

**SUPREME COURT OF NIGERIA**  
27TH JANUARY, 2012. SC. 331/2011  
CORAM:- **F. F. TABAI, C. M. CHUKWUMA-ENEH,**  
**B. RHODES-VIVOUR, N. S. NGWUTA,**  
**M. U. PETER-ODILI, JJSC**

MRS. MARGARET OKADIGBO ..... APPELLANT  
AND

1. PRINCE JOHN OKECHUKWU

EMEKA

2. INDEPENDENT NATIONAL ..... RESPONDENTS  
ELECTORAL COMMISSION

3. PEOPLES DEMOCRATIC PARTY

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COURTS - Objection - Touching on powers of court - Need to decide - Court must first have the objection disposed of - Since entertaining a matter when court has no vires - Will be a mere academic exercise (H1)

ACTIONS - Appeals - Need for consistency - A party must be consistent in its case - And an appeal is regarded as a continuation of the original action - Rather than an inception of a new suit (H2)

ELECTION PETITIONS - Jurisdiction - Court of Appeal - By 1999 Constitution s. 246(3) - Court of Appeal is the final court - In appeal arising from National Assembly Election Petition Tribunal (H3)

ELECTION PETITIONS - Appeals - Courts - Abuse of process - Appellant abused the process of court - By instituting this suit as election petition matter - When she has a similar pending suit at the Federal high court (H4)

COURTS - Incapacitation - Jurisdiction - Absence of - Without jurisdiction - A court is incapacitated - As any decision it reaches creates no obligation (H5)

**FACTS**

Appellant and 1st respondent are members of 3rd respondent

ent i.e. Peoples Democratic Party, one of the political parties that contested for the Anambra South Senatorial District at the general election held on the 9th of April, 2011. 1st respondent emerged as winner having pulled majority of the lawful votes cast and was declared as the winner of the election by 2<sup>nd</sup> respondent. Being dissatisfied with the result of the election, appellant filed a petition at the National Assembly Election Petition Tribunal holden in Awka, Anambra State contesting the return and declaration of 1st respondent as the winner of the said election mainly on the grounds that appellant and not 1st respondent was the candidate of 3rd respondent at the aforementioned election. 1st respondent raised a preliminary objection and filed a motion on notice dated the 1st of June, 2011 challenging the jurisdiction of the tribunal to entertain the petition mainly on the grounds that the petition was predicated on pre-election matters and the petitioner lacked locus standi to institute the same.

In a well considered ruling, the tribunal upheld the preliminary objection and dismissed the petition. Aggrieved, appellant appealed to the Court of Appeal, Enugu Division. The court upheld the decision of the tribunal. Aggrieved further, appellant has appealed to Supreme Court praying that the judgment of the Court of Appeal be set aside and for the Supreme Court to assume jurisdiction and determine the case below as if it were the Court of Appeal or otherwise to remit the case back to the trial Tribunal for determination on the merit. 1<sup>st</sup> respondent has equally raised preliminary objection to the jurisdiction of the Supreme Court to entertain this matter.

**HELD** (Unanimously striking out the appeal per **CHUKWUMA-ENEH JSC**)

***Objection - Touching on powers of court - Need to decide***

1. It is trite that where an objection as the instant ones raise fundamental issues touching on the vires of the court to entertain a matter as the instant appeal it is incumbent on the Court to have it disposed of first as to proceed to entertain the matter in circumstances where the Court has no vires to do so comes to naught being a mere academic exercise. (p. 188 C)

***ACTIONS - Appeals - Need for consistency***

2. I have taken pains to set forth the sequence of lack of consistency

in the appellant's case in this appeal as compounded by the averments in her pleadings through her stance in both lower courts to this Court where she seemed to have abandoned her pleadings altogether as exemplified by the above abstract. It is settled law that a party ought to be consistent in the case he pursues and not as it were, spring surprises on the opposite party from one stage to another. This is so as an appeal is regarded as a continuation of the original action rather than as an inception of a new suit. And so in appeals parties are normally confined to their case as pleaded in the Court of first instance (in this case the trial tribunal). See: the case of *Jumbo v. Bryanko International Ltd* (1995) 6 NWLR (Pt.403) 545 at 555-536 F-H and *Ajide v. Kelani* (supra). The Court is bound in this instance to reject the appellant's case and dismiss the appeal in its entirety even solely on this ground against its peculiar circumstances and as the saying goes "you can't change horses midstream". More importantly I am satisfied and hold that the facts of this case are hinged on pre-election matters and so are not entertainable by the instant trial tribunal as they are ultra vires its powers. (p. 191 H)

### ***Jurisdiction - Court of Appeal***

3. Next I examine the provisions of Section 246(3) (in the context of this appeal) which provides that:

"The decisions of the Court of Appeal in respect of Appeals arising from the National and State Houses of Assembly election petitions shall be final."

This means simply that the lower Court is the final Court in the appeals arising from the National and State Houses of Assembly election petition tribunal. Therefore, this Court lacks the jurisdiction to entertain such appeals vis-a-vis election petitions from the lower Court. It is the final Court in such matters whether rightly or wrongly decided. The instant appeal in this Court has arisen from the decision of the lower Court sitting as an election appeal tribunal and being a final tribunal in all matters under the provisions of Section 246(3) and Section 285(1) and if I may repeat this Court lacks the jurisdiction to entertain the same. What so far has resulted from the circumstances of this case is that it could be properly determined at the Federal High Court as it is a pre-election matter and it may ultimately come to this Court. (p. 192 E)

***Courts - Abuse of process - Instance***

4. Without mincing words, this appeal is misconceived because the appellant has relied on reasoning by implication in order to get to the conclusions she has invited the Court to reach even as the instant proceeding is an abuse of process in that the appellant has an already pending matter as per suit No. FHC/AWK/CS/05/2011 seeking as in this matter the very reliefs which are the subject matter of the said pending suit.
- Finally, because some of the issues pertinent in dealing with this matter are still live issues vis-a-vis the suit No. FHC/AWK/CS/05/2011 still pending at the Federal High Court, Awka in that case there is no legal ground to institute the instant action at the trial tribunal as an election petition matter. It smacks of an abuse of process and even moreso as forum shopping with respect. (pp. 193 A/E)

***Jurisdiction - Absence of - Effect***

5. The bottom line of this case therefore, is that the trial tribunal has no vires to entertain this matter ab initio and that jurisdiction is the enabling power for the Court to act on matters placed before it and without it the Court labours for nothing.
- Lack of jurisdiction is that profound in its total incapacitation of any Court's decision as the decision creates no obligations nor confers any rights. (p. 193 C)

**REPRESENTATION**

- C. Chuma Oguejiefor Esq., with I. Akoh Esq., for the Appellant  
 C. I. Okafor with C. T. Chinwuba for the 1st Respondent  
 Ahmed Raji with Marcus Aba, Ebuka Nweze, Ade Ola Adedipe and Garuba Zakeri, for the 2nd Respondent  
 E. Nwoye Esq. with E. Ikoro, for the 3rd Respondent

**CASES REFERRED TO**

- Oniwaka B. Ibrahim v. Ishola Balogun Fulani & Ors (2009) 18 WRN 180  
 Prince Olusegun Adesola & Ors. v. Mr. Isaac Adeyinka Ayeoba and Ors. (2009) 23 WRN 118  
 Madukolu v. Nkemdilim (1962) 2 SCNLR 341

- Ihekwoba v. State (2004) 15 NWLR (Pt. 896) 296  
Ugwuanyi v. NICON Insurance Plc. (2004) 15 NWLR (pt. 897) 612  
Onyenucheya v. Military Administrator, Imo State (1997) 1 NWLR (pt.482) 429  
Onuaguluchi v. Ndu (2001) 7 NWLR (Pt. 712) 309  
Ucha v. Onwe (2011) 4 NWLR (Pt. 1237) 386 B  
Amgbare v. Oji Lekwauwa (2011) 8 EPR 843  
PDP v. Onwe (2011) 4 NWLR (pt. 1236) 166  
Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248  
Jumbo v. Bryanko Intn'l. Ltd. (1995) 6 NWLR (Pt. 403) 545 C  
Oduko v. Govt. of Ebonyi State & 3 Ors (2009) 25 WRN 10

### **STATUTES REFERRED TO**

- Constitution of Federal Republic of Nigeria 1999 (as amended), 246(3), 285(6) D  
Electoral Act 2010 (as amended), ss. 65(2) (b), 137(1) and 141

### **LEAD JUDGMENT BY CHUKWUMA-ENEH JSC**

This appeal has arisen from the decision of the Court of Appeal Enugu Judicial Division, sitting as Election Appeal Tribunal of Anambra State holden at Awka in which the appellant as the petitioner has prayed for the following reliefs:

- "1. An order disqualifying the candidature of the 1st respondent as candidate for the April 9th election into Anambra-North Senatorial District as not having been sponsored by any political party.* F
- 2. An order returning the petitioner as the elected candidate in the April 9th Senatorial Election having polled the majority of lawful votes cast at the said election.*
- 3. An order directing the 3rd respondent to issue Certificate of Return to the petitioner being the winner of the said election."* G

The appellant has lost in both the two lower Courts and has now appealed to this Court and has maintained the same case here as in the lower Courts. The tribunal in its Ruling delivered on 29th June 2011 has held as follows: H

*"Having reached a finding:-*

- (1) That this tribunal lacks jurisdiction to entertain this petition as it is predicated on pre-election issues, and*
- (2) That the petitioner has no locus standi to present and main-*

*tain this petition, the preliminary objection succeeds and we accordingly order that this petition be and is hereby struck out."*

In the same vein the lower Court in its judgment delivered on 19/8/2011 has come to this important conclusion in affirming the decision of the trial Tribunal in these words:

B *"In the instant case, there was no final and subsisting judgment of a Court in favour of the appellant but an ex parte order meant to last momentarily pending the determination of the substantive application.*

C *The subsequent order of the Federal High Court, Awka made on 25/3/2011 urged parties to maintain the status quo until the matter is disposed of. There is nothing before this Court to show that the matter has been disposed of on the merit meaning that it is perhaps still pending. The issue in contention thus remains a pre-election matter.*

D *The appellant is free to proceed with the matter at the Federal High Court including perhaps contempt proceedings for a breach of the exparte order where it is found necessary but not in an Election Petition Tribunal. In the circumstances I hold that the trial tribunal was right in finding that it lacks jurisdiction to entertain the appellant's*  
 E *petition because it is predicted on pre-election issues.*

*On the issue of locus standi, it is my humble view that addressing the issue now will constitute an academic exercise having agreed with the trial tribunal that it lacked jurisdiction to even look into the*  
 F *petition having found that it is a pre-election matter. From the totality of the above, I hold that this appeal lacks merit and is hereby dismissed. The Ruling of the trial tribunal delivered on 29/6/2011 is hereby affirmed."*

G The above abstracts of the two lower Courts speak for themselves. I have however, positioned these findings as concurrent findings in this matter and the onus is on the appellant to show their perversity to succeed and specifically to bring to the fore the central questions in this appeal. The appellant instead of going back to continue to its final conclusion the matter of her candidacy nomination  
 H and sponsorship still pending at the Federal High Court Awka has chosen the course of the instant appeal before this court. Even as appellant's Counsel has in his submission as at p.360 LL.7-10 of the record(s) which has not been challenged stated thus;

*"... that the issue was not that the appellant wanted the tribu-*

*nal to declare her a candidate of the party but rather that she was already a candidate by the decision of the Federal High Court, Awka. Therefore, all the votes cast for PDP in the election should be attributed to her and thus declared winner of the election with the 60,788 votes awarded to her and not the 1st respondent... that in so far as the Federal High Court had decided that the appellant was the candidate in the Election, that decision had automatically made her a candidate in the election thus conferring her with the locus standi to present the petition."*

Being aggrieved by the decision of the lower Court the appellant in her brief of argument filed on 27/9/2011 in this matter has raised a sole issue for determination as follows:

*"Whether the Court below was right in holding as it had done that the petition of the appellant was predicated on pre-election issues that divested the trial tribunal of jurisdiction to entertain the same and whether the decision did not thereby act to deny or deprive the appellant of a hearing on the merit in respect of the Election Petition."*

The 1st respondent in his brief filed on 11/1/2011 in this appeal has raised the issue for determination as follows:

*"Whether the Court of Appeal was right in upholding the decision of the Lower Tribunal striking out the petition on the grounds that same was predicated on pre-election matters."*

The 2nd respondent in its brief of argument filed on 24/10/2011 in which it has reacted to the issue raised by the appellant as to the grounds of appeal has adopted the appellant's sole issue. The 3rd respondent in his brief of argument filed on 30/9/2011 in this matter clearly has also adopted the said sole issue as raised by the appellant. The 1st and 2nd respondents have each raised a preliminary objection in their respective briefs of argument. The 2nd respondent's notice preliminary objection typical of the objections simply put is that-

*"The Supreme Court lacks jurisdiction to entertain the Appellant."*

The grounds of the objection are:-

*"1. That this Honourable Court lacks jurisdiction to entertain the Appeal of the Appellant.*

*2. The subject matter relates to an appeal from the decision of*

*the Court of Appeal sitting as an Election Appeal Tribunal.*

3. *The law in existence as applicable to the instant appeal is the 1999 Constitution (as amended), and by virtue of Section 246(3) thereof, this Honourable Court lacks the competence to entertain this appeal, the Court of Appeal being final in respect of appeals arising from the National and State House of Assembly Election petitions.*"

The 3rd respondent has not followed suit in filing preliminary objections but has proceeded to argue the substantive appeal. In consequence of the objections raised by the 1st and 2nd respondents, the appellant has reacted to the same as per the appellant's reply briefs to the 1st and 2nd respondents' briefs of argument and filed the same.

***It is trite that where an objection as the instant ones raise fundamental issues touching on the vires of the court to entertain a matter as the instant appeal it is incumbent on the Court to have it disposed of first as to proceed to entertain the matter in circumstances where the Court has no vires to do so comes to naught being a mere academic exercise.***

The 1st respondent has relied on the cases of Drexel Energy and Natural Resources Ltd. & Ors. V. Trans International Bank Ltd. & Ors. (2009) 15 URN. 1 at 52 LL.25-35 and Osuu S. C. Oduko v. Government of Ebonyi State & Ors. (2009) 25 WRN pp.10-11 LL. 45, Oniwaka B. Ibrahim v. Ishola Balogun Fulani & Ors. (2009) 18 WRN 1 p.80 LL.5-10, Prince Olusegun Adesola & Ors. v. Mr. Isaac Adeyinka Ayeoba and Ors. (2009) 23 WRN 118 pp.142-143 LL.25-10 to submit on the vires of the Court to embark on its judicial action which has to be controlled by the statute creating the Court and further more on to assert whether a Court as this Court is competent to exercise its jurisdiction without which (i.e. this power) the Court acts in vain. It inter alia has referred to Ihekwoaba v. State (2004) 15 NWLR (Pt.896) 296; Ugwuanyi v. NICON Insurance Plc. (2004) 15 NWLR (pt.897) 612 and Onyenucheya v. Military Administrator, Imo State (1997) 1 NWLR (pt.482) 429. The point is made that the parties cannot by consent, omission or conduct confer on or expand the jurisdiction of a Court nor can the Court confer on itself the power it would otherwise, not have. See Ukpong v. Commissioner for Finance Akwa Ibom (2007) FWLR (Pt. 350) 1246. Madukolu v. Nkemdilim



(1962) 2 SCNLR 3411 is also submitted that Section 246(3) of the 1999 Constitution (as amended) has provided that decisions that have originated from election petitions to the Court below shall be final in the National and State Assembly election petitions and that the instant appeal having been caught by the said provisions of that section terminates thereat so that this Court lacks the power to hear the matter as per the Constitution being the supreme law; and refers to *Onuaguluchi v. Ndu* (2001) 7 NWLR (Pt.712) 309 on the finality of such judgment. The instant case has been distinguished from the case of *Ucha v. Onwe* (2011) 4 NWLR (Pt.1237) 386. The Court is urged to uphold the objection and strike out the appeal.

The 2nd respondent as I have posited above has set out the grounds of its objection. It also relies on Section 246(3) of the 1999 Constitution to submit that the decisions of the lower Courts in respect of the appeals arising from the National and State Houses of Assembly election petitions shall be final. And so, that the instant election petition filed by the appellant has been rightfully struck out at the Federal High Court being a pre-election matter over which the instant Election Petition Tribunal has no jurisdiction. The point is also made that by virtue of Section 246(3) that the decision of the Court of Appeal Election Appellate Tribunal delivered on 19/8/2011 being final the instant appeal to this Court constitutes an abuse of Court process. See *Amgbare v. Oji Lekwauwa* (2011) 8 EPR 843 at 853-554. The Court is urged to dismiss the appeal as it constitutes an abuse of Court process.

The appellant in her response to the objections has contended that although Section 246(3) of the 1999 Constitution has provided that the decisions of the Court of Appeal in respect of appeals arising from election petitions shall be final that the provision does not apply here as appeals on issues of substitution terminate in this Court and that this Court has the power to pronounce on pre-election matters. She relies on *Ucha v. Onwe* (supra) for so submitting. See also *PDP v. Onwe* (2011) 4 NWLR (pt.1236) 166. The Court is urged to overrule the objection and to hold that this Court has the jurisdiction to hear the appeal. On an over-view of this case, it is necessary not to decide or pronounce on live issues that ought to be decided at the trial Court in the pending suit No. FHC/AWK/CS/05/2011. Therefore, this Court must tread carefully in dealing with this matter.

Before coming to the issue of jurisdiction in dealing with this matter it is necessary to clear the apparent confusion of the appellant's case in this Court, which I have identified as want of maintaining a consistent case here as in the two lower Courts. It is not in any doubt that the instant action has commenced and continued in the trial Tribunal and the lower Court as an election petition matter which has metamorphosed into a pre-election matter in this Court. And as held in *Ajide v. Kelani* (1985) 3 NWLR (Pt.12) 248, justice will never decree anything in favour of such slippery a customer.

In expatiation in the instant Election Petition Tribunal the appellant has in paragraph 4 of the petition pleaded that:

*"The petitioner will at the trial rely on the tabular of the INEC downloaded from the official INEC website which shows that PDP won the election with the name of the 1st respondent which is written against the PDP but with the word 'Election' not included."*

The implication of this averment and as has been borne out from its judgment and I agree with the lower Court in that regard there has been a pre-existing controversy over the nomination and sponsorship between the appellant and the 1st respondent as to the rightful candidate to carry the PDP flag in the election of 9/4/2011 as has been in the case of *Onyekweli v. INEC* (supra) a case the appellant has relied upon at every stage in advancing her case here. And the same has not been resolved before the election of 9/4/2011. If I may interpose here Section 141 of the Electoral Act 2010 as amended has provided for the scenario being played out in the circumstances. However, in paragraph 10 of the petition the appellant has made the position clearer that her case amounts to a pre-action matter by averring that:

*"In addition to the above documents which are authentic documents a candidate is required to show, there are also three (3) Court orders made by the Federal High Court Awka, in suit No. FHC/AWK/CS/05/2011 dated 13/01/2011, 11/02/2011 and 25/03/2011 respectively as per page 64 to 66 of the record, which restrained INEC not to accept any other name other than the name of the petitioner in respect of Anambra North Senatorial District..."*

The above averment has unequivocally made it clear that the appellant and the 1st respondent are locked in contest in the Federal High Court Awka, as to who is the authentic PDP flag bearer in the

election of 9/4/2011. The appellant has relied on the above mentioned three orders she has obtained from the Federal High Court Awka, which as found by the lower Court, are no more than ex parte orders which have been made pending the determination of the substantive application for judicial review to the effect that the 2nd respondent has no powers not to accept any list of candidates' names sent to it by the political party. In other words, I must observe the orders being relied on by the appellant here to invoke the principle applied in the decision in Onyekweli v. INEC (supra) to all intents and purposes are not final orders. The appellant has embarked on this exercise to all appearances all in a futile attempt to bring the petition within the ambit of Sections 137(1) and 141 of the Electoral Act 2010 as amended. There can be no doubt that the appellant has misconstrued the case of Onyekweli v. INEC (supra) vis-a-vis its application to this case.

From the above scenarios the lower Court rightly has found that the action as constituted and concluded at the trial tribunal is a pre-election matter otherwise being prosecuted as an election petition simpliciter. In this Court the appellant has turned complete summersault as per her brief of argument and in the oral submission before us in her case and on this apparent blunder has submitted as per paragraph 3 of the appellant's reply brief to the 2nd respondent's brief of argument thus;

*"In so far therefore as the Court below had found that election petition in this appeal deals on pre-election issues, I then submit most respectfully my Lords that this Court has jurisdiction to entertain the Appeal the provisions of 246(3) of the 1999 Constitution (as amended) notwithstanding" and relies on Ucha v. Onwe (supra) and PDP v. Onwe (2011) 4 NWLR (pt.1236) 166 for so submitting. My lord, what the lower Court has said as per the foregoing abstract could constitute a ground of complaint and so a ground of appeal in this Court and not an enabling vires to empower this Court to entertain this appeal as the appellant has in error submitted at the oral hearing of this appeal."*

This is a clear concession that the matter is a pre-election matter clearly instituted in the wrong court without powers to entertain it.

***I have taken pains to set forth the sequence of lack of consistency in the appellant's case in this appeal as com-***

**pounded by the averments in her pleadings through her stance in both lower courts to this Court where she seemed to have abandoned her pleadings altogether as exemplified by the above abstract. It is settled law that a party ought to be consistent in the case he pursues and not as it were, spring surprises on the opposite party from one stage to another. This is so as an appeal is regarded as a continuation of the original action rather than as an inception of a new suit. And so in appeals parties are normally confined to their case as pleaded in the Court of first instance (in this case the trial tribunal).**

See: the case of *Jumbo v. Bryanko International Ltd* (1995) 6 NWLR (Pt.403) 545 at 555-536 F-H and *Ajide v. Kelani* (supra). **The Court is bound in this instance to reject the appellant's case and dismiss the appeal in its entirety even solely on this ground against its peculiar circumstances and as the saying goes "you can't change horses midstream". More importantly I am satisfied and hold that the facts of this case are hinged on pre-election matters and so are not entertainable by the instant trial tribunal as they are ultra vires its powers. See *Ucha v. INEC* (supra) and *PDP v. Onwe* (supra).**

**Next I examine the provisions of Section 246(3) (in the context of this appeal) which provides that:**

**"The decisions of the Court of Appeal in respect of Appeals arising from the National and State Houses of Assembly election petitions shall be final."**

**This means simply that the lower Court is the final Court in the appeals arising from the National and State Houses of Assembly election petition tribunal. Therefore, this Court lacks the jurisdiction to entertain such appeals vis-a-vis election petitions from the lower Court. It is the final Court in such matters whether rightly or wrongly decided. The instant appeal in this Court has arisen from the decision of the lower Court sitting as an election appeal tribunal and being a final tribunal in all matters under the provisions of Section 246(3) and Section 285(1) and if I may repeat this Court lacks the jurisdiction to entertain the same. What so far has resulted from the circumstances of this case is that it could be properly determined at the Federal High Court as it is a pre-elec-**

**tion matter and it may ultimately come to this Court.** See Onuaguluchi v. Ndu (supra), Osakwe v. Federal College of Education Asaba (2010) (Vol.187) LRCN 170 at 1999. **Without mincing words, this appeal is misconceived because the appellant has relied on reasoning by implication in order to get to the conclusions she has invited the Court to reach even as the instant proceeding is an abuse of process in that the appellant has an already pending matter as per suit No. FHC/AWK/CS/05/2011 seeking as in this matter the very reliefs which are the subject matter of the said pending suit.** See Doma v. Adamu (1999) 1 NWLR (Pt.598) 311 and Benaplastic v. Vasilyer (1999) 10 NWLR (Pt.624) 620. **The bottom line of this case therefore, is that the trial tribunal has no vires to entertain this matter ab initio and that jurisdiction is the enabling power for the Court to act on matters placed before it and without it the Court labours for nothing.** See Drexel Energy and Natural Resources Ltd. & Ors. V. Trans International Bank Ltd. & Ors (supra). **Lack of jurisdiction is that profound in its total incapacitation of any Court's decision as the decision creates no obligations nor confers any rights.**

**Finally, because some of the issues pertinent in dealing with this matter are still live issues vis-a-vis the suit No. FHC/AWK/CS/05/2011 still pending at the Federal High Court, Awka in that case there is no legal ground to institute the instant action at the trial tribunal as an election petition matter. It smacks of an abuse of process and even moreso as forum shopping with respect.**

For the reasons stated above, I find merit in the preliminary objections of both 1st and 2nd respondents and uphold the same. In the result, the lower court having rightly affirmed the ruling of the trial tribunal, the instant appeal is hereby struck out with N50,000 costs to the 1st respondent only.

Appeal struck out.

### NGWUTA JSC

At stake in Suit No. FHC/AWK/C5/05/2011 in the Federal High Court, Awka is the claim of the appellant to the candidature of the

Peoples Democratic Party (PDP) for Anambra North Senatorial District for the April 2011 general elections. The Federal High Court made an order restraining INEC from accepting any name other than the name of the appellant in respect of Anambra North Senatorial District pending the final disposal of the suit.

B It would appear that the 2nd Respondent, INEC, defied the order of the Federal High court and accepted the name of the 1st Respondent as the candidate of the PDP for the Anambra North Senatorial District in the April 2011 elections.

C It is not the case of the appellant that the issue before the Federal High Court, Awka, has been resolved in her favour or at all. Appellant cannot approach the Election Tribunal constituted for Anambra State to be declared winner of the election for the Anambra North Senatorial District on the platform of the PDP when the suit  
D she brought to determine her nomination for the said election is still pending or, at least, not determined in her favour. She cannot rely on the interim order pending the determination of her suit to reap the benefit of her expected final order yet to be made in the suit. It follows from the above that the Petition No. EPT/AN/NAE/SE/02/  
E 2011 is a pre-election matter over which the election tribunal has no jurisdiction. The Electoral Act 2010 (as amended) did not confer jurisdiction on Election Tribunals to hear and determine claims based on pre-election matters. See *Madukolu & Ors v. Nkemdilim* (1992) NSCC 374. Under the Electoral Act 2010 (as amended) the appel-  
F lant lacks the locus standi to file the election petition.

With profound respect to learned Counsel for the appellant, the facts of *Ucha v. Onwe* (2011) 4 NWLR (Pt.1237) 386 at 426, are on all fours with this case but this Court did not affirm the decision of  
G the Court of Appeal. In the same case the appellant, Ucha, argued before the Election Tribunal at Abakaliki that the respondent's petition to be declared winner of the election on the basis that he was the nominated candidate of the PDP was a pre-election matter which is outside the jurisdiction of the Tribunal.

H The Tribunal found in favour of the Respondent and on appeal the appellant urged the Court of Appeal to set aside the decision of the trial Tribunal and strike out the Petition for want of jurisdiction. Ucha lost at the Court of Appeal and appealed to this Court. Rather than affirm the decision of the Court of Appeal as claimed by the

appellant, the Court allowed the appeal on the ground that the petition was founded on pre-election matters.

The lower Court was right to have affirmed the decision of the trial Tribunal that the Petition was founded on pre-election matter over which the Tribunal has no jurisdiction.

For the above, I entirely agree with the judgment of my learned brother Chukwuma-Eneh, JSC, which I had the privilege of reading in draft that the Court has no jurisdiction to hear the appeal. I also strike out the appeal for want of jurisdiction. I abide by the consequential order in the lead judgment.

C

### ***PETER-ODILI JSC***

I agree with the ruling just delivered by C. M. Chukwuma-Eneh J.S.C. and the reasoning thereof. I would add below a few words in support. The 1st respondent, Prince John Okechukwu Emeka raised a preliminary objection as to the competence of this appeal and the jurisdiction of the Supreme Court to entertain the same.

The grounds upon which the said objection has been initiated are as follows:

1. The appellant, vide, her Notice and Grounds of Appeal is praying this honourable Court to set aside the judgment of the Court below and assume jurisdiction over the matter and hear and determine same as if it were the Court below or in the alternative, remit the matter back to the tribunal for determination on the merits.

2. The appeal is therefore incompetent and the Supreme Court is devoid of jurisdiction to hear same on the following grounds:

(a) The Supreme Court, pursuant to section 246(3) of the 1999 constitution (as amended) has no jurisdiction to entertain appeals in respect of matters questioning the validity of the election of a person to the National Assembly.

(b) The appellant's reliefs cannot be granted in the right section 285(6) of the constitution of the Federal Republic of Nigeria, 1999 (as amended) which stipulates that all Election matters must be determined and judgment delivered within 180 days of filing a petition.

Briefly, the facts relevant for our purpose in this ruling are: the

appellant and the 1st respondent are members of the Peoples Democratic Party, the 3rd respondent, a registered Political Party that has the right under section 65(2) (b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) to sponsor a candidate for the subject election into the Anambra State South Senatorial District at the general election held on the 9th of April, 2011 wherein the 1st respondent emerged as having pulled majority of the lawful votes cast and was declared and returned as the winner of the election.

The appellant filed a petition at the National Assembly election Tribunal holden in Awka contesting the return and declaration of the 1st respondent as the winner of the said election mainly on the grounds that the appellant and not the 1st respondent was the candidate of the 3rd respondent, the Peoples Democratic Party (PDP) at the aforementioned election. The Independent National Electoral Commission and the PDP were joined in the suit as the 2nd and 3rd respondents respectively. The 1st respondent raised a preliminary objection and filed a motion on notice dated the 1st of June, 2011 challenging the jurisdiction of the tribunal to entertain the petition mainly on the grounds that the petition was predicated on the pre-election matters and the petitioner lacked locus standi to institute the same.

In a well considered ruling, the tribunal upheld the preliminary objection and dismissed the petition. Aggrieved, the appellant appealed to the Court of Appeal who upheld the decision of the tribunal. The appellant has now further appealed to this Court praying that the judgment of the Court of Appeal be set aside and for the Supreme Court to assume jurisdiction and determine the case below as if it were the Court below or otherwise to remit the case back to the Trial Tribunal for determination on the merit.

It is necessary to go a little into the background to the appeal before this Court which has given rise to this preliminary objection being now considered and these are: The appellant in challenging the declaration and return of the 1st respondent on the grounds of his candidacy of the 3rd respondent stated as follows in paragraphs 1 to 4 of her petition (at pages 1 to 2 of the records):

1. Your petitioner, Lady Margaret Okadigbo was a candidate of the Peoples Democratic Party (herein under simply referred as to as "PDP") at the above election and has a right to be referred as winner of the election.



2. Your Petitioner, Lady Margery Okadigbo, further to paragraph 1 supra, is a person who voted and was indeed a contestant and candidate of the PDP at the above election and actually had a right to be declared as the Senator for the Anambra North Senatorial District.

3. The Petitioner states that the election into the Anambra North Senatorial District was held on the 9th of April, 2011 and the results declared on 10th of April, 2011 when the following were the candidates, and the political parties at the said election and the scores of votes for each political party and candidates.

a. PDP Party	Prince John Emeka	60,788	C
b. CAN Party	Barr. Jesse Balonwu	17,849	
c. APS Party	Godwin O. Obi	630	
d. APGA Party	Dr. Joy Emodi	54,060	D
e. Accord Party	Dr. Mike O. Areh	7,514	
f. ADC Party	Chief O. C. Ebeze	4,006	
g. ANPP Party	John C. Nwadiogbu	1,006	E
h. CDC Party	Okoli O. Obioma	260	
i. CPC Party	John Bosah	794	
j. PPA Party	Jonathan Onwumehie	633	
k. Labour Party	Dennis Odife	1,366	
l. NTP Party	Barr. C. E. Onyekwe	244	

4. The Petitioner will at the trial rely on the Tabular of the INEC downloaded from the official INEC website which shows that the PDP won the election with the name of the 1st respondent which is written against the PDP but with the word “Elected” not included.

(a) Ground one of the grounds upon which the appellant’s petition at the lower tribunal was predicated also states as follows (at paragraph 16 (b), (c), (e) and (f) of the petition, found at pages and 5 of the records):

(b) Your Petitioner avers that the 1st respondent was not qualified to contest the election as he was not a candidate of any political party as of the time of the election which is contrary to the requirements of the constitution of the Federal Republic of Nigeria 1999 which provides clearly in section 65(2)(b) that a candidate must be a candidate of political party in order to be qualified to contest for an election.

(c) Your Petitioner further avers that the only candidate of the

3rd petitioner. Peoples Democratic Party (PDP) for the election is the petitioner.

(d) The Petitioner avers that from the available records the only candidate sponsored by the 3rd respondent, Peoples Democratic Party (PDP) is the petitioner for the election.

B (e) The Petitioner avers that the Peoples Democratic Party (PDP) sponsored no other candidate for the office of Senate for Anambra North Senatorial District other than the Petitioner.

C The appellant then prayed the Honourable Tribunal for the following reliefs:

1. An order disqualifying the candidature of the 1st respondent as candidate for the April 9th Election into Anambra North Senatorial District as not having been sponsored by any political party.

D 2. An order returning the Petitioner as the elected candidate in the April 9th Senatorial Election having polled the majority of lawful votes cast at the said election.

3. An order directing the 3rd respondent to issue a certificate of return to the Petitioner being the winner of the said election. (See page 5 of the record).

E Replies were subsequently filed by the respondents and the appellant. 1st and 2nd respondents in their respective replies both raised preliminary objections challenging the jurisdiction of the Tribunal to hear and determine the petition (see pages 76 and 94) of the records respectively. The 1st respondent by way of Motion Notice  
F filed on the 10th of June 2011, prayed the Honourable Tribunal to dismiss the petition on the following grounds (see page 160 of the records).

1. The entire petition is predicated on pre-election matters

G 2. The matters raised as grounds for the petition do not qualify as grounds specified in the Electoral act, 2010 (as amended).

3. The matters on which the petition is predicated are not within the jurisdiction of the Honourable Tribunal.

H 4. The petitioner has no locus standi to present and maintain the petition.

The Tribunal, in a well considered ruling held that it lacked jurisdiction to entertain the petition as it was predicated on pre-election matters. The tribunal further held that the appellant lacked the requisite locus standi to institute proceedings challenging the election

as by her own admission, she was not a candidate at the election and therefore could not challenge an election which she did not take part in. Aggrieved, the appellant appealed to the Court of Appeal contending that as there was a subsisting interim order from the Federal High Court mandating the 2nd respondent to recognize her as the only recognized candidate of the 3rd respondent, she should be deemed to have actually contested the election having been installed as the candidate of the 3rd respondent by virtue of the said interim order. The Court of Appeal after hearing arguments canvassed by all the parties as per their briefs of argument dismissed the appeal, and upheld the judgment of the lower tribunal. On the date stated for the hearing of the appeal, the 1st respondent called attention to his preliminary objection which argument was incorporated in 1st respondent's brief filed on 1/11/2011. In it for the objection learned counsel on his behalf had distilled one issue for determination and that is:

Whether the Court of Appeal was right in upholding the decision of the lower tribunal striking out the petition on the ground that same was predicated on pre-election matters.

2nd respondent, Independent National Electoral Commission (INEC) in their brief of argument settled by Ahmed Raji incorporated the preliminary objection's argument. That brief was filed on 24/10/11.

The position of the 3rd respondent, Peoples Democratic Party (PDP) in its brief of argument filed on 30/9/2011 which brief was settled by Clems Ezika Esq. is that the appellant is the candidate who emerged victorious in the 3rd respondent Primary Election and she was the candidate the party sponsored for the election into the Anambra North Senatorial District of Anambra State at the National Assembly election held on the 9th day of April, 2011. That after the election, the 2nd respondent declared the 1st respondent as the winner of the said election and issued him with Form E C 8 E.

The appellant through her reply brief responded to the 2nd respondent's brief of argument filed on 3/11/2011.

Arguing the sole issue raised whether the one of 1st respondent or as couched by the 2nd respondent which are basically the same, the learned counsel for the 1st respondent contended that jurisdiction is the basis or the authority to embarking on any judicial action. That a Court is competent to exercise jurisdiction to entertain and deter-

mine a case when:

(a) It is properly constituted as regards members and qualification of members of the bench and no member is disqualified for one reason or another;

(b) The subject matter of the case is within its jurisdiction and there is no feature of the case which prevents the Court from exercising its jurisdiction;

(c) The case comes to the Court initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction.

He cited *Drexel Energy and National Resources Limited & 2 Ors v Trans International Bank Limited & 2 Ors* (2009) 15 WRN 1 at 52; *Oduko v. Government of Ebonyi State & 3 Ors* (2009) 25 WRN 10; *Oniwaka B. Ibrahim v. Ishola Balogun Fulani & 4 Ors* (2009) 18 WRN 1 at 80; *Prince Olusegun Adeola & 2 Ors v Mr. Isaac Adeyinka Ayeoba & 4 Ors* (2009) 23 WRN 118; *Madukolu v Nkemdilim* (1962) 2 SCNLR 341.

For the 1st respondent was further submitted that the law is that parties cannot by consent, omission or conduct confer on or expand the jurisdiction of a Court which it would otherwise not have had. Also that the Court cannot confer on itself jurisdiction which it does not have and that the jurisdiction of Court is ascertained from the claim of the plaintiff. He referred to *Ukpong v. Commissioner for Finance, Akwa Ibom State* (2007) ALL FWLR (Pt.350) 1246; *Obi v INEC* (2007) 1 NELR (Pt.1046) 565.

Prof. Ilochi Okafor SAN went on to submit for the 1st respondent in the brief of argument that the superior Courts are intended and presumed to have the general jurisdiction to entertain any matter except what is expressed by the provisions of law excepted or removed or excluded from it as section 246 (3) of the Constitution has done with its provision that all election petitions into the State and National Assemblies must terminate at the Court of Appeal and so this appeal cannot be smuggled in as is being sought in clear violation of that constitutional provisions He cited *Mobile Oil Producing Nigeria Unlimited v. Lagos State Environmental Protection Agency & 3 Ors* (2002) 12 SC (Pt.1) 26 at 37; *Onuaguluchi v. Ndu* (2001) 7 NWLR (Pt.712) 309.

He said the reliefs sought by the appellant are to have set aside

the judgment of the Court below and assume jurisdiction over the matter, hear and determine the same as if it were the Court below or in the alternative to remit the matter back to the tribunal for determination on the merits. That the alternative arm is jurisdiction to deal with the first arm and cannot be since by Section 285(6) of the Constitution as amended, the 180 days provided for the filing and determination of a petition has expired. He referred to *Capital Bancorp v S. S. L. Ltd* (2007) 3 NWLR (pt.1131) 430 at 435; *Dalorima v. Yale* (2009) 6 NWLR (Pt.1137) 409 at 415; *Ifezue v Mbadugha* (1984) L SCNLR 427. B

For the 2nd respondent, it was canvassed that having regard to section 246 (3) of the 1999 Constitution (as amended), the decision of the Court of Appeal in respect of appeals arising from decisions of Election Petition Tribunal concerning National and State House of Assembly elections petitions is final. That in view of the time the cause of action arose and with respect to section 246(3) of the Constitution, this provision of the constitution cannot be undermined. That the constitution being the supreme law of the land prevails over other statutes including the Supreme Court Act. That the Court of Appeal's decision on the 19th August, 2011 is final and this instant appeal by the appellants is an abuse of court process. He referred to *Osakwe v. Federal College of Education, Asaba* (2010) 187 LRCN L70 at 199; *Amgbare v. Oji Lekwauwa* (2011) 8 EPR 843 at 853. C D E

Learned counsel for the appellant along the line of their brief of argument settled by Chioma Oguejiofor Esq. contended that in so far as the Court below had found that the election petition in this appeal deals on pre-election issues, this Court has jurisdiction to entertain the appeal, the provisions of section 246(3) of the 1999 Constitution notwithstanding. That *Uche v. Onwe* (2011) 4 NWLR G (Pt.1237) 386 at 428 availed the appellant to entertain and determine this appeal. F

The 3rd respondent through counsel argued on the same side as the appellant being of the strong position that the appellant was the candidate, 3rd respondent sponsored for the election on 9th April, 2011. That based on section 285 (1) of the constitution of the Federal Republic of Nigeria 1999, once a Returning Officer to an election had made the return whether it is due or undue return any person challenging the action of the Returning Officer can only find H

solace in the Election Petition Tribunal. He stated that the State High Court has no power to make a “RETURN”. He went on to say that the pronouncement on legality or validity of such a return is vested on the Election Tribunal by virtue of section 285(1)(a) of the Electoral Act 2010 as amended. He cited *Uche v Onwe* (2011) 4 NWLR B (Pt.1237) 386 at 426; *Enemuo v. Duru* (2006) AFWR 304 at 508.

Learned counsel further contended for the 3rd respondent that the 3rd respondent sponsored the petitioner appellant and submitted her name as its candidate to the 2nd respondent for the election. That there is only one Peoples Democratic Party (PDP) registered with the 2nd respondent candidate to an election. That there cannot be a valid return without a valid candidature and sponsorship. He said that the return of the 1st respondent by the 2nd respondent is invalid as the 2nd respondent lacks the power to return a D person not sponsored by the 3rd respondent since it is the 3rd respondent that won the election. That the era of justice by technicalities has long gone and no Court should allow the ghost of technicality to haunt it from its grave. He cited *Egolum v. Obasanjo* (1999) 7 NWLR (pt.611) 355 at 387. He concluded by saying that the Trial E Tribunal and the Court of Appeal reasoned wrongly that the petition is predicated on pre-election matters subject of his appeal.

That being a summary of the submissions in connection with the two preliminary objections, one from 1st respondent and the second from 2nd respondent even though the objections are really F on the same point. However, at the root of the matter is the rightness or impropriety in the sponsorship of the candidate of the 3rd respondent. While the appellant insists that she was the candidate sponsored by the 3rd respondent who agrees, the 1st respondent contends she is the one. That brings into focus what the cause of action for which the plaintiff/appellant sought the relief from the Election Tribunal holden at Awka which on appeal, the Court of Appeal had no difficulty affirming what the Trial Tribunal did and that is that the process was wrongly initiated in the Tribunal instead of the High Court, H whether State or Federal. It becomes necessary therefore to restate the relevant statute and that is section 87(9) of the Electoral Act, 2010 (amended) which provides thus: Section 87 (a):

*“Notwithstanding the provisions of this Act or rules of a political party, an aspirant who complains that any of the provisions of this*

*Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or FCT for redress."*

The above section of the Electoral Act situated in context with the facts or circumstances including the cause of action and the relief sought are clearly what section 87 (9) of the Electoral Act has covered and provided for. The forum is not within the purview or jurisdiction of the Election Tribunal as the appellant as plaintiff had ventured into, rather the forum appropriately so is State High Court or that of the Federal capital Territory. The wrong initiation of process is not one of those irregularities that could be repaired or ignored or waived as it is deep rooted in the competence or jurisdiction of the particular Court as provided for by the constitution taking along the Electoral Act.

As a follow up to the above, the appeal of the appellant and supported by 3rd respondent that in so far as the Court below had found that the election petition in this appeal dealing with pre-election issue this Court being the final Court in respect thereof can step in and adjudicate fully or in the alternative send to the High Court to hear it fully. This is a very colourful and attractive posturing which has been pushed forward without the attendant statutory mandate. I would cite the relevant constitutional provisions of the 1999 Constitution (as amended) and it provides as follows:

*"Section 246 (3):*

*The decisions of the Court of Appeal in respect of appeals arising from National and state Houses of Assembly Elections shall be final"*

That being the clear position the appeal from the Awka Election Tribunal to the Court of Appeal had settled for all time with finality the cause of action that bought about the suit, therefore what the appellant including their supporter, 3rd respondent is attempting here is to smuggle in a contraband through the front door by subterfuge and in this respect I cannot resist the quotation from Onuaguluchi v. Ndu (2001) 7 NWLR (Pt.712) 309 at p.321 per Uwaifo JSC in relation to section 246 (3) of the old Constitution of 1999 *impari materia* with the same section 246(3) of the amended constitution and it is as follows:

*"This Court will not permit or encourage any subterfuge un-*

*der which it may assume jurisdiction to hear an appeal in respect of which the constitution has in clear and unambiguous language made the Court of Appeal the final Court. It follows that an appeal in respect of a decision of the Tribunal in petition when decided by the Court of Appeal cannot be taken on appeal to the Supreme Court*  
 B *but is final for all purposes... it must be emphasised that such finality applies also to every interlocutory decision or nay decision taken in respect of a matter or on issue concerning or arising from the decision reached in the appeal. No appeal shall lie from it to any other*  
 C *Court even if it is patently wrong."*

The matter of the alternative reliefs now being sought that is for this Court to remit the matter to the lower appropriate trial Court. That in clear confrontation to section 285(6) of the Constitution 1999 as amended as follows:

D "An election Tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition."

From that, it needs no special computation that the 180 days had exhausted been long time ago. The constitution has clearly made the stipulation and it is not for any one or even this Court to alter or  
 E ignore but must follow. The words of the statute are plain, clear and not in any way ambiguous and has not left any room for manoeuvre and so the ordinary interpretation is what it is, and translated mean that the effluxion of time has made the alternative relief asked for impossible. See Capital Bancorp S.S.L. Ltd (2007) 3 NWLR (Pt.1020)  
 F 148; Tanko v. State (2009) 4 NWLR (pt.1131) 430 at 435.

From the foregoing and the more detailed reasoning of the lead ruling, this Court lacks the jurisdiction to enter into what is being asked of it and therefore no difficult in holding that there is no juris-  
 G diction in this Court and the trial tribunal, the appeal is struck out.

No order as to costs.