

SUPREME COURT OF NIGERIA

8TH JULY, 2011, SC. 141/2011

**CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH,
M. S. MUNTAKA-COOMASSIE, J. A. FABIYI, S.
GALADIMA, JJSC**

1. CONGRESS FOR PARTIES SEEKING
PROGRESSIVE CHANGE LEAVE TO APPEAL
2. BRIG GEN. MOHAMMED
BUBA MARWA (RTD.) INTERESTED PARTIES/
APPLICANTS

AND

1. ADMIRAL MURTALA NYAKO (RTD.)
2. PEOPLES DEMOCRATIC PARTY) PLAINTIFFS/
RESPONDENTS
3. INDEPENDENT NATIONAL
ELECTORAL COMMISSION DEFENDANT/
RESPONDENT

APPEALS - Leave - Competence of the application - Where it is made before Supreme Court under Constitution 1999 s. 233(5) - It is proper and competent (H1)

APPEALS - Leave - Grant of the application - Condition precedent - Applicant must prove that his interest has been prejudicially affected - By the decision he is seeking leave to appeal against (H2)

APPEALS - Leave - Grant of the application - Principles - It will be granted where the grounds of appeal show a prima facie arguable appeal (H3)

FACTS

This action commenced at the Federal High Court, Abuja where 1st and 2nd respondents instituted action against 3rd respondent (INEC) over the tenure of the office of 1st respondent. Both the trial High court and the Court of Appeal, Abuja gave orders which deferred the conduct of the governorship election until 2012. Dissatisfied, 1st applicant (not a party at Federal High court and Court of Appeal)

and 2nd applicant (who was a candidate of 1st applicant at the election slated for April, 2011 with respect to Adamawa State Governorship seat, and also not a party at the proceedings in the Federal High court and Court of Appeal) filed application before the Supreme Court.

The application was brought pursuant to the provisions of Sections 6(6) and 233(5) of the Constitution of Federal Republic of Nigeria, 1999 and Order 2 Rules 28(1) (2) and 31 and Order 6 Rule 10 of Supreme Court Rules. By a motion on notice, applicants are seeking for the order of Supreme Court, which essentially is to grant them leave as interested parties to appeal against the judgment of the Court of Appeal, Abuja delivered in this matter on the 15th April, 2011. The application is supported by a 31 paragraph affidavit. Both 1st and 2nd respondents have filed separate counter-affidavits in opposition to the application. 2nd respondent also has filed a notice of preliminary objection to the hearing of the application.

HELD (Unanimously dismissing the notice of preliminary objection and granting the application per **MOHAMMED JSC**)

APPEALS - Leave - Competence of the application

1. Let me point out right away that the application that was heard and determined by the Court of Appeal on 31st March, 2011, was application for leave to appeal to the Court of Appeal by the Applicants as parties interested in the matter under Section 243(a) of the Constitution against the judgment of the Federal High Court of 23rd February, 2011. This court has nothing to do with that application as there is no direct appeal to this court against the decision of the Federal High Court. The present application on the other hand was brought under Section 233(5) of the 1999 Constitution for leave to appeal by the Applicants as parties having interest in the matter against the judgment of the Court of Appeal delivered on 15th April, 2011. The application therefore having been brought under Section 233(5) of the Constitution and not under Section 243(a) of the same Constitution is indeed properly before this court and therefore quite competent. The preliminary objection in this respect is clearly misconceived and same is hereby dismissed. (p. 2154 B)

Leave - Grant of the application - Condition precedent

2. The law is well settled that for an Applicant to be entitled to be granted the relief of leave to appeal as person having interest in the matter as prescribed under Section 233(5) of the 1999 Constitution, that Applicant must show not only that he is a person having interest in the matter but also that the order or judgment of the court below he is seeking leave to appeal against prejudicially affects his interest. In other words, to succeed in this application, the Applicants must show that they are persons who are aggrieved; who have suffered legal grievances; against whom decisions have been pronounced which have wrongfully deprived them of something or wrongly refused them something or wrongly affected their title to something. In short the Applicants must be persons whose interest has been prejudicially affected by the decision they are seeking leave to appeal against. See *Jarmakani Transport Ltd, v. Kallo* (1965) 1 NMLR 194 and *Maja v. Johnson* 13 WACA 194 which were decided under the provisions of Section 117(6)(a.) of the 1963 Constitution which are in *pari materia* with the provisions of Section 213(5) of the 1979 Constitution and now Section 233(5) of the 1999 Constitution on the definition of the words – “person having interest in the matter.” The facts and circumstances of each case determine whether or not the requirement of the constitution had been satisfied to justify granting the Application for leave to appeal by person having interest in the matter. (p. 2154 G)

Leave - Grant of the application - Principles

3. In addition, this court in a plethora of cases had laid down principles for granting application for leave to appeal *simpliciter* which is also included in the requirement under Section 233(5) of the Constitution for application for leave to appeal as person having interest in the matter. The general rule is that an application for leave to appeal will be granted where the grounds of appeal raise issues of general importance or novel points of law or where the grounds of appeal show a *prima facie* arguable appeal. In the present application, the grounds of appeal contained in the notice of appeal in support of the application which clearly involve matters of constitutional and jurisprudential importance, in my view, have shown *prima facie* arguable appeal to justify granting this application. (p. 2157 H)

REPRESENTATION

Chief Wole Olanipekun SAN., (with him, I. A. Adedipe, SAN., Gbenga Adeyemi, Kerechukwu Azie, Aisha Ali, A. A. Isoto), for the Applicants.

Okon N. Efut, (with him, Rita Odion, Patricia Obi, John Ochogwu, Haruna Aromeh, Ezinne Njoku, Dickson Otuagoma, D.A.N. Eke, Peter Erivwode, Wilkey Kehinde, and Victor R. Ogbonna) for the 1st Respondent.

Chief Olusola Oke, (with him, A. A. Ibrahim, O. Gbadeyan, M. Onyiane and S. G Ikuesan) for the 2nd Respondents.

B. Mahmoud, SAN., (with him, V. O. Awomolo, Aminu Sadauki, Baraka Ali, Anulika Osuigwe, Feyisayo Folonsumo, Ephraim Ajijola and Isiaku Shuaibu), for the 3rd Respondent.

CASES REFERRED TO

Ubagu v. Okachi (1964) 1 All NLR 36

Ijelu v. L.S.D.P.C (1992) 9 NWLR (Pt.266) 44

Bewaji v. Obasanjo (2008) 9 NWLR (Pt. 1093) 540

Ezeagu Local Govt. v. Ufuanya (1996) 7 NWLR 459

E Owena Bank Plc. v. NSE (1997) 8 NWLR (Pt.575) 1 at 13

Sun Insurance Office Ltd. v. Ojemuyiwa (1965) 1 All NLR 1

Enuduk Engineering v. Mac Arthur (1990) 4 NWLR (Pt.143) 260

Kigo Nig. Ltd. v. Holman Brothers Nig. Ltd. (1980) 5-7 S.C. 62

F Akande v. General Electric (1979) 3-4 S.C. 115

Society Generate Bank v. Afekoro (1999) 7 S.C. (Pt. III) 95

Societe Generale v. Afekoro (1999) 7 S.C. (Pt. III) 95

STATUTE & RULES REFERRED TO

G Constitution of Federal Republic of Nigeria 1999, ss.6 (6), 233(5), 234 and 243(a)

Supreme Court Rules, O. 2 r. 28(1) (2) (3), O. 6 r. 10

LEAD JUDGMENT BY MOHAMMED JSC

H Pursuant to the provisions of Sections 6(6) and 233(5) of the Constitution of the Federal Republic of Nigeria, 1999 and Orders 2 Rules 28(1) and (2) and 31 and Order 6 Rule 10 of the Rules of the Supreme Court, Applicants by a motion on notice dated and filed in this court on 28th April 2011 sought for the following orders -

“1. An Order granting leave to the interested parties/Applicants to appeal against the judgment of the Court of Appeal, Abuja Judicial Division delivered in this matter on 15th April, 2011.

2. Pursuant to (1.) supra An Order granting leave to the interested parties/Applicants to rely on and make use of their notice of appeal attached hereto in the prosecution of this appeal, the proper filing fee having been paid and the said notice of appeal having been served on all the parties. B

3. An Order permitting the interested parties/ Applicants to make use of and rely on the record of proceedings of the lower court already prepared and certified by the said lower court in 2 Volumes, together with a supplementary record for the purpose of this appeal, the said record of proceedings having been formally brought before this honourable court for use for the purpose of this appeal. C

4. An Order of departure from the Rules of this honourable court by accelerating the hearing of this appeal and also abridging the time with which parties are to file their respective briefs of argument. D

5. And for such order or orders as the honourable court may deem fit to make in the circumstances.” E

The grounds of bringing the application include -

“i. The lower court delivered judgment in this matter on 15th April, 2011, affirming the judgment of the trial high court dated 23rd February, 2011 to the effect that INEC should not conduct governorship election in Adamawa, State at the on-going general election. F

ii. Before the said judgment Applicants have made and are still making elaborate arrangements to participate and contest in the election on the platform of their political party.

iii. By the judgment of the lower court the interest shown by the Applicants in the said election earlier fixed for 16th April, 2011 but now postponed to 26th April, 2011 has been and is being truncated. G

iv. Applicants applied before the lower court for leave to be joined as parties to the appeal against the judgment of the trial court but their application was refused on 31st March, 2011. H

v. Applicants timeously appealed to this court against the decision of the lower court refusing them leave to appeal on 12th April, 2011, but before the appeal could be entered in this court, the lower

court delivered its judgment on 15th April, 2011.

vi. Applicants thus withdrew their said appeal in order to file this application for leave to appeal against the judgment of the lower court.

vii. Applicants have shown their interest to contest the Adamawa State Governorship election initially slated for April, 16th 2011 by the Independent National Electoral Commission (INEC).

viii. 1st Plaintiff/Respondent has also signified his 'interest to participate in the said election initially slated for April, 16th 2011.

ix. Financial human and material resources have been committed and still being committed by the Applicants into the preparation for the election.

x. 1st Applicant has conducted its primaries for the said election and forwarded the name of the 2nd Applicant to INEC as its candidate for Adamawa State governorship polls."

The application is supported by a 31 paragraph affidavit deposed on 28th April, 2011 to which various processes including the notice of appeal and the records relevant to the hearing of this application were exhibited as Exhibits 1-14 and a further affidavit dated and filed on 1st May, 2011.

In opposing the motion, the 1st Respondent filed a counter-affidavit of 51 paragraphs through his learned counsel who also filed a written brief of argument in support of the facts averred in the counter-affidavit. In the same vein, the 2nd Respondent is also opposing this application through its counter-affidavit of 18 paragraphs. In addition, the 2nd Respondent also filed a notice of preliminary objection to the hearing of the application which its learned counsel described as incompetent and therefore urged this court to strike it out.

Arguing the application, learned senior counsel for the Applicants observed that the application was brought under Section 233(5) of the 1999 Constitution for the Applicants who were not parties to the case at the trial Federal High Court and the Court of Appeal be given leave to appeal against the decision of the Court of Appeal delivered on 15th April, 2011 affirming the judgment of the trial Federal High Court given on 23rd February, 2011 as parties having interest in the matter Relying on the nomination forms submitted to the 3rd Respondent to contest the governorship election in Adamawa

State in April, 2011, the judgment of the trial court, the judgment of the Court of Appeal, notice of appeal containing the proposed grounds of appeal to be argued if leave is granted and the certified records of the courts below on which the appeal shall be heard if leave is granted, learned senior counsel urged this court to find that the Applicants have satisfied the requirement of the Constitution that they are parties having interest in the matter to justify granting the application. Several cases were cited and relied upon in support of the application. B

Learned counsel to the 1st Respondent however in opposing the application pointed out that close scrutiny of the judgments of the two courts below shows that the matter forming the subject of the judgments of the two courts below relates to the tenure of office of the 1st Respondent which was in issue between the parties in those courts and as such the Applicants have no interest whatsoever in the matter. Citing and relying on a number of cases, learned counsel urged this court to refuse the application. C D

As for the 2nd Respondent, its learned counsel is also of the view that the Applicants have no business coming into this matter at this stage, the matter being purely a dispute between the 1st and 2nd Respondents on one hand and the 3rd Respondent on the other hand on the tenure of office of the 1st Respondent. In addition to citing and relying on several cases to support his submission urging this court to dismiss the application, a preliminary objection to the competence of the application was also brought by the learned counsel who pointed out that the issues arising for determination in this application having been raised and determined by the Court of Appeal which refused the same application, the present application is incompetent and should be struck out as this court has no jurisdiction to hear it. E F G

Learned senior counsel to the 3rd Respondent who filed no written processes in this matter responded to the application orally in support of the application on points of law alone. He observed that taking into consideration that the matter under consideration in the application has raised substantial constitutional and jurisprudential issues, it ought to be granted because Section 233(5) of the 1999 Constitution under which the application was brought, gave this court powers to grant the Applicants application for leave to appeal against H

the judgment of the Court of Appeal as parties having interest in the matter.

Starting with the 2nd Respondent's preliminary objection, it was the contention of the learned counsel that the facts and reliefs sought in the present application have already been considered and settled by the Court of Appeal in its ruling delivered on 31st March, 2011, between the same parties; that as such the Applicants are estopped in law from raising the same issues before this court. ***Let me point out right away that the application that was heard and determined by the Court of Appeal on 31st March, 2011, was application for leave to appeal to the Court of Appeal by the Applicants as parties interested in the matter under Section 243(a) of the Constitution against the judgment of the Federal High Court of 23rd February, 2011. This court has nothing to do with that application as there is no direct appeal to this court against the decision of the Federal High Court. The present application on the other hand was brought under Section 233(5) of the 1999 Constitution for leave to appeal by the Applicants as parties having interest in the matter against the judgment of the Court of Appeal delivered on 15th April, 2011. The application therefore having been brought under Section 233(5) of the Constitution and not under Section 243(a) of the same Constitution is indeed property before this court and therefore quite competent. The preliminary objection in this respect is clearly misconceived and same is hereby dismissed.***

Coming back to the application itself, the facts giving rise to the instant application are riot at all in dispute between the parties having regard to the affidavits in support of the application with the exhibits and the counter-affidavits of the Respondents opposing the application. ***The law is well settled that for an Applicant to be entitled to be granted the relief of leave to appeal as person having interest in the matter as prescribed under Section 233(5) of the 1999 Constitution, that Applicant must show not only that he is a person having interest in the matter but also that the order or judgment of the court below he is seeking leave to appeal against prejudicially affects his interest. In otherwords, to succeed in this application, the Applicants must show that***

they are persons who are aggrieved; who have suffered legal grievances; against whom decisions have been pronounced which have wrongfully deprived them of something or wrongly refused them something or wrongly affected their title to something. In short the Applicants must be persons whose interest has been prejudicially affected by the decision they are seeking leave to appeal against. See Ubagu v. Okachi (1964) 1 All NLR 36; Sun Insurance Office Ltd. v. Ojemuyiwa (1965) 1 All NLR 1; Jarmakani Transport Ltd, v. Kallo (1965) 1 NMLR 194 and Maja v. Johnson 13 WACA194 which were decided under the provisions of Section 117(6)(a.) of the 1963 Constitution which are in pari materia with the provisions of Section 213(5) of the 1979 Constitution and now Section 233(5) of the 1999 Constitution on the definition of the words - “person having interest in the matter.” The facts and circumstances of each case determine whether or not the requirement of the constitution had been satisfied to justify granting the Application for leave to appeal by person having interest in the matter.

Coming back to the present application and guided by the above decisions on the subject of this Application, the question to be answered is whether or not the Applicants have shown on the materials brought in support of their application that they are persons whose interest has been prejudicially affected by the decision of the trial Federal High Court Abuja, delivered on 23rd February, 2011 and affirmed by the Court of Appeal, Abuja Division in its judgment handed down on 15th April, 2011 which the Applicants are now seeking leave to appeal against To answer this question I shall simply rely on the undisputed facts averred in support of the application and in opposing the application as presented to this court by the parties and the judgments of the two courts below which are the subject of the application.

From the record in support of this application, it is quite clear from the judgment of the trial Federal High Court that the 1st and 2nd Respondents dragged 3rd Respondent (INEC) to the trial court following the issuance by INEC the 3rd Respondent of the notice of election to the stakeholders and the general public in exercise of its powers under the Constitution that governorship elections will hold in all the states of the Federal Republic of Nigeria in January, 2011,

except in Rivers State, Edo State, Ondo State and Anambra State where governorship election shall hold in June 2011 for Rivers, July 2012 for Edo and Ondo and November, 2014 for Anambra. Relying on this notice, the Applicants who no doubt as “stakeholders” to whom the notice of election was addressed, proceeded with preparation to participate or contest the election by conducting primaries resulting in the emergence of the 2nd Applicant as candidate of the 1st Applicant to contest the governorship election of 2011 in Adamawa State and by ultimately submitting the nominations forms of 2nd Applicant to INEC as the candidate of the 1st Applicant to contest the election.

Therefore when the Federal High Court in its Judgment of 23rd February, 2011 granted all reliefs claimed by the 1st Respondent except Relief No.5, it became obvious that the 3rd Respondent had been restrained from conducting the governorship election in Adamawa State which the Respondents were waiting to participate/contest in April 2011. It is also on record from the ruling of the Court of Appeal of 31st March, 2011, that the attempt by the Applicants to seek leave to appeal against the judgment of the Federal High Court to the Court of Appeal was not successful hence the present application. However in its judgment in the consolidated suits, the trial court had granted Reliefs 1, 2, 3 and 4 to the 1st Respondent and stated that Reliefs had been overtaken. For the avoidance of doubt I quote the 5 reliefs as granted and refused at Pages 66-67 of the materials in support of the application. They are -

“Whereof the Plaintiff seeks the following reliefs:

1. A declaration that upon nullification by the Court of Appeal of the governorship election held in Adamawa State on the 14th day of April, 2007, the Oath of Allegiance and Oath of Office taken by the Plaintiff as Governor of Adamawa State based on the nullified election was thereby rendered null and void and of no legal effect whatsoever.

2. A declaration that the four-year term of office of the Plaintiff as Governor of Adamawa State started to run from the 30th day of April, 2008 when he took the Oath of Allegiance and Oath of Office after he was returned as the candidate elected at the re-run election of 26th day of April, 2008 in Adamawa State and it terminates on the 30th day of April, 2012.

3. declaration that no vacancy exist in the governorship seat of Adamawa State for the period up to 30th day of April, 2012 and the Defendants cannot validly conduct any primary or general governorship election in Adamawa State on a date earlier than the 28th day of February, 2012.

4. An order of injunction restraining the Defendants from conducting any governorship election in Adamawa State on a date earlier than the 28th day of February, 2012. B

5. An order of injunction restraining the 3rd Defendant from organizing or conducting any primary election to choose her candidate for the January, 2010 planned election for the governorship of Adamawa State.” C

Looking at the above four reliefs that had been granted to the 1st Respondent by the trial court and affirmed by the Court of Appeal, it is not difficult to see that while Reliefs 1 and 2 relate to the question of tenure of the 1st Respondent, Reliefs 3 and 4 are clearly orders affecting the conduct of the governorship election in April, 2011 which the Applicants were waiting to participate or contest To say that the order by the trial court in Relief 4 sought by the 1st Respondent and granted by the trial court and affirmed by the Court of Appeal restraining the Defendants from conducting any governorship election in Adamawa State on a date earlier than 28th day of February, 2012 does not prejudicially affect the interest of the Applicants who were ready to participate in the election and contest the governorship election in Adamawa State as scheduled earlier than 28th February, 2012 in April, 2011, as claimed by the Respondents, is certainly far from the reality of the situation. Reliefs 3 and 4 above as granted by the trial court and affirmed by the Court of Appeal, in my view, certainly affected the interest of the Applicants to bring them within purview of the plain words of the Constitution as persons having interest in the matter. In other words, on the plain facts and circumstances that gave rise to the case at the trial court and the appeal at the Court of Appeal, particularly the orders of the trial court postponing the conduct of governorship election in Adamawa State which were affirmed by the Court of Appeal, I am satisfied that the Applicants have satisfied the requirements of the law to justify the exercise of the discretion of this court in their favour to grant their application. D E F G H

In addition, this court in a plethora of cases had laid

down principles for granting application for leave to appeal simpliciter which is also included in the requirement under Section 233(5) of the Constitution for application for leave to appeal as person having interest in the matter. The general B rulers that an application for leave to appeal will be granted where the grounds of appeal raise issues of general importance or novel points of law or where the grounds of appeal show a prima facie arguable appeal. See Kigo (Nigeria) Ltd. v. Holman Brothers (Nigeria) Ltd. (1980) 5-7 S.C. 62; (1980) 5-7 C S.C. (Reprint) 41. In the present application, the grounds of appeal contained in the notice of appeal in support of the application which clearly involve matters of constitutional and jurisprudential importance, in my view, have shown prima facie arguable appeal to justify granting this application.

D Accordingly, it is hereby ordered as follows:

1. Leave is hereby granted to the interested parties/ Applicants to appeal against the judgment of the Court of Appeal, Abuja Judicial Division delivered in this matter on 15th April, 2011.
2. Leave is also granted to the interested parties/ Applicants to E rely on and make use of their notice of appeal filed in support of their application in the prosecution of this appeal.
3. Interested parties/Applicants are permitted to use and rely on the record of proceedings of the lower court already prepared and certified by the lower court in two volumes together with the F supplementary record for the purpose of this appeal.
4. An order for departure from the rules of this court is also hereby made to give accelerated hearing of this appeal by abridging the time within which the parties are to file their respective briefs of G argument

Finally, having regard to the fact that this appeal arose from the decision of the Court of Appeal in civil proceedings on questions as to the interpretation or application of the provisions of the 1999 Constitution, the appeal is hereby referred to the Honourable Chief H Justice of Nigeria for constituting a panel of full court to hear and determine the appeal as required by Section 234 of the Constitution on a date to be communicated to the parties taking into consideration that the relief for accelerated hearing of the appeal has been granted. I am not making any order on costs.

CHUKWUMA-ENEH JSC

I have read in draft the leading ruling of my learned brother, Mohammed JSC., just delivered. His reasoning and the conclusion he has arrived at are co-terminous with my views in this matter.

However, I add that the instant Applicants by their depositions and exhibits annexed thereto as per the supporting affidavit to their application for purposes of appealing in this case as an interested party pursuant to Section 233(5) of the 1999 Constitution as amended, unequivocally have placed enough materials before this court albeit to show that they have sufficient interest in the conduct of the Governorship Election in Adamawa State scheduled for 16/4/2011 and later re-scheduled for 26/4/2011. And so, they have been adversely affected by the order/decision of the trial court as affirmed by the lower court now sought to be appealed against particularly as to the effect that INEC should not conduct Governorship Election in Adamawa State at the on-going general elections. See: *Owena Bank Plc. v. NSE* (1997) 8 NWLR (Pt.575) 1 at 13, *Enuduk Engineering v. Mac Arthur* (1990) 4 NWLR (Pt.143) 260, *Akande v. General Electric* (1979) 3- 4 S.C. 115; (1979) 3-4 S.C. (Reprint) 77; *Ezeaa Local Govt. v. Ufuanya* (1996) 7 NWLR 459 and *Society Generate Bank v. Afekoro* (1999) 7 S.C. (Pt. III) 95; (1999) 7 SCNJ 171.

In the circumstances, I should exercise my discretion in favour of granting the application and I abide by the orders contained in the leading ruling.

MUNTAKA-COOMASSIE JSC

I have an opportunity of reading in draft the leading ruling of my learned brother Mahmud Mohammed, JSC., just delivered. I agree entirely with his reasoning and conclusion which I adopt, with tremendous respect, as mine. I have no hesitation in agreeing with the leading ruling when I digested the provision of Section 233 (5) of the Constitution of the Federal Republic of Nigeria, 1999 vis-a-vis application for leave to appeal as a person having interest in the matter. That Section 233 (5) (supra) provides thus:-

“The Supreme Court shall have jurisdiction, to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Court of Appeal.

(5) any right of appeal to the Supreme Court from the decision of the Court of Appeal conferred by this section shall be exercisable in the case of civil proceedings at the instance of a party thereto, or with the leave of the Court of Appeal or the Supreme Court at the instance of any other person having an interest in the matter, and in the case of criminal proceedings at the instance of an Accused person, or subject to the provision of this Constitution and any powers conferred upon the Attorney General of the Federation or the Attorney General of a State to take over and continue or to discontinue such proceedings, at the instance of such other authorities or persons as may be prescribed.”

The facts of this case showed:-

- i) That the 2nd interested party/Applicant is a Nigerian;
- ii) He is an aspirant
- iii) He is saddled with legal interest; and
- iv) The decisions and orders of the two lower courts vis-a-vis deferring the conduct of governorship Election in Adamawa State etc.

That being the case, I am convinced that the Applicants herein have satisfied the conditions of the law to warrant the exercise of our discretion in favour of the present Applicants. It has to be noted that at this stage we are not in any way concerned with the pending appeal. We are only dealing with Order granting leave to the interested parties to appeal against the judgment of the Court of Appeal, Abuja Division.

Having also considered the decided cases of -

- 1. Ubagu v. Okachi (1964) 1 ALL NLR 36.
- 2. Sun Insurance Office Ltd. v. Ojemuyiwa (1965) 1 All NLR 1.
- 3. Maja v. Johnson 13 WACA 194 - defining the “Person Having Interest in the Matter” under the provisions of Section 117(6) of the 1963 Constitution. Section 213 (5) of the 1979 Constitution which are in pari materia with the 1999 Constitution, Section 233 (5) thereof. See also Jarmakani Transport Ltd, v. Alhaji Kalte (1965) 1 NMLR 194, Per Bairamian, JSC., (as he then was).

I believe the interest of the Applicants has been adversely and prejudicially affected. That is the more reason why I entirely agree with my lord, Mohammed, JSC., that this application deserves to be granted I too therefore exercise my discretion judicially and judiciously in favour of the Applicants. The application is therefore granted as

prayed. The appeal before us is hereby referred to the Hon. Chief Justice of Nigeria to constitute a fresh panel of full court to hear and determine the appeal under Section 234 of the Constitution. Fresh hearing notices shall be issued to all the parties if a panel has been re-constituted. No order as to costs.

B

FABIYI JSC

I have read before now the ruling just handed out by my learned brother - Mohammed, JSC. I agree with the reasons advanced for granting the application.

C

The Applicants' application was, in essence, filed pursuant to the provision of Section 233 (5) of the Constitution of the Federal Republic of Nigeria, 1999. The relevant portion of same provides as follows:-

D

"233 (5) Any right of appeal to the Supreme Court from the decisions of the Court of Appeal conferred by this section shall be exercisable in the case of civil proceedings at the instance of a party thereto, or with the leave of the Court of Appeal or the Supreme Court at the instance of any other person having an interest in the matter....."

E

The facts of the matter, put briefly, are that the 2nd Applicant was the candidate of the 1st Applicant at the election slated for April, 2011, with respect to Adamawa State governorship seat. The two lower courts in their decisions made orders which deferred or put in abeyance the conduct of the governorship election until 2012. The Applicants were not joined as parties at the lower courts, lam of the view that ordinarily, they should have been joined. See: Attorney General. Ekiti State v. Paramo (2003) 5 S.C. 70; (2003) 10 NWLR (Pt. 827) 140 at 162.

F

The Applicants have demonstrated that they are persons interested. Same had been adversely affected. This is a matter which touches constitutional interpretation of the legal right of the Applicants. I strongly feel that a broad interpretation which entails a liberal approach or a global view should be employed. See: Rabi v. The State (1980) 8-11 S.C. 130 at 151, 195; (1980) 8-11 S.C. (Reprint) 85.

H

The grounds of appeal in support of the application, as con-

tained in the notice of appeal, relate to constitutional matters of utmost importance. They show a prime facie arguable appeal; in the main. The application deserves being granted.

For the above reasons and those carefully set out by my learned brother which I hereby adopt, I subscribe to the conclusion that the application should be granted. I order accordingly.

I make no order on costs.

GALADIMA JSC

The Applicants herein on 28/4/2011 filed a motion on notice pursuant to the provisions of Sections 6(6) and 233 (5) of the Constitution of the Federal Republic of Nigeria, 1999 and Order 2 Rules 28(1) and (2) and 31 and Order 6 Rule 30 10 of the rules of the Supreme Court. They sought for the following orders:

“1. An Order granting leave to the interested parties/Applicants to appeal against the judgment of the Court of Appeal, Abuja Judicial Division delivered in this matter on 15th April 2011.

2. Pursuant to (1.) supra. An Order granting leave to the interested parties/Applicants to rely on and make use of their notice of appeal attached hereto in the prosecution of this appeal, the proper filing fee having been paid and the notice of appeal having been served on all the parties.

3. An Order permitting the interested parties/ Applicants to make use of and rely on the record of proceedings of the lower court already prepared and certified by the said lower court in Volumes, together with a supplementary record for the purpose of this appeal, the said record of proceedings having been formally brought before this honourable court for use for the purpose of this appeal.

4. An Order of departure from the rules of this honourable court by accelerating the hearing of this appeal and also abridging the time within which parties are to file their respective briefs of argument.

5. And for such order or orders as the honourable court may deem fit to make in the circumstances.”

The following are the grounds for the application:

“i. The lower court delivered judgment in this matter on 15th April 2011, affirming the judgment of the trial high court dated 23rd

February, 2011 to the effect that INEC should not conduct Governorship Election in Adamawa State at the on-going general election.

ii. Before the said judgment Applicants have made and are still making elaborate arrangements to participate and contest in the election on the platform of their political party.

iii. By the judgment of the lower court the interest shown by the Applicants in the said election earlier fixed for 16th April 2011 but now postponed to 26th April 2011 has been and is being truncated.

iv. Applicants applied before the lower court for leave to be joined as parties to the appeal against the judgment of the trial court but their application was refused on 31st March, 2011.

v. Applicants timeously appealed to this court against the decision of the lower court refusing them leave to appeal on 12th April 2011, but before the appeal could be entered in this court, the lower court delivered its judgment on 15th April, 2011.

vi. Applicant thus withdrew their said appeal in order to file this application for leave to appeal against the judgment of the lower court.

vii. Applicants have shown their interest to contest the Adamawa State governorship election initially slated for April 16th 2011 by the Independent National Electoral Commission (INEC).

viii. 1st Plaintiff/Respondent has also signified his interest to participate in the said election initially stated for April, 16, 2011

ix. Financial human and material resources have been committed and still being committed by the Applicants into the preparation for the election.

x. 1st Applicant has conducted its primaries for the said election and forwarded the name of the 2nd Applicant to INEC as its candidate for Adamawa State governorship polls."

Supporting the application, the Applicants deposed to an affidavit of 31 paragraphs. Various processes including the notice of appeal and record of proceeding needed for this application and subsequent appeal thereon were attached as Exhibits 13 and 14 respectively. Other processes relevant to this application were also attached and accordingly marked as exhibits. These are:

1. Exhibits 1 and 2 respectively - are forms for 1st Applicant's nomination and affidavit in support of his personal particulars.

2. Exhibit 3 - a copy of the declaration of the 2nd Applicant as the winner of the primary election of the 1st Applicant in Adamawa State.

3. Exhibits 4 and 5 - The publication in Guardian and This-Day Newspapers respectively of 247 2/2011 from which the 1st Applicant became aware of the judgment of the trial court given on 23/2/2011.

4. Exhibit 6 - A copy of the Applicants' counsel application for the copy of the said judgment.

5. Exhibit 7 - A copy of the judgment received by the Applicants on 10/3/2011.

6. Exhibit 8 - A copy of the Applicants' motion of 28/2/2011 praying for leave of the trial court to allow them appeal against Exhibit 7.

7. Exhibit 9 - A copy of the ruling of the lower court refusing the Applicants' application for leave to appeal.

8. Exhibit 10 - A copy of the notice of appeal against the ruling, i. e Exhibit 9.

9. Exhibit 11 - A copy of the leading judgment of the lower court in the main appeal delivered on 15/4/2011.

10. Exhibit 12 - A copy of notice of discontinuance of appeal No. SC. 134/2011.

On 4th May, 2011 Applicants filed further affidavit of 9 paragraphs, essentially explaining that as a result of the matter coupled with the Stress of having to compile the record, there was no time for the Applicants to first bring this application before the lower court.

Stung by the Applicants' motion, the 1st Respondent met it with stiff opposition and filed a counter-affidavit of 51 paragraphs through his learned counsel who also filed a written brief of argument in support of the facts deposed to in the said counter-affidavit. The 2nd Respondent followed suit and filed a counter-affidavit of 18 paragraphs, and also a notice of preliminary objection to the hearing of the application for being incompetent and for want of jurisdiction.

On 5/5/2011 we took the application. Learned counsel for the Applicants Wole Olanipekun, SAN., made the following observations: That the application was brought under Section 233(5) of the 1999 Constitution for the Applicants who were not parties to the case at the trial Federal High Court and the Court of Appeal be given leave

to appeal against the decision of the latter court delivered on 15/4/2011 affirming the judgment of the court delivered on 23/2/2011 because they are parties having interest in the matter. Learned senior counsel relied on the following: nomination forms, Exhibit 1, submitted to the 3rd Respondent to contest the governorship election in Adamawa State in April, 2011; notice of appeal, Exhibit 13 containing the proposed grounds of appeal to be argued in the event of this leave being granted, and the certified records of the two courts below on which the said appeal shall be heard. He urged us to find that the Applicants have satisfied the requirement of the constitutional provisions that they are parties having interest in the matter to several cases including: Attorney General of The Federation v. Attorney General of Abia State (2001) 7 S.C. (Pt. I) 32; (2001) 11 NWLR (Pt.725) 689 at 730-731; Evesan v. Sanusi (1984) 4 S.C. 115 at 136-137; Re: Madaki (1996) 7 NWLR (Pt.459) 153 at 164. Re: Yinka D Folawiyo & Sons Ltd. (1999) 7 NWLR (Pt. 202) 237 at 244 were cited and relied upon in support of the application.

Learned counsel for the 1st Respondent, Okon N. Efut, Esq., in opposing the application observed that close scrutiny of the judgments (Exhibits 7 and 11) of the two courts below shows clearly that the matter in which the Applicant allegedly have an interest relates to the tenure of office of the 1st Respondent, the near-expiration of which will constitutionally invest the 3rd Respondent with authority and power to conduct an election to fill the position. In the brief of argument he filed on behalf of the 1st Respondent, the learned counsel observed further that the judgment of the trial court that the election year is 2012 is binding on the Applicants. That this issue was resolved without the necessity of making the Applicants necessary parties. That the Applicants were aware of proceedings at the trial court but did not apply to be joined as necessary parties. That since the two courts have adjudged that no election is due in Adamawa State in 2011, the Applicants cannot claim to have interest in an election that is not due. It is submitted that the phrase “interest in the matter” in Section 233(5) of 1999 Constitution is an actionable interest and which is enforceable by legal action in a court of law. Relying on Ikonne v. C.O.P too State & Anor. (1986) 2 NSCC 1130; Ogbagu & Ors v. Okachi & Ors. (1964) NSCC 20: That “a person having an interest” “has been described as synonymous with a person aggrieved. Relying on In-Re:

Ijelu v. L.S.D.P.C (1992) 9 NWLR (Pt.266) 44; Societe Generale v. Afekoro (1999) 7 S.C. (Pt. III) 95; (1999) 11 NWLR (Pt.623) 521 at 524, Bewaji v. Obasanjo (2008) 9 NWLR (Pt. 1093) 540 and In Re: Yinka Folawiyo & Sons (1999) 7 NWLR (Pt.202) 237 at 244. Finally the learned counsel has urged this court to dismiss the application as
 B lacking in merit.

The 2nd Respondent's learned counsel, Chief Olusola Oke, is also of the view that the matter being purely dispute between the 1st and 2nd Respondents on the other hand on the tenure of office of
 C the 1st Respondent, the Applicants should not come in at this stage. On the preliminary objection to the competence of the application, learned counsel pointed out that the issues arising for determination in this application having been raised and determined by the Court of Appeal which refused the same application, the present applica-
 D tion is not competent and should accordingly be struck out, as this court lacks jurisdiction to entertain it.

Learned counsel to the 3rd Respondent, A.B. Mahmud, SAN., did not file written processes in this matter. He only responded to the application on points of law. He contended that the matter has raised
 E substantial constitutional and jurisprudential issues and because of this court ought to grant the Applicants' application under Section 233 (5) of the 1999 Constitution. That the Applicants have shown that they are parties having interest the matter.

On the preliminary objection of the 2nd Respondent, it was
 F contended by his learned counsel that the facts and reliefs sought in the present application have already been considered and settled by the Court of Appeal in its ruling of 31/3/2011 between the same parties, in short raising estoppel by res judicata. When it is said that
 G res judicata applies in law, it should be borne in mind that a party is estopped from re-litigating the matter in hand by the fact that the same matter had already been the subject of a final judicial pronouncement between the two parties. I will say, without any hesitation, that the learned counsel, with due respect has had a mix-up of this matter.
 H The application that was determined by the court below on 31/3/2011 was application brought by the Appellants for leave to that court as parties interested in the matter under Section 243(9) of the Constitution against the decision of the Federal High Court of 23/2/2011. I am in complete agreement with my learned brother. Mo-

hammed JSC., on this point that this court has nothing to do with that application. There is no direct appeal to this court against the decision of the Federal High Court. By comparison, this application on hand was brought under Section 233(5) of the said 1999 Constitution by the Applicants for leave to appeal as parties having interest in the matter against the judgment of the court below delivered on 15/3/2011. The application is competently brought before this court. Accordingly, I hold that the preliminary objection is misconceived and it is dismissed. B

Now to the main application. Having regard to the affidavit in support of the application with the exhibits listed herein and the counter-affidavits of the Respondents in opposition to this application, it is needless exposing further the facts giving rise to the Applicants' application. It is trite law that for an Applicant to be granted leave to appeal as a person interested in the matter as prescribed under Section 233(5) of the 1999 Constitution, he must show that he is a person who is aggrieved and has suffered a legal grievance, against whom a decision has been pronounced, which has wrongfully deprived him of something or wrongly refused him something or wrongfully affected his title to something. In *Re: Ijelu* (supra) it was held that the Applicant, in short, must show not only that he is a person interested but also that the order made prejudicially affected his interest See further: *Ubagu & Ors. v. Okachi & Ors.* (1964) 1 All NLR 36; *Sun Insurance Office Ltd. v. Ojemuyiwa* (1965) 1 All NLR 1; and *Jarmakani Transport Ltd. v. Alhaji Kalla* (1965) NMLR 194; *Ikonne v. C.O.P & Anor.* (1986) 4 NWLR (Pt. 36) 473 at 479 and *Maja v. Johnson* 13 WACA 194. C
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In his contribution in *Ikonne's* case. *Karibi-Whyte, JSC.*, explained further thus: G

“The expression ‘person having interest’ has been defined as synonymous with ‘person aggrieved.’ He cited- In *Re: Sideboham Ex-parte Sideboham* (1880) 14 CH. D where James L.J., said:

“A person aggrieved must be a person who has suffered a legal grievance, against whom a decision has pronounced which has wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to something” H

I have observed, however, that the cases of *Ubagu* (supra) *Sun Insurance Office Ltd* and *Jarmakani Transport Ltd*, (supra) and

Maja (supra) were decided under the provisions of Section 117(6) (a) of the 1963 Constitution and are *impari materia* with the provisions of Section 213(5) of the 1979 Constitution and now Section 233(5) of the 1999 Constitution.

B These cases have given clear definition of the phrase “person having interest in the matter.” It is further observed that the facts and circumstances of each case determines whether or not the requirement of the Constitution had been satisfied to justify the granting of the application for leave to appeal by a person having interest in the matter.

C Having been amply guided by the various decisions cited above on the subject matter of the present application, the question which may now be asked is whether or not the Applicants have sufficiently shown that they are persons whose interest has been prejudicially D affected by the decision of the trial court, delivered on 23/2/2011 and affirmed by the court below in its judgment delivered on 15/4/2011 which the Applicants are now seeking leave of this court to appeal against. The answer to this question can be found in the facts E deposited to by the Applicants in their affidavits and the supporting documents; the counter-affidavits in opposition of the application; and above all the consideration of the two decisions of the two courts below.

F It is quite clear from the record in support of this application that the 1st and 2nd Respondents dragged the 3rd Respondent to the trial court following the issuance by the 3rd Respondent (INEC) of the notice of election to the stakeholders and the general public, in exercise of its constitutional powers under the constitution that the governorship election will hold in all the states of the Federation, in G January, 2011 except in Rivers State, Edo State, Ondo State, November 2014 for Anambra State. Prompted by the 3rd Respondent’s notice, the Applicants as stakeholders to whom the notice of election was addressed proceeded with necessary preparation that will enable the 2nd Applicant participate in the election. He went into H primaries and he emerge successful candidate for the 1st Applicant to contest the Governorship Election of 2011 in Adamawa State. His nomination forms were submitted by the 1st Applicant to the 3rd Respondent However, when the trial Federal High Court in its judgment of 23/2/2011 granted all the reliefs claimed by the 1st Respond-

ent, except Relief No.5 it became obvious that the 3rd Respondent had been restrained from conducting the said Governorship Election in Adamawa State which the Applicants had anxiously been waiting to participate in April. 2011.

It is instructive to note that by the ruling of the lower court of 31/3/2011 the Applicants were refused leave to appeal against the judgment of the trial Federal High Court. Hence, the Applicants have further brought this application. As noted above the trial court only granted Reliefs: 1, 2, 3 and 4 to the 1st Respondent. The 5 reliefs sought are:

2. A declaration that the four-year term of office of the Plaintiff as Governor of Adamawa State started to run from the 30th day of April. 2008 when he took the Oath of Allegiance and Oath of Office after he was returned as the candidate elected at the re-run election of 26th day of April, 2008 in Adamawa State and it terminates on the 30th day of April. 2012.

3. A declaration that no vacancy exists in the governorship seat of Adamawa State for the period up to 30th day of April. 2012 and the Defendants cannot validly conduct any primary or general governorship election in Adamawa State on a date earlier than the 28th day of February. 2012.

4. An order of injunction restraining the Defendants from conducting any governorship election in Adamawa State on a date earlier than the 28th day of February, 2012.

5. An order of injunction restraining the 3rd Defendant from organizing or conducting any primary election to choose her candidate for the January, 2010 planned election for the governorship of Adamawa State.”

I am in perfect agreement that careful study of reliefs that had been granted to the 1st Respondent by the trial court and affirmed by the court below Reliefs 1 and 2 clearly relate to the question of tenure of the 1st Respondent But Reliefs 3 and 4 are orders affecting the conduct of the governorship election in April. 2011 which the Applicants had anxiously waited to participate. I do not agree with the contention of the 1st and 2nd Respondents that the order by the trial court, in Relief 4 sought by the 1st Respondent granted by the trial court and affirmed by the court below restraining the 3rd Respondent from conducting any Governorship election in Adamawa

State on a date earlier than 28/2/2012 does not prejudicially affect the interest of the Applicants. They were quite ready to participate in the election in Adamawa State as scheduled earlier. Reliefs 3 and 4 affected their interests in the matter of election in Adamawa State which was postponed as a result of the orders of the two courts below. They are in my view “persons having interest” in the matter. Their grounds of appeal raise issues of general public importance and they show a prima facie arguable appeal. The grounds clearly involve matters of constitutional and jurisprudential importance to justify the granting of this application.

It is for the foregoing and the fuller reasons admirably given in the leading ruling by my learned brother, Mohammed JSC., that I too grant this application. I abide by all his consequential orders but make no orders as to costs.

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