

SUPREME COURT OF NIGERIA
15TH APRIL, 2011. SC. 466/2010
CORAM:- M. A. MUKHTAR, W. S. N. ONNOGHEN, F. F.
TABAI, J. A. FABIYI, B. RHODES-VIVOUR, JJSC

SENATOR JOY EMORDI APPELLANT
AND

1. HON. ALPHONSUS UBA IGBEKE
2. HON. JESSIE BALONWU
3. PRESIDENT, SENATE OF THE RESPONDENTS
- FEDERAL REPUBLIC OF NIGERIA
4. CLERK OF THE SENATE OF FRN
5. SENATE OF THE FRN
6. INEC

CONSTITUTIONAL LAW - Ambiguity - Election Appeals - Section 246 (3) Constitution of FRN - That clearly provides for its termination before the Court of Appeal - Is not ambiguous (H1)

JURISDICTION - Supreme Court - Appellate jurisdiction of - It cannot assume jurisdiction for the sake of doing justice - Where none is given to it by Constitution or any statute (H2)

ELECTION PETITIONS - Appeals - Judgments - National Assembly Election - Finality of decision applies - To interlocutory decision and judgment of Court of Appeal (H3)

CONSTITUTIONAL LAW - Election appeals - Interpretation of the word 'shall' in Section 246 (3) Constitution of FRN - National assembly election petition - Court of Appeal has ultimate and final jurisdiction (H4)

FACTS

Appellant, 1st and 2nd respondents were among the candidates who contested the National Assembly Election for Anambra North Senatorial District, conducted on the 28th April, 2007. 6th respondent returned appellant as the winner at the election. The return of appellant was challenged by the respective petitions filed by 1st and 2nd respondents at the Election Petition Tribunal at Awka. The tribunal

dismissed both petitions. 1st and 2nd respondents filed separate appeals at Court of Appeal, Enugu Division. Appeal No. CA/E/EPT/78/2008 filed by 2nd respondent was heard first by the Court. On 10th February, 2009, the Court dismissed the appeal for non-joinder of the presiding officers at the election. Thereafter, the same division of the Court, but this time slightly differently constituted delivered judgment on the 26th March, 2010 in Appeal No. CA/E/EPT/04/2009 filed by 1st respondent.

The appeal was allowed and the judgment of the tribunal was set aside by the Court. The Court ordered 6th respondent to issue certificate of return to 1st respondent. Appellant immediately filed two applications before the Court, seeking to set aside the latter judgment of the Court on the ground of nullity; and a clarification of the conflicting two judgments of the Court. The Court dismissed appellant's applications on the 12th May, 2010. Aggrieved, appellant has now appealed to Supreme Court, while 6th respondent filed a Notice of preliminary objection seeking to strike out the appeal on the following ground inter alia: That the appeal contravenes the provision of Section 246 (3) Constitution of the Federal Republic of Nigeria 1999.

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

CONSTITUTIONAL LAW - Ambiguity - Election Appeals

1. Let me state it clearly that the provision of Section 246 (3) of the Constitution is not ambiguous. And so, it should be given its ordinary meaning. The ruling of the court below of 12th May, 2010 is rooted in election appeal which the law stipulates that it should end at the Court of Appeal. (p. 973 F)

Supreme Court - Appellate jurisdiction of

2. In the case of *Alao v. ACE Ltd.* (2000) 9 NWLR (Pt. 670) 264., it was pronounced that although this court is the court of last resort, it is nevertheless, a court of appellate jurisdiction which is regulated by the Constitution. Its jurisdiction is basically appellate apart from first instance restricted matters. The court is statutory and cannot for the sake of doing justice confer on itself a jurisdiction where none is given to it by the Constitution or by any statute. (p. 973 G)

Appeal - Judgment - National Assembly Election

3. It is clear to me that the decision of the court below as entered on 12th May, 2010 is final and not subject to appeal to this court. I need to state it in clear terms that such finality applies 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 substantive appeal before the court below. (p. 974 A)

Election appeal - Interpretation of the word 'shall'

4. The employment of the word '*shall*' points to mandatory realm. It imbues the court below with ultimate and final jurisdiction. It has been interpreted by this court in a line of authorities to deprive this court of jurisdiction and competence in appeals such as this one relating to Senatorial election petition. The Court of Appeal is the final court in respect of same. This court will not allow an imagined referral vide section 295 of the 1999 Constitution through the back door, as it were. I am of the considered view that this court is not imbued with the requisite jurisdiction and competence to hear the appeal. (p. 974 B)

NOTABLE POINT OF INTEREST***FABIYI JSC******1. Interpretation of the words 'decisions, shall and final'***

As stated earlier on in this judgment, the preliminary objection is rooted on the provision of section 246 (3) of the 1999 Constitution which reads as follow:-

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

The word 'decision' in legal parlance is defined as '*a judicial determination after consideration of the facts and the law, especially a ruling, order or judgment pronounced by a court when considering or disposing of a case.*'

The word '*shall*' as employed in the above quoted applicable section 246 (3) of the Constitution denotes obligation or a command and gives no room for discretion. By its nature, it is mandatory and one cannot wriggle out same. It imposes a duty. Where a provision stipulates that a thing shall be done it goes without equivocation that a peremptory mandate is enjoined. Refer to *Bamaiyi v. Attorney-*

General Federation & Ors. (supra) at page 497. Briefly put, the word ‘final’ as employed in the applicable Section 246 (3) connotes conclusiveness; point never to be revisited. (p. 973 B)

REPRESENTATION

- ^B Dr. (Mrs.) V. J. O Azinge (with her Uja Ikeazor (Mrs) O. Izuora, V. Azubike, U. Obeuwou and D. Akpesuwe (Miss) for Appellant. A. C. Anaenugwu for the 1st Respondent. O. J. Nnadi (with him V. Muoneke) for the 2nd Respondent.
- ^C Emeka Etiaba (with him Lynda Ikpeazu) for 6th Respondent.

CASES REFERRED TO

- Onuaguluchi v. Ndu (2001) 7 NLR (Pt. 712) 309
- Awuse v. Odili (2003) 18 NWLR (Pt. 851) 116 at 153
- ^D Akintunde v. Ojo (2002) 4 NWLR (Pt. 757) 284 at 302
- Okonkwo v. Ngige 2007 12 NWLR part 1047 page 191
- Okonkwo v. Ngige (2007) 12 NWLR (Pt. 1047) 191 at 218
- Jimoh v. Starco Nig Ltd. (1998) 7 NWLR (Pt. 558) 522 at 527
- Arubo v. Aiyeleru & Ors. (1993) 3 NWLR (Pt. 280) 126 at 142
- ^E Bamaiyi v. A-G Federation & Ors. (2001) 12 NWLR (Pt. 727) 468

STATUTE REFERRED TO

Constitution of the FRN 1999, ss. 246 (3) (1), 295

^F

LEAD JUDGMENT BY FABIYI JSC

- The appeal in SC. 176/2010 is against the decision of the Court of Appeal, Enugu Division (‘the court below’ for short) handed out on 12th May, 2010. Therein, two applications filed by the appellant
- ^G were dismissed.

- It is apt to state briefly the relevant facts leading to this appeal. The appellant, the 1st and 2nd respondents were among the candidates, who contested the National Assembly Election for Anambra State North Senatorial District which was conducted on 28th April, 2007. The 6th respondent returned the appellant as the elected candidate at the election. The return of the appellant was challenged
- ^H vide petitions filed at the Election Petition Tribunal, Awka by the 1st and 2nd respondents, respectively. The Tribunal dismissed both petitions. This prompted the 1st and 2nd respondents to initiate separate

appeals at the court below.

Appeal No. CA/E/EPT/78/2008 by the 2nd respondent was heard first by the court below. On 10th February, 2009, it delivered judgment wherein the appeal was dismissed on the ground that failure to join the Presiding Officers who worked at the election was fatal to the petition. Subsequently, the same Division of the court below, partly, differently constituted, heard and delivered judgment in Appeal No. CA/E/EPT/04/2009 initiated by the 1st respondent. In the judgment handed out on 26th March, 2010, the appeal was allowed. The court below reversed the judgment of the Tribunal, set aside the return of the appellant and ordered that the 6th respondent should issue a certificate of return to the 1st respondent as the candidate elected at the said election. There emerged a seeming conflict in the two judgments of the court below.

The appellant thereafter filed two applications before the court below in quick succession. The first application sought for the setting aside of the latter judgment of the Court below on ground of being a nullity. The second application required a clarification of the purport and intendment of the two conflicting judgments of the court below. On 12th May, 2010, the court below dismissed the appellant's applications.

The above scenario precipitated the appellant's appeal to this court seeking, inter alia, a referral on the interpretation of the two judgments of the court below and direction in respect of same.

The 6th respondent filed a Notice of preliminary objection dated 26th October, 2010 urging this court to strike out the appeal on the following grounds:-

(a) The appeal contravenes the provision of section 246 (3) of the Constitution of the Federal Republic of Nigeria 1999.

(b) The appeal is an abuse of the process of this Honourable court as it is targeted at irritating and annoying the respondents and is an affront on the efficient and effective administration of justice in this Honourable court.

(c) The appeal is not only vexatious and frivolous but oppressive and malicious

On 1st February, 2011, when this appeal was heard, learned counsel for the 6th respondent moved the notice of preliminary objection. The argument canvassed in respect of the preliminary objec-

tion is contained in the 6th respondent's brief or (sic) argument filed on 26th November, 2010.

On behalf of the 6th respondent, learned counsel submitted that vide the provision of section 246(3) of the Constitution of the Federal Republic of Nigeria, 1999 the decision of the Court of Appeal in respect of appeals arising from election petitions shall be final.

He submitted that the use of the word 'shall' denotes obligation or command which gives no room to discretion. He cited the case of *Bamaiyi v. A. G. Federation & Ors.* (2001) 12 NWLR (Pt. 727) 468 at 497

Learned counsel observed that the word 'final' connotes that the decision of the Court of Appeal in respect of election petitions is conclusive and never to be re-visited. He cited the cases of *Awuse v. Odili* (2003) 18 NWLR (Pt. 851) 116 at 153; *Onuaguluchi v. Ndu* (2001) 7 NLR (Pt. 712) 309; *Okonkwo v. Ngige* (2007) 12 NWLR (Pt. 1047) 191 at 218.

Learned counsel submitted that the appellant, who knew that all issues relating to Senatorial Election matters such as her own terminate at the Court of Appeal, ought not to have filed this appeal. He felt that such equates to an abuse of court process. Learned counsel cited the cases of *Akintunde v. Ojo* (2002) 4 NWLR (Pt. 757) 284 at 302; *Jimoh v. Starco Nig Ltd.* (1998) 7 NWLR (Pt. 558) 522 at 527; *Arubo v. Aiyeleru & Ors.* (1993) 3 NWLR (Pt. 280) 126 at 142.

Learned counsel urged that the preliminary objection be sustained and the appeal should be struck out for lack of jurisdiction or dismissed for being an abuse of court process.

On behalf of the appellant, learned counsel submitted that the issue before this court arose from a civil matter questioning whether the Court of Appeal has constitutional powers to make two conflicting decisions in respect of the same case without one of the judgments invalidating the other. Learned counsel strongly felt that the issue is a constitutional one and that this court is imbued with jurisdiction to entertain same vide a referral under Section 295 of the 1999 Constitution to the Supreme Court.

Learned counsel felt that the facts of this case appear different from those in the cases of *Awuse v. Odili* (supra) *Onuaguluchi v. Ndu* (supra) as well as *Okonkwo v. Ngige* (supra). Learned counsel observed that the appeal arose from a civil case challenging the conflict-

ing judgments of the Court of Appeal and urging this court to exercise its appellate powers as contained in Section 233 (2) (b) of the Constitution of the Federal Republic of Nigeria 1999 and interpret section 246 (3) of the Constitution as it applies to the Ruling of the Court of Appeal delivered on the 12th day of May, 2010. Learned counsel urged that the preliminary objection be dismissed in its entirety. B

As stated earlier on in this judgment, the preliminary objection is rooted on the provision of section 246 (3) of the 1999 Constitution which reads as follow:-

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

The word ‘decision’ in legal parlance is defined as ‘a judicial determination after consideration of the facts and the law, especially a ruling, order or judgment pronounced by a court when considering or disposing of a case.’ D

The word ‘shall’ as employed in the above quoted applicable section 246 (3) of the Constitution denotes obligation or a command and gives no room for discretion. By its nature, it is mandatory and one cannot wriggle out same. It imposes a duty. Where a provision stipulates that a thing shall be done it goes without equivocation that a peremptory mandate is enjoined. Refer to *Bamaiyi v. Attorney-General Federation & Ors.* (supra) at page 497. E

Briefly put, the word ‘final’ as employed in the applicable Section 246 (3) connotes conclusiveness; point never to be revisited. F

Let me state it clearly that the provision of Section 246 (3) of the Constitution is not ambiguous. And so, it should be given its ordinary meaning. The ruling of the court below of 12th May, 2010 is rooted in election appeal which the law stipulates that it should end at the Court of Appeal. G

In the case of Alao v. ACE Ltd. (2000) 9 NWLR (Pt. 670) 264 , it was pronounced that although this court is the court of last resort, it is nevertheless, a court of appellate jurisdiction which is regulated by the Constitution. Its jurisdiction is basically appellate apart from first instance restricted matters. The court is statutory and cannot for the sake of doing justice confer on itself a jurisdiction where none is given to it by the Constitution or by any statute. (See also the case of Dangote v. H

C. S. C Plateau State (2001) 9 NWLR (Pt. 717) 132 at 150) where the same opinion was expressed.

It is clear to me that the decision of the court below as entered on 12th May, 2010 is final and not subject to appeal to this court. I need to state it in clear terms that such finality applies 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 substantive appeal before the court below.

The employment of the word 'shall' points to mandatory realm. It imbues the court below with ultimate and final jurisdiction. It has been interpreted by this court in a line of authorities to deprive this court of jurisdiction and competence in appeals such as this one relating to Senatorial election petition. The Court of Appeal is the final court in respect of same. This court will not allow an imagined referral vide section 295 of the 1999 Constitution through the back door, as it were.

I am of the considered view that this court is not imbued with the requisite jurisdiction and competence to hear the appeal (Refer to Onuaguluchi v. Ndu (supra), Awuse v. Odili (supra) and Okonkwo v. Ngige (Supra))

With all the above in view, I have no hesitation in upholding the preliminary objection raised on behalf of the 6th respondent that this court lacks jurisdiction and due competence to hear this appeal. It is hereby struck out.

Appeal No. SC. 466/2010 is between the same parties with similar background and issues as the one considered above. It is equally caught by the provision of Section 246(3) of the 1999 Constitution. It is also struck out for want of jurisdiction.

Both appeals are hereby struck out. I assess costs at N50,000.00 in favour of each respondent against the appellant.

H **MUKHTAR JSC**

The appeal before this court emanated from the Court of Appeal, Enugu Division. The 6th respondent has filed a notice of preliminary objection, for an order striking out or dismissing this appeal for being incompetent and an abuse of the process of court. The

grounds upon which the application is based are as follows:-

“(a) This Appeal contravenes the provisions of Sections 246 (3) of the Constitution of the Federal Republic of Nigeria, 1999.

(b) The Appeal is an abuse of the process of court as it is targeted at irritating and annoying the Respondents and is an affront on the efficient and effective administration of justice.

(c) The Appeal is not only vexations and frivolous but oppressive.”

The gravamen of this objection is to my mind predicated on ground (a) above, which is the propriety or otherwise of the appeal before this court i.e., whether section 246 of the constitution supra allows this appeal to stand. What does the relevant provision of section 246 of the constitution stipulate? It stipulates thus:-

“(1) An Appeal to the Court of Appeal shall lie as of right from

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(a)

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

(1) 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.”

I have reproduced the very relevant provisions that are pertinent to this objection. Now, the question that may beg for answer is, does this appeal fall within the ambit of sections (1) and (3) of the constitution supra? Before one can answer this question one would have to look at the process that initiated this action in the lower court of first instance. Although the initial process of this suit in the Election Tribunal does not form part of the record of proceedings before this court, from the affidavit in support of the motion on notice that was moved in the Court of Appeal, and from which ruling is the subject of this appeal can be found depositions that confirm that the suit from which the appeal and application originated was election petition in an Election Tribunal. The relevant depositions read:-

“3. That I am informed by the Applicant in the offices of Messrs.

Azinge & Azinge, No. 19 Bujumbura Street off Libreville Street, Wuse Abuja on the 6th of May 2010 at 4 p.m. and I verily believe her as per the following:-

(a) That she was duly elected as Senator of the Federal Republic of Nigeria in 2007 to represent Anambra North Senatorial District.

B (b) That after the said election, the 2nd Respondent challenged the Applicant's election in Petition No: EPT/AN/NAE/SE/9/2007.

(c) That the Tribunal dismissed the Petition of the 2nd Respondent and she further appealed to the Court of Appeal in Appeal No: CA/E/EPT/73/2008.

C (d) That on the 10th of February 2009, this Honourable court dismissed the Appeal and held that the election was properly conducted and that the court below was right to uphold the election of the Applicant who scored a majority of the lawful votes cast at the
D Election.....

(e) That subsequently, the 1st Respondent also filed a Petition with No: EPT/AN/NAE/SE/11/2007 for the same Anambra North Senatorial Election and the Tribunal dismissed the said Petition.

(f) That on further appeal to this court in Appeal No: CA/E/
E EPT/04/2009 this court held that the applicant was not elected by majority of the lawful votes and ordered the Independent National Electoral Commission to withdraw the Applicant's Certificate of Return and issue same to the 1st Respondent.

F It is as clear as crystal from the above depositions that the matter that is the bone of contention in this appeal is the validity or otherwise of the election of the appellant to the National Assembly. That is the bottom line and it cannot be called by any other name, than that the matter that forms the bedrock of this appeal is a decision of
G the Election Tribunal of Anambra State, which falls within the ambit of section 246 (1) and (3) of the Constitution of the Federal Republic of Nigeria, 1999.

By virtue of the said subsection (3) the judgment of the Court of Appeal became final on being delivered, and cannot be subject of
H appeal in this court. The provision is very clear and straight forward, and does not require any extraordinary interpretation. By the use of the word '*shall*' it made the provision mandatory and compulsory, thereby excluding the exercise of discretion, and a chance to shift even an inch. If the word '*shall*' in the provision is given its ordinary

and natural meaning, then the proper thing to do is to hold that this court has no jurisdiction to hear this appeal and will not hear it. The other crucial word used in the provision is '*final*', which connotes that the judgment is conclusive, and never to be re-visited. Indeed, when a matter is said to be final, it means that is the end and it has reached its terminal destination. See *Awuse v. Odili* 2003 18 NWLR part 85 B page 116, *Onuaguluchi v. Ndu* 2001 7 NWLR part 712 page 309, and *Okonkwo v. Ngige* 2007 12 NWLR part 1047 page 191.

In the light of the above I believe the appropriate thing to do is to uphold the preliminary objection, and strike out the appeal. To this end, I hereby strike out the appeal for this court has no jurisdiction to hear and determine it. I have had the opportunity of reading in advance the lead ruling of my learned brother Fabiyi JSC, and I agree entirely with all the orders he has made therein. SC.176/2010 D

The ruling and the orders made in SC. 466/2010 apply to this appeal.

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother FABIYI, JSC just delivered and I agree with his reasoning and conclusion that the preliminary objection raised in the appeals be sustained as same is meritorious. E

It is clear that by the provisions of section 246(3) of the constitution of the Federal Republic of Nigeria, 1999 the decision of the Court of Appeal in respect of appeals arising from election petitions, such as senatorial election petition appeals as in the instant case, is final by which it is understood to mean not subject to any further appeal or review by any other court or tribunal. The provision is clearly mandatory and in no way discretionary and I hold the view that no amount of ingenuity employed by learned counsel can confer jurisdiction in this court to intervene under any guise. The jurisdiction of this court, just as that of the lower court [Court of Appeal] is statutory as the same is prescribed by the constitution or statute. F G H

I therefore sustain the objection and abide by the consequential orders made in the said lead judgment of my learned brother including the order as to costs.

Appeals struck out for being incompetent.

RHODES-VIVOUR JSC

Once again this appeal raises the issue of finality of Judgments of the Court of Appeal in Election cases. The appellant seeks from this court by her appeal, interpretation of two judgments of the Court of Appeal on the Elections conducted in 2007 for the Anambra State North Senatorial seat. The 6th defendant INEC, the regulatory body for the conduct of Elections in Nigeria filed a preliminary objection on the following grounds:

(a) The appeal contravenes the provision of Section 246(3) of the Constitution of the Federal Republic of Nigeria 1999.

(b) The appeal is an abuse of the process of this Honourable Court as it is targeted at irritating and annoying the respondents and is an affront on the efficient and effective administration of justice in this Honourable court.

(c) The appeal is not only vexations and frivolous but Oppressive and malicious.

It is important I reproduce Section 246(3) of the Constitution:

Section 246 (i) (b) (i) (3) of the Constitution states that: 246 (i) 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 Houses Election Tribunals on any question as to whether -

(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 decision of the Court of Appeal in respect of appeals from election petitions shall be final. Both decisions that the appellant seeks interpretation from this court are final decisions of the Court of Appeal on the question as to who between appellant, 1st and 2nd respondents was validly elected as a member of the Senate. Any conflicts in the decisions is to be resolved by the Court of Appeal and not the Supreme Court in view of the provisions of Section 246 (3) of the Constitution.

For this and the much fuller reasoning in the leading judgment delivered by Fabiyi JSC, I strike out both appeals and award costs of N50,000.00 in favour of each respondent against the appellant.