

SUPREME COURT OF NIGERIA
3RD DECEMBER, 2010. SC. 143/2010
CORAM:- A. M. MUKHTAR, F. F. TABAI,
M. S. MUNTAKA-COOMASIE, J. A. FABIYI,
B. RHODES-VIVOUR, JJSC

1. HON. SUNDAY UGWA
2. PEOPLES DEMOCRATIC PARTY APPELLANTS
AND
1. HON. OJILEKWUWA
2. INDEPENDENT NATIONAL RESPONDENTS
ELECTORAL COMMISSION (INEC)

ELECTION PETITIONS - Words & phrases - "Decision" - Meaning - It is a judicial determination - After consideration of the facts and law (H1)

JURISDICTION - Supreme Court - Election petition appeals - Limit Supreme court does not have jurisdiction - Where appeal arises from Governorship and Legislative Houses Election Tribunal - Decision of Court of Appeal in respect thereof is final (H2)

FACTS

The petitioner/1st respondent contested for the Bende North State Constituency seat in Abia State House of Assembly in the April 2007 general elections against the respondent/1st appellant and the 1st appellant was returned as the winner. 1st respondent unsuccessfully challenged the return of the 1st appellant at the election petition tribunal. Aggrieved by the judgment of the tribunal, the 1st respondent appealed to the Court of Appeal, Port Harcourt Division in the court's capacity as an election petition appeal tribunal. After filing an initial brief of argument, 1st respondent's counsel filed an application for leave to file an amended brief of argument. But he subsequently withdrew the application thereby leaving the original brief as the extant brief of argument.

Ultimately, the appeal was heard and dismissed but the court utilized the proposed amended brief which was withdrawn by the 1st respondent's counsel instead of the original brief in its judgment. Con-

sequently, the 1st respondent filed an application before the Court of Appeal, Owerri Division praying for an order setting aside the judgment of Court of Appeal, Port Harcourt Division as having been delivered without jurisdiction. The application was heard and granted and the appeal reheard on the appropriate brief. 1st respondent was eventually declared the winner in place of the 1st appellant. Dissatisfied, appellants have brought this appeal against the judgment of Court of Appeal, Owerri Division. In reaction, the 1st respondent has raised a preliminary objection challenging the jurisdiction of the Supreme Court to entertain the appeal in view of S. 246 (3) of the 1999 Constitution which makes the decision of Court of Appeal final in Governorship and Legislative Houses Election Tribunals.

ISSUE FOR DETERMINATION

Whether the Supreme Court has the jurisdiction to entertain this appeal having regard to the provisions of Section 245 (1) (b) and (3) of the Constitution.

HELD (Unanimously striking out the appeal per **MUKHTAR JSC**)

Words & phrases - "Decision" - Meaning

1. I think it is pertinent that I reproduce and consider the provisions of section 246, around which this discussion revolves.

(3) The decisions of the Court of Appeal in respect of appeals arising from election petitions shall be final."

I will particularly like to focus my attention on the provision of section 246 (3) and the interpretation to be given to that provision. The word I would like to lay emphasis on in that subsection is 'decision'. What is the meaning of the word 'decision' in the context of this provision? I will reproduce its definition as stated in Blacks Law dictionary, Seventh Edition. According to this dictionary 'decision' is:- *"A judicial determination after consideration of the facts and the law, esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case."* (p. 3054 B/E)

Supreme Court - Election petition appeals - Limit

2. Going by the above definition of the word 'decision', the judgment of the Court of Appeal, Owerri Division appealed against by the appellants come within the ambit of the provision of section 246 (3) of the Constitution supra. On whether this court has jurisdiction

to hear this appeal, the answer is obviously in the negative, in view of the said provision of section 246(3) of the Constitution *supra*, and a plethora of this court's decisions by which we are bound. In the case of *Awuse v. Odili & Ors.* 2003 18 NWLR part 851 page 116, this court emphasized the finality of decisions such as this from the Court of Appeal as follows:-

under section 246(3) above, the decision of the Court of Appeal in respect of an appeal arising from an election petition as in this case, is final.

I have not the slightest doubt that the Constitution has in clear and unambiguous language made the Court of Appeal a final court in respect of appeals arising from election petitions as in matter before us now." (p. 3054 H)

NOTABLE POINT OF INTEREST

MUKHTAR JSC

1. That application was heard by another panel does not negate finality of Court of Appeal's decision

It is instructive to note that although there was a decision of the case by the Port Harcourt Division of the Court of Appeal, this was set aside by the Court of Appeal Owerri, Division, which had a concurrent jurisdiction. Ordinarily, the application should have been before the same panel that gave the first judgment, but the fact that it is not so, cannot compromise the provision of section 246(3) *supra*. (p. 3055 E)

REPRESENTATION

Mr. K. C. Nwugo, with him U. C. Ndubuisi for the appellants.

Chief U. N. Udechukwu SAN, with him J. N. Udechukwu (Mrs), David Ikoro for the 1st respondents.

Mr. Nwabueze Nwankwo, with him Tina S. Nwigboke for the 2nd - 108 respondents.

CASES REFERRED TO

Esewe v. Ogbe 1988 5 NWLR part 93 page 134

Awuse v. Odili 2003 18 NWLR part 851 page 116

Mbadinuju Vs. Ezuka (1994) 8 NWLR (pt. 364) 535

CARDOSSO V. DANIEL (1986) 2 NWLR (pt. 20) 1

OBIOHA V. IBERO (1994) 1 NWLR (pt. 322) 503/532

Kalu V. Chima (2007) 17 NWLR (pt. 1062) 187 at 194
 Aladegbimi Vs. Fasanmade (1998) 3 NWLR (pt 81) 129
 Onuaguluchi v. Ndu & Ors 2001 7 NWLR part 712 page 309
 UKACHUKWU V. U.B.A (2004) 10 NWLR (pt. 881) 294/310
 Okonkwo V. Okonkwo (1998) 10 NWLR (pt 571) 554 at 563

B Nwokoro and Ors Vs. Onuma & Ors (1990) 3 NWLR (pt 138) 22
 Alh. Lawal Tunbi vs. Isreal Opanoye (2000) 2 NWLR (pt 664) 264
 Ecoconsult Ltd v. Pancho Villa Ltd. 1999 1 NWLR part 588 page 507

STATUTE REFERRED TO

C Constitution of the Federal Republic of Nigeria 1999, S. 246 (3), S. 245 (1) (b) & (3)

LEAD JUDGMENT BY MUKHTAR JSC

D This is an appeal against the decision of the Court of Appeal, Owerri Division, which set aside the judgment of the Court of Appeal, Port Harcourt Division. In that judgment Eko JCA in the lead judgment found for the appellants in that court, as follows:-

E *“Even from the gross results, (sic) That is the raw total votes with the tainted votes the 1st Appellant had majority of the votes from the 7 wards. The Appellants proved the reliefs they sought at the Tribunal. The appeal is allowed in part. The decision of the Tribunal affirming the declaration or return of the 1st Respondent as the winner with the majority of lawful votes is hereby set aside. In its stead, it is hereby declared*
 F *that the 1st Appellant ought to be returned and he is hereby declared as the person with the majority of lawful votes from the election to the Abia State House of Assembly conducted on 14th April, 2007 in Bende North State Constituency of Abia State.”*

G By virtue of the provision of section 246 (3) of the Constitution of the Federal Republic of Nigeria, the judgment was supposed to be the final judgment, being an electoral dispute. That judgment was the final judgment as far as electoral complaints in respect of the subject matter in the suit was concerned. The 1st Respondent however being dissatisfied
 H with the judgment of the Port Harcourt Division of the court delivered on 27th of January, 2009, went back to court and on 25th February, 2009 filed an application praying the court to wholly set aside the said judgment. The Court of Appeal, Owerri Division heard and granted the application and set aside the judgment of 27/1/2009,

even though the appellants in this appeal, who were the respondents in the application had contended that the Court of Appeal, Owerri Division had no jurisdiction. Aggrieved by the ruling the appellants have appealed to this court on four grounds of appeal, from which the appellants in their brief of argument formulated four issues for determination. Briefs of argument were exchanged by the parties, to wit there was an appellants' reply brief of argument, and they were all adopted at the hearing of the appeal. B

The 1st respondent filed a notice of preliminary objection, which he argued in his brief of argument. The learned counsel for the 1st Respondent moved it at the hearing of the appeal. The grounds of the objection are as follow:- C

“(1) That suit No. SC/143/2010 - SUNDAY UGWA & ANOR Vs. HON. OJI LEKWUWA & 108 ORS. now pending in this Honourable court is an abuse of court process as it contravenes sections 246(1)(b) and (3) of the Constitution of Nigeria ,1999. D

(2) That the appeal arose from a decision of the Court of Appeal in an appeal to that court arising from a Legislative House Election Petition Tribunal decision and the Supreme Court therefore lacks the jurisdiction to entertain the appeal or any proceeding arising there from.” E

The learned Senior Counsel for the 1st respondent at the hearing of this appeal raised and moved their notice of preliminary objection. The argument canvassed on the objection is contained in their brief of argument. According to the learned SAN, having regard to section 246 (1) (b) (i) and (3) of the 1999 Constitution, the decision of the Court of Appeal in respect of appeals arising from decisions of Election Petition Tribunal concerning Election to the State House of Assembly are final and not subject to appeal to the Supreme Court. Reliance was placed on the authorities of Onuaguluchi v. Ndu & Ors 2001 7 G NWLR part 712 page 309, Awuse v. Odili 2003 18 NWLR part 851 page 116, Esewe v. Ogbe 1988 5 NWLR part 93 page 134 and Ecoconsult Ltd. v. Pancho Villa Ltd. 1999 1 NWLR part 588 page 507. F

The learned counsel for the appellants in their reply brief submitted that this court has jurisdiction to entertain this appeal as the judgment appealed against is a post final election appeal judgment, and not a pre-judgment interlocutory decision or a final decision. The learned counsel distinguished the present case from that of H

Onuaguluchi and Awuse supra, and argued that it was because the Court of Appeal Owerri violated section 246 of the 1999 Constitution when it set aside the final Election appeal judgment in CA/PH/EPT/230/2008, that made the appellants to approach the court to determine whether the setting aside of the said judgment was proper.

B ***I think it is pertinent that I reproduce and consider the provisions of section 246, around which this discussion revolves.*** The relevant provisions read:-

C “246 (1) *An appeal to the Court of Appeal shall lie as of right from*

(a).....

(b) *Decisions of the National Assembly Election Tribunals and Governorship and Legislative Houses Election Tribunals on any question as to whether -*

D (i) *any person has been validly elected as a member of the National Assembly or of a House of Assembly of a State under this Constitution.*

(ii) *any person has been validly elected to the office of Governor or Deputy Governor; or*

E (iii) *the term of office or any person has ceased or the seat of any person has become vacant.*

(2)

F ***(3) The decisions of the Court of Appeal in respect of appeals arising from election petitions shall be final.***”

G ***I will particularly like to focus my attention on the provision of section 246(3) and the interpretation to be given to that provision. The word I would like to lay emphasis on in that subsection is ‘decision’. What is the meaning of the word ‘decision’ in the context of this provision? I will reproduce its definition as stated in Blacks Law dictionary, Seventh Edition. According to this dictionary ‘decision’ is:- “A judicial determination after consideration of the facts and the law, esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case.”***

H Now, the pertinent question is, does the present appeal fall within the ambit of the decision envisaged by section 246?

Going by the above definition of the word ‘decision’, the judgment of the Court of Appeal, Owerri Division appealed against by the appellants come within the ambit of the

provision of section 246 (3) of the Constitution supra. On whether this court has jurisdiction to hear this appeal, the answer is obviously in the negative, in view of the said provision of section 246(3) of the Constitution supra, and a plethora of this court's decisions by which we are bound. In the case of *Awuse v. Odili & Ors* 2003 18 NWLR part 85 1 page 116, this court emphasized the finality of decisions such as this from the Court of Appeal as follows:-

"Under section 246 (1) (b) (ii) of the Constitution above an appeal would ordinarily lie to the Court of Appeal from that decision striking out the applicant's petition. Also under section 246 (3) above, the decision of the Court of Appeal in respect of an appeal arising from an election petition as in this case, is final. I have not the slightest doubt that the Constitution has in clear and unambiguous language made the Court of Appeal a final court in respect of appeals arising from election petitions as in matter before us now."

I am fortified by the above finding and categorically state that the present appeal before us is not competent, for it is one envisaged by section 246(3) of the Constitution supra. See also the case of *Onuaguluchi v. Ndu and ors* 2001 7 NWLR part 712 page 309.

It is instructive to note that although there was a decision of the case by the Port Harcourt Division of the Court of Appeal, this was set aside by the Court of Appeal Owerri, Division, which had a concurrent jurisdiction. Ordinarily, the application should have been before the same panel that gave the first judgment, but the fact that it is not so, cannot compromise the provision of section 246(3) supra.

In the light of the above discussion I uphold the preliminary objection raised by the learned Senior Advocate that this court lacks the jurisdiction to hear this appeal. The appeal is therefore struck out. I assess costs at N50,000.00 in favour of each set of respondent, against the appellants.

The learned Counsel for the 2nd respondent also filed a similar notice of preliminary objection which was also moved at the hearing of the appeal. In the 2nd respondent's brief of argument, he adopted the argument of the 1st respondent in respect of the preliminary objection as they share the same substratum in their grounds. For this same reason my pronouncement in respect of the 1st respondent's notice of preliminary objection applies to the 2nd respondent's objec-

tion, and the objection is also upheld, and the appeal is struck out.

MUNTAKA-COOMASSIE JSC

B This is an appeal against the ruling of the Court of Appeal sitting in Owerri, in which it set aside the judgment of the Court of Appeal, Port-Harcourt, and ordered to be reheard by a different panel of the Court of Appeal.

C On the 27/1/2009, the Court of Appeal, sitting in Port-Harcourt delivered its judgment in an Appeal brought before it by the Appellants against the decision of the Governorship and Legislative House Election Tribunal holden at Umuahia, which dismissed the petition filed by the Appellants against the return of the 1st Respondent as the winner of House of Assembly election of Bende North constituency in Abia State.

D In its judgment, the Court of Appeal allowed the Appeal and declared the 1st Appellant as the winner of the said election.

However, by a motion dated 23/2/2009, the 1st Respondent filed an application in which he prayed the Court of Appeal (hereinafter called the lower court) for the following orders: -

E *“That the judgment of this Honourable Court in Suit No. CAPH/ EPT/230/2008, SUNDAY WAWA and P.D.P Vs. HON. OJI LEKWAUNA and Ors., delivered on the 27/1/2009 be wholly set aside and annulled ex debito justitae for being null, and void or unconstitutional AND FURTHER TAKE NOTICE that the grounds for*
F *so contending are as follows: -*

(a) *The judgment was based on an amended Appeal Brief, which was not proper before the Court, having been withdrawn and accordingly struck out by the Court of Appeal on the 29th day of October, 2008.*

G (b) *The judgment is a breach of the 1st respondent/Applicants right to fair hearing, enshrined under section 36 (1) and (3) of the 1999 constitution.*

H (c) *By reason of 1 and 2 above, the said judgment is void and the 1st respondent/Appellant claims a right to have it set aside ex debito justitae”.*

The 2nd - 110th respondents also filed similar application, whilst the Appellants filed a motion dated 6/03/2009, in which he prayed for the following Order: -

“AN ORDER to correct the error arising from accidental slips in

the judgment in appeal No. CA/PH/EPT/230/2008 SUNDAY WAWA & ANOR.. Vs. HON. OJI LEKWAUNA & 109, by deleting the references made at pages 8, 13 and 15 to APPELLANT'S AMENDED BRIEF OF ARGUMENT and substituting thereof with APPELLANTS' BRIEF OF ARGUMENT".

Both parties were heard on these applications, and in a considered ruling the lower court refused the application of the Appellant and consequently made an order setting aside the judgment and ordered a re-hearing on the ground that Amended 1st Respondent's Brief utilised by the Court of Appeal, Port-Harcourt had been withdrawn and struck out and as such the 1st Respondent Brief of Argument was not considered and thus occasioned a breach of the 1st Respondent right to fair hearing.

The Appellants were dissatisfied with this ruling and have, as a result, appealed to this court. In response to the Appellants' appeal, the Respondents filed Notice of preliminary objection, in which they prayed for the following:-

"AN ORDER setting aside the Notice of Appeal dated 19th April, 2010 and filed on the 22nd day of April, 2010 by the Appellants".
The grounds for this application are stated as follows:-

(1) The Appeal is an abuse of the process of the Supreme Court having been brought in flagrant disregard of the provisions of Section 246 (1) (b) and (3) of the 1999 constitution;

(2) The appeal is against a decision of the Court of Appeal in respect of an appeal to that court arising from a Legislative House Election Petition Tribunal decision, and the Supreme Court lacks the jurisdiction to entertain the appeal or any proceeding arising therefrom."

In compliance with the rules of this court, the Notice of Preliminary Objection were argued together with the main appeal in the parties respective briefs of argument. The appellants in their brief of argument dated 14/6/2010, formulated four (4) issues for determination as follows:-

"(1) whether the Court of Appeal Owerri Division has the jurisdiction to set aside the final election appeal judgment delivered by the Court of Appeal Port-Harcourt Division. (Ground one).

2) whether the final Election Appeal Judgment in CA/PH/EPT/230/2008 violated the Respondent's right to fair hearing and assuming the answer is in the positive, whether the Court of Appeal

can do anything in respect thereof being an Election matter? (Ground two).

3) *whether the Appellants suffered a miscarriage of Justice by virtue of the lower court delivering just a single ruling in respect of three consolidated applications with distinct appeal numbers (Ground three).*

4) *whether it was proper for the lower court to grant the Respondents application seeking to destroy the proceeding/Judgment at the expense of the appellants, application seeking to correct or breathe life to the proceedings/judgment? (Ground four)*

Whilst the 1st Respondent in his brief of argument dated 1/7/2010 distilled three issues for determination as follows:-

i) *whether having regard to Section 246 (1) and (3) of the 1999 Constitution, the Supreme Court has jurisdiction to entertain this appeal? (The preliminary objection)*

ii) *whether the Court of Appeal had the jurisdiction to entertain the 1st respondent's application dated 25th day of February, 2009*

iii) *whether the decision of the Court of Appeal (lower court) now appealed against is correct having regard to the circumstances of this case”.*

The 2nd - 108 respondents formulated two issues in their brief of argument dated 1/7/2010 as follows:-

“1) *whether this court, in view of the relevant laws and authorities, has jurisdiction to entertain this appeal arising strictly and ostensibly from a State House of Assembly Election.*

2) *whether the court below, to wit, the Court of Appeal or indeed any court under our constitution and jurisprudence, can set aside its own judgment on any of the grounds recognized under our law and especially in circumstances of the case before the court below”.*

Learned counsel to the Appellant in respect of the issue one formulated by him, submitted that the court of Appeal, Owerri Division, lacked the jurisdiction to set aside the final Election Appeal judgment delivered on the 27th day of January, 2009 by the Court of Appeal Port-Harcourt Division in Appeal No. CA/PH/EPT/230/2008. Learned counsel cited the provisions of Section 246 (3) of the 1999 Constitution of the Federal Republic of Nigeria and submitted that the provisions un-ambiguously stipulated for the finality of the judgment of the Court of Appeal in Election Petition and once the Court of Appeal delivered its judg-

ment it is final, he supported his submissions with the cases of-
CARDOSO V. DANIEL (1986) 2 NWLR (pt. 20) 1; and OBIOHA V.
IBERO (1994) 1 NWLR (pt. 322) 503/532; and UKACHUKWU V. U.B.A
(2004) 10 NWLR (pt. 881) 294/310. He further submitted that the judg-
ment of the Court of Appeal, Port-Harcourt Division was final and can-
not be set aside even if there was any feature that rendered it irregular. B
The Court of Appeal has become *Functus Officio* except with the power
to amend its own judgment so as to correct and bring the judgment to
carry out the meaning which the court intended under the slip rules.

On the second issue, it was the submission of the learned counsel C
that the judgment delivered by the Court of Appeal, Port Harcourt Divi-
sion did not violate the right of the Respondents to fair hearing, and if it
does, the Court of Appeal can do nothing about it.

Learned counsel submitted that the reference to the defunct Ap-
pellants' brief of argument by the Court of Appeal, Port Harcourt Divi- D
sion, did not occasion any miscarriage of justice to the respondents, he
cited, in support, the case of Okonkwo V. Okonkwo (1998) 10 NWLR
(pt 571) 554 at 563.

On the third issue, the learned counsel submitted that the Appel- E
lants' right to fair hearing was violated and thereby occasioned miscar-
riage of justice when the lower court delivered just a single ruling in
respect of the three consolidated applications before it, it was his sub-
mission that consolidated suits are tried and resolved in the same
proceeding, but it must be noted that each suit remains separate and F
distinct and its own judgment must be given separately at the end of the
common trial. The case of Kalu V. Chima (2007) 17 NWLR (pt. 1062)
187 at 194.

On the 4th issue, the learned counsel submitted that the lower G
court ought to have taken his application that seeks to remedy the pro-
ceedings before considering the respondents application which seeks to
set aside the judgment, he cited, in support, the case of Nalsa and Team
Associates V. NNPC (1991) 11 SCNJ 51 at 62.

The learned counsel to the 1st Respondent, at the hearing, adopted H
his brief of argument and urged the court to dismiss the appeal.

On the preliminary objection learned counsel Chief
Udechukwu SAN submitted that having regard to Section 246 (1)
(b) (i) and (3) of the 1999 Constitution, the decision of the Court of
Appeal in respect of appeals arising from the decision of Election

Petition Tribunal concerning Election to the State House of Assembly are final and not subject to appeal to the Supreme Court, and any such appeal would amount to an abuse of the process of the court. Learned counsel Chief Udechukwu SAN cited the following cases in support:-

B (1) Onuaguluchi Vs. Ndu and Ors. (2001) 7 NWLR (pt. 712) 309;

(2) Awuse Vs. Odili (2003) 18 NWLR (pt. 851) 116;

C (3) Esewe Vs. Gbe (1988) 5 NWLR (pt. 83) 131, and urged the Supreme Court to affirm its consistent earlier position in allied cases by resolving this issue one in their favour, by holding that having regard to section 246 (1) (b) (1) and (3) of the 1999 constitution that the Supreme Court has no jurisdiction to entertain this appeal against the decision of the Court of Appeal.

D On the second issue, the learned counsel for the Applicants submitted that a party aggrieved by some fundamental vice which rendered a decision of a Court of Appeal void or un-constitutional or without jurisdiction can approach the court of Appeal under section 6 (6) (a) of the 1999 Constitution to have that vice exercised, as a debt owed to justice. The following cases were cited:-

E (a) Barclays Bank of Nig. Ltd. Vs Central Bank of Nig. (1976) 6 SC 175; L 11 and

F (b) Sken Consult Nig. Ltd. & Anor Vs. Ukey (1981) 1 SC 6 at 36 L. 16. It was his further submission that the lower court has no jurisdiction to determine an appeal on the basis of an abandoned brief, that any decision based on the such an abandoned brief is void being unconstitutional, a breach of the rule of fair hearing and an exercise without jurisdiction. He relies on the following:-

G Nwokoro and Ors. Vs. Onuma & Ors. (1990) 3 NWLR (pt 138) 22; and Alh. Lawal Tunbi Vs Isreal Opanoye (2000) 2 NWLR (pt 664) 264.

H He pointed out that the Brief utilised in giving its judgment was based on the withdrawn and struck out Amended Brief of Argument, while the extant and proper brief of the Respondent was not considered thereby occasioning a miscarriage of justice. He therefore submitted that when a judgment had been given without jurisdiction the court should, upon proper application made to it, set aside such judgment. See:-

(i) Aladegbimi Vs. Fasanmade (1998) 3 NWLR (pt 81) 129;

and

(ii) *Mbadinuju Vs. Ezuka* (1994) 8 NWLR (pt. 364) 535.

On the 3rd issue, it was his submission that lower court was right when it set aside the judgment delivered by the Court of Appeal Port-Harcourt Division and ordering that it be re-heard.

Learned counsel to the 2nd Respondent also adopted his brief of argument at the hearing and urged the court to dismiss the appeal. On the preliminary objection he submitted that by the virtue of Section 246 (1) (b) (1) and (3) of our 1999 constitution, the Court of Appeal sitting over an election petition arising from Governorship and Legislative House of Assembly election is final arbiter and adjudicator in respect thereof, see the case of *Awuse Vs Odili* (Supra) at 116. As such, this court is effectively and effectually deprived of the competence and jurisdiction to entertain this appeal.

On the 2nd issue, it was the learned counsel's submission that any court of competent jurisdiction has powers to set aside any of its own decision if it finds that the decision was given without jurisdiction. He cited the cases of:-

Chime Vs. Ude (1996) 7 NWLR (pt. 461) 379;

Tunbi Vs. Opawale (supra) 275 and

Ukachukwu Vs. Uba (supra) at 294

In response to the respondents Briefs of argument the Appellant filed a reply brief dated 8/7/2010 wherein he contended that this court has jurisdiction to entertain this appeal. This is so, because this appeal is against post final election judgment decision. The decision being appealed against is neither a pre-judgment, interlocutory decision nor a final judgment. He contended that if the decision had been a pre-judgment or interlocutory decision or a final judgment this court would not have jurisdiction to entertain the Appeal. He distinguished the decision in the case of *Onuaguluchi v. Ndu* (supra) and submitted that it was in respect of the pre-judgment and final judgment of the Court of Appeal in Election Matters.

I have carefully perused the record of this appeal. It is not in dispute that the 1st respondent filed an original Brief of argument in the appeal before the lower court, i.e. Court of Appeal Port-Harcourt Division. Thereafter he filed an application to amend his Brief of argument, which he later withdrew; this was on the 29/10/2008, and the following transpired in court -

*"Nwosu M. Nwosu Esq. - pray leave of this
court to withdraw the appellants motion filed on 19/9/
2008.*

Neory Echefu Esq.- No objection.

P. C. Okorie: - No objection.

B *Court: - Appellants motion on Notice filed on 19/9/2008 for
the Amendment of his brief of argument having been withdrawn
is hereby struck out".*

Hence it is clear that the said Amended Brief of argument was
C no longer extant and neither does it represent the case presented by
the respondent at the lower court. Furthermore, it is also not in dis-
pute that it was this abandoned Brief of argument that had been
struck out that was utilised by the Court of Appeal, Port-Harcourt
Division in its judgment. However, in view of the fundamental nature
D of the issue of jurisdiction raised by the Respondents, it would be
more prudent to determine the issue of jurisdiction before proceed-
ing to the substantive matter.

Jurisdiction is a fundamental issue, the absence of which would
rob this court, or any court for that matter, the power to determine the
E appeal. I have produced the two Notices of preliminary objection filed by
the respondents earlier in this judgment. The objection is centred on the
provisions of Section 246 (3) of the 1999 constitution which provides as
follows: -

F *"The decisions of the Court of Appeal in respect of appeal, aris-
ing from Election Petition shall be final".*

This court has in a number of cases, given judicial interpretation
to these provisions in some of its decided cases. In the case of Awuse Vs
ODILI (supra) also reported in (2003) 11 SCNJ 88, this court Per Kutigi
G JSC (as he then was) stated the legal position as follows: -

*"Under Section 246(1) (b) (11) of the constitution above an ap-
peal would ordinarily be to the Court of Appeal from that decision
striking out the applicants petition. Also under Section 246 (3) above,
the decision of the Court of Appeal in respect of an appeal arising from
H an election petition, as in this case is final. I have not the slightest doubt
that the constitution has in clear and unambiguous language made the
Court of Appeal a final court in respect of appeal arising from elec-
tion petition as in the matter before us now."*

His Lordship Iguh JSC in the same case at page 104 succinctly

state thus:-

“In making provision in respect of decisions of the Court of appeal in Election petition matters, Section 246 (2) of the 1999 Constitution makes no distinction between interlocutory and or final decision of the court. In my view the language of Section 246 (3) of the 1999 Constitution is so clear and unambiguous that it institutionalized the Court of appeal as the final Court of Appeal in respect of appeals arising from decisions to the office of member of the National assembly or of a State Assembly of a State and Governor or Deputy Governor of a State. I cannot, with the greatest respect to the learned appellant’s counsel, accept that Section 246 (3) of the 1999 by any stretch of the imagination conferred this court with jurisdiction to entertain appeals from the decision of the Court of Appeal in respect of appeals arising from election petitions specifically mentioned under that section of the constitution, inclusive of the Election Petition in issue in the present case”.

Also in the case of Onuaguluchi V. Ndu & Ors (2001) 7 NWLR (pt. 712) 309 at 321; this court unanimously held as follows:

“The decision of the Court of Appeal in respect of appeals arising from election petition shall be final. Section 246 (1) (b) specifies the election concern to be National Assembly, Governorship and State House of Assembly elections. It must be emphasized that such finality applies also to every interlocutory decision or any decision taken in respect of a matter or an issue concerning or arising from the decision reached in the appeal. No appeal shall lie from it to any other court even if it is patently wrong”.

It is not in dispute that this is a decision of the Court of Appeal concerning the election to the Abia State House of Assembly. The appellant has argued that this appeal is not against the final judgment of the Court of Appeal but a post final election judgment decision. With due respect to the learned counsel this is a distinction without difference. I do not comprehend what exactly the learned counsel referred to as “post final judgment”, the fact remains that the decision of the Court of Appeal, which is the subject of this is appeal concerns and is in respect of the Election to the Abia State House of assembly and this falls within the ambit of the provisions of Section 246 (1) (11) of the 1999 Constitution. I am in agreement with the decisions of this court cited above and I have no reason to depart from it. It is now well settled that no

appeal will lie to this court from the decision of the Court of Appeal in respect of the matters set out in Section 246 of the 1999 Constitution be it post final judgment /decision, as the learned counsel to the appellants posited, or any decision whatsoever of the Court of Appeal. As such I have no hesitation in holding that this court lacks jurisdiction to entertain this appeal. Consequently, it is hereby struck-out.

I was opported to read in advance the illuminating judgment of my learned Lord Mukhtar JSC I have no difficulty in agreeing with the judgment. With my little but resolute contribution and the more elaborate judgment of my learned Lord I entirely agree with the decisions as adumbrated in the lead judgment.

In view of the above, I hold that the appeal is not only devoid of any merit, but also incompetent as this court totally and completely lack jurisdiction to hear it. Consequently the appeal is struck out. I abide by the order as to costs.

FABIYI JSC

I have read before now the judgment just delivered by my learned brother, Mukhtar, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal deserves to be struck out.

It is not in dispute that the decision of the Court of Appeal, Owerri Division which precipitated this appeal is in respect of election petition over the outcome of the election into Bende North State Constituency of Abia State. Both respondents raised objection to this appeal on the ground that this court is not imbued with jurisdiction. They placed reliance on the provision of section 246 (3) of the 1999 Constitution which provides as follows:-

“246 (3) - The decisions of the Court of Appeal in respect of appeals arising from election petitions shall be final.”

From the above, it is clear that the decision of the Court of Appeal in respect of appeals arising from decisions of Election Petition Tribunals concerning election to the State House of Assembly as herein, are final and not subject to appeal to this court. This court is not imbued with jurisdiction over same. Refer to *Onuaguluchi v. Ndu (2001) 7 NWLR (Pt. 713) 309 at 321; Awuse v. Odili (2003) 18 NWLR (Pt. 851) 116 at 151.*

For the above reason and more especially, those set out in the lead

judgment, I subscribe to the view that this court lacks jurisdiction to hear the appeal. It is therefore struck out. I endorse the order relating to costs therein contained.

RHODES-VIVOUR JSC

I have had the privilege of reading in draft the leading Judgment of my learned brother Hon. Justice A. M. Mukhtar, JSC. So completely do I agree with it that I was inclined to say nothing much but I have decided to add a few paragraphs of my own.

On the 14th day of April, 2007 elections were held in Nigeria for seats in the State Houses of Assembly. The 1st appellant and the 1st respondent contested the elections into the Abia State House of Assembly for the Bende North State Constituency. The 1st respondent won and was declared the winner by the 2nd respondent.

Dissatisfied with the results, the 1st appellant filed a Petition before the Governorship and Legislative House Election Petition Tribunal in Umuahia, Abia State. On the 23rd day of January, 2008 the tribunal affirmed the results announced by the 2nd respondent. Still dissatisfied the 1st appellant appealed to the Court of Appeal, Port Harcourt Division.

In a judgment delivered on the 27th day of January, 2009, the decision of the Tribunal declaring the 1st respondent the winner was set aside. The Court of Appeal declared the 1st appellant the winner. Aggrieved, the 1st respondent filed a post election appeal. It was heard in the Court of Appeal, Owerri Division. That court acceded to the 1st respondent prayers, set aside the judgment of the Court of Appeal Port Harcourt Division.

The 1st appellant, then filed an appeal before this court and distilled from his grounds of appeal four issues for determination. They read:

(i) Whether the Court of Appeal Owerri Division had the jurisdiction to set aside the final Election Appeal judgment delivered by the Court of Appeal Port Harcourt Division.

(ii) Whether the final Election Appeal Judgment in CA/PH/EPJ/230/2008 violated the respondents right to fair hearing and assuming the answer is in the positive, whether the Court of Appeal can do anything in respect thereof, being an Election matter?

(iii) Whether the appellants suffered a miscarriage of justice by virtue of the lower court delivering just a single Ruling in respect of three consolidated applications with distinct appeal numbers.

(iv) Whether it was proper for the lower court to grant the respondents application seeking to destroy the proceeding/judgment at the expense of the appellants application seeking to correct or breathe life to the proceedings/judgment.

Both respondents filed separate briefs which contained preliminary objections.

The issue is whether the Supreme Court has the jurisdiction to entertain this appeal having regard to the provisions of Section 245 (1)(b) and (3) of the Constitution.

By the provisions of Section (6) (1) of the Constitution Courts in Nigeria derive their jurisdiction from the Constitution. An appeal lies from decisions of the Court of Appeal to the Supreme Court as of right in the following cases:

(a) Where the ground of appeal involves questions of Law alone, decisions in any civil or criminal proceedings before the Court of Appeal;

(b) decisions in any civil or criminal proceedings on questions as to the interpretation or application of the Constitution;

(c) decisions in any civil or criminal proceedings on questions as to whether any of the provisions of chapter IV of the Constitution has been, is being or is likely to be contravened in relation to any person;

(d) decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court;

(e) decisions on any question:-

(i) Whether any person has been validly, elected to the office of President or Vice-President under the Constitution;

(ii) Whether the term of office of President or Vice President has become vacant; and

(f) Such other cases as may be prescribed by an Act of the National Assembly.

It is clear from Section 233 (2) (e) (i) that the Supreme Court is the final court to determine whether a person has been validly elected to the office of President or Vice-President.

The argument put forward by learned counsel for the respon-

dents is that by virtue of the provisions of Section 246 (1) (b) (i) and (3) of the Constitution the decision of the Court of Appeal from decisions of the Election Petition Tribunal concerning Election to the State House of Assembly are final and subject to no appeal to the Supreme Court. Reference was made to *Awuse v. Odili* 2003 18 NWLR pt. 851 p. 116;

B

Esewe v. Ogbe 1988 5 NWLR pt. 93 p. 134.

On the other hand learned counsel for the appellants observed that this court has jurisdiction to entertain this appeal because the judgment appealed against is a post election judgment which according to learned counsel was a clear violation of the provisions of Section 246 of the Constitution when the Court of Appeal set aside the Election appeal judgment.

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It is now important for the provisions of Section 246 of the Constitution to be examined as it relates to the issue.

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Section 246 (1) (b) (1) (3) of the Constitution reads thus:

"246(1) An appeal to the Court of Appeal shall lie as of right from -

(b) decisions of the National Assembly Election Tribunals and Governorship and Legislative House Election Tribunals on any question as to whether-

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(i) Any person has been validly elected as a member of the National Assembly or of a House of Assembly of a State under this constitution.

(3) The decisions of the Court of Appeal in respect of appeals arising from election petitions shall be final."

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Courts in Nigeria derive their jurisdiction from the constitution and some specific Laws. The Supreme Court is the final court in all matters but when determining election matters its decision are final when the issue is whether a person has been validly elected to the office of President or Vice-President.

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The decision of the Court of Appeal is final in respect of appeals from election petitions on -

(a) Who was validly elected Governor or Deputy Governor.

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(b) Who was elected member of the National Assembly.

(c) Who was elected member of the House of Assembly, of a State.

In *Onuaguluchi v. Ndu* 2001 7 NWLR pt. 712 p. 309 and

Awuse v. Odili 2003 18 NWLR pt. 851 p. 116

This court made it abundantly clear that decisions of the Court of Appeal are final when dealing with appeals from Election Petition Tribunals on National Assembly, Governorship and State Houses of Assembly elections.

B Appeals from decisions of election Petition Tribunals on State Houses of Assembly, National Assembly and Gubernatorial elections are heard by the Court of Appeal and its decisions are final on these elections. See Section 246 (i) (b) (3) of the Constitution.

C An appeal to the Supreme Court from the final decision of the Court of Appeal would amount to no appeal, since the Supreme Court has no jurisdiction to hear such an appeal.

The Court of Appeal has inherent powers to correct real errors or abuse of its process in, or arising out of, or concerning its final decisions on election matters and no appeal shall be entertained by the Supreme Court even if the decision is wrong.

The preliminary objection is upheld and the appeal is struck out.

This court lacks jurisdiction to hear this appeal.

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