

SUPREME COURT OF NIGERIA
28TH JANUARY, 2011. SC. 207/2009
CORAM:- A. M. MUKHTAR, F. F. TABAI, I. T. MUHAMMAD,
M. S. MUNTAKA-COOMASSIE, B.
RHODES-VIVOUR, JJSC

CHIEF UFIKAIRO MONDAY EFET APPELLANT/
CROSS RESPONDENT

AND

1. INDEPENDENT NATIONAL RESPONDENT
ELECTORAL COMMISSION
2. PEOPLES DEMOCRATIC PARTY RESPONDENTS/
3. HON. CHARLES MBONG CROSS-APPELLANTS

ACTIONS - Appeals - Preliminary objection - Purpose - It is to terminate the proceedings at infancy - Without dissipating unnecessary energies - In considering a fruitless matter (H1)

AFFIDAVITS - Averments - Failure to deny - Effect - Any fact which has not been categorically denied - By a party - Is deemed to be admitted (H2)

APPEALS - Blame - Retrial order - Abandonment of - Appellant should be blamed - For discontinuing the matter - Ordered for retrial by the Court of Appeal (H3)

RULES OF COURT - Discontinuance of action - Remedy - Where a party discontinued an action - Order 50 r. 4 of the Federal High Court - Allows him to institute a fresh action to resurrect the dead one (H4)

ACTIONS - Appeals - Retrial order - Options - Appellant had an option to either - Stay the proceeding pending appeal - Or re-file the matter - Yet he preferred to discontinued the action - Which is fatal to his Supreme Court appeal (H5)

APPEALS - Nature & Purpose - Rehearing - An appeal is a continuation of an original case - Confined to the records forwarded from

the court below - And may be reheard by the appellate court (H6)

APPEALS - Retrial - Wrong procedure - Appellant misdirected himself in taking a wrong procedure - At the retrial court - And cannot sustain his argument that this appeal arose from the Court of Appeal (H7)

FACTS

Plaintiff/Appellant/Cross respondent by originating summons before the Federal High Court Abuja, sought for the intervention of the court over his substitution, by the 3rd respondent/cross appellant, as it was contrary to s. 34 (1) and (2) of the Electoral Act, 2006. The case of the appellant was that he was the nominated candidate of Peoples Democratic Party for the Ikot Abasi Eastern Obolo State Constituency for the April, 2007 general election, in compliance with the Electoral Act and the Peoples Democratic Party's guidelines, after which he was issued certificate of return and his name forwarded to the 1st respondent. However, by a letter dated 12/2/07, the 2nd respondent sought to substitute him with the 3rd respondent without any cogent and verifiable reason. Appellant maintained that he remained the candidate of 2nd respondent for the House of Assembly election in the said constituency. He therefore prayed the court to declare inter alia, that the purported letter of substitution of 3rd respondent did not contain cogent and verifiable reason in accordance with the provision of s. 34 (1) and (2) Electoral Act, 2006.

Respondents filed separate memorandum of conditional appearances while the 2nd and 3rd respondents also filed a notice of preliminary objection against the action. The appellant responded by filing a counter affidavit. Meanwhile, the election scheduled for the 14/4/07, took place and was concluded on 28/4/07, declaring the 3rd respondent as the winner. Consequently, appellant sought to amend the reliefs prayed in his originating summons, in the light of the election held and concluded. The 2nd and 3rd respondents objected against the amendment on the ground that appellant could not claim the result of an event which occurred after the suit had commenced. The trial court in its ruling, refused the amendment. Dissatisfied, appellant appealed to the Court of Appeal, which allowed the appeal but refused to grant the prayer invoking its jurisdic-

tion under s. 15 of the Court of Appeal Act. It remitted the case back to the trial court for rehearing. Pursuant to the order, the matter started de novo and was however withdrawn by appellant, when he filed a notice of discontinuance which the court granted and the matter was struck out accordingly. Appellant later filed an appeal to the Supreme Court. Respondents raised a preliminary objection for the court to strike out the appeal for abuse of court's processes. The 2nd and 3rd respondents also filed a cross appeal which sought to set aside the Court of Appeal's decision which had allowed the 1st respondent's suit.

ISSUES FOR DETERMINATION

1. *“Whether the alleged dispute as to who won the party primary election, as between the appellant and the 3 respondent, is relevant to the determination of the real issue in the case challenging unlawful substitution, brought pursuant to section 34 (2) of the Electoral Act, 2006.*

2. *Having regard to the fact that this case was initiated by way of originating summons, specifically seeking the interpretation of section 34 (2) of the Electoral Act, 2006, vis-a-vis the letter of substitution dated 12th February, 2007, the life span of the res, and having had the letter of substitution placed before it, whether the Court of Appeal was not in error to decline to invoke its powers under section 15 (formerly section 16) of the Court of Appeal Act, on the ground that the appellant had not placed enough materials before the court to establish who won the party primary election between him and the 3^d respondent.” (Etc. see p. 150)*

HELD (Unanimously upholding the preliminary objection and dismissing the appeal and cross appeal per **MUHAMMAD JSC**)

ACTIONS - Appeals - Preliminary objection - Purpose

1. As has been chronicled above, all the three respondents raised preliminary objections, argued same and relied on same as to the competence of this appeal. The aim/essence of a preliminary objection is to terminate at infancy, or as it were, to nip it at the bud, without dissipating unnecessary energies in considering an unworthy or fruitless matter in a court's proceedings. It, in other words fore-closes hearing of the matter in order to save time. (p. 156 C)

AFFIDAVITS - Averments - Failure to deny - Effect

2. In the two separate counter-affidavits filed by the appellant in response to the affidavits in support of the notices of intention to rely upon preliminary objection by the respondents, there is no averment which countered the facts deposed to by the respondents in their respective affidavits in support as summarised above. The law is well settled that any fact which has not been categorically countered or denied by a party, that fact is deemed admitted in law by the other party. (p. 159 D)

APPEALS - Retrial order - Abandonment of

3. There is no dispute that there was a re-trial order by the court below. The court below was so clear and categorical that it was the same originating summons, which was earlier placed before the Federal High Court and the reliefs of which were sought to be amended but refused, was ultimately dismissed by the said Federal High Court. This is what went on appeal to the court below, hence, the order of retrial on same facts, parties and subject matter. Instead of pursuing the retrial, the appellant, for reasons best known to him, decided to discontinue the retrial, soon after commencement thereof. The retrial court yielded to his request and struck out the matter referred to it by the court below for retrial. Now, who is to blame? The respondent? The re-trial court? Or, the appellant? If I am to answer this question to my conscience, it is the latter that should shoulder the blame. (p. 159 G)

RULES OF COURT - Discontinuance of action - Remedy

4. Rule 4 of Order 50 of the Rules is very clear and free of any ambiguity. I am as well in support of the argument that discontinuance under the provision, cannot be a defence to a subsequent action for the same or substantially the same cause of action. What I do not agree with, is the contention of the learned counsel for the appellant that the already struck out action is still pending and existing validly before the re-trial court. Withdrawal or discontinuance of an action connotes the termination or removal of that action from the cause list of that court. It exists no more before that court. It has slumped down, fainted and ultimately died, only waiting for resurrection where there will be one. Thus, where an action has been

withdrawn or discontinued, the remedy provided by law as in rule 4 of order 50 of the Federal High Court Rules, is to institute a fresh, or subsequent action to resurrect the dead, wholly or partially and whether of the same or substantially the same cause of action. (p. 161 G)

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ACTIONS - Appeals - Retrial order - Options

5. The order given by the Court of Appeal is for a re-trial of the same cause of action. The re-trial commenced in earnest. The plaintiff had so many options open to him. He could have asked for a stay of proceedings in view of the pending appeal before the Supreme Court, to await the final determination of the appeal by this court; or, he could withdraw it (as he rightly did) but to re-file same; or he could have discontinued his appeal before the Supreme Court in order to pursue the re-trial process to its logical conclusion. The appellant preferred withdrawal/discontinuance of the re-trial action. This became fatal to his appeal at the Supreme Court. (p. 162 C)

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APPEALS - Nature & Purpose - Rehearing

6. An appeal is generally taken to be a continuation of the original case started at the first instance court, it is not a new cause of action. It is always confined to the consideration of the record which was forwarded from the court below, with no new testimony or issues raised in the appellate court. Focussing on the record of appeal placed before it, the appeal court “rehears” the case and may make its own evaluation of the evidence contained in the record of appeal. From that record, the appeal court may review the findings and inferences of fact, and where it considers it proper, may substitute its own view of the facts for that of the trial court. It may also review the whole proceedings including all the interlocutory decisions given in the trial. It may reject conclusions of the trial court from facts which do not flow from the evidence, or may be regarded as perverse. (p. 162 E)

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APPEALS - Retrial - Wrong procedure

7. If there is anyone that goofed, it is the appellant himself. He misdirected himself in not taking the correct procedure/approach to the retrial case. The argument put by learned counsel or the appellant

that the body, spirit and soul of the present appeal arose directly from the decision of the Court of Appeal in Appeal No. CA/A/46/2008, which arose from an earlier final decision of the Federal High Court and not dependent on suit No. FHC/ABJ/CS/ 287/2007 by the Federal High Court, may appear lofty but faulty. If one may ask, from where did the appeal come to the Court of Appeal? Is it not from suit No. FHC/ABJ/CS/287/07 between same parties and same subject matter from the same court? Is it not the one ordered by the court below to be retried by the same court, though differently constituted? Yes! It is an unintelligible argument. It cannot also alter the facts of the case presented, however brilliantly put. One cannot eat one's cake and have it again.

To consider the merit of this appeal is like beating a dead horse. It serves no useful purpose. It is an exercise in futility. I find the preliminary objections raised by the respondents in this appeal very sound and sustainable. I sustain same. (p. 163 A)

NOTABLE POINTS OF INTEREST **MUHAMMAD JSC**

1. Appeals - Court is bound to consider preliminary objection first
It is trite law now that where a notice of preliminary objection is filed and moved before a court of law, the court is duty bound to consider the preliminary objection before venturing into the main or cross-appeal, as the case may be. (p. 151 C)

2. Courts do not determine academic issues
Courts of law dissipate energy on live issues. Courts of law for long, have left academic issues to the academia. They rather concentrate on live issues. I have no reason to go into the merit of the appeal as courts do not make orders in vain. (p. 163 E)

REPRESENTATION

Mamman Usuman, SAN. with him, A. R. Fatunde; A. Umosoh; Chris Maku, U. Nwoko and E. Ekpo for the Appellant/ Cross-Respondent. H. M. Liman with him, I. M. Dikko, Y. D. Dangana, T. N. Akoso and A. A. Abdullahi for the 1st Respondent. P. D. Abalaka, with him, Joe Abah, Deborah Akar and Joshua Ejiga for 2nd and 3rd Respondents/Cross-Appellants.

CASES REFERRED TO

- Bakare v. ACB Ltd. 1986 3 NWLR Pt 26 p 47
- Saraki v. Kotoye [1992] 9 NWLR (part 264) 156
- Okulate v. Awosanya 2002 2 NWLR Pt 645 p530
- Makinde v. Akin wale (1995) 6 NWLR (Pt.399) 5 B
- Bhojwani v. Bhojwani 1996 6 NWLR Pt 457 p663
- NNSC Ltd. v. Sabana (1988) 2 NWLR (Pt.74) 23
- Ekudano v. Keregbe (2008) 4 NWLR (pt 1077) 422 at 430
- Adegoke Motors v. Adesanya (1989) 3 NWLR (Pt.109) 250 C
- Nzeribe v. Dave Eng. Co. Ltd. (1994) 8 NWLR (Pt.361) 124
- Oredoyin v. Arowolo (1989) 4 NWLR (Pt.114) 171 at p.211
- ANAMBRA STATE vs. N.I.W.A (2004) 3 NWLR (pt 861) 640
- UBN PLC. vs. Luobai Nig. Ltd. (2008) 2 NWLR (pt 1071) 257 at 281 D
- UBA v. BTL Industry Ltd. (2006) 19 NWLR [part 1013] 61 at page 107-108
- Ekudayo & Ors. v. Keregbe & Ors. (2008) 4 NWLR [part 1077] 422 at page 430
- Ministry of Works v. Tomas (Nig.) Ltd. [2002] 2 NWLR [part 752] E 740 at page 765

STATUTES & RULES REFERRED TO

- Court of Appeal Act, s. 15
- Constitution of Federal Republic of Nigeria 1999, s. 233(1) F
- Electoral Act, 2006, s. 34 (1) & (2)
- Federal High Court Rules O. 50 rr. 2(1), 4, & 5
- Supreme Court Rules O. 9 r 29 (1), O. 2 G

LEAD JUDGMENT BY MUHAMMAD JSC

By an originating summons dated the 24th day of April, 2007 and filed before the Federal High Court (trial court) holden in Abuja, the plaintiff applied to that court for the determination of the following questions: H

1. Whether the purported letter of substitution of the plaintiff with the 3rd defendant issued by the 2nd defendant satisfies the requirement of section 34 (1) and (2) of the Electoral Act, 2006.
2. If the answer to question 1 is in the negative, whether the

1st defendant properly substituted the plaintiff with the 3rd defendant having regards to the peculiar facts of this case.

The salient facts giving rise to the appeal as stated by the plaintiff in the affidavit in support of the originating summons are that he was nominated the Peoples Democratic Party candidate for the Ikot Abasi Eastern Obolo State Constituency for the April, 2007 General Elections in compliance with the Electoral Act 2006 and the PDP Guidelines for the primaries. His name was forwarded along with other candidates on the 21st of December, 2006 to the 1st defendant. The plaintiff stated that when he won the primaries for nomination conducted by the 2nd defendant on or about the 30/11/06 with overwhelming majority, he was issued with a certificate of return dated 30/11/06.

However, by a letter dated 12/2/07, the 2nd defendant sought to substitute him with the 3rd defendant without giving any cogent and verifiable reason for the substitution. The plaintiff claimed that since nomination, he had been and still remained the candidate of the 2nd defendant for the House of Assembly Election in the Ikot Abasi Eastern Obolo State Constituency, having been nominated and presented and not substituted in accordance with the provisions of the law.

The plaintiff, therefore, prays the trial court for the following reliefs:

1. *"A declaration that the purported letter of substitution of 3rd defendant to the plaintiff dated..... 12/02/07 does not contain cogent and verifiable reason for the said substitution as contemplated by the provision of Section 34 (1) & (2) of the Electoral Act, 2006.*

2. *A declaration that the exclusion of the name of the plaintiff for the April, 2007, general election as the candidate of the 2nd Defendant in the Ikot Abasi/Eastern Obolo State Constituency is wrongful, null and void.*

3. *A declaration that for the purpose of the election to the House of Assembly, the plaintiff is the candidate of the 2nd defendant validly nominated and not substituted.*

4. *An order setting aside the substitution of the plaintiff for not being in conformity with the provisions of Section 34 (2) of the Act, 2006.*

5. *An order directing the 1st defendant to forthwith place the*

name of the plaintiff on the ballot as the candidate of the 2nd defendant representing Ikot Abasi Easter Obolo State Constituency in April general election to the Akwa Ibom State House of Assembly.

6. *An order of perpetual injunction restraining the 1st and 2nd defendants from recognizing or continuing to recognize the 3^d defendant as the candidate of the 2nd defendant for the election scheduled for April, 2007.”* B

The defendants, each, filed a memorandum of conditional appearance. Both 2nd and 3rd defendants filed a notice of preliminary objection against the action. The plaintiff responded by filing a counter affidavit to each of the notices of the preliminary objection. C

Meanwhile, the election which was scheduled for the 14th of April, 2007, commenced on that day in some parts of the constituency but could not be concluded. Part of the election was staggered to the 28th of April, 2007. Result was declared with the 3rd defendant D emerging as the winner.

In the course of the proceedings before the trial court, the plaintiff by a motion on notice filed on the 18th of June, 2007, sought to amend the reliefs prayed in the originating summons in the light of the election held and concluded on 28th April, 2007, after the suit E had been filed. The 2nd and 3rd respondents vehemently opposed the motion on the ground that the election was held after the action had been commenced and that the appellant could not claim the result of an event which occurred after the suit had been commenced. The F learned trial judge gave her ruling on the 17th of July, 2007, wherein she refused the amendment sought by the plaintiff.

Dissatisfied, the plaintiff as appellant filed a notice and grounds of appeal before the Court of Appeal, Abuja (court below). The court G below allowed the appeal. It however refused to grant the prayer of the appellant inviting it to invoke its general powers under section 15 of the Court of Appeal Act, to hear and determine the case on the ground that enough materials were not placed before the court to determine the actual person that won the primaries in view of the fact that primary elections were conducted in the case. The court H below remitted the case to the Federal High Court for re-hearing.

Dissatisfied with the decision of the court below, the appellant appealed further to this court.

In this court and in compliance with the rules of the court,

parties filed and exchanged briefs of argument. The appellant placed the following issues for determination by this court:

1. “ whether the alleged dispute as to who won the party primary election as between the appellant and the 3 respondent, is relevant to the determination of the real issue in the case challenging unlawful substitution brought pursuant to section 34 (2) of the Electoral Act, 2006.

2. Having regard to the fact that this case was initiated by way of originating summons specifically seeking the interpretation of section 34 (2) of the Electoral Act, 2006 vis-a-vis the letter of substitution dated 12th February, 2007, the life span of the res, and having had the letter of substitution placed before it, whether the Court of Appeal was not in error to decline to invoke its powers under section 15 (formerly section 16) of the Court of Appeal Act on the ground that the appellant had not placed enough materials before the court to establish who won the party primary election between him and the 3rd respondent.

The 1st respondent filed a preliminary objection by way of motion on notice seeking for the striking out and or dismissal of the appeal for being an abuse of court process. The following sole issue was formulated by the 1st respondent in the event of failure of the preliminary objection.

The issue is as follows:

(i) “ *Whether in view of the order of the Court of Appeal allowing appellant’s appeal and ordering for a retrial before the trial court, the appellant can compel the Court of Appeal to invoke its power under section 15 of the Court of Appeal Act, 2004, to retry the matter itself. [Grounds 1 and 2 of the notice of appeal]*”

2nd and 3rd respondents filed a joint brief of argument. They too, filed a notice of intention to rely upon preliminary objection. They however submitted two issues for determination. The issues are as follows:

[1] “ *Whether the Court of Appeal was right in the circumstance of this case when it declined the invitation to invoke its powers under section 15 of the Court of Appeal Act, to determine the case on its merits?*

[2] *Assuming [without conceding] that the issue No. 1 above is resolved in the affirmative, whether the Supreme Court can in the*

circumstances of this case invoke its powers under section 22 of the Supreme Court Act to determine this case on the merits?”

Learned counsel for the appellant filed a joint reply brief to the preliminary objection raised by the 1st, 2nd and 3rd respondents. It is to be noted that the 2nd and 3rd respondents herein, filed a cross-appeal. The notice of the cross-appeal is contained in the supplementary record of appeal, pages 533 thereof. It contains two grounds of appeal and the relief sought is for the setting aside of the lower court's decision and upholding the decision of the trial court which dismissed the 1st respondent's suit. Briefs in respect of the cross-appeal were filed and exchanged with relevant issues formulated by the respective parties. I may revisit the cross-appeal later, if need be. It is trite law now that where a notice of preliminary objection is filed and moved before a court of law, the court is duty bound to consider the preliminary objection before venturing into the main or cross-appeal, as the case may be. See: AGBAREH & ANOR. V. MIMRA & ORS. [2008] 1 SCN.J. 409, ONYEKWULUJE V. ANIMASHAUN & ANOR [1996] 3 SCN.J. 24; ONYEMEH & ORS. V. EGBUCHULAM & ORS. [1996] 4 SCN.J. 235.

The 1st respondent filed its preliminary objection on the 10th of November, 2009, whereas the 2nd and 3rd respondents filed theirs on the 11th of November, 2009. Both objections are same and similar in purpose. The notice filed by the 2nd and 3rd respondents, for instance, premised their objection as follows:

“TAKE NOTICE that the 2nd and 3rd Respondents herein intend at the hearing of this appeal to rely upon the following preliminary objection, notice whereof is hereby given, Viz:

That the appeal herein is incompetent because its substratum/ foundation has been completely eroded by the act of the appellant.

AND TAKE NOTICE that the grounds for the objection are as follows:

1. The Court of Appeal by its judgment dated 6th day of May, 2009, upon allowing the appellant' [sic] appeal, remitted the case to the Federal High Court for rehearing.

2. That the rehearing commenced at the Federal High Court but the appellant voluntarily discontinued the case at the Federal High Court before filing this appeal to the Supreme Court.

3. That the discontinuance has completely extinguished life out

of the case of the appellant and deprives this appeal of any foundation or substratum.

4. That the case having been discontinued and struck out the appeal has become ipso facto vacated.

5. The case which forms the pillar and foundation of the appeal having been discontinued, this appeal has become merely academic.

6. The appeal which seeks reliefs founded on a suit which no longer subsists is an abuse of this Court process"

C There is an affidavit in support of the notice of preliminary objection. It is averred in the affidavit in support by one Relwan Okpanachi, a legal practitioner in the chambers of the 2nd and 3rd respondents' solicitors as follows:

D 2. "That I am aware that the judgment of the Court of Appeal was delivered on the 6th day of may, 2009.

3. That I have read the judgment and I know that the Court of Appeal remitted the case to the Federal High Court for rehearing.

E 4. That I am aware that the record of this appeal consisting of the proceeding of the Court of Appeal and its judgment is already before this court.

5. That on the 9th day of November, 2009, at about 12:30pm P. D. Abalaka Esq. my principal in chambers informed me and I verily believe him as follows:

F a. That after the judgment of the Court of Appeal, the appellant ensured that the case was immediately remitted to the Federal High Court for the rehearing and that the rehearing commenced on the 4th day of June, 2009. A copy of the proceedings at the Federal High Court Abuja on 4th day of June, 2009 in hereby attached as G Exhibit "A"

b. That the Federal High fixed 7th day of July, 2009 for the hearing of the case.

H c. That on the 15th day of June, 2009, the appellant through his counsel filed a notice of discontinuance to terminate or withdraw the suit. A copy of the notice of discontinuance is attached herewith as Exhibit "B".

d. That on the 7th day of July, 2009, when the case came up for hearing the appellant through his counsel moved the court to strike out the case based on the notice of discontinuance earlier filed

and the case was accordingly struck out. A copy of the proceedings of 7/7/09 wherein the case was struck out is attached herewith as Exhibit "C".

e. That on the 19th day of June, 2009, the appellant filed this appeal in the court below seeking reliefs based on the suit which had already been discontinued. B

f. That the implication of discontinuing the suit at the Federal High Court is to deprive this appeal of its foundation.

6. That it is in the interest of justice to sustain this objection."

In its submissions on the preliminary objection, which has been embedded in its brief of argument, the 1st respondent stated that its preliminary objection was filed by way of motion on notice on the 10th of November, 2009. The motion on notice is brought pursuant to section 233 (1) of the Constitution of the Federal Republic of Nigeria, 1999, order 2 rule 29 (1) of the rules of this honourable court and under the inherent jurisdiction of this honourable court. It prayed for an order striking out this appeal as being an abuse of court process and for such further or other orders as this court may deem fit to make in the circumstance. It is stated further that the grounds of the motion on notice are as contained in the body of the motion on notice which is, inter alia, that the suit which was the substratum of this appeal was withdrawn by the appellant and struck out from the cause list of the Federal High Court which in turn strips this court of jurisdiction to hear and determine this appeal. C D E

Learned counsel for the 1st respondent submitted that the motion is also supported by a 30 paragraph affidavit. There are four exhibits attached to the affidavit which are marked exhibits 'A', 'B', 'C' and 'D' respectively. Learned counsel placed reliance on all the averments contained in the affidavit including the exhibits attached thereto particularly Exhibits 'D' which is a certified true copy of the proceedings of the Federal High Court made on the 7th day of July, 2009, which struck out the appellant's suit which is the substratum of this appeal, at the instance of the appellant who had filed a formal notice of discontinuance. Learned counsel for the 1st respondent submitted that the law is settled that an appeal from any court below to an appellate court must be predicated upon an appellate decision or judgment of the court below. He supported his submission by citing the cases of UBA v. BTL Industry Ltd. (2006)19 NWLR [part 1013] F G H

61 at page 107-108 H-A; Saraki v. Kotoye [1992] 9 NWLR (part 264) 156. The appellant, learned counsel submitted further, exercised his constitutional right by filing the notice of appeal of 19th of June, 2009. But it is trite that mere filing of notice of appeal by an appellant does not translate to stay of proceedings. He cited the case of Nika Fishing Co. Ltd. v. Lavina Corporation [2008] 16 NWLR (part 1114) 509 at page 542 G-A. Following the order of re-trial by the court below, parties submitted themselves to the trial court for re-trial of the original suit since there was no order of stay of proceedings from any court. The appellant made several appearances for the re-trial as evidenced at Exhibit “C”, and having earlier filed a formal motion on notice for discontinuance of the suit on the 15th of June, 2009. The suit was withdrawn and same was struck out as evidenced by exhibit ‘D’.

Learned counsel for the 1st respondent submitted that any order that is not appealable or ceased to be subsisting, goes with the bedrock or platform within which the appellant’s appeal is maintained. The substratum of this appeal, it is submitted, is the order for re-trial made by the court below. The singular act of the appellant of 7th of July, 2009, of withdrawing the original suit FHC/ABJ/CS/287/2007 takes away the appellant’s power of sustaining the appeal since that suit goes with it. This court is urged by the 1st respondent to dismiss the appeal being an abuse of court process and or for want of jurisdiction.

In his submissions on the preliminary objection which is contained in the brief of argument, filed by the 2nd and 3rd respondents, learned counsel for the 2nd and 3rd respondents made same submissions with equal force as made by the learned counsel for the 1st respondent. He however added that the suit was discontinued pursuant to order 50 rule 2 [1] of the Federal High Court [Civil Procedure] Rules 2009. By order 50 r. 4, the discontinuance shall not be a bar or defence to any subsequent action for the same or substantially the same cause of action. The discontinued suit, it is argued, is dead for all purposes and cannot be resurrected or relisted. It ceases to exist. It implies that the parties are left in the same position which they had occupied if no such suit had been instituted. The cases of Permanand v. Prescribed Authority (2002)1 AIHC 15 at page 18 (an Indian Authority); Ministry of Works v. Tomas (Nig.) Ltd. [2002] 2

NWLR [part 752] 740 at page 765, were cited. It is argued further that the reliefs sought in this appeal are predicated on the reliefs contained in the suit which has been discontinued. The reliefs contained therein died with the suit and are no more subsisting and the court cannot hear and determine a dead suit. It is thus, not competent for this court to grant such reliefs. Learned counsel for the 2nd and 3rd respondents urged this court to sustain the preliminary objection and strike out the appeal. B

In the joint reply brief to 1st respondent and 2nd and 3rd respondents/cross appellants' briefs, learned counsel for the appellant submitted that the objections raised by the respondents are too belated and incurably bad in law. The respondents had taken several fresh steps after receiving the notice of appeal in this matter. They are barred by the rules from raising this objection at this stage. The rules referred to by learned counsel for the appellant are provisions of order 2 rule 29 (1) of the rules of this honourable court. If this court is minded to consider the objections on merit, learned counsel conceded that appellant has right under order 50 (2) of the Federal High Court [Civil Procedure] Rules, 2009, to discontinue and that such discontinuance cannot be a defence to a subsequent action. He urged us to hold this position of the law and supported his submission by the cases of *Ekudayo & Ors. v. Keregebe & Ors.* (2008) 4 NWLR [part 1077] 422 at page 430 F - H; *Union Bank of Nig. Plc. v. Luobi Nig. Ltd.* (2008) 2 NWLR [part 1071] 257 at page 281 - 282. He further argued that the discontinuance of the retrial proceedings before the Federal High Court cannot rob this appeal of its life and deprive this court of the jurisdiction to entertain it. He cited section 233 (2) of the Constitution to buttress the point that a right of appeal lies from a decision of the court below to this court. In the instant case, he stated, the body, spirit and soul of the present appeal do not depend on the retrial of the suit No. FHC/ABJ/CS/287/2007 by the Federal High Court. It arises directly from the decision of the Court of Appeal in appeal No. CA/A/46/2008 which arose from an earlier final decision of the Federal High Court. Learned counsel argued further that it is a gross misconception to argue that the discontinuance of a retrial proceedings at the Federal High Court can extinguish the right of appeal against the decision of the Court of Appeal. This appeal it was argued, does not owe its existence and validity to the decision in the C D E F G H

retrial. It derives its validity from the earlier decision given by the Court of Appeal. From the same subject matter, there can be several decisions arising from the litigation or dispute on the matter. In such circumstance every decision will on its own give rise to a separate appeal. Even if the case were to be remitted for retrial up to ten times, each decision will give rise to a separate appeal and the termination of a retrial cannot extinguish the right of appeal from an earlier decision. It is argued further that all the legal authorities by counsel on behalf of the objectors are inapplicable to the instant case. This court is urged to dismiss the objections with substantial costs against the objectors.

As has been chronicled above, all the three respondents raised preliminary objections, argued same and relied on same as to the competence of this appeal. The aim/essence of a preliminary objection is to terminate at infancy, or as it were, to nip it at the bud, without dissipating unnecessary energies, in considering an unworthy or fruitless matter in a court's proceedings. It, in other words, forecloses hearing of the matter in order to save time. See: Yaro v. Arewa Construction Ltd. & Ors. [2007] 6 SCNJ 418. The fulcrum of the objection against this appeal is that it would amount to futility as the bottom of the subject matter at the trial court, that is, the reliefs sought for, exist no more, having been withdrawn and same struck out by the trial court, has been knocked off. The reliefs sought at the Federal High Court in the originating summons taken from the Federal High Court [trial court] on the 24th day of April, 2007, read, at the risk of repetition, as follows:

1. *"A declaration that the purported letter of substitution of 3^d defendant to the plaintiff dated 12/02/07, does not contain cogent and verifiable reason for the said substitution as contemplated by the provision of section 34 [1] and [2] of the Electoral Act, 2006.*

2. *A declaration that the exclusion of the name of the plaintiff for the April 2007, general Election as the candidate of the 2nd defendant in the Ikot Abasi/Eastern Obolo State Constituency is wrongful, null and void.*

3. *A declaration that for the purpose of the Election to the Akwa Ibom House of Assembly, the plaintiff is the candidate of the 2nd defendant validly nominated and not substituted.*

4. *An order setting aside the substitution of the plaintiff for*

not being in conformity with the provisions of section 34 [2] of the Act, 2006.

5. A [sic] order directing the 1st defendant to forthwith place the name of the plaintiff on the ballot as the candidate of the 2nd defendant representing Ikot Abasi Eastern Obolo State Constituency in April general election to the Akwa Ibom State House of Assembly. B

6. An order of perpetual injunction restraining the 1st and 2nd defendants from recognizing or continuing to recognize the 3^d defendant as the candidate of the 2nd defendant for the election scheduled for April, 2007.” C

By a motion on notice dated 18th June, 2007, and filed before the trial court on same date, the plaintiff sought to amend the originating summons by:

“1. An order granting leave to the plaintiff applicant to amend his reliefs in the originating summons by: D

[i] Inserting the words “Akwa Ibom State” in between the words “the” and for the “representative” in line two of reliefs 3,

[ii] deleting reliefs 5 and 6

[iii] introducing new reliefs 5, 6, and 7 as follows:

[5] An order compelling the 1st defendant to grant the full benefits due to the plaintiff as the candidate of the 2nd defendant at the election held on 28/4/2007 as it gave to other successful candidates. E

[6] An order compelling the 3^d defendant to relinquish the full benefits and fruits of victory at the election to the plaintiff who was the lawful candidate of the 2nd defendant at the election. F

[7] An order of perpetual injunction restraining the 3^d defendant from continuing to usurp and enjoy the benefits and fruits of victory at the said election in which the plaintiff was the lawful candidate of the 2nd defendant.” G

2. An order deeming the amended originating summons herein filed as having been properly filed appropriate fees having been paid.

3. Any further order or other orders as this honourable court may deem necessary to make in the circumstance of this case. H

The amendment sought was not allowed by the trial court. The matter then proceeded to trial with parties adopting their respective written addresses. In its final judgment, the trial court, per Nyako, J, held inter alia, as follows:

“This suit by its nature from the relief sought is pre-election matter. Not only did the plaintiff not come to court timeously, he came to court 10 days after the election had been conducted and results declared. The law does not help the indolent. The plaintiff slept on his right. Even if his substitution was not proper, he has not come to court timeously. The elections could not wait for him. If he had come to court even one day to election he would have been in time but not almost 3 months after the substitution and after the election. *Diapianlong v. Dariye* [2001] NSCQOR [part 2] 1022, Time is of the essence as election were to be conducted on 14th April, He came after the event he intended to participate in. Consequently, I am not going to do an academic exercise by going into all the arguments canvassed by parties because it will amount to academic exercise. This suit ought to have been filed before the conduct of the election and since it was not, it is too late in the day and the only option open to me is to dismiss the suit for being academic and I so order. Because this settles the case I shall not go into the issues.”

In its consideration of the appeal before it, the court below, held as follows:

“In the present case enough materials were not placed before the court to determine the actual person that won the primaries in view of the fact that three primary elections were conducted in this case. In the circumstances, it is my view that this is not an appropriate situation for this court to exercise its powers under section 16 of the Court of Appeal Act, 1976.

In the final analysis, this appeal succeeds and it is allowed. The judgment of the lower court which dismissed the appellant’s case is hereby set aside.

In its place, the originating summons filed at the lower court is remitted to the Chief Judge of the Federal High Court, Abuja, for assignment to another judge to hear and determine the case on its merit without further delay.”

(underlining supplied for emphasis).

The above order was given by the court below on the 6th day of May, 2009.

From the affidavit in support of notices of intention to rely on preliminary objection by the 2nd and 3rd respondents, it has been averred to the fact that:

1. Judgment of the Court of Appeal was delivered on the 6/5/09

2. That the Court of Appeal remitted the case to the Federal High Court for re-hearing,

3. Re-hearing commenced at the trial court on 4/6/2009.

4. That the Federal High Court fixed 7/7/09 for the rehearing of the case. B

5. That on 15/6/09, the appellant through his counsel filed a notice of discontinuance to terminate or withdraw the suit.

6. That on 7/7/09 appellant's counsel moved the Federal High Court to strike out the case based on the notice of discontinuance filed earlier. C

7. That the case was accordingly struck out by the Federal High Court on 7/7/09

8. On 19/6/09, the appellant filed this appeal in the court below seeking reliefs based on the suit which had been discontinued.

9. That the implication of discontinuing the suit at the Federal High Court is to deprive this appeal of its foundation.

In the two separate counter-affidavits filed by the appellant in response to the affidavits in support of the notices of intention to rely upon preliminary objection by the respondents, there is no averments which countered the facts deposed to by the respondents in their respective affidavits in support as summarised above. The law is well settled that any fact which has not been categorically countered or denied by a party, that fact is deemed admitted in law by the other party. E F

See: Nzeribe v. Dave Eng. Co. Ltd. (1994) 8 NWLR (Pt.361) 124; Omoregbe v. Lawani (1980) 3-4 SC 108. See also section 75 of the Evidence Act, LFN, Cap. 112, 1990. G

Secondly, ***there is no dispute that there was a re-trial order by the court below. The court below was so clear and categorical that it was the same originating summons, which was earlier placed before the Federal High Court and the reliefs of which were sought to be amended but refused, was ultimately dismissed by the said Federal High Court. This is what went on appeal to the court below, hence the order of retrial on same facts, parties and subject matter. Instead of pursuing the retrial, the appellant, for reasons best known to*** H

him, decided to discontinue the retrial, soon after commencement thereof. The re-trial court yielded to his request and struck out the matter referred to it by the court below for retrial. Now, who is to blame? The respondent? The re-trial court? Or, the appellant? If I am to answer this question to my conscience, it is the latter that should shoulder the blame. I say so because of a number of reasons:

Firstly, the appellant was the original plaintiff at the first trial court. He was the appellant at the court below. The court below gave judgment in his favour by asking the trial court, differently constituted, to rehear the matter on its merit. Instead of pursuing the retrial, as I stated earlier, the appellant decided to discontinue the rehearing process. Of course under the rules of court, and particularly the rules of the Federal High Court, he has every right to discontinue a matter he has brought before that court. The notice of discontinuance was dated and filed on 15/6/09. Learned counsel for the plaintiff, Uwemedimo Nwoko, Esq, moved the retrial court on the 7th of July, 2009, part of the proceedings of that day reads as follows:

“Nwoko: We have a notice of discontinuance dated 15/7/09. It’s filed under order 50 rule 2 (1) of the Federal High Court Rules. We ask for leave to discontinue this matter.

Igwe: we have been served. We are not opposed to the application.

We will be construed (sic) to ask for N100,000.00 as costs.

Okpanachi: we are not opposing the application to discontinue this case. We shall be asking for N100,000.00 costs.

Nwoko: we have not filed our pleadings. We urge the court to make the order of cost to be in course(sic)

Court: Upon the notice of discontinuance dated 15/6/09 filed on behalf of the plaintiff, this case is hereby struck out. The 1st respondent and the 2nd and 3^d respondents’ counsel have respectively asked for costs of N100,000.00, costs is at the discretion of the court...., costs of N10,000.00 is awarded in favour of the 1st respondent and the same amount i.e. N10,000.00 is awarded in favour of the 2nd and 3^d respondents. This case is hereby struck out. Signed Hon. Justice G.O. Kolawole JUDGE, 7/7/09.”

For the avoidance of doubt, order 50 rule 2 (1) of the Federal High Court (Civil Procedure) Rules 2009, provides that:

“The plaintiff in an action may, without the leave of the court, discontinue the action, or withdraw any particular claim made by him therein as against any or all the defendants at any time not later than fourteen days after service of the defence on him or, if there are two or more defendants, if the defence last served, by serving a notice to that effect on the defendant concerned.” B

As the parties to the action did not resort to filing of written consent to the withdrawal of the matter as required by sub-rule (5) of order 50 rule 2, the appellant did correctly in my view, what order 50 rule 2 (1) requires of him, that is to seek leave of that court to discontinue. The retrial court too, did the right thing also by acceding to the plaintiff’s request, more so, when none of the defendants opposed the application to discontinue. C

In considering the argument of the learned counsel for the appellant before us here, whether it can hold any water, that by the provision of order 50 rule 4 of the said rules, the import of that provision, which he said, the respondents conceded, is to the effect that discontinuance under that order cannot be a defence to a subsequent action. Learned counsel contended further that it is a gross misconception to argue that the discontinuance of a retrial proceedings at the Federal High Court can extinguish the right of appeal against the decision of the Court of Appeal. That this appeal does not in anyway owe its existence and validity to the decision in the retrial, rather, it derives its validity from the decision earlier given by the Court of Appeal. But let me first of all set out the provision relied upon by the learned counsel for the appellant. That of course, is order 50 rule 4 of the rules under consideration, which states: D E F

“Subject to any terms imposed by the court in granting leave under the rule 3 of this order; the fact that a party has discontinued an action or counter-claim or withdrawn a particular claim made by him therein, shall not be a defence to a subsequent action for the same, or substantially the same cause of action.” G

(underlining supplied for emphasis)

Rule 4 of Order 50 of the Rules is very clear and free of any ambiguity. I am as well in support of the argument that discontinuance under the provision, cannot be a defence to a subsequent action for the same or substantially the same cause of action. What I do not agree with is the contention of the H

learned counsel for the appellant that the already struck out action is still pending and existing validly before the re-trial court. Withdrawal or discontinuance of an action connotes the termination or removal of that action from the cause list of that court. It exists no more before that court. It has
B **slumped down, fainted and ultimately died, only waiting for resurrection where there will be one. Thus, where an action has been withdrawn or discontinued, the remedy provided by law as in rule 4 of order 50 of the Federal High Court Rules, is**
C **to institute a fresh, or subsequent action to resurrect the dead, wholly or partially and whether of the same or substantially the same cause of action. The order given by the Court of Appeal is for a re-trial of the same cause of action. The re-trial commenced in earnest. The plaintiff had so many options**
D **open to him. He could have asked for a stay of proceedings in view of the pending appeal before the Supreme Court, to await the final determination of the appeal by this court; or, he could withdraw it (as he rightly did) but to re-file same; or he could have discontinued his appeal before the Supreme Court in**
E **order to pursue the re-trial process to its logical conclusion. The appellant preferred withdrawal/ discontinuance of the re-trial action. This became fatal to his appeal at the Supreme Court. An appeal is generally taken to be a continuation of the original case started at the first instance court. It is not a**
F **new cause of action. See: Oredoyin v. Arowolo (1989) 4 NWLR (Pt.114) 171 at p. 211; Adegoke Motors v. Adesanya (1989) 3 NWLR (Pt.109) 250. It is always confined to the consideration of the record which was forwarded from the court below with no**
G **new testimony or issues raised in the appellate court. Focusing on the record of appeal placed before it, the appeal court “rehears” the case and may make its own evaluation of the evidence contained in the record of appeal. From that record, the appeal court may review the findings and inferences of**
H **fact and where it considers it proper, may substitute its own view of the facts for that of the trial court. It may also review the whole proceedings including all the interlocutory decisions given in the trial. It may reject conclusions of the trial court from facts which do not flow from the evidence, or may be**

regarded as perverse. See: Okotie-Eboh & Ors. v. Okotie-Eboh & Ors. (1986) 1 SC 479 at p. 507; Onowan & Anor. v. Iserhein (1976) NWLR 263. What the court below did is akin to this principle of practice and procedure.

So, **if there is anyone that goofed, it is the appellant himself. He misdirected himself in not taking the correct procedure/approach to the retrial case. The argument put by learned counsel or the appellant that the body, spirit and soul of the present appeal arose directly from the decision of the Court of Appeal in Appeal No. CA/A/46/2008 which arose from an earlier final decision of the Federal High Court and not dependent on suit No. FHC/ABJ/CS/ 287/2007 by the Federal High Court, may appear lofty but faulty. If one may ask: from where did the appeal come to the Court of Appeal? Is it not from suit No. FHC/ABJ/CS/287/07 between same parties and same subject matter from the same court? Is it not the one ordered by the court below to be retried by the same court, though differently constituted? Yes! It is an unintelligible argument. It cannot also alter the facts of the case presented however brilliantly put. One cannot eat one's cake and have it again.**

To consider the merit of this appeal is like beating a dead horse. It serves no useful purpose. It is an exercise in futility. Courts of law dissipate energy on live issues. Courts of law for long, have left academic issues to the academia. They rather concentrate on live issues. **I find the Preliminary Objections raised by the respondents in this appeal very sound and sustainable. I sustain same.** I have no reason to go into the merit of the appeal as courts do not make orders in vain. See: Makinde v. Akin wale (1995) 6 NWLR (Pt.399) 5; N. N. S. C. Ltd. v. Sabana (1988) 2 NWLR (Pt.74) 23. I accordingly strike out the appeal. This affects the cross appeal as well. It is also struck out by me. I make no order as to costs in the main appeal and the cross-appeal.

H

MUKHTAR JSC

I have read in advance the lead judgment delivered by my learned brother Muhammad JSC, and I entirely agree with his rea-

soning. I would however like to highlight the notices of intention to rely upon preliminary objection raised by learned counsel for the 1st respondents and learned counsel for the 2nd and 3rd respondents. In the notice of preliminary objection of the 2nd and 3rd respondents can be found the following:-

B *“That the appeal herein is incompetent because its substratum/foundation has been completely eroded by the act of the appellant.*

C *AND TAKE NOTICE that the grounds of the objection are as follows:-*

1. *The Court of Appeal by its judgment dated 6th day of May, 2009, upon allowing the appellant’s, appeal, remitted the case to the Federal High Court for rehearing.*

D *2. That the rehearing commenced at the Federal High Court but the appellant voluntarily discontinued the case at the Federal High Court before filing this appeal to the Supreme Court.*

3. That the discontinuance has completely extinguished life out of the case of the appellant and deprives this appeal of any foundation or substratum.

E *4. That the case having been discontinued and struck out the appeal has become ipso fact vacated.*

5. The case which forms the pillar and foundation of the appeal having been discontinued this appeal has become merely academic.

F *6. The appeal which seeks reliefs founded on a suit which no longer subsists is an abuse of this courts process.”*

In the supporting affidavit to the notice of preliminary objection. Realwan Okpanachi deposed as follows, inter alia:-

G *“5 a. That after the judgment of the Court of Appeal the appellant ensured that the case was immediately remitted to the Federal High Court for the rehearing and that the rehearing commenced on the 4th day of June, 2009,.....*

H *b. That the Federal High Court fixed 7th day of July, 2009, for the hearing of the case.*

c. That on the 15th day of June, 2009, the Appellant through his counsel filed a notice of discontinuance to terminate or withdraw the suit.....

d. That on the 7th day of June, 2009, the Appellant through

his counsel moved the court to strike out the case based on the notice of discontinuance earlier filed and the case was accordingly struck out.....

e. That on the 19th day of June, 2009, the Appellant filed this appeal in the court below seeking reliefs based on the suit which had already been discontinued. B

f. That the implication of discontinuing the suit at the Federal High Court is to deprive this appeal of its foundation.”

Indeed, a careful perusal of the record of proceedings of that 7th day of July, confirms the above depositions. It reads:-

“Nwoko: *We have a notice of discountenance dated 15/6/09. It’s filed under order 50 rule 2 (1) of the Federal High Court Rules. We ask for leave to discontinue this matter.* C

Igwe: We have been served. We are not opposed to the application. D

We will be construed to ask for N100,000.00 as costs.

Okpanachi: We are not opposing the application to discontinue this case. We shall be asking for N100,000.00 costs.

Nwoko: We have not filed our pleadings. We urge the court to make the order of costs to be in course. E

Court: Upon the notice of discontinuance dated 15/6/09 filed on behalf of the Plaintiff, this case is hereby struck out. The 1st Respondent and 2nd and 3^d Respondents’ counsel have respectively asked for costs of N100,000.00, costs is at the discretion of the court. Although, from what the Plaintiffs counsel has said both parties have not filed their respective pleadings and as such, the Respondents have not really incurred expenses. My view is that once a counsel is briefed, and once he appears in a matter, it does not really matter if no process has been filed, he is deemed to have began to incur expenses-if not monetary, we look at his time and energy expended in coming to court. In the light of this, my view is that both the 1st and the 2nd and 3^d Respondents ought to be compensated by way of costs so that their counsel’s respective efforts would not have been in vain, perhaps gratuitous. Costs of N10,000.00 is awarded in favour of the 1st Respondent and the same amount, i.e. N10,000.00 is awarded in favour of the 2nd and 3^d Respondents. This case is hereby struck out.” F G H

Having struck out the case as prayed by the learned counsel

for the appellant, surely, the substratum of the appeal has gone. The bath water together with the baby have been thrown away, so to speak. Nothing is left again to sustain the appeal, as the fundamental objective of the exercise is no longer in existence. The treatment of the appeal becomes an academic exercise, from which nothing will be gained. See *Tanimola v. Survey Mapping Geodata Ltd.* 1995 6 NWLR part 403 page 617. There is merit in the preliminary objections raised by the respondents, and I hereby uphold and sustain them. The appeal is therefore incompetent and deserve to be struck out, as done by my learned brother in the lead judgment. The same goes for the cross-appeal. I agree with the order in respect of costs.

MUNTAKA-COOMASSIE JSC

The appellant won the primary election of the Peoples Democratic Party (PDP), to contest as its candidate representing Abasi Eastern Obolo State Constituency of the Akwa-Ibom State House of Assembly election held in 2007. His name was duly submitted to Independent National Electoral Commission (INEC) as a candidate to represent the PDP in that election, however, before the conduct of the election the PDP sought to substitute the appellant's name with that of the 3rd respondent, (Hon. Charles Mbong) on the ground of lack of sufficient information. The said substitution was accepted by the 1st respondent (INEC), and as a result, the appellant had instituted this action by way of an originating summons wherein he claimed as follows:-

“(1) A DECLARATION that the purported letter of substitution of the plaintiff with the 3^d defendant dated 12/12/2007, does not contain cogent and verifiable reason for the said substitution as contemplated by the provisions of section 34 (1) and (2) of the Electoral Act, 2006.

(2) A DECLARATION that the exclusion of the name of the plaintiff from the April, 2006, general election as the candidate of the 2nd defendant in the Eket/Abasi Obolo State Constituency is wrongful, null and void.

(3) A DECLARATION that for the purpose of the election into Akwa-Ibom State House of Assembly the plaintiff is the candidate of the 2nd defendant validly nominated and not substituted.

(4) *AN ORDER* setting aside the substitution of the plaintiff for not being in conformity with the provisions of section 34 (2) of Act, 2006.

(5) *AN ORDER* directing the 1st defendant to forthwith place the name of the plaintiff on the ballot as the candidate of the 2nd defendant representing Ikot/Abasi Eastern Obolo State Constituency in April general election. B

(6) *AN ORDER* of perpetual injunction restraining the 1st and 2nd defendants from recognizing or continuing to recognize the 3^d defendant as the candidate of the 2nd defendant for the Akwa-Ibom State House of Assembly election schedule for April, 2007". C

Upon being served with the court process, the 2nd defendant/respondent filed a notice of preliminary objection, in which it was prayed that this action be struck out on the following grounds; -

“ 1. That the plaintiff did not exhaust the internal machinery for dispute resolution open to 2nd defendant’s member as enshrined in the PDP Constitution before instituting the suit.

2. That the Lis in this suit has been extinguished/destroyed. The election which the plaintiff predicates his claims, having been long concluded before the institution of this suit. E

3. That the issues raised in this suit are not live issues but merely academic.

4. That none of the reliefs sought can be enforce supposing this honourable courts grants them, courts do not act in vain. F

5. That the reliefs sought herein, are post-election matters which can only be addressed at the Election Tribunal set (sic) under the 1999 Constitution”.

The preliminary objection was heard by the trial court and in its ruling, upheld same and held as follows:- G

“ This suit by its nature from the reliefs sought is a pre-election matter. Not only did the plaintiff not come to court timeously, he came to court 10 days after the election had been conducted and results declared. The law does not assist the indolent. The plaintiff slept on his right. Even if his substitution was not proper, he has not come to court timeously. The election could not wait for him. If he had come to court even one day to election he would have been in time but not almost 3 months after the substitution and after the election. *Dapiam Long Vs. Dariye (2001) NSC or (pt. 2) 1022. Time* H

is of the essence as elections were to be conducted on 14th April. He came after the event he in-ted (sic, intended) to participate in. Consequently, I am not going to do an academic exercise by going into all the arguments canvassed by parties because it would amount to academic exercise."

B Dissatisfied with this judgment, the appellant successfully appealed to the Court of Appeal Abuja Division, hereafter called the lower court which court allowed the appeal and orders as follows:-

C *"In the final analysis, this appeal succeeds and it is allowed. The judgment of the lower court which dismissed the Appellant's case is hereby set aside. In its place, the originating summons filed at the lower court is remitted to the Chief Judge of the Federal High Court, Abuja for assignment to another Judge to hear and determine the case on its merit without further delay".*

D Pursuant to the order of the lower court, the matter commenced de novo before Justice G. O. Kolawale of the Federal High Court. The matter was heard on 4/5/09 and further adjourned to 7/7/09 for adoption of witnesses statement and cross-examination. However, by a notice of discontinuation dated 15/6/09 and filed on the same day, the plaintiff sought to discontinue the suit. This application to discontinue was moved and granted, without opposition on the 7/7/09. The trial court held as follows:-

F *"Upon the notice of discontinuation filed dated 15/6/09, filed on behalf on the plaintiff, this case is hereby struck out."*

G After the matter had been struck out, the appellant thereafter sought to appeal against the decision of the court below. The respondents also filed cross-appeal. In accordance with the rules of this court, both parties filed and exchanged their respective briefs of argument. The 2nd and 3rd respondents filed a notice of preliminary objection to the appeal dated 10/11/2009, which was also argued by the parties in their respective briefs of argument. Because of the fundamental nature of this objection, it is better and neater to deal with it before proceeding to the substantive matter.

H The objection as filed is in the following term:-

"That the appeal herein is incompetent because its substratum/foundation has been completely eroded by the act of the appellant.

AND TAKE NOTICE that the grounds for the objection are as

follows:-

1. That the Court of Appeal by its judgment dated 6th day of May, 2009, upon allowing the Appellant's appeal remitted the case to the Federal High Court for rehearing.

2. That the rehearing commenced at the Federal High Court but the appellant voluntarily discontinued the case at the Federal High Court before filing this appeal to the Supreme Court. B

3. That the discontinuance has completely extinguished life out of the case of the appellant and deprives this appeal of any foundation or substratum.

4. That the case having been discontinued, struck out, the appeal has become ipso facto vacated. C

5. The case which forms the pillar and foundation of the appeal having been discontinued, this appeal has become merely academic. D

6. The appeal which seeks reliefs founded on a suit which no longer exists, is an abuse of this court process”

The 1st respondent, in its brief of argument dated 2/2/2010, submitted in support of the objection that the sole issue for consideration is whether your Lordships are not stripped of the jurisdiction to hear and determine this appeal since the appellant has withdrawn the suit which is the substratum of this appeal, which in turn has extinguished the order of retrial made by the court below that gave raise to this appeal. It was again submitted that an appeal from any court below to an appellate court must be predicated upon an appealable decision or judgment of the court below. Counsel cited in support the case of U.B.A. V. BIL IND. LTD. (2006) 19 NWLR (pt. 1013) 61 at 107. E F

In the instant case, the substratum of this appeal is the order of retrial made by the court below. Thus, the singular act of the appellant in withdrawing the original suit has taken away the appellant's power of sustaining the appeal. G

The 2nd and 3rd respondents in their joint brief dated 6/1/2010, submitted that the principal question that calls for determination is, “what is the effect of the discontinuation on this appeal”. It was submitted that when a suit is discontinued or withdrawn, it ceases to exist. The implication is that the parties are left in the same position which they had occupied if no such had been instituted. The discon- H

tinued suit has no existence in the eye of the law. In the case of *Permanod V. Presarioded Authority* (2002) AIHC 15/18 Ministry of Works *V. Tomas Nig. Ltd.* (2002) 2 NWLR (Pt. 752) 740 at 750.

The filing of the notice of discontinuance effectively terminated the suit that when the notice of appeal to the Supreme Court was filed on 19th June, 2009, there was no foundation for the appeal. The suit having been discontinued, the subsequent appeal lacked the requisite foundation. It was incompetent ab initio, particularly when the reliefs sought in the appeal are predicated on the suit that had been withdrawn and struck out.

The appellant in its reply brief referred to order 2 rule 9, 28 and 29 (1) of the rules of this court and submitted that the objection is belated as the respondents have taken steps in the appeal by filing briefs of argument and cross-appeal. Appellant further submits that there is no dispute as to appellant's right to discontinue the trial proceedings pursuant to order (9) of the Federal High Court Rules, 2009 but submitted that the discontinuance shall not be a defence to the subsequent action for the same or substantially the same cause of action, counsel cited *Ekudano V. Keregbe* (2008) 4 NWLR (pt 1077) 422 at 430; *UBN PLC. vs. Luobai Nig. Ltd.* (2008) 2 NWLR (pt 1071) 257 at 281. Learned counsel further referred to section 233 (2) of the Constitution of the Federal Republic of Nigeria 1999 and submitted that the Appellant has a constitutional right to appeal to the Supreme Court, if dissatisfied with the judgment of the Court of Appeal. He further submitted that what gives life to an appeal is the decision of the lower court. Once a decision has been made by a lower court, it activates the right of appeal to the designated appellate court hence the life of this appeal does not depend on the retrial which was discontinued.

I have carefully and closely considered the issues raised in this preliminary objection, the facts that are not in dispute (i.e. silent) can briefly be summarized thus:-

(a) On 31/10/07, B. F. M Nyako J. of the Federal High Court of Justice dismissed the originating summons filed by the appellant for disclosing no triable issue.

(b) The appellant appealed against this judgment to the Court of Appeal Abuja, who allowed the appeal and remitted the case back to the Chief Judge of the Federal High Court, to assign it to another

judge for retrial.

(c) In compliance with the order of the Court of Appeal, the matter was re-assigned to G. O Kolawole J. of the Federal High Court, who commenced the hearing of the case de novo.

(d) Before the hearing could commence the plaintiff filed a notice to discontinue the action and it was consequently struck out. B

(e) After the case had been struck out, the appellant turned around to pursue this appeal.

From the above, it is quite clear that the judgment of Justice Nyako, which formed the basis of the appeal to the Court of Appeal C had been set aside and replaced with the order of retrial, which had commenced before Justice G. O. kolawole.

At the time the case was struck out based on an application to be discontinued, no issue is in dispute between the parties any longer. An appeal does not lie on an incompetent suit which has been struck out as the subject matter of the appeal is no longer subsisting at the lower court and the appellate court lacked jurisdiction to determine that which is non-existent. In other words, a suit struck out is no longer alive and upon which no appeal can lie and be heard. To do otherwise, would amount to an exercise in futility and the court does not act in vain. I am fortified by this court's decision in ANAMBRA STATE Vs N.I.W.A (2004) 3 NWLR (pt 861) 640. This is so because an appeal is generally regarded as a continuation of an original suit rather than as an inception of a new action. An appeal should be a complaint against the decision of a retrial court. Thus, in the absence of such a decision on a point, there cannot possibly be an appeal against what has not been decided against a party. See: -

- (i) N.D.I.C Vs. S.B.N (2003) 1 NWLR (pt 801) 311;
- (ii) Oredoyin V. Arowolo (1989) 4 NWLR (pt 114) 172;
- (iii) Babalola V. State (1989) 4 NWLR (pt 115) 264; and
- (iv) Jumbo V. Bryanko Int. Ltd. (1995) 6 NWLR (pt. 403) 545 at 547.

In the instant case, my Lords, the judgment of the trial court that dismissed the appellant's claims have been set aside, and order of retrial made. When the case was re-commenced and subsequently struck out, the plaintiffs claims no longer exist. The lis is no more. There is no longer any relief pending that is capable of being enforced. It is for the above stated reasons that I agree with the respon- H

dents that this appeal is incompetent the reliefs being sought in this appeal have been discontinued and struck out, consequently, I have no hesitation in holding that this court lacks jurisdiction to hear this appeal. For this and fuller reasons adumbrated in the lead judgment of my learned brother, I. T. Muhammad JSC, which I had read before now, that the appeal deserved to be struck out. I accordingly struck same out. The cross-appeal was also contaminated and it is also struck out. I too make no order as to costs.

C

RHODES-VIVOUR JSC

The appellant/cross Respondent and the third Respondent are members of the Peoples Democratic Party. They were interested in the Ikot Abasi Constituency for the Akwa Ibom State House of Assembly. The elections took place in April, 2007. Before the elections, as is customary, the PDP (the 2nd Respondent) conducted primary elections to decide who among the two members should be the party's candidate for the Ikot Abasi Constituency. At the conclusion of the primaries, the 3rd Respondent won, but somehow the appellant got his name on the 1st respondents list as the candidate of the PDP for the Ikot Abasi constituency. The 3rd respondent protested to the 1st respondent and was successful. He contested the election and won and was declared the winner by the 1st respondent. The 3rd respondent took his seat in the Akwa Ibom State House of Assembly as the PDP representative for the Ikot Abasi Constituency. He is still there. His term runs out in April, 2011.

On 12/12/07, the appellant filed a suit before the Federal High Court to challenge his substitution by the 3rd respondent. He lost. He appealed. The Court of Appeal remitted the case to the Federal High Court for retrial. The appellant commenced retrial on 7/7/09, and on that day a notice of discontinuance filed on 15/6/09, was considered by the court. At the end of an inter partes hearing, the suit was struck out. A notice of appeal to this court against the judgment of the Court of Appeal ordering a retrial was filed on 19/6/07. The 2nd and 3rd respondents filed a notice of preliminary objection to the hearing of the appeal by this court insisting that the appeal is incompetent because the substitution has been completely eroded by the discontinuance of the suit at the Federal High Court. The ground of

the objection runs thus:

1. The Court of Appeal by its judgment dated 6/5/09, upon allowing the appellant's appeal, remitted the case to the Federal High Court for rehearing.

2. That the rehearing commenced at the Federal High Court but the appellant voluntarily discontinued the case at the Federal High Court before filing this appeal to the Supreme Court. B

3. That the discontinuance, has completely extinguished life out of the case of the appellant and deprives this appeal of any foundation or substratum.

4. That the case having been discontinued and struck out, the appeal has become ipso fact vacated. C

5. The case which forms the pillar and foundation of the appeal having been discontinued, this appeal has become academic.

6. The appeal which seeks reliefs founded on a suit which no longer subsists is an abuse of this court's process. D

By way of an originating summons filed in the Federal High Court, the appellant as plaintiff sought the following reliefs:

1. A declaration that the purported letter of substitution of 3rd defendant to the plaintiff dated 12/2/07, does not contain cogent and verifiable reason for the said substitution as contemplated by the provision of section 34 (1) And (2) of the Electoral Act, 2006. E

2. A Declaration that the exclusion of the name of the Plaintiff for the April, 2007 general election as the candidate of the 2nd defendant in the Ikot Abasi /Eastern Obolo State Constituency is wrongful, null and void. F

3. A Declaration that for the purpose of the election to the House of Assembly, the Plaintiff is the candidate of the 2nd defendant validly nominated and not substituted. G

4. An Order setting aside the substitution of the Plaintiff for not being in conformity with the provisions of section 34 (2) of the Act, 2006.

5. An Order directing the 1st defendant to forthwith place the name of the plaintiff on the ballot as the candidate of the 2nd Defendant representing Ikot Abasi Eastern Obolo State Constituency in April general election to the Akwa Ibom State House of Assembly. H

6. An Order of perpetual injunction restraining The 1st and 2nd Defendants from recognizing or continuing to recognize 3rd de-

fendant as the candidate of the 2nd Defendant for the election scheduled for April, 2007.

Nyako J. presided, and on the 31st day of October, 2007, the learned judge dismissed the suit for being academic, in that the suit ought to have been filed before and not after the conduct of the election. The plaintiff, now as appellant appealed. Now, an appeal is a rehearing of the case, and the duty of an appeal court is to examine, evaluate evidence and draw inferences from facts established at the court of first instance.

On 6/5/09, the Court of Appeal remitted the case to the Federal High Court for rehearing. On 7/7/09, rehearing commenced, and on the same day, the case was struck out on a notice of discontinuance filed by the appellant. That is to say all that was before Nyako J., no longer exists. Under the Federal High Court Rules, where all the parties consent (as was the case here) the action, i.e. the suit shall be struck out. Once a suit is struck out, it no longer exists.

A case is the foundation of an appeal. Once it is discontinued there is nothing for the appeal court to rehear.

An appeal to the Supreme Court is a further and final rehearing of the suit. Appeal Court pronounced on the reliefs before the court of 1st instance and so when the reliefs sought in the court of first instance are withdrawn by a notice of discontinuance and the suit struck out, there would be nothing for the appeal court to pronounce on. Courts are set up to determine live issues. It would amount to this court engaging itself or indulging in an academic exercise, if it proceeds to hear this appeal when the suit from which the appeal arose no longer exists. It has been said in a plethora of cases that courts should not engage or indulge in an academic exercise. Courts are to determine only live cases. See:

- Bakare v. A.C.B. Ltd. 1986 3 NWLR Pt. 26 p 47
- Okulate v. Awosanya 2002 2 NWLR Pt. 645 p530
- Bhojwani v. Bhojwani 1996 6 NWLR Pt. 457 p663
- Oyeneye v. Odugbesan 1972 4 SC p. 244

After the Court of Appeal ordered a retrial, the appellant had two options. He could commence retrial, then file for stay of proceedings pending an appeal to the Supreme Court against the judgment of the Court of Appeal, or appeal straightaway against the judgment of the Court of Appeal.

Filing a notice of discontinuance before or after the notice of appeal was filed, makes no difference. Since the originating suit is dead and buried, the appeal before this court is clearly incompetent. The Preliminary objection thus succeeds.

For this and the much fuller reasoning in the leading judgment, the draft of which I was privileged to peruse, I am in complete agreement with Muhammad, JSC, that the appeal and cross appeal should be struck out. I also strike both appeals out for being incompetent.

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