notice has been overtaken by the grant of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents/Applicants' application setting aside of the order of this Court of 10<sup>th</sup> March, 2010.

6. Application by 2<sup>nd</sup> Respondent/Applicant filed on 11<sup>th</sup> February, 2010 for departure from the rules and stay of proceedings in Court of Appeal Abuja and Sokoto Divisions

(a.) Application for departure from the rules is incompetent and same is struck-out.

(b.) Application for stay of proceedings in the Court of Appeal Abuja in appeal No. CA/A/276/08 pending the determination of appeal is

refused and the same is dismissed.

(c.) Application for stay of proceedings in the Court of Appeal Sokoto in appeal No. CA/S/EP/GOV/10/09 is struck-out as this Court has no jurisdiction to grant the same. I am not making any order on costs.

B

### ***TABAI JSC***

This Ruling is sequel to 9 Applications which details I shall set out later. But before doing so it is pertinent to state, in substance, some salient facts leading to the institution of the Action culminating in the Appeal before this Court and the afore mentioned Applications.

1. On the 14th April, 2007 the Governorship Election of Sokoto State was held. The candidates and the political parties they represented as contained in Exhibit R 8 attached to the Originating Summons were as follows:

(i) Abubakar Chika M. Sarkin Yaki	ANPP	
(ii) Muhammadu Maigari Dingyadi	DPP	
(iii) Ahmed Bello Ahmed		AD
(iv) Abdulwahab Yahaya Goronyo	UNPP	E
(v) Dr. Umar Bello		AC
(vi) Aminu A. Salah Tauma	CNPP	
(vii) I. H Abdullahi Umar Faulk	APGA	
(viii) Aliyu Magatakarda Wammako	PDP	F
(ix) Bello Ibrahim Guau	PPA	
(x) Abubakar Garba Alhaji	ADC	

2. In the result announced the 2<sup>nd</sup> Defendant/Respondent won overwhelmingly.

3. The Plaintiffs/Appellants were not satisfied with the result and so filed a Petition at the Sokoto State Election Tribunal on the sole ground that 2<sup>nd</sup> Defendant/Respondent was not properly nominated by his political party.

4. By the decision of the said Election Tribunal on the 29/10/2007 the Petition was dismissed.

5. The Plaintiffs/Appellants were not satisfied with the decision of the Election Tribunal and so proceeded on Appeal to the Court of Appeal Kaduna Judicial Division.

6. In the Judgment in CA/K/EP/GOV/60/07 delivered on the

11/4/08 the Kaduna Division of the Court of Appeal coram, Bulkachuwa, Aboki, Belgore, Gumel and Anyanwu, JJCA., allowed the Appeal, and ordered a re-run Election and made consequential Orders which turn out to have set in Motion all the controversies in this case.

B 7. In the concluding paragraphs of its Judgment the Court per Ahmed Olarewaju Belgore, JCA., made the following orders:

(i) That Judgment of the Governorship and Legislative Houses Election Tribunal sitting in Sokoto delivered on the 29th day of October, 2007 in Election Petition No. SS/EPT/GOV/1/2007 is hereby set  
C aside.

(ii) The Sokoto State Governorship Election held on the 14th day of April, 2007 is hereby  
annulled for substantial irregularities in the conduct of the Election  
D and on the 14<sup>th</sup> day of April, 2007 is hereby annulled for substantial irregularities in the conduct of the Election and on the ground that the 1<sup>st</sup> Respondent was not qualified to contest the Election as at the 14<sup>th</sup> day of April 2007.

(underlining mine)

E (iii) The Independent National Electoral Commission shall conduct fresh Governorship Election for Sokoto State within 90 days of the date hereof.

(iv) The fresh Election herein ordered shall be between the  
F same parties and Candidates as appear on Exhibit R8 (underlining mine).

(v) The Speaker of Sokoto State House of Assembly shall be sworn-in immediately, as the Acting Governor of Sokoto State pending the outcome of the fresh Election herein ordered.

G (vi) Costs assessed at N50,000.00 (Fifty Thousand Naira) only is awarded against the 1st and 2<sup>nd</sup> Respondents.

8. In apparent belief that the 2<sup>nd</sup> Respondent was, by reason of the 2<sup>nd</sup> Order above disqualified from contesting as a candidate in the ordered re-run Election the Plaintiffs/Appellants caused this Originating Summons to issue at the Abuja Judicial Division of the Federal  
H High Court on the 25<sup>th</sup> of April, 2008. They claimed the following reliefs:

(i) A DECLARATION that neither the 1st Defendant nor any of its officers can lawfully issue fresh nomination forms to the 2<sup>nd</sup>

Defendant or allow the 3<sup>rd</sup> Defendant to nominate and or sponsor any candidate(s) for the fresh Elections ordered by the Court of Appeal in its decision of 11/4/08 in CA/K/EP/GOV/60/07.

(ii) A DECLARATION that the 2<sup>nd</sup> Defendant having been declared not qualified to contest the Sokoto State Gubernatorial Elections of 14/4/07 by virtue of invalid nomination and double nomination, he cannot lawfully contest in the fresh Elections ordered by the Court of Appeal in its decision in CA/K/EP/GOV/08 by virtue of his said disqualification. B

(iii) A DECLARATION that the 3<sup>rd</sup> Defendant does not have the right to nominate or put forward the 2<sup>nd</sup> Defendant or any other candidate for the fresh gubernatorial Elections ordered to be conducted by the 1<sup>st</sup> Defendant in Sokoto State by virtue of the decision in CA/K/EP/GOV/60/ 2007 Alhaji Muhammad Maigari Dingyadi & 1 Or. v. Aliyu Magatakarda Lamakko & 42 Ors on 11/4/07. C D

(iv) A DECLARATION that the list of candidates ordered by the Court of Appeal in its decision of 11/4/08 to contest the fresh Elections as contained in exhibit R8 in Alhaji Muhammadu Maigari Dingyadi & 1 Or v. Aliyu Magatakarda Wamakko & 42 ORS Appeal No. CA/K/EP/GOV/60/2007, does not contemplate or include a person judicially and legally disqualified from contesting the Election in the self same decision which is a subsisting Judgment of a competent Court. E

(v) A DECLARATION that the 3<sup>rd</sup> Defendant, its gubernatorial candidate for the Elections of 14/4/07 having been declared not qualified to contest the said Elections, cannot now nominate fresh candidate(s) for the fresh Elections, the time statutorily stipulated for the nomination of candidates for the gubernatorial Election having elapsed. F G

(vi) A PERPETUAL INJUNCTION restraining the 1<sup>st</sup> Defendant from allowing the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to contest in the fresh Elections ordered by the Court of Appeal in CA/K/EP/GOV/60/ 07, the Court of Appeal having held that the 2<sup>nd</sup> Defendant was not qualified to contest the gubernatorial Election as at 14/4/07, and the time for nomination of candidates having elapsed well before 14/4/ 07. H

(vii) AN ORDER OF MANDATORY INJUNCTION setting aside any or all steps taken by the 1<sup>st</sup> Defendant to enable the 2<sup>nd</sup>

and 3rd Defendants to participate in the fresh Elections ordered by the Court of Appeal in its decision of 11/4/ 08 IN CA/K/EP/GOV/60/07.

9. The grounds upon which the reliefs were sought were:

(i) The Court of Appeal Kaduna in its Judgment of 11/4/08 in Alhaji B Muhammadu Maigari Dingyadi & Anor. v. Aliyu Magatakarda Wamakko & 42 Ors. Appeal No.CA/K/EP/GOV/60/2007 nullified the Sokoto State gubernatorial Elections of 14/4/07.

a. The basis upon which the said Election was nullified was C that the 1st Respondent therein (2nd Defendant/Respondent herein) was as at the date of the Election not qualified to contest the gubernatorial Election.

(ii) That the Court of Appeal further in its said Judgment ordered as follows:

D a. That the Appeal has merit and is hereby allowed.

b. That Judgment of the Governorship and Legislative Houses Election Tribunal sitting in Sokoto delivered on the 29th day of October, 2007 in Election Petition No. SS/EPT/GOV/ 1/2007 is hereby set aside.

E c. The Sokoto State Governorship Election held on the 14th day of April, 2007 is hereby annulled for substantial irregularities in the conduct of the Election and on the ground that the 1<sup>st</sup> Respondent was not qualified to contest the Election as at the 14th day of April, 2007.

F d. The Independent National Electoral Commission shall conduct fresh Governorship Election for Sokoto State within 90 days of the date hereof.

e. The fresh Election herein ordered shall be between the G same parties and candidates as appear on Exhibit R8.

f. The Speaker of the Sokoto State House of Assembly shall be sworn in, immediately, as the acting Governor pending the outcome of the fresh Election herein ordered.

g. Costs assessed at N50,000.00 is awarded against the 1st H and the 2nd Respondents.”

(underlining ours)

(iii) By virtue of the said decision the 2nd Defendant having not been qualified to contest the 14/4/07 Elections for the reasons stated in (2) above, cannot put himself forward or be put forward as

a candidate of the 3rd Defendant to contest the fresh Elections ordered in consequence of the nullification of the 14/4/07 Election.

(iv) By virtue of the said Judgment the 2nd Defendant having been declared not qualified the 3rd Defendant cannot put forward any other candidate for the Election the time for nomination having elapsed before 14/4/07. B

(10) The re-run Election as ordered took place on the 24th of May, 2008 with the Plaintiffs/ Appellants participating.

(11) In the result announced the 2nd Respondent scored 562,395 (five hundred and sixty-two thousand, three hundred and ninety-five) votes while the 1st Plaintiff/ Appellant scored 124,046 (one hundred and twenty- four thousand and forty-six) votes. C

(12) The Plaintiffs/ Appellants were again aggrieved by the outcome of the re-run Election and on the 20/6/08 filed a Petition at the Governorship and Legislative Houses Election Tribunal at Sokoto. D In the said Petition the 2nd Respondent herein, that is, Aliyu Magatakarda Wamakko, was the 1<sup>st</sup> Respondent, the Peoples Democratic Party the 2<sup>nd</sup> Respondent and INEC the 3rd Respondent. There were 24 other Respondents.

The grounds of the Petition as can be gleaned from a number of paragraphs therein is that the 2nd Respondent was, by reason of the 2nd Order of the Judgment of the Court of Appeal in CA/K/EP/GOV/60/2007 delivered on the 11<sup>th</sup> of April 2008, disqualified from contesting the ordered Re-run Election. E

In Paragraph 4 of the Petition the Plaintiffs/ Appellants averred: F

*“4. The 1<sup>st</sup> Respondent was a candidate at the said Election despite being adjudged not qualified to contest the Election by the Court of Appeal in their Judgment delivered on 11<sup>th</sup> April, 2008 in Appeal No. CA/K/EP/GOV/60/2007.”* G

See also Paragraph 10 of the Petition.

And specifically in parts of Paragraph 12 of the Petition the Plaintiffs/Petitioners/Appellants pleaded as follows:

**“12 NON-QUALIFICATION OF THE 1<sup>ST</sup> RESPONDENT H**

(i) The Election of 24th of May, 2008 was the fresh Election ordered by the Court of Appeal in its Judgment delivered on the 11<sup>th</sup> of April, 2008 in Appeal No. CA/K/ EP/GOV/60/07.

(ii) Appeal No. CA/K/EP/GOV/60/07 was an Appeal chal-

lenging the Judgment of the National Assembly/Governorship and Legislative Houses Election Petition Tribunal sitting at Sokoto in Petition No. SS/EPT/GOV/1/07 filed by the Petitioners herein in respect of the Gubernatorial Election of 14th April, 2007.

(iii) .....

B (iv) The Court of Appeal in its Judgment delivered on the 11<sup>th</sup> of April, 2008 allowed the Appeal, holding in its Judgment as follows:

C “2. The Sokoto State Governorship Election held on the 14th day of April, 2007 is hereby annulled for substantial irregularities in the conduct of the Election and on the ground that the 1st Respondent was not qualified to contest the Election as at the 14<sup>th</sup> day of April, 2007.

D 3. The Independent National Electoral Commission shall conduct fresh Governorship Election for Sokoto State within 90 days of the date hereof.

4. The fresh Election herein ordered shall be between the same parties and candidates as appear in Exhibit R8.

(v) .....

E (vi) .....

(vii) .....

(viii) .....

F (ix) The nomination of candidates relevant for the Election held on 24th May, 2008 was the nomination in place for the Election of the invalid nomination of the 1st Respondent by the 2nd Respondent.

G (x) The 1st Respondent knowingly contested the Election of the 24th of May on the basis of his already adjudged invalid nomination as he was fully aware of the terms of the Court of Appeal Judgment of the 11<sup>th</sup> April, 2008 in Appeal No. CA/K/EP/GOV/60/2007.

H (xi) All the Respondents herein as well as the general populace of Sokoto State were at the time of the Election of the 24th May, aware of the terms of the Judgment of the Court of Appeal of 11<sup>th</sup> April, 2008, in Appeal No. CA/K/EP/GOV/60/2007 and/or the circumstances of the 1<sup>st</sup> Respondent’s disqualification.

(xii) That immediately after the 1st and 2nd Respondents began media campaigning asserting that they would contest in the fresh Elections despite the Court of Appeal Judgment.



(xiii) They purported to place reliance on one of the consequential orders in the Judgment where it was stated:

*“The fresh Election herein shall be between the same parties and candidates as appear on Exhibit R8.”*

whilst ignoring the fact that the same Judgment had unequivocally held in the sections preceding the above quotation that the 1st Respondent was not qualified to contest the Election of 14th April 2007 by virtue of the Electoral Act in the process of his nomination for the said Election.

(xiv) The said Exhibit R8 is the result of the said nullified Elections of 14th April, 2007.

(xv) In proof of the foregoing averments the Petitioners plead and shall at the hearing of this Petition rely on the following documents:

(a) A Certified True Copy of the Judgment of the Court of Appeal.

(b) Various newspaper publications.

(c) A Certified True Copy of Exhibit R8.”

In yet another paragraph 12 of the Petition, the Plaintiff/ Petitioners/Appellants alleged invalid return of the 1st Defendant as follows:

*“The 4th Respondent invalidly returned 1<sup>st</sup> Respondent as duly elected at the Election instead of 1st Respondent who scored majority of lawful votes and scored at least one quarter of the valid votes cast in at least two thirds of all the Local Government Areas of Sokoto State.”*

And in Paragraph 13 of the Petition, the Plaintiffs/Petitioners/Appellants set out the detailed scores by the parties in each of the 23(twenty three) Local Government Areas describing therein the scores of the 1st and 2nd Respondents as invalid by virtue of non-qualification.

Finally in the concluding Paragraph 17 (seventeen) of the Petition the Plaintiffs/Petitioners/Appellants prayed:

*“1. THAT IT BE DETERMINED that the 1st Respondent was not qualified to contest as Governorship Candidate of the Peoples Democratic Party for Sokoto State in the Election held on 24th May, 2008.*

*2. THAT IT BE DETERMINED that the 1st Respondent was*

*not validly nominated as the governorship candidate of the Peoples Democratic Party for Sokoto State in the Election held on 24th May, 2008.*

B 3. *THAT IT BE DETERMINED that the 562,395 votes recorded as valid votes cast for the 1st Respondent by the Collation Officer at the governorship Election held in Sokoto State on 24th May, 2008 are void and wasted, the candidate having not been qualified to contest the Election on the Platform of Peoples Democratic Party or at all.*

C 4. *THAT IT BE DETERMINED that the 1st Petitioner scored majority of lawful valid votes at the Governorship Election held on 24th May, 2008 and also scored not less than one quarter of the total valid votes cast in at least two thirds of the Local Government Areas of Sokoto State.*

D 5. *THAT IT BE DETERMINED that the 1st Petitioner is entitled to be returned by the 3<sup>d</sup> and 5<sup>th</sup> Respondents as having been duly elected Governor of Sokoto State in the governorship Election held on 24th May, 2008.*

E 6. *CONSEQUENTIAL ORDER that the 1st Petitioner be sworn in office forthwith by the Chief Judge of Sokoto State."*

F The Respondents filed their replies to the Petition. There after the Petition was diligently prosecuted by the Plaintiffs/ Petitioners/ Appellants and same vigorously defended and fought to its conclusion at the Governorship and Legislative Houses Election Tribunal Sokoto.

G In its majority Judgment on the 18<sup>th</sup> of February, 2009 the Tribunal dismissed the Petition. The reasons for its dismissal of the Petition can be gleaned from some parts of the Judgment. For instance at Page 66-67 of the Judgment, the Tribunal had this to say:

H *"Now the resolution of this issue lies in examining the materials before the Tribunal. These include the Judgment of the Court of Appeal and the enrolled orders as well as the originating process at the Federal High Court. It is not in dispute that the Federal High Court case was in relation to the Judgment of the Court of Appeal despite which existence the Petitioners filed this Petition. They however sought a distinction in the High Court case being a Pre-Election matter. That may well be the case. But the legal position is that it is not open for a party to pursue both rights provided for in Section 32*

*of the Electoral Act (pre-Election) and Section 145 (post Election) all at the same time. The Petitioners have the choice to either pursue the matter at the Federal High Court to conclusion as Pre-Election matter or pursue the Post-Election matter at the Tribunal. It is legally not open to them to pursue both avenues to achieve the same objective to wit:- disqualification of the 1st Respondent. By doing so, the Petitioners cannot escape being indulgent in abuse of Court process. They are caught up by the well laid down judicial authorities on the matter such as Attorney General of Anambra State v. Uba (2005) All FWLR (Pt. 277) Page 909...*

After examining the decision in A.G Anambra State v. Uba (supra) the Tribunal at Page 68 of its Judgment said:

*"From the facts before us we are satisfied that the filing of this Petition while the case at the Federal High Court was actively being pursued is a clear case of abuse of Court process and hereby accordingly find against the Petitioners."*

The Plaintiffs/Petitioners/Appellants were not satisfied with the decision of the Election Tribunal and proceeded on Appeal to the Court of Appeal via their Notice of Appeal dated and filed on the 5<sup>th</sup> of March, 2009. It is evident that they have since been diligently prosecuting the Appeal and which is still pending at the Sokoto Division of the Court of Appeal, in Appeal No. CA/S/EP/GOV/10/09.

Meanwhile the Plaintiffs/Petitioners/Appellants have also been vigorously prosecuting the earlier suit No. FHC/ABJ/CS/260/08 at the Federal High Court Abuja. In its Judgment on the 17<sup>th</sup> of July, 2008 the Court per A. Bello J., declined Jurisdiction to entertain the suit and struck it out for incompetence. The Plaintiffs/Petitioners/Appellants were aggrieved by the said Judgment and proceeded on Appeal to the Abuja Judicial Division of the Court of Appeal. The Notice of Appeal was filed on the 21st of July, 2008.

By a Motion filed on the 4th of November, 2008 the Plaintiffs/ Petitioners/Appellants sought the leave of the Court of Appeal Abuja Division to amend the Notice of Appeal so as to raise and argue fresh point of law not raised at the Federal High Court. The proposed Amended Notice of Appeal was attached to the Affidavit in support of the Application as Exhibit MD 2. The Respondents filed a Counter-Affidavit. In its Ruling on the 30th of November, 2009, the Court of Appeal refused the Application which was accordingly dis-

missed.

The Plaintiffs/Petitioners/Appellants were not satisfied with the Ruling of the Court of Appeal of the 30th of November, 2009 and so proceeded to the Supreme Court on Appeal. The Notice of Appeal was dated and filed on the 14th of December, 2009. For the Reliefs B sought, the Plaintiffs/Appellants urged this Court to:

*“(a) Allow the Appeal and grant the reliefs/prayers sought by the Appellants at the lower Court.*

*(b) Invoke the inherent powers of this Court under Section C 22 of the Supreme Court Act and determine the substantive Appeal on the merits.”*

The above conspectus tells the story of the two suits, each initiated by the Plaintiffs/Petitioners/Appellants against the same Defendants/Respondents and their progress through the judicial process before the Notice of Withdrawal of Appeal and the spate of other Applications which ensued.

The Notice of Withdrawal of Appeal itself was stated to be brought pursuant to Order 8 Rule of the Supreme Court Rules 1999. It was dated the 22nd of January, 2010 and was filed on the 12th E February, 2010.

The first reaction to this Notice of Withdrawal of Appeal came from the 1st Respondent (INEC). It filed a Notice of Opposition to Withdrawal of Appeal under Order 8 Rule 6 (4) of the Supreme Court Rules as Amended in 1999. This Motion opposing the withdrawal of the Appeal was dated 26th February, 2010 and filed on the 1<sup>st</sup> of March, 2010. The grounds of opposition to the withdrawal were stated to be that the Notice of Withdrawal was filed in bad faith to defeat the cause of justice and that it was against their interest and F the interest of justice to allow the withdrawal.

The 2<sup>nd</sup> Respondent herein also filed a Motion on the 10<sup>th</sup> of March, 2010 praying this Court for an Order striking out the Notice of Withdrawal of the Appeal. Among the grounds of the Application was that the Notice of Withdrawal was, apart from being premature, H an abuse of the process of this Court.

Despite the above Applications opposing the withdrawal of the Appeal, the Notice of Withdrawal was taken by this Court in Chambers on the 10th of March, 2010 and the Appeal dismissed. This was followed by a number of Applications some of which particulars I

shall state hereafter. Meanwhile on the 15/3/2010 following oral Applications by Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents which were however opposed by Learned Counsel for the Appellants, the proceedings between the parties at the Sokoto Division of the Court of Appeal were stayed pending the determination of the relevant Applications before this Court. B

With respect to the Applications there were altogether about 9 Motions as at the time of the proceedings of the 19<sup>th</sup>, 20<sup>th</sup>, and 21<sup>st</sup> of April, 2010. Of these, one was filed by the Plaintiffs/ Appellants, three by the 1<sup>st</sup> Defendant/Respondent, three by the 2<sup>nd</sup> Defendant/ Respondent and two by the 3<sup>rd</sup> Defendant/ Respondent. C

The 1<sup>st</sup> Defendant/Respondent's Motion dated and filed on the 23/3/2010 was withdrawn and same was struck out. The 3<sup>rd</sup> Defendant/Respondent's Motion dated the 4/3/2010 was not moved. The remaining seven Motions were argued. I hereunder set out the Motions and the prayers sought in each of them as follows: D

#### A. MOTION BY THE APPELLANTS

The Appellants' Motion was dated the 18<sup>th</sup> of March, 2010 and was filed on the 19<sup>th</sup> of March, 2010. It contained three main prayers the first of which was withdrawn. The other two reliefs were as follows: E

(2) AN ORDER of this Honourable Court setting aside or otherwise vacating its earlier Order made/dated 15<sup>th</sup> day of March, 2010, which Order stayed the delivery of the Judgment of Court of Appeal in Appeal No. CA/S/GOV/10/ 2009 which was made pending the hearing and determination of the Motions filed in the Supreme Court and adjourned to the 1<sup>st</sup> day of April, 2010 for hearing. F

(3) AN ORDER of this Honourable Court dismissing or otherwise striking out all other pending Applications filed by any of the other Respondents to the Appeal of the Appellants/ Applicants which was dismissed on 10<sup>th</sup> March, 2010 but more specifically an order dismissing or otherwise striking out: G

(i) 2<sup>nd</sup> Respondent/Applicant's -

(a) Departure from the Rules H

(b) Stay of Proceedings in Appeal No. CA/A/276/08 from which the Appeal to this Court emanated.

(c) Stay of Proceedings in CA/S/EP/GOV/10/09 which is an Election Petition Appeal and in respect of which the Court of Appeal

is the final Court of Appeal.

(d) Accelerated hearing of the Appeal

(e) Omnibus prayer.

(ii) 1<sup>st</sup> Respondent's undated Motion filed on 1/3/10 in opposition to withdrawal of Appeal pursuant to Order 8 Rule 6(4) Supreme Court Rules;

(iii) 3rd Respondent's Motion dated 4/3/10 filed same day seeking -

(a) extension of time for Respondent/ Appellant to file Cross-Appeal

(b) Order deeming Notice of Cross-Appeal filed duly filed and served.

#### B. MOTIONS BY THE FIRST RESPONDENT

(1) Motion dated 26th February, 2010 and filed on the 1<sup>st</sup> of March, 2010 wherein the 1<sup>st</sup> Respondent opposed the Appellant's Notice of Withdrawal of the Appeal of the Appellants the ground being that the said Notice of Withdrawal was filed in bad faith to defeat the cause of justice.

(2) Motion dated and filed on the 23<sup>rd</sup> of March 2010 for an Order directing the parties to file written briefs or written addresses in respect of all the pending Applications in this matter. (This Motion was withdrawn and was struck out)

(3) Motion dated and filed on the 29<sup>th</sup> of March 2010 for:

(i) AN ORDER of this Honourable Court preserving the Res and/or subject matter of this Appeal which is the Sokoto State Governorship 2007 and 2008 Election and Re-Election dispute.

(ii) AN ORDER of this Honourable Court directing the Court of Appeal Sokoto to suspend and/or stay the delivery of Judgment in Appeal No. CA/S/EP/GOV/10/09 on the same subject matter pending the completion of investigation into serious allegations against the Honourable President of the Court of Appeal and the Honourable Justices hearing the Appeal.

#### C. MOTIONS BY THE 2ND RESPONDENT

(1) Motion dated and filed on the 11/2/2010 for:

(i) AN ORDER granting departure from the Rules of this Honourable Court by,

(a) Allowing and/or directing parties to make use of the Record of Proceedings of the lower Court as compiled by the Appli-

cant for the purpose of this Appeal.

(b) Accepting for the purpose of this Appeal the Record of Proceedings of the lower Court as compiled by the Applicant, with liberty to any party to file a supplementary Record if he considers that the Record as compiled by the Applicant is inaccurate/inadequate. B

(ii) AN ORDER Staying Proceedings at the Court of Appeal Abuja Judicial Division in Appeal No. CA/A/276/08 which relates to and concerns the subject matter of this Appeal until the final determination of this Appeal. C

(iii) An Order Staying Proceedings at the Court of Appeal, Sokoto Judicial Division in Appeal No. CA/S/EP/GOV/10/09 which relates to the subject matter of this Appeal until the final determination of the Appeal by the apex Court.

(iv) AN ORDER of accelerated hearing of this Appeal. D

(2) Motion dated and filed on the 10th of March, 2010 by the 2nd Respondent for:

(i) AN ORDER striking out Notice of Withdrawal of the Appeal filed by the Appellants dated 22nd January, 2010 and filed on the 12<sup>th</sup> February pursuant to Order 8 Rule 6 of the Supreme Court Rules 1999. E

(3) Motion dated and filed on the 12th of March 2010 which prayed for:-

(i) AN ORDER setting aside the ex parte Order made by this Honorable Court in Chambers on the 10th of March, 2010. F

(ii) AN ORDER preserving the res and/or subject matter of the Applicant's Application dated 11<sup>th</sup> February 2010 and already fixed for 15<sup>th</sup> March, 2010.

(iii) Pursuant to (2) supra, all Order directing both the Court of Appeal Abuja and Sokoto Judicial Divisions to stay the proceedings in Appeal No. CA/A/276/08 and CA/S/EP/ GOV/10/09 respectively until the determination of Applicant's Application dated 11<sup>th</sup> March, 2010 already served on both Courts. G

#### D. MOTIONS BY THE 3RD RESPONDENT H

(1) Motion dated and filed on the 4th of March, 2010 for -

(i) AN ORDER extending the time for the (3rd) Respondent/Applicant to file a Cross-Appeal in Appeal No. SC.32/2010 pending before this Honorable Court.

(ii) AN ORDER deeming the Notice of Cross Appeal in terms of Exhibit A attached hereto as duly filed and served appropriate fees having been paid. (This Motion was not moved and is therefore not considered in this Ruling)

B (2) Motion dated 7<sup>th</sup> April, 2010 and filed on the 8<sup>th</sup> of April, 2010 praying for:

(i) AN ORDER setting aside the Notice of the ex-part Order made by this Honourable Court in Chambers on the 10<sup>th</sup> of March, 2010 and restoring the Appeal back to the Cause List.

C IN THE ALTERNATIVE

(ii) AN ORDER setting aside the Notice of Withdrawal of the Interlocutory Appeal dated 22<sup>nd</sup> January, 2010 filed on the 12<sup>th</sup> February, 2010 by the Appellants Respondents/Respondents in SC/32/2010 as same is a gross abuse of the process of this Honorable Court D having regard to CA/S/EP/GOV/10/09 pending before the Court of Appeal, Sokoto Judicial Division on the same subject matter, same issue and same reliefs and an order dismissing both CA/S/ EP/GOV/10/09 and CA/A/276/09 in the circumstances.

E (iii) AN ORDER of this Honourable Court directing the Court of Appeal Sokoto to suspend and/or stay the delivery of the Judgment in CA/S/EP/GOV/10/09 pending the hearing and determination of either prayer 1 and the alternative prayer 2 above in this Motion by this Honorable Court.

F The Applications and addresses of Counsel for the parties had two main issues in focus. The first pertains to the Notice of Withdrawal of Appeal dated the 22<sup>nd</sup> of January, 2010 and filed on the 12<sup>th</sup> February, 2010. The second issue in focus was whether having regard to the facts and circumstances of the case the proceedings G before the Court of Appeal Sokoto be stayed pending the determination of the Appeal before this Court.

With respect to the 1<sup>st</sup> issue of Notice of Withdrawal of the Appeal and the resultant dismissal of the Appeal Leaned Senior Counsel for the Plaintiffs/Appellants submitted in substance that this Court H having pronounced the dismissal of the Appeal, it can no longer be resuscitated. For this submission, Learned Counsel relied on Majekodunmi v. WAPCO (1992)1 NWLR (Pt. 219) 564 at 577 and Ezomo v. A.G Bendel State (1986) 4 NWLR (Pt.



It was Counsel's further submission that the matter being a Governorship Election matter and for which the Court of Appeal is the final Appellate Court, this Court cannot intervene.

Reliance was placed in *Umanah v. Attah* (2006) 9 S.C. 151; (2006) 17 NWLR (Pt. 1009) 503-528.

Learned Counsel for the 1<sup>st</sup> Respondent referred to their Application of the 1st of March, 2010, opposing the withdrawal of the Appeal and pointed out that once the matter was adjourned to the 15/3/2010 both Applications ought to have been taken on the 15/3/2010. Learned Counsel argued that if the attention of this Court had been drawn to the Motion opposing the withdrawal of the Appeal, it would not have dismissed the Appeal. It was also argued that the termination of the Appeal was contrary to Order 8 Rule 6 (4) of the Rules of this Court. Learned Counsel for the 2nd and 3rd Respondents argued in the same vein as the 1<sup>st</sup> Respondent.

On this issue Learned Counsel for the Plaintiffs/ Appellants gave the impression that once an Appellant decides not to prosecute the Appeal any further and pursuant thereto files a Notice of Intention to withdraw, the Court is bound to terminate the Appeal either by striking it out or dismissing it. I do not think that this submission is supported by the provisions of Order 8 Rule 6 of the Supreme Court Rules as Amended in 1999 on which both the Applicants and the Respondents relied. It is pertinent to examine the said provision which says:-

*"6(1) An Appellant may at any time before the Appeal is called on for hearing serve on the parties to the Appeal and file with the Registrar a notice to the effect that he does not intend further to prosecute the Appeal."*

*(2) If all parties to the Appeal consent to the withdrawal of the Appeal without Order of Court, the Appellant may file in the Registry the document or documents signifying such consent and signed by the parties or by their legal representatives and the Appeal shall be struck out of the list of the Appeal by the Court and in such event any sum lodged in Court as security for costs of the Appeal shall be paid out to the Appellant."*

*(4) If all the parties do not consent to the withdrawal of the Appeal as aforesaid, the Appeal shall remain on the list, and shall come on for hearing of any*

*issue as to costs or otherwise remaining outstanding between the parties and for the making of an order as to the costs of Appeal.”*

Firstly there was nothing on record to show that all the parties to the Appeal consented to its withdrawal as stipulated in Order 8 Rule 6(2). No document or documents signifying such consent and signed by the parties or their legal representatives was filed in the Registry of this Court. Rather the clear evidence is that opposing the withdrawal as demonstrated in the Motions filed by the 1<sup>st</sup> Respondent on the 1<sup>st</sup> March, 2010 and 2<sup>nd</sup> Respondent on 10<sup>th</sup> March, 2010. Secondly, by virtue of the provisions of Order 8 Rule 6(4) where all the parties do not consent to the withdrawal of the Appeal, then the Appeal ought to and should remain on the list for the hearing and determination of any issue as to costs or otherwise remaining outstanding between the parties.

Thus under the provisions of Order 8 Rule 6 of the Supreme Court Rules, 1999 (as Amended) the mere filing of a Notice of Withdrawal of an Appeal, without more, does not automatically entitle the Court to terminate the Appeal. In the face of the clear absence of consent by the Respondents to the withdrawal of the Appeal, the Appellants cannot be said to have met the requirements of Order 8 Rule 6 of the Supreme Court Rules, 1999 (as Amended) to warrant the termination of the Appeal.

There is even a more fundamental question on this issue of the withdrawal of the Appeal. In reaction to the Appellants’ Notice of Intention to withdraw the Appeal, the 1<sup>st</sup> Respondent filed a Motion on the 1/3/2010 opposing the withdrawal. The 2<sup>nd</sup> Respondent also filed a Motion on the 10/3/2010 opposing the withdrawal. At all material times, the case had been fixed for the 15/3/2010 for hearing and on which date the Respondents would have had the opportunity of contesting the withdrawal. Curiously the Notice of intention to withdraw the Appeal found itself on the Cause List of this Court sitting in chambers on the 10/3/2010. And more curiously none of the two Motions opposing the withdrawal were included in the Cause List. And so on the 10/3/ 2010 this Court unaware of the two Motions opposing the withdrawal and dismissal of the Appeal and the fact that the matter had earlier been fixed for the 15/3/2010, granted the withdrawal and dismissed the Appeal. That on the 10/3/2010 this Court was not aware of these facts is apparent from the Ruling of the

Court. No mention was made of any of the two Motions. And there was no indication that this Court was aware that the matter had already been fixed for the 15/3/2010.

*I agree entirely with the contention of the Respondents that had this Court been aware of the existence of any of the Motions opposing the withdrawal and the fact that the matter had been fixed for the 15/3/2010, it would not have granted the withdrawal and dismissal of the Appeal. In my view the decision of this Court arrived at without reference to the Motions opposing the withdrawal of the Appeal and/or without hearing from the Respondents who had indicated their opposition thereto is clearly a decision in violation of the Respondents rights of fair hearing guaranteed in Chapter (IV) of the Constitution. It is settled law that any decision of a Court arrived at in violation of the fundamental rights of fair hearing of a party against whom it is made cannot be a valid decision and should be declared a nullity. For this principle see Oyejemi v. Commissioner for Local Government Kwara State (1992) 2 NWLR (Pt. 226) 161 at 685; Okafor v. A-G Anambra State (1991) 7 S.C. (Pt.II) 138; (1991) 6 NWLR (Pt. 200) 659 at 678-679. And where the decision of a Court is a nullity, as in the instant case, the Court that made it has the inherent power to set it aside. See Okafor v. A.G. Anambra State (supra); Adegoke Motors Ltd. v. Adesanya (1989) 5 S.C. 133; (1989) 3 NWLR (Pt. 109) 250 at 273; Obimonure v. Erinoshio (1966) 1 ALL NLR 250; Skenconsult (Nig.) Ltd. v. Ukey (1981) 1 S.C. 6; (1981) 1 S.C. (Reprint) 4.*

*On this issue of withdrawal and dismissal of the Appeal the 1st Respondent's Motion of 1/3/2010 and that of the 2nd Respondent of 10/3/2010 opposing the withdrawal are hereby granted. Also granted are the 1st prayer of the 2nd Respondent's Motion of 12/3/2010 and the 1st prayer of 3rd Respondent's Motion of 8/4/2010 for an order setting aside the decision of this Court in chambers on the 10/3/2010.*

*The decision of this Court in chambers on the 10/3/2010 dismissing the Appeal be and is hereby set aside and the Appeal restored to the Cause List.*

I now come to the 2<sup>nd</sup> issue of whether having regard to the facts and circumstances of this case the proceedings before the Sokoto Division of Court of Appeal No. CA/S/EP/GOV/10/09 be stayed or

even struck out for being an abuse of the judicial process. For a quick understanding of this issue of whether or not there has been an abuse of the judicial process it is necessary to restate, albeit at the risk of repetition, the various legal processes through which the Plaintiffs/Petitioners/Appellants have taken the Defendants/Respondents in purported pursuit of their perceived legal rights. The Federal High Court suit was filed on the 25/4/2008. The Petition at the Governorship and Legislative Houses Elections Tribunal Sokoto was filed on the 20/6/2008. Judgment in the Federal High Court suit Abuja was delivered on the 17/7/2008. The Plaintiffs/Appellants were not satisfied with the said Judgment and on the 21/7/2008 filed their Notice of Appeal. While they were prosecuting the said Appeal at the Abuja Division of the Court of Appeal they were at the same time also prosecuting the Election Petition at the Tribunal Sokoto. In its majority Judgment on the 18/2/09 the Tribunal dismissed the Petition. The Plaintiffs/Petitioners/Appellants were still not satisfied and proceeded on Appeal through their Notice of Appeal dated and filed on the 5/3/09. The said Appeal is now pending and being prosecuted at the Sokoto Division of the Court of Appeal.

Back at the Abuja Division of the Court of Appeal, the Plaintiffs/Petitioners/Appellants by a Motion sought an amendment of the Notice of Appeal to raise and argue a fresh point of law not raised at the Trial Federal High Court. In its Ruling on the 30/11/09 the Court refused the Application and dismissed it. The Plaintiffs/Appellants were not satisfied with the decision of the Court of Appeal and have come on Appeal to this Court which Appeal is still pending.

Thus at the instance of the Plaintiffs/Appellants the parties have been engaged in a sustained legal battle from one Court to the other in the following order; Governorship and Legislative Houses Election Tribunal Sokoto, Court of Appeal Kaduna, Federal High Court Abuja, again Governorship and Legislative Houses Elections Tribunal Sokoto, Court of Appeal Abuja, Court of Appeal Kaduna and later Court of Appeal Sokoto and the Supreme Court, all in a purported pursuit of their perceived legal rights and all on the self-same issue of the 2<sup>nd</sup> Defendant's/Respondent's adjudged improper nomination and his alleged resultant disqualification.

*The question now is whether, in the circumstances of this case, the Plaintiffs/Petitioners/Appellants are guilty of abuse of judicial*

*process? Abuse of judicial process arises in a variety of circumstances. It arises, for instance, in a situation where a party in litigation, in pursuit of a perceived legal right initiates and simultaneously prosecutes legal processes in more than one Court against the same Defendant and over the same subject matter, occasioning thereby irritation and annoyance of the Defendant and undue interference with the efficient administration of justice. See Saraki v. Kotoye (1990) 6 S.C. 1; (1992) 9 NWLR (Pt.264) 156 at 188-189; Okafor v. A-G Anambra State (supra); Okorodudu v. Okorodudu (1977) 3 S.C. 21; (1977) 3 S.C. (Reprint) 13; Harriman v. Harriman (1989) 5 NWLR (Pt. 119) 6 at 16; Oyebola v. Esso West Africa Inc. (1966) 1 All NLR 170; Arubo v. Aiyeleru (1993) 3 NWLR (Pt. 280) 126 at 142.*

*The principle abuse of judicial process has its foundation in public policy expressed in the latin maxim “nemo debet bis vexari pro una et eadem causa.” meaning, no one shall be subjected to defend the same cause twice.*

*In this case I am persuaded by the arguments of the Respondents that Appellants’ filing of the Petition in Suit No. SS/EPT/GOV/1/2007 at the Governorship and Legislative Houses Elections Tribunal Sokoto against the same Defendants/Respondents and over the same subject matter of the 2nd Respondent’s adjudged improper nomination and disqualification as in the earlier Federal High Court Suit No. FHC/ABJ/CS/260/08 and simultaneously prosecuting both cases to the appellate Courts is a clear abuse of the judicial process. And where, as in this case, there is abuse of the judicial process the Court should invoke its coercive powers to dismiss the abusive process. In the instant case it is the Election Petition which is later in time together with the Appeal emanating therefrom that constitutes the abusive process which ought to be dismissed. However, the Respondents asked for a stay of those abusive processes and it is only proper to award just the stay sought.*

Finally in addition to the Motions and reliefs for setting aside the Judgment of this Court in chambers on the 10/3/2010 and restoring the Appeal on the Cause List which I have already granted, I also make the following Orders:

*“1. The Plaintiffs’/Appellants’ Motion dated the 18/3/2010 and filed on the 19/3/2010 which sought the dismissal of all Applications by the Respondents is hereby dismissed for lack of merit.*

2. The 1<sup>st</sup> Respondent's Motion dated and filed on the 29/3/2010 for an order preserving the Res and/or subject matter of this Appeal and for an order suspending and/or staying the delivery of Judgment in Appeal No. CA/S/EP/GOV/10/09 on the same subject matter is granted to await the determination of suit No. FHC/ABJ/CS/08 and Appeal or Appeals arising therefrom.

3. The 2<sup>nd</sup> Respondent's Motion dated and filed on the 11/2/2010 for departure from Rules is granted. Accordingly the Record of Appeal compiled by the 2nd Respondent be and is hereby accepted for use in these proceedings with any of the parties being at liberty to file supplementary record.

4. An Order is also granted, staying the proceedings of the Court of Appeal, Sokoto Judicial Division in Appeal No. CA/S/EP/GOV/10/09 pending the determination of the Appeal by or at this Court.

5. The prayer for Stay of Proceedings of Appeal No. CA/A/276/09 at the Abuja Judicial Division is however refused.

6. Prayer 3 of the 3<sup>rd</sup> Respondent's Motion dated 7/4/2010 and filed on the 8/4/2010 for Order of this Honorable Court directing the Court of Appeal, Sokoto to suspend and/or stay the delivery of Judgment in CA/S/EP/GOV/10/09 is also granted.

F

### **MUNTAKA-COOMASSIE JSC**

I had the privilege of reading in draft the Rulings of His Lordship, Tanko Muhammad, JSC. I must admit that I am in full agreement with my Learned Brother's reasons and conclusions. I also abide by the Orders made therein. The facts of this matter have been well stated in the Leading Rulings I will therefore not further dissipate my energy in reproducing them herein.

On the 10th March, 2010, this Court sitting in chambers granted the Notice of withdrawal of Appeal, filed by the Appellant and dismissed this Appeal. This was done apparently without the Court taking cognizance of other Applications pending in the case, i.e.

“(i) Motion of Notice dated 18/3/2010 filed by the Applicants on the 19/3/2010 for an Order of this Court bringing forward the next adjourned date in the matter; etc.

(ii) *Motion on Notice dated 23/3/2010 filed by the 1<sup>st</sup> Respondent on same date; praying for an Order directing the parties to file written Brief; etc.*

(iii) *Motion on Notice dated 29/3/2010 and filed on same date by the 1<sup>st</sup> Respondent for an Order of this Court preserving etc.*

(iv) *Notice of opposition to withdrawal of Appeal dated and filed by the 1<sup>st</sup> Respondent on 1/3/ 2010, and others”.* <sup>B</sup>

*By virtue of the provisions of Order 8 Rules 6(2) and (4) of the Rules of this Court, Appeal can be withdrawn under two situations: under Order 8 Rule 6(2) where all the parties consented to the withdrawal of an Appeal by filing in the registry the documents signifying such consent and signed by the parties, the Appeal shall be deemed to have been withdrawn, even without the Order of this Court. This Court in the case of Okafor & Ors. v. The Attorney-General and Commissioner for Justice Anambra State (1991) 7 S.C. (Pt. II) 138; (1991) 7 SCNJ 345, where a Notice of Withdrawal of Appeal was filed without the consent of All The Parties, this Court at Page 208, per Achike, JSC., (of blessed memory), held as follows:* <sup>C</sup>

*“.....Construing the provisions of Order 3 Rule 18(2), I hold that the wordings of the provisions of sub-rule are clear, plain and unambiguous and therefore should be awarded their literal or ordinary meaning. To That extent I hold that Exhibit ‘A’ made pursuant to Order 3 Rule 18 (2), did not satisfy the ingredients of that sub-rule because of the 5th Respondent, Ozo Dr. S.E. Onejeme did not subscribe his signature to Exhibit ‘A’ not withstanding the arrogant averment on the face of Exhibit ‘A’ that the Appeal was withdrawn with the consent of all parties thereto. See: I. K. Randa v. Governor of Kaduna State (1986) 4 NWLR (Pt. 35) 361; and Niger Progress Ltd v. NEL Corp. (1989) 4 S.C. (Pt.II) 164; (1989) 3 NWLR (Pt. 107) 68 at 72.”* <sup>F</sup>

*I think it is not in dispute that the Notice of Withdrawal of Appeal filed in this matter was not filed with the consent of all the parties in this case, and for this reason, it failed to comply with the provisions of Order 8 Rule 6(2) of the Supreme Court Rules.* <sup>H</sup>

*However, that is not the end of the matter; under the second situation that is the provisions of Order 8 Rule 6(4) where a Notice to withdraw an Appeal was filed without the consent of all the parties, the matter shall be fixed for hearing where all the parties would be*

heard on any issues outstanding in the matter, and for the making of an Order as to the disposal of any sum lodged in the Court if any. In *Okafor v. Attorney-General* (supra) at page 209, this Court in interpreting similar provisions of the Rule held thus:

“By way of seeing the complete picture of the efficacy of withdrawal by the combined effect under sub-rules 2 and 4, it remains to clarify the unfettered position of the party in the Appeal who did not subscribe to the Notice of Withdrawal. This is exemplified by the position of 5th Respondent who, it may be recalled did not sign Exhibit ‘A’ in the Appeal in hand. In that situation, the Appeal although withdrawn will remain in the Cause List and on coming up for hearing, the 5th Respondent will exercise his right with regard to any issue of costs or otherwise remaining outstanding between the parties and for making of an Order as to the disposal of anysum lodged in Court as security or the costs of Appeal.” See also *Akuneziri v. Okenwa* (2000) 12 S.C. (Pt.II) 75; (2000) 12 SCNJ 3421, per Achike, JSC.”

The sitting of this Court in Chambers on 10/3/2010, when the Notice of Withdrawal of this Appeal was considered without inviting the Respondents to exercise their rights as provided in Order 8 Rule 6(4), in my humble view is unconstitutional. It has denied the Respondents to exercise the rights granted them by both the Rules of this Court and the Constitution of the Federal Republic of Nigeria, 1999 i.e. Fair Hearing and to this extent the decision reached on that day was not only void but also amounted to a nullity. In situation when the decision of the Court is a nullity and unconstitutional, the Court has an inherent Jurisdiction, *ex-debito justitiae*, to set it aside, the Court may do so, suo motu, or through a Motion filed by the party affected by the decision. The same Court that made the decision and Order can take the Application or a Court of concurrent Jurisdiction. See: *Okafor v. Attorney-General of Anambra State* (supra), at Page 211, per Achike, JSC.

In view of the above, I have no hesitation in setting aside the Order made by this Court, regrettably though, on the 18/3/2010 and I accordingly make an Order restoring this Appeal.

Another issue that I wish, with respect, to briefly address is the Application for Stay of Proceedings of the Appeal pending before the Court of Appeal, Sokoto, Suit no. CA/S/EP/GOV/10/09. The Ap-



pellants in this case participated in the Governorship Election conducted on 14/4/2007, in Sokoto State, wherein the 2<sup>nd</sup> Respondent was declared as the winner having scored the highest number of votes in the said Election. Dissatisfied with this result, the Appellants filed a Petition before the Governorship Election Petition Tribunal, Sokoto. The Appellant, Alhaji Muhammadu Maigari Dingyadi, had his Petition dismissed as a result of which he appealed to the Court of Appeal, Kaduna Division. The Appeal was partly successful as the Court of Appeal set aside the Election of the 2<sup>nd</sup> Respondent, i.e. Aliyu Magatakarda Wamako, and ordered for fresh Election to be conducted by the 1<sup>st</sup> Respondent, INEC, within 90 days. The Court of Appeal ordered as follows:

(i) The Judgment of the Governorship and Legislative Houses Election Tribunal Sitting in Sokoto delivered on 29<sup>th</sup> of October, 2007 in Election Petition No. SS/EPT/GOV/1/2007 is hereby set aside. D

(ii) The Sokoto State Governorship Election held on the 14/4/2007 is hereby annulled for substantial irregularities in the conduct of the Election on the ground that the 1<sup>st</sup> Respondent was not qualified to contest as at the 14/4/2007.

(iii) That Independent National Electoral Commission shall conduct fresh Governorship Election for Sokoto State within 90 days of the date thereof. E

(iv) The fresh Election herein Ordered shall be between the same persons and candidates as appeared on Exhibit R1.

(v) The Speaker of the Sokoto State House of Assembly shall be sworn in immediately as the acting Governor of Sokoto State pending the outcome of the fresh Election herein ordered. F

(vi) Costs assessed at N50,000.00 is awarded against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. G

The 1<sup>st</sup> Respondent (INEC), pursuant to these Orders of the Court of Appeal conducted fresh Election and the 2<sup>nd</sup> Respondent again was declared the winner having scored the highest number of votes in the said Election.

Again the Appellants were not satisfied with this, and therefore filed a fresh Election Petition before the Sokoto State Governorship and Legislative Houses Election Petition Tribunal on the ground that 2<sup>nd</sup> Respondent was not qualified to participate in the said Election and urged the Tribunal to interpret the Orders No. 11 of the H

Court of Appeal. This Petition was struck out as the Tribunal held it had no power to interpret the Judgment of the Court of Appeal. Dissatisfied with this decision, the Appellants appealed to the Court of Appeal, Sokoto State.

B In the same vein, the Appellants approached the Federal High Court, Abuja wherein they challenged the participation of the 2nd Respondent in the fresh Election on the ground of non-qualification in Suit No. FHC/ABJ/CS/260/2008; based on the Judgment of the Court of Appeal, Kaduna in Suit No. CA/K/EP/GOV/60/2007. At the conclusion of the hearing, the Trial Court struck out the suit on the ground that it has no Jurisdiction to interpret the Judgment of the Court of Appeal, Kaduna, that Court held as follows:

D *"I have no option than to toe the line drawn by the superior Courts and hold that in so far as the Originating Summons herein is calling for the interpretation of the Judgment of the Court of Appeal in CA/K/EP/GOV/60/2007 between Alhaji Muhammadu Maigari Dingyadi & 21 Ors. v. Alhaji Magatakarda Wamakk & 42 Ors. It is incompetent and the Court lacks the Jurisdiction to embark on the interpretation of the Judgment in question."*

E Dissatisfied with the decision of the Federal High Court, the Appellants appealed to the Court of Appeal, Abuja. The Appellants filed an Application to raise fresh issue not raised before the lower Court, that is, that the lower Court has the power to enforce the Judgment of the Court of Appeal. This Application was refused. In the Leading Ruling of Bada, JCA., the Court of Appeal held thus:

G *"In my humble view, to accede to the Appellant's prayers, to argue fresh point on Appeal not raised before the lower Court, to wit, Jurisdiction to enforce decisions of the Court of Appeal contrary to interpretation of the decision of the Court of Appeal earlier brought before the lower Court would amount to this Court taking a fresh cause of action and assuming Jurisdiction contrary to the Provisions of Section 240 of the 1999 Constitution. In effect what the Appellants/Applicants want to do in this Court with the leave being sought is to change the subject of the case which they brought before the lower Court. Whereas an Appeal is generally a continuation of hearing and it should not be an invention of a new Cause of Action."*

H It is against this decision of the Court of Appeal, Abuja that the Appellants have appealed to this Court. Considering the nature

of the claims in this case and the Appeal pending before the Court of Appeal, Sokoto, the Respondents have brought the Application for Stay of Proceedings of the matter before the Court of Appeal, Sokoto Division.

The submissions of the Learned Senior Counsel to both parties have been set out extensively in the Leading Rulings of both Hon. Mahmud Mohammed and Tanko Muhammad, JJSC. However, the following facts are not in dispute:-

(i) The core issue in dispute in the two separate actions pending before the Court of Appeal, Sokoto and the Appeal before this Court, relates to the construction of the Judgment of the Court of Appeal, Kaduna delivered on 11<sup>th</sup> April, 2006 as to whether or not the 2<sup>nd</sup> Respondent was excluded in the re-run Election in Sokoto Governorship Election.

(ii) The parties before the Court of Appeal, Sokoto and in this case are the same.

(iii) The Cause of Action arose out of the conduct of the re-run Governorship Election conducted in Sokoto State.

*It is correct as submitted by the Learned Senior Counsel to the 1st Respondent that in a matter relating to Governorship Election Petition, the Court of Appeal is the final Court. But would that be the basis of submitting that this Court does not have the Jurisdiction to grant the Order to stay the proceedings before that Court or to protect the res, pending the outcome of the Appeal before the Court. It is to be noted that this Court has Jurisdiction to hear and determine this Appeal, being an Appeal that arose from the proceedings of the regular Civil Courts, i.e. The Federal High Court and the Court of Appeal, at this time the Court of Appeal, Sokoto has the Jurisdiction to determine the Appeal pending before it, being an issue that arose out of the Judgment of the Governorship and Legislative Houses Election Petition. However, since the Issues for Determination or dispute between the parties before these two different Courts are the same, of what effect would it be if the Court of Appeal holds peradventure that the 2<sup>nd</sup> Respondent was not qualified to participate in the said Election, and this Court holds on the other hand that he was qualified to participate in the said Election, of what effect would be the Judgment of the Court of Appeal? With tremendous respect I must point out that the Judgment of the Court of Appeal*

*remains the Judgment of that Court, while the Judgment of this Court remains the final Judgment on any issue determined by it. Hence if a situation, as I stated above happens, the Judgment of the Court of Appeal would be rendered nugatory. This is so in view of the provisions of Section 287(1) of the Constitution of the Federal Republic of Nigeria.*

*"The decisions of the Supreme Court shall be enforced in any part of the Federation by all authorities and persons and by Courts with subordinate Jurisdiction to that of the Supreme Court."*

*It is therefore my view, with all sense of responsibility, that where, as in this instant case, there is an issue of the Jurisdictional powers of the Supreme Court with that of the lower Court, that of the Supreme Court shall supersede that of the lower Court. It is for these reasons that I hold that this Court has the Jurisdiction to grant the Orders prayed for by the Respondents.*

*Be that as it may, would this Court close its eyes to the way and manner the Appellants invoked the Jurisdiction of two different Courts on the same subject matter between the same parties. In other words, what is the effect of these multiple Actions filed by the Appellants against the same set of Respondents and on the same subject matter? There is no doubt that in law multiplicity of suits or proceedings by the parties in respect of the same matter and issues whether in the same Court or in different Courts constitutes an Abuse of Court Process. See: Okorodudu v. Okoromadu (1977) 3 S.C. 21 at 22; (1977) 3 S.C. (Reprint) 13; Adesokan v. Adegorolu (1991) 3 NWLR (Pt. 179)293.*

*To institute an action during the pendency of another one claiming the same Reliefs amounts to an abuse of Court process, it does not matter whether the matter is an Appeal or not, as long as the previous action has not been finally decided. The subsequent action would constitute an abuse of process of the Court. I refer to:-*

*1. Okafor v. Attorney-General of Anambra State (1991) 7 S.C. (Pt.II) 138; (1991) 6 NWLR (Pt.200) 659 at 681;*

*(2) Nnama v. Nwanebe (1991) 2 NWLR (Pt. 172) 188.*

*It is my view, that the Appellants have abused the Court process. Ordinarily the consequence of holding that there is an abuse of the process of the Court is to strike out the offending process, however, in the instant case, I will rather stay the proceedings of the Court*

of Appeal, Sokoto pending the final determination of this matter.

Finally, I adopt the reasoning and conclusion of my Learned Brother, Tanko Muhammad, JSC. I have nothing more to add in his Lordship's all encompassing Rulings. I abide by consequential Orders adumbrated in the Rulings. I, too make no Order as to costs.

B

### **ADEKEYE JSC**

I had a preview of the ruling just delivered by my learned brother IT. Muhammad, JSC. During the gubernatorial election held in Sokoto on the 14<sup>th</sup> day of April, 2007, the 2<sup>nd</sup> Respondent Alhaji Aliyu Magatakarda Wamakko, the P.D.P. candidate, nominated to contest for the office of Governor of Sokoto State was returned as the winner of the election having scored 392, 258, the highest number of votes. There were ten other candidates from various political parties in the election. Alhaji Muhammadu Maigari Dingyadi, the 1<sup>st</sup> appellant, who contested this election on the platform of PDP, scored the second highest number of votes, 296, 419. Being aggrieved by the outcome of the election, filed a petition before the Governorship and Legislature Houses Election Tribunal, sitting in Sokoto challenging the return of the 2<sup>nd</sup> respondent as the winner of the election and his declaration as Governor of Sokoto State. The grounds for the petition as embodied in paragraph 9 of the petition reads as follows:-

9 (1) *Your petitioner states that the 1<sup>st</sup> Respondent, Aliyu Magatakarda Wamakko was not validly returned as the person duly dated on the following grounds:-*

(i) *The 1st Respondent was not qualified to contest. The election (sic) nomination to contest the election to contest the election being (sic) was void, having being sponsored for the election by All Nigeria People's Party to which he belonged, as against the Peoples Democratic Party, on whose platform he was placed on the ballot at the election.*

(ii) *The election was in valid by reason of corrupt practices and for non compliance with the provision of Electoral Act 2006 and*

(iii) *The 1<sup>st</sup> Respondent was not duly elected by majority of lawful votes cast at the election.*

(iv) *The 4<sup>th</sup> Respondent as the returning officer of the election wrongfully failed to return 1<sup>st</sup> petitioner as duly elected Gover-*

*nor of Sokoto State in breach of section 70 of the Constitution.*

The facts in support of the foregoing were stated in paragraphs 11, 12, 13 and 14 of the petition which were principally more about the qualification of the 1<sup>st</sup> respondent for nomination by the People's Democratic Party when he had not withdrawn his valid nomination on the platform of All Nigeria Peoples Party as required by section 38 of the Electoral Act. That he allowed himself to be nominated twice by two political parties. Consequently, the petitioners/appellants sought the tribunal to declare as void the purported nomination of the 2<sup>nd</sup> respondent as a candidate of the Peoples Democratic Party in the governorship election held on the 14<sup>th</sup> April 2007. That the return of the 2<sup>nd</sup> Respondent as having been duly elected as governor of

Sokoto State at the governorship election of 14<sup>th</sup> April 2007 on the basis of 392, 258 void and invalid votes cast for the candidates of People's Democratic Party in the election was a nullity. Even based on the fact that the 1<sup>st</sup> Petitioner scored majority of the lawful valid votes at the governorship election, and also scored not less than 25% of the total votes cast in at least two thirds of the Local Government Areas of Sokoto State be returned as having been duly elected as Governor of Sokoto State. Alternatively, that the Sokoto State Governorship election held on 14<sup>th</sup> April, 2007 be voided for substantial irregularities, while a fresh Governorship election be held in Sokoto State amongst candidates who were validly nominated at the close of nomination before the election held on the 14<sup>th</sup> day of April 2007.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed Notice of preliminary objection based on the grounds that the Tribunal has no jurisdiction to entertain the complaints of the Petitioners, while the petitioners have no locus standi to question the 2<sup>nd</sup> Respondent's election on the ground that he was not qualified to contest the election, and/or in the alternative that the issue of the nomination of the 2<sup>nd</sup> Respondent to contest the election on the platform of the 3<sup>rd</sup> Respondent is not justifiable. The 3<sup>rd</sup> - 43<sup>rd</sup> Respondents - INEC and its officials, now 1<sup>st</sup> Respondent in this application filed their joint reply to the petition. The Tribunal dismissed the preliminary objection challenging the competency of the petition and the jurisdiction of the tribunal to entertain the petition and to proceed to hear it. In the judgment delivered on the 29<sup>th</sup> of October 2007, the Tribunal dismissed the petition in that it

failed to meet the required standard of evidential proof - and was dismissed. The Tribunal affirmed the return of the 2<sup>nd</sup> Respondent Aliyu Magatakarda Wamakko by the 3<sup>rd</sup> Respondent as duly and validly elected Governor of Sokoto State.

The petitioners, the appellants in this application appealed to the Court of Appeal, Kaduna Division by filing a notice of appeal containing sixteen grounds of appeal. Parties formulated issues in their brief and the appeal was heard- In a considered judgment of the Tribunal Appeal Court Kaduna the appeal was allowed with consequential orders made as follows:-

(1) The judgment of the Governorship and Legislative Houses Election Tribunal sitting in Sokoto delivered on the 29<sup>th</sup> of October, 2007 in Election Petition No. SS/EPT/GOV/1/2007 is hereby set aside.

(2) The Sokoto State governorship election held on the 14<sup>th</sup> day of April 2007 is hereby annulled for substantial irregularities in the conduct of the election and on the ground that the 1<sup>st</sup> Respondent was not qualified to contest the election as at the 14<sup>th</sup> of April 2007.

(3) The Independent National Electoral Commission shall conduct fresh Governorship selection for Sokoto within 90 days of the date hereof.

(4) The fresh election herein ordered shall be between the sane parties and candidates as appeared on Exhibit R<sup>8</sup>.

(5) The Speaker of the Sokoto State House of Assembly shall be sworn - in, immediately as the Acting Governor of Sokoto State pending the outcome of the fresh election herein ordered.

(6) Costs assessed at N50,000.00 is awarded against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

The disparity between order two on the issue of the nullification of the election of the 14<sup>th</sup> of April on the ground that the 2<sup>nd</sup> Respondent was not qualified to contest the election - and that he shall be a candidate to contest in the fresh election to be conducted by INEC within 90 days regardless of disqualification left parties in a limbo.

The appellants went to the Federal High Court Abuja by way of originating summons seeking the interpretation of the judgment of the Court of Appeal Kaduna in CA/K/EP/GOV/60/07 and further that he the 1<sup>st</sup> appellant be returned as the winner of the gubernato-

rial election in Sokoto. The Federal High Court dismissed the suit on the 17<sup>th</sup> of July 2008.

Dissatisfied with the judgment of the Federal High Court, Abuja the appellants appealed to the Court of Appeal Abuja. While that appeal before the Court of Appeal Abuja was pending, the appellants filed on election petition No. SS/EP/GOV/1/08 before the Governorship Election Tribunal in Sokoto, seeking the same reliefs based on the same subject- matter which relates to the participation of 2<sup>nd</sup> Respondent in the Governorship seat election in Sokoto State by the Court of Appeal Kaduna Judicial Division. It is the same subject matter in the originating summons in FHC/ABJ/CS/260/2008 now on appeal in CA/A/276/08 at the Court of Appeal Abuja. On the 18<sup>th</sup> of February 2009 - the election Tribunal sitting in Sokoto in the petition SS/EP/GOV/1/08 dismissed the petition on the ground that it was a gross abuse of the court process. The appellants appealed to the Court of Appeal Sokoto Division praying for the same relief as in the pending appeal before the court of Appeal Abuja.

On the 30<sup>th</sup> of November 2009 the appellants filed an application before the Court of Appeal, Abuja in the appeal CA/A/276/08 to raise a fresh issue which is the jurisdiction of the Federal High Court to enforce the judgment of the Court of Appeal Kaduna Division in CA/K/EP/GOV/60/07 - to amend the notice of appeal accordingly. The Court of Appeal Abuja in its ruling of the 30<sup>th</sup> of November 2009 dismissed the application. The appellants were dissatisfied with the ruling of the Court of Appeal Abuja on the interlocutory application appealed to this court.

The notice and grounds of appeal were filed on 14/12/09. In the Notice of Appeal - to this court, the appellants are praying the court to invoke section 22 of the Supreme Court Act to determine the substantive appeal on the merits.

Meanwhile the appellants after filing the notice of Appeal on the 4/12/09 refused to compile the record of proceedings or ensure its compilation and transmission to the Supreme Court.

It is note worthy that the application before the Court of Appeal Abuja has the chance of getting to the Supreme Court while the suit before Sokoto Court of Appeal in CA/S/EP/GOV/10/09 terminates at the Court of Appeal Sokoto. The date of judgment in the appeal before the Sokoto Court of Appeal in CA/S/EP/GOV/10/09



was fixed for the 24<sup>th</sup> of February 2010. The appellants filed a Notice of withdrawal on 12<sup>th</sup> of February 2010 in both the interlocutory appeal SC/32/2010 before this court, and in the main appeal in CA/A/276/08 before the Court of Appeal Abuja. In its sitting in chambers on the 10<sup>th</sup> of March 2010, this Court considered the Notice of withdrawal filed by the appellants, granted it and dismissed the appeal SC.32/2010. That foregoing are the background facts which triggered the reaction of the Respondents to the withdrawal of the appeal on the 10<sup>th</sup> of March 2010. The parties filed applications to test the legality of the Notice of withdrawal and the order of this court made on the 10<sup>th</sup> of March 2010. Simultaneously parties' filed applications to challenge the Notice of withdrawal of the main appeal in CA/S/276/08 now pending for determination before the Court of Appeal Abuja. Since the reliefs involved in the appeal before this court and that in the appeal CA/S/EP/GOV/10/09 are same and the final decision of the Supreme Court invoking Section 22 of the Supreme Court Act can determine the reliefs one way or the other, this court on the 15<sup>th</sup> of March 2010 made an order to preserve the Res in the matter. In view of the pending judgment in the appeal before the Sokoto Court of Appeal, stayed proceedings and adjourned this application to the 1<sup>st</sup> of April 2010 for hearing. This court for reasons of the congestion in the hearing of the matters before it could not hear the applications of the parties until the 19<sup>th</sup> to the 21<sup>st</sup> of April 2010 when the appellants and the 1<sup>st</sup> - 3<sup>rd</sup> Respondents were heard viva-voce on their respective applications then filed and pending before this court on those dates.

On the 19<sup>th</sup> of April 2010, Mr. Fagbemi, S.A.N. leading the team of counsel appearing for the appellants/applicants identified the motion on Notice filed on the 19<sup>th</sup> of March 2010 brought pursuant to section 6 (6) of the 1999 constitution and the inherent jurisdiction as application for hearing. In this application, the appellants/applicants prayed this court to hear the preliminary objection raised to the competence of this court to entertain any outstanding proceedings in the dismissed appeal. The appellant/applicants had three prayers as follows:-

(1) An order of this Honourable Court bringing forward the next adjourned date in this matter from the 1<sup>st</sup> of April 2010 to a much earlier date convenient to this Honourable Court.

(2) An order of this Honourable Court setting aside or otherwise vacating its earlier order made dated 15<sup>th</sup> day of March 2010 which order stayed the delivery of the judgment of court of appeal in Appeal No. CA/S/GOV/10/2009 which was made pending the hearing and determination of the motions filed in the Supreme court and  
B adjourned to the 1<sup>st</sup> day of April 2010 for hearing.

(3) An order of this Honourable Court dismissing or otherwise striking out:-

(a) the 2<sup>nd</sup> Respondent's applications filed on 11/2/2010 seeking:-  
C

(1) Departure from the Rules

(2) Stay of proceedings in Appeal No. CA/A/276/08 from which the appeal SC/32/2010 emanated.

(3) Stay of proceedings in CA/S/EP/GOV/10/09 which is an  
D election petition appeal in respect of which the court of Appeal is the final court.

(4) Accelerated hearing of the appeal

1<sup>st</sup> Respondent's Motion filed on 1/3/10 opposing the withdrawal of the appeal SC/32/2010. Application filed on 28/3/2010  
E for preservation of the Res - which is Sokoto State Governorship election of 2007 and 2008.

Application filed 23/3/2010 directing parties to file written briefs or address which has been overtaken by events by the hearing  
F of the applications.

3<sup>rd</sup> Respondents motion filed 4/3/10 for -

(1) (a) Extension of time for Respondent/applicant to file cross/appeal

(b) Order deeming notice of cross/appeal filed and served.

(2) Motion on Notice brought pursuant to Order 2 Rules 28,  
G Order 3 Rules 14 of the Supreme Court Rules for an order to set aside the ex-parte order made by the court in Chambers on the 10<sup>th</sup> March 2010 and restoring appeal back to the cause list.

In the Alternative

H (1) An order setting aside the Notice of Withdrawal of the interlocutory appeal filed on 12<sup>th</sup> of February 2010 by the appellants/Respondents in SC/32/2010 as same is a gross abuse of the process of the court having regard to CA/S/EP/GOV/10/09 pending before the Court of Appeal Sokoto Judicial Division on the same

subject matter, same issue and same reliefs and an order dismissing both CA/S/EP/GOV/10/09 ad CA/A/276/09 in the circumstance.

(2) An order of this Honourable Court directing the court of Appeal Sokoto to suspend and/or stay the delivery of judgment in CA/S/EP/GOV/10/09 pending the hearing and determination of either prayer 1 or the alternative prayer 2 above in this motion by this Honourable Court. In the face of the multiple applications before the court it is appropriate to make the application filed by the appellants/applicants on the 19/3/2010 a stepping stone particularly with emphasis on relief number three which reads:-

*“An order of the Honourable Court dismissing or otherwise striking out all other pending applications filed by any of the other Respondents to the appeal of the appellants/applicants which was dismissed on the 10<sup>th</sup> of March 2010.”*

When learned Senior Counsel, Mr. Lateef Fagbemi move the application he withdrew the been overtaken by events, and the prayer on the application which had been overtaken by events, and the prayer was consequently struck out. The issue of the dismissal of the appeal SC/32/2010 in chambers on the 10<sup>th</sup> of March 2010 had to be entertained so as to determine the jurisdiction of the present court as constituted in respect of the appeal already dismissed in chambers on the 10<sup>th</sup> of March. The order of dismissal is that of a court with concurrent jurisdiction. The law is also crystal clear that once the Supreme Court in its decision has effectively decided on a matter before it and there is no ambiguity or slip to be corrected it becomes functus officio of the powers of the court to re-open it. But there are circumstances in which the inherent powers of the court can be involved to take some steps so that the interest of justice will be served.

Adigun v. The Secretary Iwo Local Government (1999) 8 NWLR pt.63 pg.30 SC

Ahovo v. African Continental Bank Ltd 2000 6 SC part 1 pg. 27

Okegbe v. Chikere (2000) 7 SC part 1 pg. 106

Furthermore, before a court can be competent to exercise jurisdiction in respect of any matter it must:-

(a) Be properly constituted as regards numbers and qualification of the members of the bench and no member is disqualified for one reason or the other.

(b) The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction and

(c) The case comes by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.  
 B Madukolu v. Nkemdilim (1962) 2 SC NLR 34/ A.G Anambra State v. A .G Federation (1993) 6 NWLR pt. 302 pg. 692. Saleh v. Monguno (2003) 1 NWLR pt. 801 page 221

The appellant/applicants made reference to the thirty-one  
 C paragraph affidavit in support of the application with Exhibits A–K and of particular interest to this application in Exhibits F – the Notice of withdrawal of appeal pursuant to Order 8 Rule 6 of the Supreme Court Rules 1999, and order of dismissal made by this court in chambers on the 10<sup>th</sup> of March 2010. The learned Senior Counsel argued  
 D in favour of the appellant’s constitutional right to file and withdraw any appeal already filed before the court. When appeals are withdrawn they are dead. This court cannot speculate on what is before the court of Appeal. It is the plaintiffs claim which confers jurisdiction in a matter. It is not an abuse of court process to withdraw an appeal.  
 E Order 8 Rule 6 (4) does not make provision to challenge withdrawal of an appeal. The senior learned Counsel cited cases.

The 1<sup>st</sup> to the 3<sup>rd</sup> Respondents filed counter affidavits to oppose the application of the appellants on the one hand, and on the  
 F other hand, each of the Respondents filed an application praying this court to set aside the order made in chambers dismissing the appeal SC/32/2010 and restoring the appeal back on the cause list.

The 1<sup>st</sup> Respondents applications were filed on 1/3/2010 and 29/8/10, the 2<sup>nd</sup> Respondents applications were filed on 10/3/10 and  
 G 12/3/10 respectively, the 3<sup>rd</sup> Respondent’s application was filed on 8/4/2010. The appellants/applicants/respondent reacted to these applications by filing counter affidavits on the 14/4/10 to the 1<sup>st</sup> Respondent’s motion, 15/4/2010 to the 2<sup>nd</sup> respondent’s motion and 15/4/2010 to the 3<sup>rd</sup> respondent’s motion. The 3<sup>rd</sup> respondent on 4/  
 H 3/2010 filed application brought pursuant to order 2 Rule 28 (1) and (2) of the Supreme Court Rules as amended for an order extending the time for the Respondent/applicant to file a cross/appeal. The applications and counter affidavits supported the oral arguments of learned senior counsel for the parties - Mr. Mahmood learned

senior counsel for the 1<sup>st</sup> respondent argued the three applications together, and submitted that the Appeal was dismissed in chambers while other applications filed by the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> respondent were pending and fixed for hearing on 15/3/10. The appeal was to be heard on substantial point of law. The appeal was dismissed contrary to Order 8 Rule 6 (4) of the Supreme Court Rules. B

Chief Olanipekun, learned senior counsel for the 2<sup>nd</sup> Respondent associated himself with the foregoing submission of learned senior counsel for the 1<sup>st</sup> Respondent - while in addition submitted that the Appeal before the court was to be heard on fundamental issues of law and not a post - election matter which is to terminate at the Court of Appeal. The order made by this court to preserve the Res in the appeal is still subsisting. The learned senior counsel for the 3<sup>rd</sup> Respondent, Dr. Izinyon canvassed that the appeal is based on the relevant sections of the Constitution. C

This court is qualified to make an order to preserve the Res. The procedure stipulated in the Supreme Court Rules to withdraw an appeal was not followed by the appellants. The application of the appellants/ applicants was incompetent, while withdrawal of the appeal amounts to an abuse of court process. Parties cited authorities from their pool of authorities. D

As at the time the appeal was withdrawn during this court's sitting in chambers on the 10<sup>th</sup> of March 2010, the position in the interlocutory appeal before this court are as follows:- E

(1) Applications to oppose the withdrawal and for Departure from the Rules to file Record were pending. F

(2) Application to cross-appeal was pending.

(3) No record of appeal before the Court as Appeal has not been entered. G

(4) Appellants/applicants relied on the Registry number for the application for departure filed by the 2<sup>nd</sup> Respondent/applicant SC/32/2010 to file Notice of withdrawal.

(5) Hearing on the Notice of withdrawal based on the applications of parties adjourned to 15/3/10. H

(6) An order to preserve Res in the matter made on 15/3/10 not disputed.

(7) Application before the court raised fundamental issues of law - it is designed to put an end to multiple actions.

Fundamental issues in the subject - matter of appeal are nomination and disqualification of a candidate. The Respondents concluded that the withdrawal was an abuse of court process and a breach of their constitutional right to fair hearing. This court cannot shut its eyes or overlook the substantial issue of law raised by this appeal.

- B Gleaning through the Exhibits before the court and particularly the court proceedings on the 10<sup>th</sup> of March 2010 when the appeal was withdrawn- what was before the court was just the Notice of withdrawal. The court was not aware that the application to withdraw the appeal was contentious or that other applications were pending in the appeal. It could have adjourned it to another date for hearing in the open court. The crucial issue now which I regard as a fundamental omission is that the Respondents were shut out in the hearing for withdrawal of the appeal at a stage when their interest in the appeal was apparent and registered as a matter of record.

D Order 8 Rule 6 (4) of the Supreme Court Rules as Amended reads as follows:-

- E *"If all the parties do not consent to the withdrawal of the appeal as aforesaid the appeal shall remain-on the list and shall come on for the hearing of any Issue as to costs or otherwise remaining outstanding between the parties and for making an order as to the disposal of any sum lodged in court as security for the costs of appeal."*

- F The standard of fair hearing requires the observance of the twin pillars of the rules of natural justice - namely:-

- (a) audi alteram partem, that is hear the other side and
- (b) nemo iudex in causa sua – that is, no one should be a judge in his own cause.

- G While the basic criterion and attribute of fair hearing include:-

- H *"That the court or tribunal hear both sides and not only in the case before reaching a decision which may be prejudicial to any party in the case but on all material issues in the case. A hearing cannot be said to be fair if any of the parties is refused a hearing or denied the opportunity to be heard, present his case or call witnesses. Section 36 (1) of the 1999 Constitution."*

Bamgboye v. University of Ilorin (1999) 10 NWLR pt. 622 pg. 290

Kotoye v. CBN (1989) 1 NWLR pt. 98 pg. 419

Military Governor Imo State v. Nwaunwa (1997) 2 NWLR pt. 490 pg. 675.

The right to fair hearing is a fundamental constitutional right guaranteed by the Constitution of the Federal Republic of Nigeria, 1999 and a breach of it particularly in trial vitiates such proceedings rendering same null and void. B

The order made by this court in chambers on 10/3/2010 in the appeal SC.32/2010 without hearing the other parties in the appeal is null and void.

The application is hereby resolved in favour of the Respondents. The order made by the court in Chambers on 10/3/10 withdrawing and dismissing the appeal SC 32/2010 is set aside. The appeal is hereby restored on the cause list. C

On the 15th of March when the appeal was no longer on the cause list, as same was already dismissed by an order made by this court in Chambers On the 10<sup>th</sup> March 2010. The appellants/applicants in their application filed on 19/3/2010 also prayed this court for an order setting aside or otherwise vacating its earlier order which stayed the delivery of the judgment of Court of Appeal in Sokoto Appeal No. CA/S/GOV/10/2009, which was made pending the hearing and determination of the motions filed in the Supreme Court and adjourned to the 1<sup>st</sup> day of April 2010 for hearing. The learned senior counsel argued that the subject matter in the litigation was an election matter on which this court has no jurisdiction. The order for preservation when it was made, the court lacked the necessary quorum as one of the members of the panel had already disqualified himself. This court has no jurisdiction to stay a matter not before it. D E F

The learned senior counsel for the Respondents all agreed that the issue before the court was a fundamental issue of constitutional importance on which this court has the power to make an order for the preservation of the Res. It is however note worthy that the order for preservation of the Res in the matter before Sokoto Court of Appeal was made pending further hearing of this appeal on the 1<sup>st</sup> of April 2010. Hearing of the appeal today automatically discharges the order made by this court on the 15<sup>th</sup> of March 2010. That order is hereby discharged. G H

The appellants/applicants in their application filed on 19/2010 prayed for a third relief that all the pending applications filed by the

Respondents to the appeal which was dismissed on the 10<sup>th</sup> of March 2010 be struck out or dismissed as the case may be is hereby refused in view of the fact that the order dismissing the appeal has been set aside.

This brings me to the application for departure from the Rules of this court filed by the 2<sup>nd</sup> Respondent before this court *Aliyu Magatakarda Wamakko*, on 11/2/2010 and brought pursuant to Order 21 Rule 31 (1) and Order 7 Rules 5 (1) of Supreme Court Rules. The 2nd Respondent/applicant in this application prays this court for an order allowing and/or directing parties to make use of the record of proceedings of the lower court as compiled by the applicant for the purpose of this appeal.

(ii) Accepting for the purpose of this appeal the record of proceedings of the lower court as compiled by the applicant, with liberty to any party to file a supplementary record if he considers that the record as compiled by the 2<sup>nd</sup> Respondent/ applicant is inaccurate and inadequate.

In the argument in support of this application, the learned senior counsel for the applicant narrated the background facts behind the appeal before this court. That the appellants/Respondents in their notice of appeal to this court are praying this court to invoke Section 22 of the Supreme Court Act to determine the substantive appeal on the merits. The appellants refused to compile the record of proceedings or ensure its compilation and transmission to the Supreme Court while forum shopping between two different Divisions of the Court of Appeal- Abuja and Sokoto. In the latest development before this court, the appellants had taken steps to withdraw the appeals before this court and the Court of Appeal, Abuja argument is that jurisdiction of a court is determined by the appellants' case. The appellants have now suddenly thrown over board that substantial issue of law which they have invited the courts from the Federal High Court and probably to the Supreme Court to intervene in the interpretation or resolve the construction of the judgment of the Court of Appeal Kaduna Judicial Division in appeal No. CA/K/EP/GOV/60/07 dated the 11<sup>th</sup> of April 2008.

The relevant portions of the argument which I consider vital to this application are as follows:-



(i) The main issue in all the pending litigations/appeals relates to the construction of the judgment of the Court of Appeal Kaduna delivered on 11th April 2008 as to whether or not Applicant was excluded in the re-run election of 24<sup>th</sup> May 2009.

(ii) Appellants are litigating the same issue in two Divisions of the Court of Appeal at the same time thus putting all Respondents in unnecessary expenses. B

(iii) The resolution of the issue by any of the decisions of the Court of Appeal against the appellants does not fore close their appeal to the Supreme Court.

(iv) Resolution of the core issue once and for all by the Supreme Court disposes off the pending appeals at the Abuja and Sokoto Divisions of the Court of Appeal. C

The 2<sup>nd</sup> Respondent/Applicant had completed the records and filed them at the Registry of this court and served copies on the parties, and registrars of the Court of Appeal. If the suit now on appeal is resolved in favour of the appellants - the 1<sup>st</sup> appellant automatically assumes office as Governor of Sokoto State. This appeal will enable this court to resolve the issue in the appeal once and for all. D

The learned senior counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents are in favour of this application. Mr. Rickey Tarfa learned senior counsel replied to the application filed on 11/2/10 on ground of law. He examined Order 2 Rule 31 (1) of the Supreme Court Rules in view of Departure and the necessity to apply for extension of time couple with the departure. For interlocutory appeals, provisions of Order 7 Rules 6 and 7 are applicable. Where record is not filed within time there must be an application for extension of time. The law does not provide for compilation of record by the Respondent - where the appellant has failed to compile record, the right available to a Respondent is to apply for a dismissal of the appeal if the appellant is not diligent enough to compile records expeditiously. Order 7 Rule 3 does not give right to a respondent. Where record is compiled, either main record or supplementary all process must be certified. The facts revealed in support do not justify the grant of the application. E F G H

Learned Senior Counsel supported their submission with cases. Process of compilation of record in an appeal is as dictated by the rules of court. A party or litigant has his or its traditional role depending on whether he or it is an appellant or respondent. The

enabling Rules for this application for departure by the 2<sup>nd</sup> Respondent/applicant are order 2 Rule 31 (1) and order 7 Rule 5 (1)

Order 2 Rule 31 (1) stipulates as follows-

B *“The court may enlarge the time provided by these Rules for doing of anything to which these Rules apply or may direct a departure from these rules in any other way when this is required in the interest of justice.”*

Order 7 Rules 5 (1) of the Supreme Court Rules reads -

C 5(1) *“The court may in this case in which it considers it necessary or expedient so to do in the interest of justice, or in any case in which it makes an order accelerated hearing of the appeal directs a departure from Rules 2,3 and 4 of this Order.”*

D 5(2) *“Where a direction for such departure is made by the court, the provisions of Rules 6 and 7 of this Order shall apply to the appeal notwithstanding the fact that it is an appeal of the type mentioned in sub rule (1) of this order.”*

Provided that the court may give further or other directions for the purpose of procuring a record for the hearing and determination, Order 7 Rule 2 (1) refers to an interlocutory appeal like the application now under consideration. Order 6 precludes the registrar of court from compiling a record of appeal for interlocutory appeals unless otherwise directs.

E By virtue of Order 7 Rule (1) - the appellant shall in appeals to which this rule applies either simultaneously with filing his notice of appeal or within 14 days thereafter prepare for the use of the justices a record.

F (3) *“If the respondent considers that the documents and proceedings filed by the appellant are inadequate or are not sufficient for the purposes of the appeal, he shall, within a period of 7 days after service on him of the record filed by the appellant, file any further or other documents that he wishes to file.”*

G The role of the parties is as specified by the Rules - Order 7 Rules 6 and 7. The application before this court is of a peculiar nature. The application is interlocutory, the appellants filed action in different courts, the appeal has to be disposed of expeditiously, and the appellants did not show any interest in compiling the record after bringing other parties that far. The outcome of the appeal is of legal interest to both sides, the res in the judgment of appeal is the interpretation of a judgment of court affecting the parties. The 2<sup>nd</sup> respon-

dent has rightly adopted the role of the appellants as the game must be played according to the rules. This application was filed on 11/2/2010. The judgment of the Court of Appeal in Suit No. CA/A/276/08 was delivered on the 30<sup>th</sup> of November 2009. The appellants filed their Notice of Appeal without compilation of the record as required by Order 7 Rule 7. B

This opens up another question to be considered in this application which is whether in Order 2 Rule 31 (1) of the Supreme Court Rules, the term enlargement of time for the doing of anything to which these rules apply or a departure from the Rules of court in any other way when this is required in the interest of justice has the same effect. What is the essence of Departure from Order 7 Rule 7. The connotation of Departure from the rules to my mind is being granted the indulgence of Waiver of strict adherence to the Rules of court in the interest of justice. In the scenario before the court, the appellant brought the respondents to court on the issue of the interpretation of the judgment of the Court of Appeal Kaduna - which is very substantial and may put an end to the litigation itself only to refuse to carry out its role under Order 7 Rule 7 of the Supreme Court Rules - which is compilation of the record of appeal. The appeal before this court is an interlocutory appeal. The duration of compiling record is 14 days from the date the notice of appeal is filed. The notice of appeal was filed on 14/12/09. The time required for compilation of the record had lapsed if the record were to be compiled by the appellant. C D E F

The time to compile record by the respondent in this circumstance will not suffer the defect of lapse of the statutory period. The appeal has just been revived. It was not the role of the 2<sup>nd</sup> respondent/applicant to file the Record when the Notice of appeal was filed on 14/12/10. It is not unusual to direct the respondent in an appeal to compile the record of appeal in that in the process of appeal, it is the duty of counsel of both parties on the invitation of the registrar of the court to meet at a date fixed by the registrar where all the processes needed to be included in the record of proceedings in an appeal are agreed with the registrar. G H

I must remark that rules of court are made for attaining justice with ease, certainty and dispatch. They are made for the purpose of obtaining justice by parties in the citadel of justice. They must not

be used in the instance of this case as a clog in the wheel of obtaining such justice.

Solanke v. Somefun (1974) ALL NLR pt. 1 pg. 141.

The courts have power to waive compliance with the rules in exceptional circumstance when it considers that the interest of justice is of paramount importance. Nowadays, this court has moved away from technical justice to doing substantial justice. I hold that it appropriate to waive compliance with extension of time Order 2 Rule 31 (1) in the circumstance of this case. Application for departure from the rules to enable the 2<sup>nd</sup> respondent/applicant to compile Record in appeal SC.32/2010 is hereby granted.

The 2<sup>nd</sup> respondent/applicant in the same application prayed as follows for -

(1) An order staying proceedings at the Court of Appeal, Sokoto Judicial Division in Appeal No. CA/S/EP/GOV/10/09 which relates to the subject matter of appeal until the final determination of this appeal.

(2) An order staying proceedings at the Court of Appeal, Sokoto Judicial Division in Appeal No. CA/S/EP/GOV/10/09 which relates to the subject matter this appeal until the final determination of the appeal by the apex court.

In the application filed on 29/3/2010, the 1<sup>st</sup> respondent/applicant prayed for the order of this court as follows -

(1) An order of this court preserving the Res and/or subject matter of this appeal which is the Sokoto State Governorship 2007 and 2008 election and re-election dispute.

(2) An order of this Honourable Court directing the Court of Appeal to suspend and/or stay the delivery of judgment in Appeal No. CA/S/EP/GOV/10/09 on the same subject - matter pending the completion of investigations into the serious allegations against the Hon. President of the Court of Appeal and the Hon. Justices hearing the appeal. The 3<sup>rd</sup> respondent/applicant in the application filed on 8/4/2010 also applied for stay/suspension of the Court of Appeal Sokoto judgment in CA/S/EP/GOV/10/09 pending the hearing and determination of the Appeal SC/32/2010.

The appellants filed counter-affidavit to oppose the application. Chief Wole Olanipekun, learned senior counsel for the 2<sup>nd</sup> respondents/applicants tried to convince the court in his argument of

the need to stay the proceedings in the appeals CA/A/276/08 before Abuja Court of Appeal and CA/S/EP/GOV/10/09 before Sokoto Court of Appeal. He gave an insight into the judgment of the Court of Appeal, Kaduna in the appeal No. CA/K/EP/GOV/60/07 delivered on 11/4/08. The subject-matter in the appeal relates to the governorship seat of Sokoto State, particularly the participation of the 2<sup>nd</sup> respondent/applicant in the fresh election ordered by that judgment. B

The appellants went to the Federal High Court by way of originating summons praying for the interpretation of the judgment or Kaduna Judicial Division. The court ruled against the appellants. The appellants appealed to the Court of Appeal with the same subject matter as to whether the 2<sup>nd</sup> respondent/applicant was disqualified from contesting the Sokoto State Governorship re-run election held on 24<sup>th</sup> May 2009. While the appeal at the Abuja is still subsisting, the appellants filed a petition before the election Petition Tribunal, Sokoto praying for the same relief predicated on the judgment of the Kaduna Court of Appeal and the re-run held in Sokoto on the 24th of May 2009. The judgment of the Election Petition Tribunal Sokoto was against the appellants which took them to the Court of Appeal Sokoto. C D E

The appellants came back to the Abuja Division of the Court of Appeal to raise a fresh issue on the enforcement of the judgment of the Court of Appeal Abuja Judicial Division by the federal High Court still on the issue of disqualification of the 2<sup>nd</sup> respondent/applicant. The ruling of the Court of Appeal Abuja was against the appellants- they came to this court on an interlocutory appeal by filing their notices on 14/12/09. The appellants in their notice of appeal prayed this court to invoke Section 22 of the Supreme Court Act to determine the appeal on the merits. All the respondents agreed with them. Resolution of the core issue in the appeal by the Supreme Court is envisaged to dispose off all pending appeals in Abuja and Sokoto Divisions of the Court of Appeal. It was submitted that the appellants by instituting multiplicity of appeals are inviting the Court of Appeal Kaduna, Sokoto and Abuja to give conflicting judgments. This court is urged to invoke its jurisdiction and resolve issue before it as it relates to the judgment of the Court of Appeal Kaduna. The appellants are litigating the same issue in two different Divisions of the Court of Appeal, Abuja and Sokoto Divisions. The Supreme Court F G H

should be allowed to resolve the issue before it one way or the other. The learned senior counsel for the 1<sup>st</sup> respondent/applicant and learned senior counsel for the 3<sup>rd</sup> respondent, Dr. Izinyon agreed with the foregoing submission. It is added further that it will serve the interest of justice to suspend the delivery of the judgment in CA/S/EP/GOV/10/09, pending the hearing and determination of this application. The respondents concluded that the order made by this court on the 15<sup>th</sup> of March 2010 was made in the interest of justice. It is only a stay of proceedings of CA/S/EP/GOV/10/09 which will enable this court to decide on the position generated by the Kaduna Court of Appeal judgment - and end the matter one way or the other. The counsel for the appellants, Mr. Rickey Tarfa learned senior counsel replied on the application pointing out that the appeal before the Sokoto Court of Appeal is a governorship election petition - which by virtue of Section 246 (3) of the Constitution terminates at the Court of Appeal. This court has no jurisdiction in the matter and must therefore refuse to intervene in the matter being an election petition. The appellants have not been forum shopping but have pursued their different reliefs in two different courts. The reliefs are interpretation of a judgment of a competent court and an election petition appeal. Both parties buttressed their submission with authorities cited from their lists.

The issue involved here is stay of proceedings of the appeals before Abuja Court of Appeal in CA/A/276/08, an appeal which emanated from the proceedings of the Federal High Court Abuja. The appellants filed an originating summons before the court seeking the interpretation of the judgment of Kaduna Court of Appeal in CA/K/EP/GOV/60/07 and an order to return the 1<sup>st</sup> appellant as the winner of the gubernatorial election held in Sokoto in April 2007. The respondents also applied for stay of proceeding of the judgment of the Sokoto Court of Appeal fixed for delivery on the 24<sup>th</sup> of February 2010 in suit No. CA/S/EP/GOV/10/09. The appellants pursued the same reliefs at the regular court via the Federal High Court - which has the prospect to be prosecuted up to the apex court, and simultaneously at the Tribunal which by Constitution must terminate at the Court of Appeal - now in Sokoto. The cassus belli in the two courts is the interpretation of the judgment of the Court of Appeal Kaduna in CA/K/EP/GOV/60/07 and an order that the 1<sup>st</sup> respondent be re-

turned as the winner of the election. The relevant portion of the order of the Court of Appeal embodied in this judgment reads -

(1) That judgment of the Governorship and Legislative House Election Tribunal sitting in Sokoto delivered on the 29<sup>th</sup> day of October 2007 in Election Petition No. SS/EPT/GOV/1/2007 is hereby set aside. B

(2) The Sokoto Governorship election held on the 14<sup>th</sup> of April 2007 is hereby annulled for substantial irregularities in the conduct of the election and on the ground that the 1<sup>st</sup> respondent was not qualified to contest the election as at the 14<sup>th</sup> day of April 2007. C

(3) The Independent National Electoral Commission shall conduct fresh governorship election for Sokoto State within 90 days of the date hereof.

(4) The fresh election herein ordered shall be between the same parties' and candidates as appeared on Exhibit R8. D

The foregoing order threw all parties into a labyrinth of confusion. Regardless of the foregoing, a fresh election was held including the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The appellants went to the Election Tribunal Sokoto which dismissed the petition. This brought an appeal to the Court of Appeal, Sokoto. In these courts, the appellants hammered on the same reliefs - the issue of disqualification of the 2<sup>nd</sup> respondent and that the 1<sup>st</sup> appellant is candidate to be delivered as winner of the election. The appellants went to two different courts, with the same reliefs, and against the same parties. While the suits were on ground and subsisting, he went to the Court of Appeal Abuja to apply to amend his Notice to raise a fresh issue on the enforcement of the judgment of the Court of Appeal Abuja by the Federal High Court relating to the disqualification of the 2<sup>nd</sup> respondent. The Court of Appeal, Abuja dismissed the application. The appellants appealed to this court praying the court to invoke Section 22 of the Supreme Court Act, in effect to invoke its original jurisdiction to determine the substantive appeal on the merits. The respondents do not wish to oppose the application and this they indicated in clear terms in their process. By virtue of the interlocutory appeal SC.32/ 2010 which now has to be brought back to the cause list, the court no doubt has the power to preserve the Res in an appeal - so that the successful litigant on the determination of the appeal does not win a hollow victory. The respondents in view of the prevailing circum-

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stance of this case has asked that the proceedings before the Abuja and Sokoto Divisions of the Court of Appeal be stayed while this Court invokes Section 22 of the Supreme Court Act to hear and determine the nagging question, in the order of the judgment of the Court of Appeal Kaduna.

B Gleaning through the judgment, there is to my mind on the face of it, an apparent and glaring ambiguity or lacuna which begs for clarity. Meanwhile, the respondents emphasized that the suits of the appellants are abuse of court or judicial process. This brings into focus what constitutes an abuse of court or judicial process. Brevi manu decided authorities have shown that what constitutes an abuse of court process is a matter of fact which must be established by credible and admissible evidence. It may lie in both a proper and improper use of the judicial process in litigation. The list is inexhaustive D but it includes instituting multiplicity of actions between the same parties in a most disturbing manner. The multiplicity of action on the same matter between the same parties even where there exist a right to institute the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the right rather than the exercise of the E right per se.

Saraki v. Kotoye (1992) 9 NWLR (1966) 2 SCNLR 35.

Okorodudu v. Okoromadu (1977) 3 SC pg. 21.

Ali v. Albishir (2008) 3 NWLR pt. 1073 pg. 94.

Umeh v. Iwu (2008) 8 NWLR pt. 1089 pg. 225.

F The records of the petition and appeal in Sokoto show that the appellants went there not to challenge matters arising from the conduct of the re-ruin election but to canvass the enforcement of the Kaduna judgment CA/K/EP/Gov/60/07 in his favour. There is no doubt G about it from the available facts that the appellants converted what should have been or ought to be a normal election petition into an abuse of judicial process by the nature of the relief sought from the tribunal and on appeal. The appellants have litigated on the same reliefs before the Federal High Court, Abuja and Sokoto Tribunal. H Therefore are circumstances available which will make it imperative to grant the stay of the proceedings before Sokoto Court of Appeal. It is trite that where two actions of the same nature and between same parties and subject matter are being prosecuted concurrently before same court or different courts, it is the later in time that va-



cates. Abu v. Odugbo (2001) 14 NWLR pt. 732 pg. 45. While on the run between the courts, the appellants filed the action before the Federal High Court first. It is by law the later suit filed in Sokoto that will vacate for the Abuja proceedings to continue.

As I have earlier mentioned, the appellants have their appeals pending in both courts on the same reliefs against the same respondents. One is an election matter, while the other is on the interpretation of a judgment of a competent court, arising out of the same election. A stay of proceedings presupposes that there is a valid appeal pending, but then such application is not granted as a matter of routine tied slavishly to the filing of an appeal. The applicant must show to exist special and exceptional which have the effect of compelling the court to grant his application. It is a matter of law and facts. The grant is therefore made subject to a judicial and judicious exercise of the discretion of the court having regard to all materials placed before it and in the interest of justice. The court has consistently held that an applicant must satisfy the court that the proceedings must not be allowed to continue in the interest of justice. In granting the application, the court must consider the competing rights of the parties to justice and equity. A very important factor in granting a stay is the need to ensure that the Res of the proceedings is preserved as the Res sustains the proceedings, and once it is destroyed the whole proceedings become moribund. In short, if refusal of an order of stay will lead to a destruction of the Res - the proceedings must be stayed.

Akilu v. Fawehinmi (No. 2) (1989) 2 NWLR pt. 102 pg. 122.

Daily Times (Nig.) Plc. v. Magoro (1999) 7 NWLR pt. 612 pg. 592

ANAAMCO v. First Marina Trust Ltd. (2000) 1 NWLR pt. 640 pg. 309.

United Spinners (Nig.) Ltd. v. Chartered Bank Ltd. (2001) 14 NWLR pt. 732 pg. 195.

A court has a duty to preserve the subject-matter Res of a litigation before it.

Kigo v. Holman Bros (1980) 5-7 SC pg. 60. Ojukwu v. Military Governor of Lagos State (1985) 2 NWLR pt. 10 pg. 806.

Ivory Merchant Bank Ltd. v. Partnership Investment Ltd.

(1996)

Dingyadi v. INEC (2010) 6 KLR Adekeye JSC5 NWLR pt. 448 pg. 363.

The courts had decided that where an interlocutory appeal will finally dispose of the case pending before a lower court, a stay of proceedings will be granted.

Arojoye v. U.B.A. (1986) 2 NWLR pt. 20 pg. 101.

Obinyiriuka v. Aliche (1991) 4 NWLR pt. 183 pg. 87.

The appellant came to this court for an interpretation of the Kaduna judgment under the cloak of Section 22 of the Supreme Court Act. The respondents agree with the proposition. Section 22 of the Supreme Court Act is a strong weapon which this court must not hesitate to use in the pursuit of and in attaining the goal of justice. I am of the impression that invoking the jurisdiction of this court will take into consideration the competing rights of the parties and the interest of justice will be served. On a sober reflection, the matter before this court for hearing and determination is beyond an ordinary election petition in Sokoto. In the two elections of the 14<sup>th</sup> of April 2007, and the re-run in 2008, the electorates in Sokoto had manifestly demonstrated their choice. The appellants are now saying through court processes that their choice is disqualified by law. The appellants have taken the right steps by calling for an interpretation of the Kaduna judgment by this court, as Abuja and Sokoto Courts though vested with constitutional powers over election matters as the final courts are courts with concurrent jurisdiction with the Kaduna Election Tribunal. The Bench and the Bar owe the society in the development of our nascent democracy and as the custodian of the laws a duty to interpret them particularly on the subject-matter of this interlocutory appeal - election suits.

In view of the pending interlocutory appeal, while similar appeals on the same subject-matter are before Sokoto Court of Appeal and Abuja Court of Appeal, the doctrine of stare decisis -demands that the appeal before the Sokoto Court of Appeal be stayed for reasons that -

The reliefs sought are similar to the ones before this court in the interlocutory appeal and the Abuja Court of Appeal which therefore amounts to an abuse of judicial process.

The learned senior counsel applied to withdraw the applica-

tion for an order of extension of time to allow the 3<sup>rd</sup> respondent/applicant to file a cross-appeal in the appeal SC.32/2010 as being premature and until the hearing and determination of the application relating to the withdrawal of the appeal. The application was granted by this court.

In the final analysis, I have granted the under-mentioned applications: -

(1) Appellant's/Applicant's Application filed on 19/3/2010 vacating the order of this court made on 15/3/2010 - staying the delivery of the judgment of the Court of Appeal, Sokoto pending the hearing and determination of the motions filed in the Supreme Court.

(2) 2<sup>nd</sup> Respondent's/Applicant's Application filed on 11/2/2010.

(a) To restore the appeal SC.32/2010 on the Cause List.

(b) For the Departure from the Rules.

(c) Stay of proceedings in CA/S/EP/GOV/10/09 before Sokoto Court of Appeal.

(3) 1<sup>st</sup> Respondent's Application in opposition to withdrawal of Appeal SC.32/2010.

(4) 3<sup>rd</sup> Respondent's Application filed on 8/4/2010 to set aside notice of withdrawal of the Appeal SC.32/2010 and to stay proceedings before Sokoto Court of Appeal.

I make no order as to costs.

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