

SUPREME COURT OF NIGERIA
16TH DECEMBER, 2011 SC. 156/2011
CORAM: - M. MOHAMMED, C.M. CHUKWUMA-ENEH,
M.S. MUNTAKA-COOMASSIE, J.A. FABIYI, S.
GALADIMA, JJSC

HON. AHMED SALAWU OGEMBE APPELLANT
AND

1. NURUDEEN ABATEMI USMAN
2. INDEPENDENT NATIONAL RESPONDENTS
ELECTORAL COMMISSION
3. PEOPLES DEMOCRATIC PARTY

SUPREME COURT - Appeals - Filing - Procedure - Appeal to Supreme Court must relate to the decision of Court of Appeal - And not that of Federal or State High courts (H1)

JURISDICTION - Fundamental nature - An issue of jurisdiction can be raised at any time - Even for the first time during argument (H2)

JURISDICTION - Suo motu raising by court - Propriety - Court must give fair hearing to parties - But failure to do so may not lead to a reversal - As appellant must also show how the failure has occasioned a miscarriage of justice (H3)

APPEALS - Leave - Application to appeal as interested party - Applicant must annex his proposed Notice of Appeal - And the same must be filed where leave is granted - Save where deeming order has been made (H4)

APPEALS - Additional grounds - Filing of - Propriety - Leave of court must be sought and obtained - Failure of which the appeal is deemed incompetent (H5)

FACTS

1st respondent herein as plaintiff at the Federal High court commenced this action by way of originating summons, seeking inter alia, the following reliefs - An order of declaration that defendants

i.e. 2nd and 3rd respondents are bound by the result of the National Assembly primary election of 3rd respondent i.e. Peoples Democratic Party to elect candidate for Kogi Central Senatorial District. 3rd respondent as 1st defendant filed a Counter Affidavit to the originating summons. At the end of hearing, the court gave judgment in favour of 1st respondent. Dissatisfied, 3rd respondent filed an appeal to the Court of Appeal, Abuja. It filed a notice of appeal dated 31st January 2011 and upon receipt of the certified copy of the judgment, filed another notice of appeal dated 17th March 2011.

Meanwhile, appellant who was not a party in the matter, sought for leave from the trial High court to appeal as an interested party. He was granted leave to appeal. However on 28th February 2011, appellant filed a different notice of appeal from the one he attached to his application. 1st respondent objected to this improper procedure adopted by appellant. Consequently, the court struck out appellant's notice of appeal dated 28th February 2011. The court also struck out a motion filed by appellant on 3rd March 2011 seeking leave to adduce fresh evidence as it was no longer relevant. Aggrieved, appellant has filed an appeal to Supreme Court. 1st respondent has raised a notice of preliminary objection on the jurisdiction of Supreme Court to entertain this appeal. He contends that appellant cannot appeal directly to Supreme Court against the decision of a trial high court.

ISSUES FOR DETERMINATION

“1. Whether the Learned Justices of the Court of Appeal erred in Law and acted without jurisdiction in sustaining the 1st Respondent's preliminary objection.

2. Whether the Learned Justices of the Court of Appeal erred in Law in striking out the Notice of Appeal dated 28th day of February 2011 filed by the Appellant as an interested party upon which no leave was obtained.

3. Whether the Learned Justices of the Court of Appeal were right in Law in refusing to adjudicate on a defective appeal.”

HELD (Unanimously dismissing the appeal per **GALADIMA JSC**)
Appeals - Filing - Procedure

1. The complaint of the appellant arising from the decision of the trial Court set out above cannot in law be entertained by this Court.

It is well settled law that an appeal to this Court must relate to the decision of the Court of Appeal and not that of the High Court or the Federal High Court or the State. There is therefore no ground of appeal in the Appellant's Notice of Appeal filed on 18/4/2011 relating to the issues raised and argued in paragraphs 6.21 - 7.05 at pages 18 - 29 of the Appellant's brief of argument. I do not think the 1st Respondent's preliminary objection herein is "frivolous" as argued by the Appellant in his paragraph 2.03 of the Reply Brief. What the Appellant has embarked on in paragraphs 6.21-7.05 is more than mere "tracing an error from its origin (the Federal High court). The appellant is complaining of "an error by the trial Court." If so there ought to be the proper channel by which this error gets to this Court, otherwise this court may find it difficult to invoke section 22 of the Supreme Court Act 2004 to decide the merit of this matter. With due respect to the Learned Senior Counsel for the Appellant, I do not share his view that the issue posed herein is competent. It is not and must be struck out. In reaching this conclusion, I am mindful of the withdrawal of Appellant's paragraph 7.0 - 7.05 on the date of the hearing of this appeal and was struck out. (p. 2972 B)

JURISDICTION - Fundamental nature

2. Challenging the jurisdiction of the court is a threshold issue. It is a warning signal to the court that it was about to embark on a matter which it has no jurisdiction and could lead to a nullity. Because of its importance a point of jurisdiction can be raised at any time and even viva voce for the first time during argument. (p. 2974 E)

JURISDICTION - Sua motu raising by court - Propriety

3. The Court can suo motu raise it .While the court has a duty to give parties an opportunity to be heard on any issue it raises suo motu, a failure to do so does not necessarily lead to a reversal of the decision. The Appellant must go further to show that the failure to hear him on the point occasioned some miscarriage of justice. (p. 2974 F)

Application to appeal as interested party

4. I find that this case is of great assistance in the determination of this appeal. It is clear. It settles the law on this point. The argument of the Appellant that the learned trial judge did not deem the Notice of

- Appeal filed as properly filed, and that once an application for leave to appeal has been granted, the appellant is at liberty to file as many notices as he desires, does not reflect the correct provision of section 243 (a) of the 1999 Constitution on the procedure for leave to appeal. One of the important requirements, where a party seeks for leave to appeal as an interested party, is that he ought to annex to his application, a Proposed Notice of Appeal. This is to assist the appellate court in the consideration of grounds of appeal proposed by an Applicant in support of an application for leave to appeal, to find whether the proposed grounds of appeal are substantial and arguable. Once the leave is granted, except where deeming order has been made, it is the copy of the proposed grounds that should be filed, as those were the very grounds that elicited the exercise of the discretion of the lower court in favour of the Applicant.
- This is the situation in this case. The Appellant did not deny that his Notice Appeal filed on 28/2/2011 is quite different from the one attached to the application for leave to appeal. This was annexed as Exhibit "HOSA 6". I agree that the subsequent notice of appeal is incompetent. The provision of section 24(2) of the Court of Appeal Act, which provides for 14 days where the appeal is against interlocutory decision and 3 months where the appeal is against a final decision, is applicable to parties who appear in the initiation processes at the lower court, who under section 243(a) of the 1999 Constitution, can appeal as of right where the decision of the High Court is final. The law is clear on this point. A party seeking leave to appeal as an interested party not being a party initially on the record, is not at liberty to file several Notices of Appeal from the final decision of a High Court or Federal High Court within 3 months. He is required to obtain leave to appeal within 3 months of the said judgment. (pp. 2976 D/2977 B)

APPEALS - Additional grounds - Filing of - Propriety

5. A situation may arise, where after leave has been granted to an interested party, and there is the need to file additional grounds of appeal, then leave of court is further sought to do so. Where such leave is not sought and obtained, the new grounds of appeal are incompetent, and such incompetent grounds of appeal will definitely rob the appeal of its competence. (p. 2976 H)

REPRESENTATION

DR. J. O. Olatoke Esq. with A. O. Popoola Esq, B. A. Oyun Esq., J. O. Nkwota (Miss), M. A. Adelodun Esq. and G. A. Ashaolu Esq. for the Appellant

Ade Okeaya-Inneh, SAN with A. Lawal (Miss), K. M. Nomeh Esq. for the 1st Respondent

I. K. Bawa Esq. for the 2nd Respondent

Chief Olusola Oke Esq; with A. O. Ajana Esq., J. O. Mayo Esq, O. Akuyibo Esq., and Mulikat Kilani Esq. for the 3rd Respondent

CASES REFERRED TO

ODUNTAN v. AKIBU (2000) 7 SC (pt.11) 106

KWAJAJAFA v. BANK OF THE NORTH (2000) 5 SC (pt.1) 103

OLUBODE v. SALAMI (1985) 2 NWLR (pt.7) 282

IMAH v. OKOGBE (1930) 9 NWLR (pt.316) 159

EFFIOM v. CROSIEC (2010) 14 NWLR (pt.1213) 106

EXCEL PLASTIC IND. LTD V. FBN (2008) 11 NWLR (pt.935) 59

LEVENTIS V. PETROJESSICA (1992) 5 NWLR (PT.244) 675

Madukolu v. Nkemdilim (1962) 2 NSCC 375

GENERAL ELECTRIC COMPANY V. AKANDE & 4 ORS. (2010) 12 E SC (Pt. IV) 75

OPUIYO & 2 ORS V. OMONIWARI & ANOR (2007) 6 SC 35

STATUTES & RULES REFERRED TO

Supreme Court Act 2004, s. 22

Constitution of Federal Republic of Nigeria 1999, ss. 241, 242, 243(a)

Supreme Court Rules 1999 (as amended), O. 2 r. 28 (1)

LEAD JUDGMENT BY GALADIMA JSC

The 1st Respondent herein as plaintiff at the trial Federal High Court filed an action by way of originating summons, seeking for a number of reliefs: viz:

a. AN ORDER of declaration that the Defendants are bound by the result of the National Assembly primary election of the PDP candidate for Kogi Central Senatorial District.

b. AN ORDER of declaration that the Plaintiff having scored the highest number of votes is the winner of the National Assembly Primary Election conducted for Kogi Central Senatorial District by

the Defendants on 7th January, 2011.

c. AN ORDER of declaration that under the Electoral Act 2010 and the PDP constitution 2009 (as amended), the Plaintiff is the elected candidate of the 1st defendant for Kogi Central Senatorial District for the forthcoming general election to hold on the 2nd April, 2011 or
B any other date fixed by the 2nd Defendant under the Electoral Act 2010 (as amended).

d. AN ORDER of declaration that the Plaintiff having won the highest number of votes at the primary election held on 7th January, 2011 by the entitled to have his name submitted to the 2nd Defendant as the elected sponsored candidate of the 1st defendant in the
C forthcoming election for the Kogi Central Senatorial District.

e. AN ORDER of injunction restraining the 1st defendant, its servants, agents, officers, privies or otherwise howsoever from conducting any other National Assembly Primary election for the selection/election of candidate for the Kogi Central Senatorial District for the forthcoming general election.
D

f. AN ORDER of injunction restraining the 1st Defendant, its servants, agents, officers, privies or otherwise however from submitting/forwarding the name of any other person except the Plaintiff to the 2nd Defendant as the Candidate of the 1st Defendant for the Kogi Central Senatorial District in the forthcoming general election to be held on 2nd April, 2011, or any other date fixed by the 2nd Defendant.
E

g. AN ORDER of injunction restraining the 2nd defendant, its servants, agents, officers, privies or otherwise however from accepting and/or recognizing any other person save the Plaintiff as the candidate of the 2nd Defendant in the Kogi Central Senatorial District for the forthcoming general election to be held, 2011 and/or any other date fixed by the 2nd Defendant.
F
G

h. AN ORDER of injunction compelling the Defendants to recognize and accept the Plaintiff as the elected candidate of the 1st defendant for the Kogi Central Senatorial District in the forthcoming
H 2011 general election.

i. AN FOR SUCH FURTHER AND THE ORDERS as the Honourable Court may deem fit in circumstances.

To prove his case, the plaintiffs filed a 24 paragraph affidavit in support of the originating summons and a further affidavit. On their

part the 3rd Respondent herein as 1st Defendant filed a Counter Affidavit, followed by their Notice of Preliminary objection. However, the Notice of preliminary objection filed by the 3rd Respondent herein (PDP) in the Court below was withdrawn by their counsel Chief Olusola Oke on 27/1/2011 and same was accordingly struck out. Consequently the Learned Trial Judge vacated the ex parte order against the PDP and proceeded to hear the substantive matter on its merits and came to the following verdict on 31/1/2011. B

"In the absence of any decision for the National working Committee of the 1st Defendant overturning the report of the Special Appeal Panel the only conclusion to be reached is that the plaintiff won the primary election confirmed by the Appeal Panel. In view of this, I hold that the plaintiff is entitled to judgment as per his reliefs. Accordingly, judgment is hereby entered in favour of the plaintiff. Having declared judgment in the originating summons the plaintiff's motion for Interlocutory Injunction dated 24th January, 2011 is overtaken by events and same is hereby struck out". C D

The 3rd Respondent herein (PDP) was dissatisfied with the judgment and appealed. Its notice of Appeal dated 31/1/2011 contains 2 grounds of Appeal. However upon the receipt of the certified copy of the judgment, it filed another Notice of Appeal on 17/3/2011 containing 4 grounds of Appeal. E

Meanwhile, the Appellant herein, Honourable Ahmed Salawu Ogembe, who was not a party at the Lower Court sought for and was granted leave to appeal as an interested party by the trial Court on 28/2/2011. This Notice of Appeal contains 2 grounds of Appeal. F

On record, therefore before the Court of appeal, there were 3 Notices of Appeal. Because all the appeals arise from the same judgment, and the subject matter being the same, the two appeals under which the 3 Notices of Appeals have been filed, were considered by the Appeal Court and taken together, although treated in their separate identities. The Court below having adjudged the Notice of Appeal filed on 28/2/2011 as incompetent, the appeal was struck out. The Court also struck out the motion filed on 3/3/2011 seeking leave to adduce fresh evidence as it was no longer relevant. G H

Dissatisfied with this decision, the Appellant further appealed to this Court filing his Notice of Appeal containing SIX GROUNDS, 3 issues were submitted for determination as follows:

“1. Whether the Court below was not in serious error to have upheld Notice of preliminary objection which had been abandoned? Grounds 1 and 2.

B 2. Having regard to the facts and circumstance of this case, was the Court below right in concluding that Appellant’s notice of appeal filed within the statutory time limit to appeal is incompetent? Grounds 3, 4 and 5.

C 3. Whether the Court below, being an intermediate Court, was right in not considering the merit of the Appeal before it and whether this court should invoke section 22 of the Supreme Court Act 2009 to determine the merit of the case? Ground 6.”

The 1st Respondent in his brief dated and filed on 17/6/2011 identified the following 3 issues for determination: “ISSUE 1, Ground 1 and 2.

D “Whether the Learned Justices of the Court of Appeal erred in Law and acted without jurisdiction in sustaining the 1st Respondent’s preliminary objection.
ISSUE 2, Ground 3, 4, and 5

E Whether the Learned Justices of the Court of Appeal erred in Law in striking out the Notice of Appeal dated 28th day of February 2011 filed by the Appellant as an interested party upon which no leave was obtained.

ISSUE 3, Ground 6

F Whether the Learned Justices of the Court of Appeal were right in Law in refusing to adjudicate on a defective appeal.”

The 2nd Respondent formulated 2 issues for the determination of appeal as follows:

G “(1) Whether the Court of Appeal rightly acted within its jurisdiction when it considered and upheld the preliminary objection of the 1st Respondent in this appeal (Distilled from Grounds 1, 2, 3, 4 and 5 of the Notice of Appeal).”

H (ii). whether the Learned Justices of the Court of Appeal were right in dismissing the Appellant’s appeal before them. (Distilled from Ground 6 of the Notice of Appeal.)”

The 3rd Respondent in its brief of argument dated and filed on 20/6/2011, has identified 2 issues for determination as follows:

“(1) whether the Court below was right in acceding to 1st Respondent’s notice of preliminary objection and striking out Appel-

lant's appeal. (Distilled from grounds 1, 2, 3, 4 and 5 of the Notice).

(2). Whether this is not an appropriate case, that your Lordships should invoke section 22 of the supreme Court Act, 2004 to determine the merit of the case (ground 6).

On 10/10/2011 we took this appeal. Learned counsel for the Appellant Dr. J. O. Olatoke Esq. having identified his brief urged us to allow the appeal. He however, sought to withdraw his Motion on Notice dated and filled on 2/6/2011 for leave to adduce fresh evidence. This was the decision of the National working Committee of the PD.P of 14/1/2011 in respect of Kogi Central Senatorial District Primary Election held on 7/1/2011. The said Motion having been withdrawn was struck out. This in effect necessitated the withdrawal of the 1st Respondent response and argument on the merits to the Appellant's issue on adducing fresh evidence on appeal. Hence paragraphs 12.0-12.7 of the 1st Respondent's Brief were struck out.

The Learned Senior Counsel while arguing this appeal in a glib-salesman manner alluded to the 1st Respondent's preliminary objection filed on 17/6/2011. I have looked into it. It is to the effect that this Court has no jurisdiction to entertain the arguments contained in paragraphs 6.21-7.05 at pages 18-29 of the Appellant's brief filed on 31/5/2011.

I shall look at it in the course of consideration of this appeal. I have however recorded the Learned Senior Counsel as having adopted his brief of argument of 17/6/2011 and urged us to dismiss this appeal. I have carefully set out all the issues raised in the Appellant's brief. I shall consider them in details, in the course of determining this appeal.

On the ISSUE 1, it is the contention of the 1st Respondent that the complaint of the Appellant that the Notice of preliminary objection filed by him (1st Respondent) had been abandoned because the application was not moved before hearing of the Appeal is frivolous and misconceived. It is contended that the 1st Respondent herein, (as the 1st Respondent in the Court below) filed a Notice of Preliminary objection on 14/3/2011 and embedded argument in respect of the said Notice of Preliminary Objection, in his brief of argument also filed on 14/3/2011 in the lower court. Referred to pages 1132-1135 of the records of proceeding containing the proceedings of the Lower Court. Assuming, though not conceding that the Notice of objection

was not moved, Learned Senior Counsel has submitted that point raised in the said notice was a point challenging the jurisdiction of the court below to entertain an incompetent appeal and this can be raised at any stage of the case. Reliance was placed on the case of *LEVENTIS V. PETROJESSICA* (1992) 5 NWLR (PT.244) 675 at 693.

B On the second issue it is the contention of the 1st Respondent that the Learned Justices of the Court of Appeal were right in law in upholding the Notice of Preliminary Objection and striking out the Appellant's Appeal. Referring to pp. 641-645 of the records, Learned
C Senior Counsel has contended that the records clearly show that the Appellant as a party seeking leave to appeal as an interested party filed an application for leave to appeal attaching a Notice of Appeal upon which leave to appeal was granted by the Court. That the afore-mentioned pages of the records contain a totally different Notice of
D Appeal filed by the Appellant and clearly this is not the Notice of Appeal upon which leave was granted to the Appellant to Appeal.

On the third issue it is the contention of the 1st Respondent that the Court below was right in Law in refusing to adjudicate on a different Notice of Appeal. It is submitted that the appeal of the Ap-
E pellant in the Court below was clearly defective and the further appeal to this Court is defective as one cannot put something on nothing and expect it to stand. Reliance was placed on the case of *GENERAL ELECTRIC COMPANY V. AKANDE & 4 ORS.* (2010) 12 SC (Pt. IV) 75 at 89.

F Learned Counsel for the 2nd Respondent, I.K. Bawa Esq. having identified and adopted his brief of argument dated and filed on 23/6/2011, sought to withdraw his arguments and submissions on issue 1. This was granted. He has however urged this Court to allow
G the appeal and to remit the case for rehearing before the Federal High Court.

Chief Olusola Oke Esq. Learned Counsel for 3rd Respondent, having identified his brief dated and filed on 20/6/2011 has urged us to allow the appeal and set aside the judgment of the trial Federal
H High Court. Learned Counsel has adopted the argument and submissions of the Appellant. He however emphasized the fact that the 1st Respondent herein, never asked for leave to move his Notice of preliminary Objection before the commencement of the appeal. It is urged that the preliminary objection ought to have been declared

abandoned.

I shall proceed to consider the preliminary issues in this appeal first for Order 2 Rule 28 (1) Supreme Court Rules 1999 (as amended) under which the 1st Respondent has set out his preliminary objection is made to serve a purpose. The object is to give an appellant before hearing of the appeal notice of any preliminary objection to the hearing of the appeal and the grounds thereof in order to enable him to be prepared to meet the objection at the hearing of the appeal. The Rule is to safeguard against embarrassing an appellant and taking him by surprise. See EXCEL PLASTIC IND. LTD V. FBN (2008) 11 NWLR (pt.935) 59. This is exactly what the 1st Respondent has sought to achieve in this appeal when on 17/6/2011 he filed a Notice of preliminary objection and embedded and argued same in his paragraph 11.1-8 of his brief of argument. The objection is that this court lacks jurisdiction to entertain the arguments contained in paragraphs 6.21-7.05 at pages 18 - 25 of the Appellant's brief of argument filed on 31/5/2011. The argument is predicated on the ground that the appellant's argument contained therein presupposes that there is a ground of appeal from the trial court to this court. As a matter of procedural law the Appellant herein cannot appeal directly from the decision of the trial court to this court. The appellant's complaint at paragraph 6.21 is that the trial court failed to hold that the decision of the National Working Committee of the 3rd Respondent (PDP) need not be exhibited when the plaintiff had admitted the fact and existence of the decision. His complaint at paragraph 6.22 is that the Learned Trial Judge was in error in holding that the decision of the National Working Committee of the 3rd Respondent (PDP) was not exhibited, when the plaintiff had admitted the fact and existence of the decision.

The relevant passage extracted from page 5 of the judgment of the learned trial judge read as follows:

“Under the People’s Democratic Party constitution and the PDP guideline for primary election, it is only the National Working Committee that can overrule the decision of the Special Appeal Panel. There is no evidence before the Court that such a decision by the National Working Committee overruling the decision of the Panel was taken. The 1st Defendant tried to convince the Court in paragraph 16 of its Counter Affidavit that “after hearing all the parties

receiving information from the relevant stake holders, the National Working Committee, voided the Primary election and rescheduled some". No decision of the National Working Committee was attached to buttress this averment. In the absence of any decision by the National Working Committee of the 1st Defendant overturning the report of the Special Appeal Panel the only conclusion to be reached is that the plaintiff won the primary election confirmed by Appeal Panel. In view of this I hold that the Plaintiff is entitled to judgment as per his reliefs..."

The complaint of the appellant arising from the decision of the trial Court set out above cannot in law be entertained by this Court. It is well settled law that an appeal to this Court must relate to the decision of the Court of Appeal and not that of the High Court or the Federal High Court or the State.

See: ODUNTAN v. AKIBU (2000) 7 SC (pt.11) 106 and KWAJAJFFA v. BANK OF THE NORTH (2000) 5 SC (pt.1) 103 at 118. **There is therefore no ground of appeal in the Appellant's Notice of Appeal filed on 18/4/2011 relating to the issues raised and argued in paragraphs 6.21 - 7.05 at pages 18 - 29 of the Appellant's brief of argument. I do not think the 1st Respondent's preliminary objection herein is "frivolous" as argued by the Appellant in his paragraph 2.03 of the Reply Brief. What the Appellant has embarked on in paragraphs 6.21-7.05 is more than mere "tracing an error from its origin (the Federal High court). The appellant is complaining of "an error by the trial Court." If so there ought to be the proper channel by which this error gets to this Court, otherwise this court may find it difficult to invoke section 22 of the Supreme Court Act 2004 to decide the merit of this matter. With due respect to the Learned Senior Counsel for the Appellant, I do not share his view that the issue posed herein is competent. It is not and must be struck out. In reaching this conclusion, I am mindful of the withdrawal of Appellant's paragraph 7.0 - 7.05 on the date of the hearing of this appeal and was struck out.**

Now to 3 issue raised by the 1st Respondent which I considered most relevant in this appeal, but I think they are unnecessarily proliferated in sub-paragraphs. The simple issue here is whether the learned Justices were right in sustaining the 1st Respondent's prelimi-

nary objection and thereby refusing to adjudicate on the defective appeal of the Appellant herein. The 1st Respondent herein (also as 1st Respondent in the lower court) filed a Notice of preliminary objection on 14/3/2011 and embedded argument in his brief of argument dated 11/3/2011 and filed on 14/3/2011 in the court below. Pages 1132-1135 particularly page 1134 contain the proceedings where the Lead Counsel for the 1st Respondent: Ade Okeaya-Inneh, SAN dealt with the Notice of preliminary objection in this manner: B

“OKEAYA-INNEH: Our 1st Respondent’s process is P. O. dated 11/3/2011. It is supported by an affidavit of 4 paragraphs and we have attached exhibits A. and B. We argued the P. O. in the 1st Respondent’s brief of argument dated 11/3/2011 and filed on 14/3/2011. The argument on P. O. is at pages 7-9 and the argument on the main appeal is from 9 - 17. The Court granted the appellant leave to appeal as interested party. The notice that was deemed is not the one upon which the appellant argued the appeal. Appellant filed a totally different notice of appeal without seeking leave to amend same. I adopt the 1st Respondent Brief and urge the Court to dismiss the appeal. The main appeal is argued at pages 9 - 18. We also filed a reply brief to the Notice of preliminary objection. We urge the court to dismiss the appeal. The last process we filed is a reply to the 3rd Respondent’s Brief on 18/3/2011. We also adopt it and urge the Court to dismiss the Appeal.” D

The records clearly show that the Learned Senior counsel for the 1st Respondent dealt with the Notice of preliminary objection before going to argue the main appeal. The complaint of the Appellant that the Notice of preliminary objection was not moved before hearing of the Appeal is frivolous and misconceived. F

At pages 17- 18 (pp .50-51 of the Records) the lower court considering the entire preliminary objection at page 18, held thus:- G

“Argument on the preliminary objection has been incorporated in the 1st Respondent’s brief of argument dated 11/3/2011 and filed on 14/3/2011. In his argument in support of the preliminary objection, Mr. Okeaya-Inneh, Learned Senior Counsel for the 1st Respondent, submitted that this Court lacks jurisdiction to entertain the appeal of the party interested because there is no Notice of appeal before this Court upon which on appeal could be determined. In a further argument Learned Senior counsel submitted that the Notice H

of appeal dated 28th February, 2011 and filed on the same date was not the notice of appeal upon which leave to appeal an interested party was granted by the Court below on the 28th February, 2011.... In conclusion, Learned Senior Counsel urged this court to strike out the appeal."

B It is on record at page 19 of the judgment of the court below that the Learned Senior Counsel for the Appellant responded to the 1st Respondent's submission on the preliminary objection as contained at paragraph 2.0 - 2.4 of the Appellant's Reply brief of filed on 15/3/2011.

C In the light of all that has transpired in the court, borne out of the records, I cannot fathom out what the Appellant could possibly mean when he is contending that the 1st Respondent had abandoned his preliminary objection. The point raised in the 1st Respondent Notice of preliminary objection was clearly brought to the notice of the Appellant who responded and made a lengthy submission in his brief of argument. The court below considered the objection and ruled on it. Clearly the point raised in the Notice without being swayed to unnecessary technicality was a point challenging the jurisdiction of the Court of Appeal to entertain an incompetent appeal of the appellant.

Challenging the jurisdiction of the court is a threshold issue. It is a warning signal to the court that it was about to embark on a matter which it has no jurisdiction and could lead to a nullity. Because of its importance a point of jurisdiction can be raised at any time and even viva voce for the first time during argument. The Court can suo motu raise it: LEVENTIS v. PETRO JESSICA (supra). While the court has a duty to give parties an opportunity to be heard on any issue it raises suo motu, a failure to do so does not necessarily lead to a reversal of the decision. The Appellant must go further to show that the failure to hear him on the point occasioned some miscarriage of justice: see OLUBODE v. SALAMI (1985) 2 NWLR (pt.7) 282; IMAH v. OKOGBE (1930) 9 NWLR (pt.316) 159 and EFFIOM v. CROSIEC (2010) 14 NWLR (pt.1213) 106 at 133.

Head or tail the Appellant cannot loose sight of the real issue in this appeal. He has to grope with it. The issue is the competence of his appeal. It is the contention of the 1st Respondent

that the court below was right in upholding the 1st Respondent's Notice of preliminary objection and striking out the appeal of the Appellant. Right of appeal to the Court of Appeal from the decisions of the Federal High Court or a High Court and the Court of Appeal to this court is provided for in the constitution. In this appeal, the appellant filed an application to appeal as interested party against the decision of the Federal High Court. In that case he is required to file an application for Leave to appeal by virtue of S.243 (a). The records show clearly that the Appellant as a party seeking leave to appeal as an interested party filed an application for leave attaching a Notice of Appeal upon which leave to appeal was granted. The objection raised by the 1st Respondent herein is that the Notice of appeal filed by the Appellant is totally different Notice of Appeal upon which leave was granted to the appellant to appeal. Pages 1156-1158 of the records show clearly what the appellant had done. Detail decision of the Court below on this point is reproduced as follows:

"Where a party seeks for leave as an interested party, one of the requirements is that such a party ought to annex to the application a proposed Notice of Appeal. The duty of the Appellate Court in the consideration of grounds of appeal proposed by an Applicant in support of an application for leave to appeal is to see whether the proposed grounds of appeal are substantial and reveal arguable grounds of appeal. Once the leave is granted, it is only a clean copy of the proposed grounds of appeal that should be filed, since those were the grounds that elicited the exercise of the Courts discretion in favour of the Applicant. Where after leave is granted to an interested party on the basis of the grounds of appeal filed by him, and there is the need to add additional grounds of appeal, leave of court is required for that party to do so. Where such leave is not sought and obtained, the new grounds of appeal are ipso facto incompetent and such incompetent grounds of appeal will robe the appeal of its competence. In the instant case, the Appellant has admitted that the notice of appeal filed on the 28th of February, 2011 is not the same as the one attached to the application for leave to appeal. It is observed that the notice of appeal which annexed as Exhibit HOSA 6 to the motion for leave to appeal as interested party is the one filed on the 1st February, 2011. The subsequent notice of appeal filed on the 28th February, 2011 without leave is incompetent. The provision of

section 24(2) of the Court of Appeal Act, which provides for 14 days where the appeal is against interlocutory decision and three months where the appeal is against a final decision, is applicable to parties who appear in the initiating processes at the Lower Court who under Section 243(a) of the 1999 Constitution of the Federal Republic of Nigeria can appeal as of right where decision of the High court is final. An interested party does not have a right of appeal either under the Constitution or the Act and Rules of this Court.”

The lower court placing further reliance on the case of OPUIYO & 2 ORS V. OMONIWARI & ANOR (2007) 6 SC 35 quoted Niki Tobi JSC where he held as follows:-

“Let me take the objection and it is on the ground of appeal and the need to obtain leave. It appears to me that all the grounds of appeal deal with evaluation of evidence and that is clearly a matter of fact or at best mixed law and fact for which leave of court is necessary. In view of the fact that leave was not sought, I came to the inescapable conclusion that the appeal is incompetent. It is struck out.”

I find that this case is of great assistance in the determination of this appeal. It is clear. It settles the law on this point. The argument of the Appellant that the learned trial judge did not deem the Notice of Appeal filed as properly filed, and that once an application for leave to appeal has been granted, the appellant is at liberty to file as many notices as he desires, does not reflect the correct provision of section 243 (a) of the 1999 Constitution on the procedure for leave to appeal. One of the important requirements, where a party seeks for leave to appeal as an interested party, is that he ought to annex to his application, a Proposed Notice of Appeal. This is to assist the appellate court in the consideration of grounds of appeal proposed by an Applicant in support of an application for leave to appeal, to find whether the proposed grounds of appeal are substantial and arguable. Once the leave is granted, except where deeming order has been made, it is the copy of the proposed grounds that should be filed, as those were the very grounds that elicited the exercise of the discretion of the lower court in favour of the Applicant. A situation may arise, where after leave has been granted to an interested

party, and there is the need to file additional grounds of appeal, then leave of court is further sought to do so. Where such leave is not sought and obtained, the new grounds of appeal are incompetent, and such incompetent grounds of appeal will definitely rob the appeal of its competence.

This is the situation in this case. The Appellant did not deny that his Notice Appeal filed on 28/2/2011 is quite different from the one attached to the application for leave to appeal. This was annexed as Exhibit “HOSA 6”. I agree that the subsequent notice of appeal is incompetent. The provision of section 24(2) of the Court of Appeal Act, which provides for 14 days where the appeal is against interlocutory decision and 3 months where the appeal is against a final decision, is applicable to parties who appear in the initiation processes at the lower court, who under section 243(a) of the 1999 Constitution, can appeal as of right where the decision of the High Court is final. The law is clear on this point. A party seeking leave to appeal as an interested party not being a party initially on the record, is not at liberty to file several Notices of Appeal from the final decision of a High Court or Federal High Court within 3 months. He is required to obtain leave to appeal within 3 months of the said judgment.

In the light of what I have said above, I affirm the decision of the Court of Appeal in refusing to adjudicate on an incompetent appeal of the Appellant, same having been rightly struck out. I make no order as to costs.

MOHAMMED JSC

This appeal is against the decision of the Court of Appeal delivered April, 8th 2011 by which the Court struck out the Appellant’s appeal. The appeal arose from a preliminary objection raised by the 1st Respondent which led to the striking out of the notice of appeal and the appeal itself, hence the present appeal. The third Respondent conceded the appeal and urged the Court to allow it.

The circumstances giving rise to this appeal are quite plain. The result of the primaries of the P.D.P. conducted in Kogi State Central Senatorial District by the Electoral Panel, returned the first Re-

spondent as duly elected. This was confirmed on appeal by the P.D.P. appeal Panel in its report. However, there was no report of the National Working Committee of the P. D.P. allowing the Appellant's appeal and allegedly setting aside the election of the 1st Respondent. In the absence of the report of the National Working Committee of the P.D.P. cancelling the primaries, the trial Court proceeded and found for the first Respondent as the duly elected candidate of the P.D.P. The Appellant was not a party to that case at the trial Court as his application to join the case as a Defendant was not heard before the judgment was delivered in favour of the first Respondent. However, the Appellant was later granted leave by the trial Court under Section 243(a) of the 1999 Constitution to join the appeal as a party interested in the appeal. The notice of appeal dated 1st February, 2011 which was exhibited with the application for leave, was not filed immediately, The Notice of appeal that was filed later turned out to be a different Notice of Appeal from the one in respect of which the leave to appeal by party interested in the appeal, was granted.

On the 1st Respondent's objection that the Notice of Appeal was incompetent, the Notice of Appeal together with the appeal was struck out by the Court of Appeal, hence the present appeal. The main question for determination therefore, is whether as there was no leave to join the appeal or appeal by person interested in respect of the Notice of Appeal filed by the Appellants on 28th February, 2011, that notice of appeal was competent to support Appellant's appeal. As the Court of Appeal didn't hear the Appellants appeal on the merit, the issues raised in the Appellant's brief of argument are those which arose from the decision of the trial Federal High Court. These issues cannot be resolved by this Court as to do so will result in this Court usurping the jurisdiction of the Court of Appeal under Sections 241 and 242 of the 1999 Constitution.

I have read before today the leading judgment of my learned brother Galadima, JSC and I entirely agree with him that the Court below was right in coming to the conclusion that the notice of appeal filed on the 28th February, 2011, was incompetent in the absence of leave granted in filing the same and in proceeding to strike-out the Notice of appeal. It is my view that the Court below was also on very strong grounds in striking out the appeal as well. In the result I also find no merit in this appeal which is hereby dismissed. I abide by the

order on costs made in the leading judgment.

CHUKWUMA-ENEH JSC

I have read the judgment of my learned brother Galadima JSC just delivered and I agree with him that the appeal lacks merit and should be dismissed. I abide by all the orders contained in the lead judgment.

FABIYI JSC

The resolution of the only issue in this appeal falls within a narrow compass. The issue is in respect of the competence of the appellant's appeal at the Court of Appeal. The appellant was granted leave thereat to appeal on the grounds of appeal attached to his motion as Exhibit HOSA 6. On 28-02-2011, he filed a completely different one from the one attached to his application. The court of appeal took objection to the improper step taken by the appellant and nailed the appeal by striking it out.

The appellant has decided to appeal to this court in respect of the action taken by the court below which was precipitated by the appellant's own blunder, as it were. It hardly needs any gainsaying that the subsequent unauthorised Notice of Appeal filed by the appellant is incompetent.

The appeal of the appellant at the court below was not initiated by due process of law. The appellant failed to fulfil the needed condition precedent to enable the court below exercise its jurisdiction. Indeed, the appeal was a non-starter. See: *Madukolu v. Nkemdilim* (1962) 2 NSCC 375.

Any defect in the competence of the court as occasioned by the appellant herein will render further proceedings by the court below a nullity. Without much further ado, I also affirm the order of the court below whereby it struck out the incompetent appeal of the appellant. I agree with the decision of my learned brother, Galadima, JSC. I too make no order as to costs.

MUNTAKA-COOMASSIE JSC

I have read in advance the lead judgment of my learned Lord, Suleiman Galadima JSC, just delivered. I entirely agreed with his reasoning and conclusion which, I beg to adopt as mine.

B It is clear that the appeal lacks merit because the appeal before the Court of appeal is quite incompetent that was justified in refusing to adjudicate on it, Appeal is therefore un-meritorious and is struck out. I too make no order as to costs.
Appeal is dismissed.

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