

SUPREME COURT OF NIGERIA

16TH DECEMBER, 2011 SC. 361/2011, SC. 362/2011 (CON)
**CORAM: - D. MUSDAPHER CJN, W. S. N. ONNOGHEN, J.
A. FABIYI, O. O. ADEKEYE, M. U. PETER-ODILI, JJSC**

1. CHIEF GREAT OVEDJE OGBORU
 2. DEMOCRATIC PEOPLES PARTY APPELLANTS
AND
 1. DR. EMMANUEL EWETAN
UDUAGHAN
 2. PEOPLES DEMOCRATIC PARTY RESPONDENTS
 3. INDEPENDENT NATIONAL
ELECTORAL COMMISSION
-

COURTS - Abuse of process - Characteristics - It arises where party instituted action without right - To the annoyance of other party and the court (H1)

JURISDICTION - Supreme Court - Where the trial tribunal and Court of Appeal lack jurisdiction in the matter - Supreme Court will decline jurisdiction (H2)

FACTS

Following the nullification by Court of Appeal of the election of 1st respondent in April general election of the year 2007, a re-run election was ordered by the court. The re-run election was conducted on 6th January 2011. Appellants were dissatisfied with the outcome of the election. Hence, they filed a petition against same at the Delta State Governorship Election Petition Tribunal. Prior to the decision of the tribunal, the tenure of 1st respondent was adjudged by Supreme Court to have expired by 29th May 2011 on the said re-run election. Despite the said Supreme Court decision, the tribunal for the re-run election disagreed with 1st respondent that the petition of appellants had become spent. Being dissatisfied, 1st respondent appealed to Court of Appeal, Benin City in appeal no: CA/B/EPT/229/2011. He argued on the issue of whether or not the petition was spent. When finally, the tribunal decided and found against appellants in the re-run election, appellants filed appeal no: CA/B/EPT/

227/2011 at the Court of Appeal, Benin City. The two appeals were consolidated at the Court of Appeal.

In Appeal No.CA/B/EPT/229/2011, the court held that the petition of appellants had become spent and academic due to the expiration of the tenure of 1st respondent on the re-run election on the 29th May 2011 and struck out the petition. With regard to appeal no: CA/B/EPT/227/2011, the court decided that it would be an act in futility having held that the tenure of 1st Respondent had become spent, to discuss the merits of appellants' complaints. Aggrieved, appellants filed two appeals to Supreme Court against the decisions of the Court of Appeal. The appeals were consolidated. On the date fixed for hearing, the court asked counsel to address it on whether or not the Supreme Court has jurisdiction to entertain the appeals and whether having regard to the issue of the expiration of the tenure of 1st Respondent, there is in existence a live issue to be decided between the parties.

ISSUES FOR DETERMINATION

1. Whether this Court has jurisdiction to entertain this matter which stems from the April 2007 election?

2. Whether there are res for this Court to consider in this matter since the tenure of the 1st Respondent in the matter of the re-run election expired on May 29, 2011.

HELD (Unanimously dismissing the appeals per **PETER-ODILI JSC**)

Abuse of process - Characteristics

1. From those details of the prevailing circumstances and the clear decisions of the two Court below, and what transpired thereafter with the fresh election of April, 2011, it became strange that the Appellant herein would assault this Court with these appeals which are the subject of this ruling. Learned Senior Counsel for the different Respondents had alluded to these acts of the Appellant as abuse of Court process. When an abuse of Court process is said to occur, it shows cases a situation where a party has instituted a Court process with the clear lack of bona fides leading to annoyance and irritation of the other party, with an aim to over-reach with the attendant result of having the Court itself directly vexed.

It is in the light of these truths that these appeals are vexing

and a reckless display of an academic prowess exhibited by Appellant through counsel in the clear disregard that it is not the duty of this Court to be taken on academic, hypothetical journey without of course a destination. This is because this suit and appeal are of an empty and purposeless value even if judgment is granted in the Plaintiff/Appellant's favour. The implication which must be stated loud and clear is that there is a dereliction of duty on the part of counsel to the Appellants who has by these appeals shown a complete disregard of his responsibility to this Court being his primary duty before the interest of his client comes into play. This is rather unfortunate and I make no bones in saying so. The Appellants attempt to invoke Section 233(2)(e)(iv) of the 1999 Constitution as amended to give them the enablement with which these appeals in the circumstances existing be viable for adjudication from the Court of Appeal to this Court is a day dream which time is yet to come. (pp. 2947 D/2948 D)

JURISDICTION - Supreme Court

2. From all that I have stated above, it is easy to see that indeed just like the Court below and the trial Tribunal lacked the jurisdiction, this apex Court has no leg upon which it can assume jurisdiction and I say so while declining jurisdiction. I affirm the decision of the Court of Appeal and also strike out the Petition. (p. 2948 H)

NOTABLE POINTS OF INTEREST ONNOGHEN JSC

1. Applicable law is the law in force when cause of action arises

It is a settled principle of law that the applicable law to any cause of action is the law in existence or as it existed at the time the cause of action arose not that at the time the action was instituted or the judgment written. (p. 2951 H)

ADEKEYE JSC

Judgment in rem - Definition

2. "A judgment in rem may be defined as the judgment of a Court of competent jurisdiction determining the status of a person or thing as distinct from the particular interest of a party to the litigation. Apart from the application of the term to persons, it must affect the "res" in the way of condemnation, forfeiture, declaration, status or title. Ex-

amples are -

(a) Judgment of a Court over a will creating the status of administration.

(b) Judgment in a divorce by a Court of competent jurisdiction dissolving a marriage declaring the nullity or affirming its existence.

B (c) Judgment in an election petition.

The feature of a judgment in rem is that it binds all persons whether a party to the proceedings or not. It stops anyone from raising the issue of the status of person or persons or things, or the rights or title to properly litigated before a competent Court. It is indeed conclusive against the entire world in whatever it settles as to status of the person or property. All persons whether party to the proceedings or not are stopped from averring that the status of persons is other than the Court has by such judgment declared or made D it to be". (p. 2957 H)

REPRESENTATION

O. M. Sagay SAN, with K. Yunyan SAN, R. Emukpoeruo, Prof J. M. Mbaduaha, U. Onwukwe, T. S. Awhana, A. I. Moro for Appellants
 E Chief Wole Olanipekun SAN, with Adebayo Adenipekun SAN, Ken Mozia SAN, Chief Olusola Oke, V. O. Grant, Joshua Aloba, Bode Olanipekun, K. N. Azdie, A. I. Oniyangi, S. O. Abbah,
 J. Ikomi, Gboyega Oyewole, Ayo Asala, Kehinde Ogunwumiju,
 F Ahmed Raji, Zekeri Garuba, M. A. Salami for Respondents

CASES REFERRED

Bob v Akpan (2008) 7 NWLR (Pt. 1087) 449
 Bamaiyi v. A.G. Federation (2011) 2 NWLR (Pt.727) 468
 G Agbakoba v INEC (2008) 18 NWLR (Pt. 1190) 489
 Odedo v INEC (2008) 17 NWLR (Pt. 1117) 554
 Olanivi v. Aroyelwu (1991) 5 NWLR (Pt.194) 652
 Ecoconsult v. Pancho Villa Ltd. (1999) 1 NWLR (Pt.588) 507
 Dingyadi v INEC (2011) 10 NWLR (Pt. 1089)
 H Awuse v. Odili (2003) 18 NWLR (Pt. 851) 116
 Onuaguluchi v. Ndu (2001) FWLR (Pt.45) 740
 Okonkwo v. Ngige (2007) All FWLR (Pt. 393) 1
 Emordi v. Igbeke (2011) All FWLR (Pt. 580) 1262
 Plateau State vs A-G of the Federation (2006) 25 WRN 1

Okpalugo vs. Adeshoye (1996) 10 NWLR (pt. 476) 77

Ogbahon vs. Reg. Trustees CCC (2002) 1 NWLR (pt. 749) 675

Olaniyan vs. Fatoki (2003) 13 NWLR (pt. 837) 273

STATUTES REFERRED TO

Interpretation Act Cap. 123 vol. 8 LFN 2004, s. 2

Constitution of Federal Republic of Nigeria 1999, s. 180 (2)(a), 246(1)(b)(ii) and (3)

Constitution of Federal Republic of Nigeria 1999 as amended, ss. 179, 233(1)(iv)(2), 285(7)

Supreme Court Act, s. 22

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C

LEAD JUDGMENT BY PETER-ODILI JSC

On the 17/11/2011, these appeals were consolidated and heard at the end of which we decided to strike them out on the grounds of lack of any live issue as the appeals have lapsed. We promised to give our full reasons for the decision later. I now give my reasons.

The appeals stem from the decision of the Court of Appeal, Benin, dated 20/9/2011, whereat the appellant's appeal against the decision of the Tribunal of 25/7/2011, having been earlier dismissed on the ground that the subject matter on ground, there was no live issue contestable as between the Parties.

1. After the 2007 April election a re-run election was ordered by the Court of Appeal and the election was conducted on the 6/1/2011.

2. On the 25/7/2011, the trial Tribunal decided the petition filed by the Appellant.

3. Before that decision of the 25/7/2011 in Suit No. FHC/ ASB/CS/20/2011, the tenure of the 1st Respondent was adjudged to expire by 29/5/2011 on the said re-run election.

4. Despite the said decision, the Tribunal for the re-run election disagreed with the 1st Respondent that the petition of the Appellant had become spent.

5. In Appeal No. CA/B/EPT/229/2011, the 1st Respondent argued on the issue of whether the petition was spent or not.

6. When finally, the Tribunal decided and found against the Appellants in the re-run election, the Appellants filed appeal CA/B/

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EPT/227/2011 which is the subject of this appeal. The two appeals were heard together on the 20/9/2011.

7. On the 22/9/2011, the Court of Appeal delivered its judgment aforesaid. In Appeal No.CA/B/EPT/229/2011, which it delivered firstly, it held that the petition of the Appellants had become spent and academic due to the expiration of the tenure of the 1st Respondent on the re-run election on the 29/5/2011 and struck out the petition.

With regard to Appeal CA/B/EPT/227/2011, the subject matter of this appeal, the Court of Appeal decided that it would be an act in futility having held that the tenure of the 1st Respondent had become spent to discuss the merits of the Appellants complaints as contained in issue NO.2 submitted by the Appellants.

On the 17th day of November, 2011, date of hearing, this Court asked counsel to address the Court on whether, this Court has jurisdiction to entertain the appeals and whether having regard to the issue of the expiration of the tenure of the 1st Respondent, there is in existence a live issue to be decided between the parties.

For the Appellants, learned Counsel on their behalf, Mr. O. M. Sagay SAN contended that this Court has jurisdiction to entertain the appeals. That the petition, subject of this appeal was filed on the 27th January, 2011. That it was filed subsequent upon the question of who should be the Governor of Delta state. He said the result of that re-run election was declared on the 7th January, 2011, which election fell within the ambit of the second amendment of the 1999 Constitution as amended which amendment came into effect on 29/11/2010, even though the President of the Federal Republic of Nigeria signed it on the 10th January, 2011.

Mr. Sagay submitted that the commencement of the alteration to the Constitution was the date so stated within that document, the later date of signing by the President notwithstanding. He referred the Court to Section 2 of the Interpretation Act, Cap. 123, Vol. 8 Laws of the Federation of Nigeria 2004.

Learned counsel for the Appellant further contended that once the National Assembly passes a Bill, it does not require presidential assent to come into force. That the law that applies is that which existed when the cause of action arose on the 29th November, 2010, when the alteration to the Constitution was made by the National

Assembly. That the cause of action herein arose on 7th January 2011 when the result of 6th January 2011 was made. That Section 179 of the Constitution which conferred the right to contest on the Appellant and by virtue of Section 285(7) of the Constitution as amended appeal can now come before this Court so long as the matter is determined within 60 days on appeal. That there is a live issue. He cited Section 233(1) (iv) of the Constitution. B

Stated further for the Appellant is that the right of the 3rd Respondent (INEC) to conduct the subsequent election of April, 2011, cannot take away the rights under the earlier re-run of 6th January, 2011 as the tenure of the re-run had not lapsed being a fresh election. That by the time Appellant filed the Petition on 27th January, 2011, it was covered by section 233 of the Constitution and so INEC ought not to have conducted its election of April, 2011 to the same seat. C

Mr. Sagay concluded by asking this Court to exercise its jurisdiction under Section 22 of the Supreme Court Act and hear the appeal on the merit of the case. He referred to *Plateau State v. Attorney-General of Nigeria* (2006) 25 WRN 1 at 91. That the appeals should be allowed as there is a live issue. D

Responding for the 1st Respondent learned Counsel on his behalf Chief Olanipekun SAN submitted that the Court of Appeal was right to hold that these appeals were not from a fresh election but a re-run of 2007 election. That the question arising is whether 1st Respondent is in a position to appeal to this Court on the Order of the Court of Appeal which ordered for a re-run by virtue of Section 246 of the Constitution before the amendment. That if 1st Respondent could not cry out to this Court to ventilate their grievance on that order of re-run, then anything arising from that cause of action would not come before this Court as the applicable law is the Constitution before the amendment. He referred to the list of Additional Authorities of 15/11/11; *Olanivi v. Aroyelwu* (1991) 5 NWLR (Pt.194) 652 at 961; *Ecoconsult v. Pancho Villa Ltd.* (1999) 1 NWLR (Pt.588) 507. E F G H

Senior Counsel submitted that this Court has no jurisdiction to entertain this matter as the Constitution had barred this Court and the Interpretation act cited by Counsel on the other side is against interest. That the re-run was held on 6th January, 2011 and the

President signed on the 10th January, 2011. He said the cause of action had its root in the 2007 general elections. He referred to page 105 - 106 where the lower Court also referred to its own judgment and the judgment of Buba, J. of the Federal High Court on the tenure of the 1st Respondent; Chief Olanipekun went on to say that the
 B Court of law like nature, does not act in vain. That assuming this Court goes ahead what would be the value since 1st Respondent is not occupying the seat of Governor of Delta by virtue of the re-run election but by virtue of the April, 2011 election. That the case of
 C Plateau State v. A.G. Federation which Appellants' counsel cited is even against them. He said the appeals should be struck out or in the alternative dismissed for being abuse of process of Court.

Chief Adenipekun learned Counsel for 2nd Respondent, adopted the submissions of Chief Olanipekun and urged the Court
 D to resolve the issues in favour of the Respondents. That they agreed that the Constitution was signed by the President on 10th January, 2011. That the cause of action which brought about these appeals arose before the amendment of the Constitution and so the law applicable to the appeals is the 1999 Constitution before its amend-
 E ment and so this Court lacks jurisdiction to entertain these appeals. He cited Mustapha v Governor of Lagos State (1987) 2 NWLR (Pt. 58) 539 at 591 per Nnamani JSC. That it is the law in operation on 7th January, 2011, that would apply and that the judgment of Buba
 F J has not been appealed against which judgment is one in rem and binding on all parties.

Mr. Raji, learned Counsel for the 3rd Respondent also adopted the submissions of Counsel for 1st and 2nd Respondents. He referred to Section 58 of the Constitution on when the amendment
 G would take effect. That if the provisions of the Interpretation Act go contrary to the Constitutional provision, that provision of the Act would be valid. That the petition of the Appellant is nothing but an academic exercise and an abuse of Court's process.

The Court after hearing from all Counsel and having perused
 H the documents related thereto had no difficulty in finding for the respondents and affirming the judgment of the Court of Appeal holding the lack of jurisdiction as basis and striking the appeal out. The court then adjourned the reasons for the judgment which is what is being embarked upon here and now.

Two issues had arisen in the Court of these addresses of Counsel as to whether or not, there is jurisdiction upon which this Court can entertain the appeals and these are:-

1. Whether this Court has jurisdiction to entertain this matter which stems from the April 2007 election?

2. Whether there are res for this Court to consider in this matter since the tenure of the 1st Respondent in the matter of the re-run election expired on May 29, 2011. B

At the risk of repetition, I would like to once again, but may be in different words re-capture the facts, this for emphasis and they are as follows:- C

This appeal stems from the judgment of the Court of Appeal, Benin Judicial Division dated 22nd September, 2011, whereat the lower Court allowed the appeal of the respondent against the judgment of the governorship Election Tribunal, sitting in Asaba, Delta State, dated 25th July, 2011, particularly, against that portion of the judgment where the trial Tribunal held that the petition before it was not spent and/or was not on academic one. D

Respondent was first elected as Governor of Delta State in 2007 and was sworn in on 29th May, 2007. E

The Appellants challenged his return at the Election Tribunal, but their petition was dismissed. On a further appeal to the Court of Appeal, the appeal Court allowed the appeal and ordered a re-run election, as per the judgment of the Court of Appeal dated 9th November, 2010. F

Pursuant to the order of the Court of Appeal, a re-run election was held on 6th January, 2011, whereof the Respondent again won and was duly sworn-in, after taking a fresh oath of office.

In Suit No. FHC/ASB/CS/20/2011 between Uduaghan vs. INEC & Ors instituted by the Respondent before the Federal High Court, Asaba, respondent contended that his tenure was a fresh one, commencing from when he took his fresh Oath of office, after the re-run election of 6th January, 2011. The Appellants, on their own, applied to the Federal High Court to be joined as parties to the action and their application was granted. Thereafter, Appellants strenuously and vigorously contended that the Respondent's tenure would end on 29th May, 2011 and not a second after, as it was a continuation of the initial tenure which commenced on 29th May, 2007. H

In a well considered judgment delivered on 15th March, 2011, Buba J of the Federal High Court, Asaba dismissed the Respondent's action and held that his tenure would automatically come to an end on 29th May, 2011, more; particularly so with the amendment of the Constitution of the Federal Republic of Nigeria, 1999, by the
 B insertion of a new sub-section (2A) to the existing section 180(2).

Fresh elections were held on April 26, 2011, in which both the Appellants and the Respondent, amongst others, participated and at the end of the election, the Respondent again was returned as the winner, having secured majority of lawful votes cast thereat.
 C The Appellants filed a fresh petition, first, against the return of the Respondent in there-run election and later, another petition in respect of the April 26 election.

The Respondent raised several objections to the competence
 D of the petition on the re-run election bearing in mind the judgment of Buba J of 15th March, 2011 and section 180(2) (2A) of the constitution, contending further that the petition itself had become spent in the sense that the tenure which was the res expired on 29th May, 2011.

E On 20th July, 2011, the same Federal High Court, Asaba in Suit No: FHA/ASB/CS/104/2011 between Nwaoboshi & Anor v INEC & Ors (unreported) held that the 1st Appellant was not qualified to even contest the re-run election.

F The trial Tribunal disagree with the Respondent that the petition before it was not spent and lifeless, thus, resolving the first issue it formulated against the Respondent, but went ahead to dismiss the petition, after resolving the second issue against the Appellants.

G Respondent appealed against the resolution of the first issue against him by the trial Tribunal, contending at the Court of Appeal that the issue was central and primary to the jurisdiction of the trial Tribunal. The Appellants appealed to the Court of Appeal against the resolution of the second issue against them by the trial Tribunal.

H The Court of Appeal agreed with the Respondent that the petition had actually become spent, vesting no jurisdiction in the trial Tribunal, thus, striking it out and, thereafter, dismissing the Appellants' appeal against the resolution of issue 2 against them. As at the time this appeal is still pending at the Supreme Court, these same Appellants are vigorously prosecuting their petition in Petition No:

EPT/DT/GOV/4/2011 between Chief Great Ovedje Ogboru & Anor v Dr. Emmanuel Ewetan Uduaghan & Ors at the Governorship Election Tribunal, Asaba.

In the exact words of the Court of Appeal, Benin Judicial Division which in delivering it's judgment stated as follows in CA/B/EPT/227/2011:-

"We are of the view that deciding the merits or otherwise of this appeal is an academic exercise, in view of our earlier judgment. Accordingly, this appeal ought to be struck out and it is hereby struck out".

In CA/B/EPT/227/2011 the same Court of Appeal held and ordered as follows:-

"The questions in the said petition had become academic. The Tribunal, therefore, acted without jurisdiction as the petition was then liable to be struck out. In conclusion, this appeal succeeds and it is hereby allowed. The petition filed by the 1st and 2nd Respondents in the Tribunal is hereby struck out".

That Lower Court had also referred to the Federal High Court Suit presided over and determined by Buba J of the Federal High Court Asaba, in a suit brought before that Court by 1st Respondent, Governor Emmanuel Ewetan Uduaghan on the question whether his tenure after the re-run election would not be covered by the 1999 Constitution as amended. That Court of trial in a very well considered judgment held as follows:-

"The Court was referred to the case of LABOUR PARTY V. I.N.E.C. (SUPRA) AT 339 (Paragraph E). It is submitted that the import of Section 180 (2A) of the alteration to the Constitution that the election in the entire Delta State was a re-run over which the plaintiff being duly elected must serve out his 4 years tenure with the previous 3 years and seven months in contemplation.

The issue formulated by learned Counsel to the 2nd and 3rd Defendants Mr. R. E. Emukpoeru is: Whether the Plaintiff is entitled under any circumstances to hold or and occupy the office of Governor of Delta State for more two terms of four years each or how long can the Plaintiff hold the office of Governor of Delta State under the provisions of the constitution?

It is submitted that the inescapable fall out of the submissions no doubt is that since the States Houses of Assembly approved Sec-

tion 18 of the First Alteration Act by the 16th July, 2010, the Plaintiffs' case falls squarely to be determined by that section, since his election of 14th April, 2007 was annulled on the 9th of November, 2010 and the fresh election was conducted on the 6th of January, 2011, when the amendment to Section 180 by Section 18 of the
B First Alteration Act had come into full force and effect.

It is submitted that the decision of Justice Okeke of the Federal High Court in *OLISA AGBAKOBA V. NATIONAL ASSEMBLY*, that the assent of the President is required before the Constitution comes into effect, is not binding on this Court being the decision of a
C Court of co-ordinate jurisdiction. That Court is not bound at all to follow this decision. The Court was urged not to follow the decision at all. The Court was urged to hold that President's assent is not a sine qua non to the coming into force of the alteration of the provisions of the constitution. The Court was urged to hold that the First
D Alteration came into full legal force and effect on the 16th of July, 2010 and the plaintiff's claims in this actions falls squarely to be determined under the new sub-section 2 (A) to Section 180 of the constitution as introduced by section 18 of the First Alteration Act,
E 2010.

It is argued that in the event that the Court does not see its way clear in holding that Presidential assent is not a requirement for the alteration of the constitution, the 2nd and 3rd Defendants nevertheless' submits that since the president signed the alterations to the
F Constitution on the 10th of January, 2011, the day the plaintiff took another oath of allegiance and oath of office, his case falls to be determined under the new sub-section 2 (A) of section 180 of the Constitution. This is because as can be seen clearly from the provisions of
G the First Alteration Act 2010 its commencement date is still the 16th of July, 2010.

The Plaintiff has as the foundation of his cause of action the oath of allegiance and oath of office he took on the 10th of January, 2011. Without this oath of allegiance and oath of office taken on the
H 10th of January, 2011, the Plaintiff would have no cause of action whatsoever, since section 185(1) of the constitution prohibits him from holding the office of Governor without taking the oath. So whether the Constitution comes into force on the 16th of July, 2010, as the commencement date loudly proclaims or the 10th of January,

2011, the Plaintiff is nevertheless caught by the provisions of the new sub-section 2 (A) introduced by section 18 of the first Alteration Act 2010.

In conclusion, the 2nd and 3rd Defendants align themselves with the submissions of the 1st Defendant as eloquently articulated in their written address and urged the Court to dismiss in its entirety all the reliefs claimed on the originating summons because the plaintiff is not entitled to a fresh term of four years. The Plaintiff's term must take into account the three and half years he held the office of Governor of Delta State and he must vacate Government House Asaba, by latest 12 mid-night of the 28th May, 2011".

It is not surprising that there was no appeal from either side to the Court of Appeal and both parties proceeded to the fresh election of April, 2011 on the clear understanding that the earlier tenure of the 2007 Election would come to an end at mid-night of 28th May, 2011."

From those details of the prevailing circumstances and the clear decisions of the two Court below, and what transpired thereafter with the fresh election of April, 2011, it became strange that the Appellant herein would assault this Court with these appeals which are the subject of this ruling. Learned Senior Counsel for the different Respondents had alluded to these acts of the Appellant as abuse of Court process. When an abuse of Court process is said to occur, it showcases a situation where a party has instituted a Court process with the clear lack of bona fides leading to annoyance and irritation of the other party, with an aim to over-reach with the attendant result of having the Court itself directly vexed. I would refer to the cases of Dingyadi v INEC (2011) 10 NWLR (Pt. 1089); (2008) 2 -3 SC (Pt. 1135).

While not going as far as declaring these appeals including that at the Court below as abuse of Court process, I would firstly refer to Section 246(1)(b)(ii) and (3) of the 1999 constitution which provisions are as follows:-

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

(b) decisions of the National Assembly Election Tribunals and Governorship and Legislative Houses Election Tribunal on any ques-

tion as to whether-

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

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

B With those provisions which were the Constitutional mandates as at the time the cause of action which is the re-run of the General Elections of 2007, which tenure shall be effluxion of time and without anything being done expire by mid-night of 28th May, 2007.
C Therefore, assuming the Tribunal and even the final Court in relation thereto, the Court of Appeal had returned as duly elected on the re-run, the person of the 1st Appellant, Chief Great Ogboru, his tenure would have expired not later than 28th May 2007, the mid-night thereof.

D ***It is in the light of these truths that these appeals are vexing and a reckless display of an academic prowess exhibited by Appellant through counsel in the clear disregard that it is not the duty of this Court to be taken on academic, hypothetical journey without of course a destination. This is because this suit and appeal are of an empty and purposeless value even if judgment is granted in the Plaintiff/Appellant's favour. The implication which must be stated loud and clear is that there is a dereliction of duty on the part of counsel to the Appellants who has by these appeals shown a complete disregard of his responsibility to this Court being his primary duty before the interest of his client comes into play. This is rather unfortunate and I make no bones in saying so. The Appellants attempt to invoke Section 233(2)(e)(iv) of the 1999 Constitution as amended to give them the enablement with which these appeals in the circumstances existing be viable for adjudication from the Court of Appeal to this Court is a day dream which time is yet to come.*** I would cite the following cases:-

Bob v Akpan (2008) 7 NWLR (Pt. 1087) 449 at 459; Bamaiyi v A.G. Federation (2011) 2 NWLR (Pt.727) 468; Agbakoba v INEC (2008) 18 NWLR (Pt. 1190) 489 at 546; Odedo v INEC (2008) 17 NWLR (Pt. 1117) 554 at 600.

From all that I have stated above, it is easy to see that indeed just like the Court below and the trial Tribunal lacked

the jurisdiction, this apex Court has no leg upon which it can assume jurisdiction and I say so while declining jurisdiction. I affirm the decision of the Court of Appeal and also strike out the Petition.

Parties are to bear their own costs.

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MUSDAPHER CJN

On the 17/11/2011, I struck out these appeals and promised to give my reasons at a later date. I have now seen the reasons for judgment just delivered by Odili, JSC and I entirely agree with it and I adopt it as mine.

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ONNOGHEN JSC

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I have had the privilege of reading in draft, the lead judgment of my learned brother, MARY U. PETER-ODILI, JSC just delivered and I agree with the reasoning and conclusion therein stated.

The facts relevant to the determination of the issues have been stated in the lead judgment and I consequently have no need of repeating them herein except as may be needed to emphasis the point being made.

When this appeal came up for hearing this Court called on all Counsel for the parties to address it on two issues, arising from the appeals. These are:-

F

“(1) whether the Court has jurisdiction to hear and determine the appeals having regards to the fact that the cause of action arose from a re-run election conducted under the 1999 Constitution where the Court of Appeal is the final Court of appeal in relation thereto, and,

(2) whether having regards to the issue of the expiration of the 1st respondent, there is in existence a live issue to be dealt with in the appeals”.

In arguing the issues, DR. SAGAY, SAN submitted that the court has the jurisdiction to entertain the appeals. He stated that the election petition which gave rise to the appeals was filed on 27th January, 2011, following a declaration of the results of a re-run election conducted on 6th January, 2011 on 7th January, 2011; that the

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second amendment of the 1999 Constitution came into existence on 29th November, 2010, even though the President signed the Act on 10th January, 2011. Relying on section 2 of the Interpretation Act, Cap 123 Laws of the Federation of Nigeria, 2004 (vol. 8) learned Senior Counsel submitted that once the National Assembly passes a Bill, it does not need Presidential assent for it to come into force. It is the further submission of learned Senior Counsel that the law applicable to an action is that which was in existence when the cause of action arose, which Senior Counsel contends is the 1999 Constitution as amended with effect from 29th November, 2011; that by virtue of the provisions of Section 285(7) of the amended 1999 Constitution, appeals on governorship election now come before this Court, relying also on Section 233(2)(iv) of the amended 1999 Constitution.

On the second issue, learned Senior Counsel submitted that there is a life issue before the court to be determined in the appeals notwithstanding the fact that the term of the 1st respondent had lapsed. In the same breath learned Senior Counsel submitted that the tenure of the 1st respondent has not lapsed since the election to which it relates was conducted in January, 2011. Senior Counsel referred the Court to the case of Plateau State vs A-G of the Federation (2006) 25 WRN 1 at 91 and urged the Court to allow the appeals.

On his part, learned Senior Counsel for the 1st respondent, CHIEF WOLE OLANIPEKUN, SAN submitted that the two appeals are off-shoots of the April, 2007, general elections and that the lower Court at page 106 vol. 3 of the record distinguished between a re-run election and a proper election; that since the 1st respondent could not have appealed against the decision of the lower Court which ordered a re-run election by virtue of Section 246(3) of the 1999 Constitution being the law applicable at the time, it stands to reason that any appeal arising from that cause of action cannot come before this Court, relying on *Olaniya vs Aroyehun* (1991) 5 NWLR (Pt. 194) 652 at 691; *Olagbegi VS. A-G Ondo State* (1984) 5 NCLR 147; that Section 2(1) of the Interpretation Act is against the appellants.

On the second issue, learned Senior Counsel submitted that the Courts do not act in vain nor justice command the impossible and urged the Court to strike out the appeals or in the alternative dismiss same.

Learned Senior Counsel for the 2nd respondent, ADENIPEKUN, SAN adopted the submission of his learned friend, and added that the re-run election of 6th January, 2011 was before the signing into law of the Act amending the 1999 Constitution and urged the court to resolve the issues in favour of the 2nd respondent.

Learned Counsel for the 3rd respondent AHMED RAJI, ESQ, also adopted the submission of Senior Counsel for the 1st - 2nd respondents and in addition relied on Section 58 of the constitution to submit that the assent of Mr. President is a condition precedent for a Bill to become an Act and that any other interpretation would be unconstitutional.

On the second issue, it is the opinion of learned Counsel that the appeals are now mere academic exercise in view of the decision of BUBA J to which no appeal had been filed.

At the conclusion of the submissions of all Counsel, this court rose and after consideration of the submissions together with the briefs of argument filed in the appeals and the records, delivered on the Bench Judgment in which the Court held that it has no jurisdiction in entertaining the appeals and consequently struck them out promising to give the reasons for the decision on the 16th day of December, 2011. Below, therefore, are my reasons for striking out the appeal for lack of jurisdiction.

There is no doubt whatsoever, and in fact both parties agree that the election of 6th January, 2011 was a re-run election ordered by the lower Court in a judgment on an appeal arising from the decision of the election tribunal following the declaration of the 1st respondent as the duly elected governor of Delta State in the April, 2007 general election in Nigeria.

The above being the case, it follows that the cause of action arose from the declaration of the 1st respondent as the winner of the said election which appellant was dissatisfied with.

Parties are also in agreement that the election of April, 2007 was conducted under the Electoral Act, 2006 and the 1999 Constitution prior to its amendment.

It is a settled principle of law that the applicable law to any cause of action is the law in existence or as it existed at the time the cause of action arose not that at the time the action was instituted or the judgment written.

In applying the above principle to the facts of this case, learned Senior Counsel for the appellants contended that since the complaint giving rise to the instant appeals arose from the re-run election of 6th January, 2011 in Delta state and the amendment to the 1999 Constitution came into effect, according to senior counsel on the 29th day of November, 2011, it is the amended 1999 Constitution that governs the cause of action and therefore applicable thereby granting a right of appeal to the appellants to appeal against the decision of j Assembly or comes alive and be enforceable. It is also very clear that the date Mr. President signs or assents to the Bill is very crucial in determining when the Bill becomes an Act except otherwise stated. In the instant case, it was the 10th day of January, 2010.

It is true that an Act comes into effect on the day Mr. President assents to the Bill though its commencement date may be deferred to a date in the future, which is not the case here. Rather, it is the contention of the appellants that the commencement date is the 29th day of November, 2010 as allegedly stated in the Act, which is a date that is prior to the President's assent. I hold the view that to accept that view will result in absurdity as it would amount to holding that the 1999 Constitution, as amended applies retrospectively, which is very much frowned upon by law. See *Uttih vs Onopivwe* (1991) 1 NWLR (Pt 166) 166. It would also be contrary to the provisions of the Interpretation Act and Section 58(1) of the 1999 Constitution earlier reproduced in this judgment.

It is a fact that the cause of action arose from the 2007 general elections which resulted in a election petition and an appeal thereon to the lower Court, which Court ordered a re-run election; that the election was conducted under the Electoral Act, 2006; that the re-run election of 6th January, 2010 was conducted also under the Electoral Act, 2006 and the original 1999 Constitution. It should also be noted that the re-run election was contested by the same parties who contested the 2007 April general election using the same list of candidates - there was no new primaries conducted by the political parties to choose new candidates to contest the re-run election.

I therefore hold the view that the applicable law to the cause of action in the instant case is Section 246(3) of the 1999 Constitution which makes the Court of Appeal the final Court of Appeal in governorship election matters and that this Court is, in the circumstance,

without jurisdiction to hear and determine the appeals now pending before it and are consequently struck out.

It is for the above reasons and the fuller ones contained in the reasons for judgment read this morning by my learned brother, MARY U. PETER-ODILI, JSC that I strike out the appeals for want of jurisdiction. I abide by the consequential order as to costs. Appeal Nos. SC/361/2011 and SC/362/2011 are hereby struck out.

FABIYI JSC

On 17-11-2011, when the two consolidated appeals were heard, this Court requested Counsel to the parties to address us on whether the Court has jurisdiction to entertain the appeals.

The first point is whether the Court can hear an appeal which emanates from the 2007 General Elections in view of the provisions of Section 246(3) of the 1999 Constitution before its amendment. The second point is whether the re-run election of 06-01-11 and the ensuing result of 07-01-2011 before 10-01-2011, when the President signed the amended Constitution imbues this Court with jurisdiction. Another issue is whether the tenure of the 1st Respondent, having expired on 29-05-2011, there is an existing res to be determined by this Court.

Parties are ad idem that the re-run election was conducted on 06-01-2011 and results were out on 07-01-2011. The amended Constitution was signed by the President on 10-01-2011. The cause of action arose before the Constitution was amended. The law which is therefore applicable is the law before the amendment. It goes without saying that the Court lacks jurisdiction to entertain these appeals. See: *Mustapha v. Gov. of Lagos State* (1987) 2 NWLR (Pt. 58) 539 at 591; *Olaniyi v. Aroyehun* (1991) 5 NWLR (Pt.194) 652 at 691.

Apart from the above, this Court has consistently pronounced that by virtue of the clear provisions of Section 246 (3) of the 1999 Constitution before its amendment, the Court of Appeal should have the final say on this matter. That is how it should be. The word 'final' as employed, connotes conclusiveness; a matter never to be revisited. The matter reached its terminal destination. See *Awuse v. Odili* (2003) 18 NWLR (Pt. 851) 116, *Onuaguluchi v. Ndu* (2001) FWLR (Pt.45) 740; (2001) 7 NWLR (Pt.712) 309, *Okonkwo v. Ngige* (2007)

All FWLR (Pt. 393) 1, (2007) 12 NWLR (Pt. 1047) 191; *Emordi v. Igbeke* (2011) All FWLR (Pt. 580) 1262. To the knowledge of the parties, Buba, J. of the Federal High Court decided that the tenure of the 1st Respondent expired on 29-05-2011. There is no appeal on same. It constitutes a judgment in rem and binds all the parties. The
 B petition of the appellant is an academic exercise. This Court, like nature, does not act in vain. There is no utility value that will enure to the benefit of the appellant as the 1st respondent is not now occupying his seat on the re-run election.

C The Court no doubt lacks jurisdiction; looked at from all angles. The appellants' appeal equates with what I may refer to as abuse of Court process.

I agree with the reasons advanced by my learned brother, Peter-Odili, JSC. For the reasons stated by me, the consolidated appeals are hereby struck out. Each party should bear his/its own costs.

ADEKEYE JSC

I had read in draft, the judgment just delivered by my learned
 E brother, M. U. Peter-Odili JSC. At the hearing of this appeal on the 17th of November, 2011, the two appeals SC. 361/2011 and SC. 362/2011 were consolidated pursuant to the order of this Court with the consent of the Counsel to the parties. The background facts of
 F this case and the issues settled, for determination in the briefs of the parties are as eloquently restated by my learned brother in the Lead Judgment. This Court however at the sitting of 17/11/10 observed that there were only two key questions of jurisdiction raised by this appeal which are, issues:

G (1) Whether the Court has jurisdiction to hear and determine the appeals having regards to the fact that the cause of action arose from a re-run election conducted under the 1999 Constitution where the Court of Appeal is the final Court of Appeal in relation thereto and;

H (2) Whether having regards to the issue of the expiration of the term of the 1st respondent there is in existence a live issue to be dealt with in the appeals.

The Court invited address from Counsel to the parties on the foregoing questions.

Dr. O. M. Sagay, Learned Senior Counsel for the appellant was emphatic in his submission that the Supreme Court has jurisdiction to entertain these appeals. He supported this contention with facts that the petition was filed on 27/1/11 pursuant to the 1st Respondent being declared as winner of the 6/1/11 election. The result of the election was released on the 7/1/11. The election fell within the period of the 2nd amendment to the Constitution which came into force on the 29th of November, 2010, to which the President gave assent on the 10th of January, 2011. The effective date of commencement was the date the amendment was effected and not the date on which the President signed the Bills.

He relied on Section 2 of the Interpretation Act Cap 123 Laws of the Federation 2004 Vol. 8 to hold that:-

(a) An act is passed when the President assents the Bill.

(b) Once the National Assembly signs a Bill, it does not require the assent of the President for it to come into force.

The Law applicable is the law in operation when the cause of action arose which in this case is the 1999 Constitution as amended on 29/11/10. The cause of action arose on the 7th of January, 2011. Provision of Section 179(2)(a) and (b) confers the right on the petitioner to re-run and contest. By virtue of Section 285(7) of the Constitution as amended appeals can now come before this Court provided the matter is decided within 60 days.

In view, of Section 233(1) and (2) (iv) of the Constitution the appellant has come properly before this Court. Consequently, the learned Senior Counsel submitted that there is a live issue before the Court. Though there was a fresh election-the old tenure still exists for the appellant. The election conducted on 27/1/11 was done to undermine the jurisdiction of this Court. If the Court finds this appeal to be meritorious, it is an appropriate circumstance to invoke Section 22 of the Supreme Court Act. The learned Senior Counsel cited the case *Plataeu State of Nigeria VS. A.G. Federation* (2006) 35 WRN pg. 7 at pg 97, lines 30 - 40 on when a matter is supposed to be spent. The Court is urged to allow the appeal.

Chief Olanipekun Learned Senior Counsel for the 1st respondent submitted on issue one that the two consolidated appeals are the off-springs of April, 2007 governorship election. The lower Court on page 106 of Vol. 3 of the record captured that point and the appel-

lant did not appeal against it. The learned Senior Counsel thereafter submitted that the appellant cannot legally appeal to the Supreme Court on that re-run order by virtue of Section 246 (3) of the Constitution, which makes the Court of Appeal the final Court. That was the law which regulated the cause of action. If the appellant has no right of appeal based on that section of the Constitution any appeal on that decision cannot come before this Court. The learned Senior Counsel cited cases:- *Olaniyi vs. Aroyehun* (1991) 5 NWLR pt. 194, pg. 652 at 691, *Olagbegi vs. A. G. Ondo State* (1984) 5 NCLR, pg. 147, *Ecoconsult vs. Pancho Villa Ltd.* (1999) 1 NWLR pt. 588, pg. 507

There is Constitutional bar to the Supreme Court to hear this appeal. Section 2(1) of the interpretation Act cited by the appellant is against his proposition as the re-run was held on the 6/1/11, while the President signed the amendment to the Constitution on 10/1/11.

On issue No. 2 - the learned Senior Counsel referred this Court to pages 105 - 106 of the Record of the lower Court where the lower Court concluded that on the State of the Law and Sections of the Constitution it is not possible to order a re-run upon another re-run. The Courts of Law like nature does not act in vain, Justice cannot command the impossible. This appeal has no utility value as the 1st respondent is no longer occupying the Seat of Government of Delta State based on the re-run. The judgment to be obtained now is not against this new election. Case of *Plateau State vs. A.G.F.* cited by the appellant is against him. The Court is urged to dismiss the appeal as being an abuse of Court process and academic.

Mr. Adebayo Olanipekun learned Senior Counsel for the 2nd respondent adopted the submission of the Learned Counsel for the 1st respondent and cited the case *Mustapha vs. Governor of Lagos State* (1987) 2 NWLR pt. 58, pg. 539 at pg. 541. The learned Senior Counsel submitted on issue 2 that the issue of tenure of the 1st respondent was decided as a judgment in rem before the Federal High Court and there was no appeal against it.

Mr. Raji learned Counsel for the 3rd respondent, adopted the submission of the learned Counsel for the 1st - 2nd respondents. In addition, the learned Counsel submitted that to hold that the bill of amendment does not require a Presidential consent is against Section 58(1) of the Constitution. The Constitution makes the signature

of the President a condition precedent for the promulgation of the Bill. Any Law to the contrary is void.

The appellant filed a fresh petition regardless of the pronouncement of Buba J of the Federal High Court in suit No. FHC/ASB/CS/20/2011. The contention of the appellant now is an academic exercise and an abuse of the process of this Court. B

I have thoroughly digested the elucidating submission of all learned Counsel appearing for the parties. There was a challenge to the jurisdiction of this Court by the substance of these consolidated appeals before this Court. C

The salient points not disputed.

(a) The origin of the cause of action in the two appeals was the 2007 governorship election in Delta State based on the 2006 Electoral Act. The two consolidated appeals are offshoots of the 2007 election. D

(b) The Court of Appeal, Benin, ordered a re-run after the hearing and determination of the appeal against the 2007 governorship election.

(c) The appellants and the 1st and 2nd respondents were contestants at the election and the re-run. E

(d) The re-run election took place on 6th January, 2011 and the result which was declared on 7/1/11 brought the 1st respondent back to power as the governor of the State.

(e) Since the original tenure of the governor based on the 2007 election was to expire on the 28th of May, 2011 - he joined the gubernatorial contest of April, 2011. F

(f) It is however noteworthy that the origin of the appeal before the Court is not a product of the April, 2011 election- the 2nd term tenure of the 1st respondent but against his first term in office G which tenure had expired in May, 2011.

A judgment of the Federal High Court FHC/ASB/CS/20/2011 delivered on 15th March, 2011 in respect of the petition of the appellant was a judgment in rem which brought into focus the futility of the appellant's latest petition. I find it convenient at this stage to define a judgment in Rem for the advantage of the appellant. H

"A judgment in rem may be defined as the judgment of a Court of competent jurisdiction determining the status of a person or thing as distinct from the particular interest of a party to the litigation. Apart

from the application of the term to persons, it must affect the “res” in the way of condemnation, forfeiture, declaration, status or title. Examples are -

(a) Judgment of a Court over a will creating the status of administration.

B (b) Judgment in a divorce by a Court of competent jurisdiction dissolving a marriage declaring the nullity or affirming its existence.

(c) Judgment in an election petition.

C The feature of a judgment in rem is that it binds all persons whether a party to the proceedings or not. It stops anyone from raising the issue of the status of person or persons or things, or the rights or title to properly litigated before a competent Court. It is indeed conclusive against the entire world in whatever it settles as to
D status of the person or property. All persons whether party to the proceedings or not are stopped from averring that the status of persons is other than the Court has by such judgment declared or made it to be”. *Okpalugo vs. Adeshoye* (1996) 10 NWLR pt. 476, pg. 77. *Fan trades Ltd. vs. Uni Association Co. Ltd.* (2002) 8 NWLR Pt. 770,
E pg. 699, *Ogbahon vs. Reg. Trustees CCC* (2002) 1 NWLR pt. 749, pg. 675, *Olaniyan vs. Fatoki* (2003) 13 NWLR pt. 837, Pg. 273.

The suit is unconstitutional to the effect that neither the Constitution nor the Electoral Act has made provision for challenging an
F expired tenure of a governor by way of petition based on an election to the office. Any litigation against the office of a governor shall only be viable when it is brought during the four years in office. Any claim to the office ought to abate as soon as the term expired. The office of the incumbent governor of Delta State challenged by the appellant
G expired on May 28, 2011. As I said earlier on his appeal is not against the 2nd term of the 1st respondent. The appellant’s continual litigation is like flogging a dead horse or beating about the bush to find a way where there is none. I am of the impression that the appellant is lost in the abyss of self ambition.

H The consent of the President to a Bill in respect of the Constitution of any country in the world particularly in Nigeria is an exercise of Federal Legislative power. Such Bills must be passed by both the Senate and the House of Representatives and assented to by the President. The relevant laws are the Interpretation Act and Section

58(1) of the Constitution.

Section 2 of the Interpretation Act Cap. 123 Laws of the Federation of Nigeria, Vol. 8, 2004 reads:-

“An act is passed when the President assents to the Bill for the Act whether or not the Act then comes into force”.

Section 58(1) of the 1999 Constitution provides that:-

“The power of the National Assembly to make Laws shall be exercised by Bills passed by the Senate and the House of Representatives and except as otherwise provided by subsection (5) of this section assented to by the President”.

Subsection (5) states that:-

“Where the President withholds his assent and the Bill is again passed by each house by two thirds majority, the Bill shall become Law and the assent of the President shall not be required”.

This was not the position during the passage of the alteration Bills. The 2nd Alteration Bill for the amendment to the Constitution passed on the 29th of November, 2010, was signed by the President on the 10th of January, 2011. If the cause of action in the appeal accrued on the 7th of January, 2011 - the applicable law is Section 246(3) of the original Constitution and that makes the Court of Appeal the final Court. The consolidated appeals before this court are an abuse of the process of this Court. They raise academic and glaringly unconstitutional questions. This Court is a creation of Statute, with specific jurisdiction, it is not hungry for jurisdiction, neither can it be stampeded into succinctly assuming the duties of the legislature by indirectly expanding the Law. An Apex Court must never make hollow orders. The appeals are struck out for lack of jurisdiction. I abide by the consequential orders made by my learned brother in the lead judgment.

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