

**SUPREME COURT OF NIGERIA**  
7TH DECEMBER, 2012. SC. 460/2011  
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-  
COOMASSIE, S. GALADIMA, N. S. NGWUTA,  
C. B. OGUNBIYI, JJSC**

SULEIMAN ATAGO ..... APPELLANT  
AND  
1. MR. IBISO NWUCHE  
2. PEOPLES DEMOCRATIC PARTY  
3. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION ..... RESPONDENTS

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APPEALS - Grounds - Mixed law & facts - Ground can be only of facts or mixed law and facts - If it is based on a decision of court - Derived from disputed facts (H1)

APPEALS - Ground of law - Ground is of law where court considered wrong criteria - Issues are based on legal interpretation of documents - And the complaint is about misapplication of law (H2)

ACTIONS - Commencement procedure - Competence - Form of commencement does not make an action incompetent - As what is important is the justice of the case (H3)

COURTS - Jurisdiction - Actions - Commencement procedure - Since originating summons cannot properly initiate the matter - Court can convert the summons and order pleadings (H4)

***FACTS***

Plaintiff/appellant filed an originating summons at the Federal High Court Port Harcourt in a pre-election matter claiming inter alia, a declaration that 1st defendant/respondent is not a qualified registered member of 2nd defendant/respondent (Peoples Democratic Party) as required by the Constitution of the party and its guidelines for the conduct of the primary election into the Rivers State House of Assembly. On the other side, 1st respondent filed a counter-affidavit of 24 paragraphs.

After the respective parties have addressed the court, the learned trial Judge proceeded to strike out appellant's case for being incompetent on the ground that conflicts exist in affidavits of the parties. Being dissatisfied, appellant filed appeal at the Court of Appeal, Port Harcourt. The court dismissed the appeal and upheld the decision of the trial court on the same ground. Aggrieved further, appellant appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

*"1. Whether the learned Justices of the Court of Appeal were right in law to have upheld the decision of the Federal High Court which struck out the Appellant's case? This issue was distilled from ground 1 of the grounds of Appeal.*

*2. Whether the Learned Justices of the Court of Appeal were right in law to have held that there exists conflict in the affidavit evidence before them as far as the Appellant's originating summons was concerned? This issue was distilled from ground 2 of the grounds of Appeal.*

*3. Whether the Learned Justices of the Court of Appeal were right in law in refusing to hear the case of the Appellant on the merit? This issue was distilled from ground 3 of the grounds of Appeal."*

**HELD** (Unanimously allowing the appeal per **GAL-ADIMA JSC**)

*APPEALS - Grounds - Mixed law & facts*

**1. With due respect, the submission of the learned counsel is preposterous and completely unreasonable. It has not been shown by reference to a particular conflict or disputed facts or mixed law and facts upon which the court below based its decision. In other words, the two lower courts did not reach any decision one way or the other based on their evaluation of facts. A ground of appeal can only be of facts or mixed law and facts if it is based on a decision of lower court derived from disputed facts. Since none of the appellant's ground of appeal raises an issue of law which is derived from disputed facts, they cannot be regarded as grounds of mixed law and**

*fact.* (p. 3002 B)

*APPEALS - Ground of law*

**2. This Court has in a number of cases clearly categorized and recognized errors which in a ground of appeal could be regarded as ground of law. This includes: where an adjudicating tribunal or court, in reaching its decision took into account some wrong criteria; where the issues raised on the grounds of appeal are based on legal interpretation of deeds, documents, terms, words and phrases (and inference drawn from them); and where the complaint is about misunderstanding of the law or misapplication of the law by the adjudicating tribunal or court etc.** (p. 3002 D)

*ACTIONS - Commencement procedure*

**3. From the foregoing passages of the Judgment of the court below, it undoubtedly upheld the procedure utilized by the trial court, when it struck out the Appellant's case. With due respect to the learned Justices of the court below they erred in law. They ought to have ordered for the trial of the Appellant's case by ordering that pleadings should be filed at the trial court. This would have brought about justice as the case would have been heard on the merit as it would have equally given the parties the opportunity of fair hearing. The form of commencement of an action does not necessarily make it incompetent. It does not matter whether the action was begun by writ of summons or by originating summons. What is most important is the question of justice of the case.** (p. 3006 C)

*COURTS - Jurisdiction - Actions - Commencement procedure -*

**4. The court below rightly declined to hear the matter because of the conflicting affidavit. Therefore since the issue in controversy pertains to determination of who was lawfully nominated candidate of the 2nd Respondent at the primary election, the trial court lacked the jurisdiction to entertain the appellant's claim without pleadings. However, as a trial court, it has the jurisdiction to convert an Originating Summons and order pleadings in the matter since the originating summons is found**

***to be an improper procedure of commencing the instant case. The Learned trial Judge failed to do exactly that on seeing that the affidavits of the parties were conflicting and irreconcilable.*** (p. 3007 G)

**B REPRESENTATION**

Dr. A. Amuda-Kannike ESQ, for the Appellant

Aham Eke Ejelam ESQ. with B.O.B Udeibe Esq., for the 1st Respondent

**C** Chief A.O. Ajan Esq with M. Kilani Esq., for the 2nd Respondent

E.Y. Kurah Esq., for the 3rd Respondent

**CASES REFERRED TO**

Bamgboye v. University of Ilorin (1999) 6 SCNJ 295 at 302.

**D** ECSC Ltd V. N.M.B. ltd (2006) 14 WRN 45 at 51.

Opulayo & ors v. Omoni Wari & anor (2007) 6 SC 35

Doherty v. Doherty 1968 NMLR 241

Dagogo v. A.G River State (2000) FWLR (Pt.140) 196

Omojola v. Oyateme (2009) All FWLR (Pt.453) 134.

**E** Emezi v. Osuagwu (2005) 12 NWLR (pt. 939) 340 at 367

Ukpata v. Toronto Hospital (Nig.) Ltd (2010) All FWLR (Pt.532) 1709

Johnson v. Mobil Producing (Nig.) Unlimited (2010) All FWLR (Pt.530)1337

**F** Falobi v. Falobi (1967) 9 - 10 SC 1

Akinsete v. Akindutire (1966) 1 SC NLR 389

General -Aviation Service ltd. v. Thahal (2004) 10 NWLR (Pt. 885) 5

Dapialong v. Lalong (2007) 5 NWLR (Pt.1026) 99.

Osunbade v. Oyewunmi (2007) 4 - 5 SC,

**G** Ejura v. Idris & ors. (2006) 4 NWLR (Pt. 971) 538.

Famfa oil ltd. V. A.G Fed.(2003) 18 NWLR (pt. 852) 453.

Peoples Democractic Party v. Abubakar (NO. 2) (2007) 3 NWLR (pt. 1022) 515

**H STATUTES & RULES REFERRED TO**

Constitution of Federal Republic of Nigeria 1999 (as amended), s.233(3)

Federal High Court (Civil Procedure) Rules 2009, O.3 r.8

**LEAD JUDGMENT BY GALADIMA JSC**

This appeal emanated from the Judgment of the Court of Appeal Port Harcourt Division in a pre-election matter, delivered on the 7th day of December, 2011. The case that led to this Judgment was with respect to an appeal from the Federal High Court and the originating summons filed by the Appellant against the Respondents in the said pre-election matter. The conclusion of the Judgment of the court below that prompted this further appeal to this Court was as follows:-

*“The conflict in the affidavits of parties which disintitiled the lower court from determining the appellants’ claim persist. The same conflict equally disintitle us from proceeding as well ... In Chairman NPC V. Chairman Ikere Local Government (2001) 13 NWLR (Pt. 731) 540 E.O. Ayoola JSC opined at P. 559 of the report that in spite of the clear and violent (sic) in the opposing affidavits the trial tribunal had proceeded on an originating summons. It was held that the procedure adopted by the tribunal was contrary to well established principles and not in accord with the spirit of the rules of procedure contained in the enabling law. In the instant case the lower court avoided that mistake. Its decision is unassailable...”*

The facts of this case, as can be gleaned from the record of appeal are that the appellant filed an originating summons at the Federal High Court in Port Harcourt in a pre-election matter claiming, inter alia, thus:

*“1. A declaration that the 1st Defendant is not a qualified registered member of the PDP as required by the Constitution of the party and its guidelines for the conduct of the primary election into the Rivers State House of Assembly notwithstanding his purported registration as such.*

*2. A declaration that the 1st Defendant by the combined effect of the provisions of the 1999 Constitution of the Federal Republic of Nigeria as Amended, the Constitution and guidelines of the Peoples Democratic Party (PDP) and enabling Laws, Rules and Regulations in Nigeria, was not qualified to contest the primaries election in PDP in Ahoada East Local Government of Rivers State of Nigeria on the 4th January, 2011 not being a qualified registered member of the party to contest the party primary election as required by the party Constitution and guidelines.*

3. *A declaration that the participation of the 1st Defendant in the PDP Primary Election held on the 4th January, 2011 at Ahoada Town in Rivers state to elect the PDP flag bearer for the Ahoada East Local Government Constituency Two (2) seat into the Rivers State House of Assembly is illegal, unlawful and unconstitutional and therefore null and void and of no effect whatsoever.*

4. *A declaration that the subsequent inclusion and forwarding of the name of the 1st Defendant in the list of candidates of the PDP in Rivers state by the 2nd Defendant to the 3rd Defendant as the party's flag bearer and as the party's candidate to be sponsored by the party to contest the Ahoada East Local Government Constituency Two (2) seat for the Rivers State House of Assembly in the 2011 is illegal, unlawful and unconstitutional and therefore null and void of no effect whatsoever.*

5. *An order of court setting aside and or expunging the name of the 1st Defendant from the list of candidates of the PDP in Rivers state forwarded to the 3rd Defendant to be sponsored to contest the House of Assembly Election in 2011 and in its place enlist, replace and or substitute the name of the 1st Defendant with the name of the Plaintiff as winner of the primary Election of the PDP on the 4th of January, 2011 at Ahoada Town to be sponsored by the PDP as its candidate to contest the Rivers State House of Assembly Constituency Two (2) seat in the 2011 general election having won the highest number of votes cast amongst the other qualified and registered PDP candidates."*

The 1st Respondent filed a counter-affidavit of 24 paragraphs. After the respective parties have addressed the court, the learned trial Judge proceeded to strike out the Appellant case for being incompetent. As stated above the court below upheld that Judgment.

The three issues identified by the Appellant as arising from his three grounds of appeal are stated as follows:-

1. *Whether the learned Justices of the Court of Appeal were right in law to have upheld the decision of the Federal High Court which struck out the Appellant's case? This issue was distilled from ground 1 of the grounds of Appeal.*

2. *Whether the Learned Justices of the Court of Appeal were right in law to have held that there exists conflict in the affidavit evidence before them as far as the Appellant's originating summons*

was concerned? This issue was distilled from ground 2 of the grounds of Appeal.

3. *Whether the Learned Justices of the Court of Appeal were right in law in refusing to hear the case of the Appellant on the merit? This issue was distilled from ground 3 of the grounds of Appeal.* ”

On his own part the 1st Respondent submitted the following two issues for determination:

“(a) *Whether the Learned Justices of the Court of Appeal, were not right in law in upholding the decision of the Federal High Court that the Appellant’s case was wrongly commenced by way of originating summons?*”

(b) *Whether the Learned Justices of the Court of Appeal were not right in law to have held that there exists no legal reason for the Court of Appeal to interfere with the trial court’s refusal to try and determine Appellant’s suit as commenced and constituted by way of originating summons?”*

The 2nd Respondent has deemed it expedient to adopt the issues formulated by the appellant. The Appellant has deemed it necessary to file Reply briefs to the 1st and 2nd Respondent’s briefs of argument.

The 3rd Respondent in its brief identified two issues for determination as follows:-

“1. *Whether the Honourable Court of Appeal was right in affirming the Judgment and consequential order of the trial court. (Grounds 1 & 2)*”

2. *Whether the Honourable Court of Appeal was right when it declined to invoke Section 15 of the Court of Appeal Act. (Ground 3)”*

On 20th September 2012 when this appeal was heard, learned counsel for the parties identified their respective briefs. They adopted and relied on them. 2nd Respondent drew the attention of this Court to Notice of Preliminary objection filed on 02/04/2012. I shall determine the preliminary objection raised by the 2nd Respondent first. The grounds of objection is that grounds 2 and 3 of the Notice of Appeal being grounds of mixed law and facts, for which the Appellant failed to seek and obtain leave before filing, are incompetent and therefore issues 1, 2, and 3 raised by the Appellant are incompetent. Before proceeding further with the appeal there is need

to look into the preliminary objection raised by the 2nd Respondent. This court is urged to strike out all or any of issues 1, 2 and 3 predicated on the three grounds of appeal which are incompetent for failure to seek and obtain leave. This is an assumption that the grounds are of mixed law and facts.

***With due respect, the submission of the learned counsel is preposterous and completely unreasonable. It has not been shown by reference to a particular conflict or disputed facts or mixed law and facts upon which the court below based its decision. In other words, the two lower courts did not reach any decision one way or the other based on their evaluation of facts. A ground of appeal can only be of facts or mixed law and facts if it is based on a decision of lower court derived from disputed facts. Since none of the appellant's ground of appeal raises an issue of law which is derived from disputed facts, they cannot be regarded as grounds of mixed law and fact. This Court has in a number of cases clearly categorized and recognized errors which in a ground of appeal could be regarded as ground of law. This includes: where an adjudicating tribunal or court, in reaching its decision took into account some wrong criteria; where the issues raised on the grounds of appeal are based on legal interpretation of deeds, documents, terms, words and phrases (and inference drawn from them); and where the complaint is about misunderstanding of the law or misapplication of the law by the adjudicating tribunal or court etc. See BAMGBOYE V. UNIVERSITY OF ILORIN (1999) 6 SCNJ 295 at 302. ECSC LTD V. N.M.B. LTD (2006) 14 WRN 45 at 51.***

In the instant case the grounds of appeal are centred on wrong interpretation and application of Order 3 Rule 8 of the Federal High Court Civil Procedure Rules 2009. The case of OPULAYO & ORS V. OMONI WARI & ANOR (2007) 6 SC 35 cited and relied by the 2nd Respondent is not relevant. The issues involved in the instant case has nothing to do with the evaluation of evidence neither was it based on disputed facts. None of the grounds of appeal falls within the province of S.233(3) of the 1999 constitution (as amended). The appellant therefore did not require leave of the court below or this court. I am therefore of the view that the objection of the 2nd Re-



spondent lacks merit and same is accordingly overruled. The issues as formulated by the appellant are not incompetent. Hence the appeal is to be considered on the issues raised.

Now to the consideration of the issues distilled by the appellant from the three grounds of appeal as adopted by the 2nd respondent in their brief of argument. B

#### ISSUE NUMBER ONE:

*“Whether the learned Justices of the Court of Appeal were right in law, to have upheld the decision of the Court which struck out the Appellant’s case?”* C

The issue is said to have been distilled from ground 1 of the appellant’s grounds of appeal challenging the finding of the court below to the effect that the court was wrong in upholding the decision of the trial Federal High Court. It is submitted that what is meant by that decision is that once a party files a case under originating summons instead of through the normal writ of summons, no matter how reasonable and good the case may be, it must not be heard any longer and no provision of fair hearing under the constitution should be applicable. It is submitted that the court below ought to have ordered for the trial of the Appellant’s case by ordering that the pleadings should be filed at the trial court to allow the case to be heard on the merit. Learned counsel for the Appellant further submitted that a pre-election matter on a primary election that was filed before the main election, remains a pre-election matter even after the main election and it is maintainable as such, but once the matter is struck out after the election as incompetent for failure to comply with a particular procedure under the Rules of court, any new case filed would on its own become incompetent since election is now over. Referring to Order 3 Rules 1, 6, 8 and Order 13 Rule 27; Order 51 Rules 1, and 2 of the Federal High Court Civil Procedure Rules 2009.... the Appellant submitted that their combined reading and applying them, his case ought not to have been struck out. Further referring to the case of **CHAIRMAN NPC VS CHAIRMAN IKERE LOCAL GOVERNMENT** (supra), the Appellant submitted that the case is distinguishable from instant case. He contended that this Court did not say in the case that the claim be struck out because originating summons was used or that it contained disputed facts. It is explained that in this case relied upon by the court below, the court ordered for oral evi- F  
G  
H

dence and that the trial to be conducted on the merit.

In response to issue No. 1, the 1st Respondent submitted that the court below was right, in law in affirming the decision of the trial Federal High Court. That it is very glaring that the affidavit in support of Appellants' originating summons has been sufficiently challenged by the Counter-affidavit of the opposing parties. The Learned counsel for the 1st Respondent submitted that a close look at the question raised by the Appellant and the facts deposed to by him, in the affidavit in support of the proceeding in the lower court, there are serious facts which cannot be resolved solely on affidavit evidence. It is contended that there are dispute of facts that tend to establish the cause of action in which the trial court was asked to grant declaratory reliefs sought. Therefore, real likelihood of dispute on facts has turned the proceedings into a hostile one for which the originating summons is inappropriate. He relied on *DOHERTY V. DOHERTY* 1968 NMLR 241, *DAGOGO V. ATTORNEY-GENERAL OF RIVER STATE* (2000) FWLR (Pt.140) 196 and *OMOJOLA V. OYATEME* (2009) All FWLR (Pt.453) 134.

In response to issue No. 1 the 2nd Respondent's Learned Counsel submitted that since the concurrent findings of the lower courts are not perverse, their decisions in the circumstance cannot be set aside. Relying on *EMEZI V. OSUAGWU* (2005) 12 NWLR (pt. 939) 340 at 367, learned counsel contended that a court will be justified to decline ordering pleadings after findings that a case was wrongly commenced by originating summon, if nothing useful will be achieved by an order for exchange of pleadings. It is submitted that the Order 3 Rule 8 of the Federal High Court (Civil Procedure) Rules vested the court with the power of discretion in the circumstance of this case, not to order pleadings but instead strike out the case.

In response to the first issue, the learned counsel for the 3rd Respondent submitted that the contention of the Appellant that pleadings ought to have been ordered instead of striking out the case has not taken in cognizance the power conferred on the Federal High Court by Order 3 Rule 8 of the Federal High Court Rules, 2009. The principles enunciated in the two cases of *EMEZI V. OSUAGWU* (supra), *UKPATA V. TORONTO HOSPITAL (NIG.) LTD* (2010) All FWLR (Pt.532) 1709, and *JOHNSON V. MOBIL PRODUCING (NIG.)*

UNLIMITED (2010) All FWLR (Pt.530) 1337 at 1361 were further heavily relied on by the 3rd respondent. Furthermore although the Respondent put up plausible argument, but he was stingy with the peculiar circumstance of this case. The argument is that since the appellant is challenging the primary election conducted by the 2nd respondent and has asked the court to declare him the candidate of the 2nd Respondent for the election into the Rivers State House of Assembly and since the concurrent findings by the two courts is based on the lack of jurisdiction to adjudicate on the matter, therefore, the ordering of pleadings was unnecessary as this would not have changed the colouration of the suit, whatsoever. B C

Now to the consideration of the all-embracing issue No. 1. The part of the judgment of the trial court which gave rise to the appeal to the court below by the appellant reads thus:

*“From the facts and circumstances of this case as presented by the plaintiff, in his affidavit, I am of the view that the proceeding is hostile as facts are substantially in dispute and cannot be resolved vide this originating summons. Having come to the conclusion, I am now to consider the appropriate order to be made in the circumstances of this case. The General Principle of Law as I understand it is that where the court comes to the conclusion that the action ought not to have been commenced by originating summons, it shall proceed to order pleadings. Where however nothing will be achieved by an order for exchange of pleadings, an order for pleadings will not be made. This is the current judicial thinking as stated by the Supreme Court in Emezi V. Osuagwu (2005) 12 NWLR (Pt.939) pg. 340 at 347.”* D E F

The Learned Justice of the Court of Appeal in affirming the Judgment of trial court held thus: G

*“Ordinarily, the Lower court ought to have called for oral evidence and proceed thereon to determine the cause before it, See FALOBI V. FALOBI (1967) 9 - 10 SC 1, AKINSETE V. AKINDUTIRE (1966) 1 SC NLR 389 AND GENERAL-AVIATION SERVICE LTD. V. THAHAL (2004) 10 NWLR (Pt. 885) 50 at 96.* H

*But this is not an ordinary proceedings, it is a pre-election matter where both time and greater diligence are of essence of proceedings. The Appellant has argued at the tribunal and still persists that his cause is determinable notwithstanding the strong conflict in*

*the contents of the affidavits of both sides. The tribunal is right to have held otherwise."*

At page 813 lines 11 - 16 the court below held further thus:  
*"The procedure the Appellant resorted to does not satisfy the requirements of Order 3 Rules 6 and 7 of the lower court and the Judge by virtue of Rule 8 of the same Order is not bound to determine any such question of Constitution if in his opinion it ought not to be determined through that procedure. The very rule empowers the court to make such orders as, the Judge deems fit ... In the instant case the lower court has avoided that mistake. Its decision is unassailable."*

***From the foregoing passages of the Judgment of the court below, it undoubtedly upheld the procedure utilized by the trial court, when it struck out the Appellant's case. With due respect to the learned Justices of the court below they erred in law. They ought to have ordered for the trial of the Appellant's case by ordering that pleadings should be filed at the trial court. This would have brought about justice as the case would have been heard on the merit as it would have equally given the parties the opportunity of fair hearing.*** See DAPIALONG V. LALONG (2007) 5 NWLR (Pt.1026) 99. OSUNBADE V. OYEWUNMI (2007) 4 - 5 SC, FALOBI V. FALOBI (supra) EJURA V. IDRIS & ORS (2006) 4 NWLR (Pt. 971) 538. ***The form of commencement of an action does not necessarily make it incompetent. It does not matter whether the action was begun by writ of summons or by originating summons. What is most important is the question of justice of the case.*** See FAMFA OIL LTD. V. ATTORNEY-GENERAL OF THE FEDERATION (2003) 18 NWLR (pt. 852) 453. PEOPLES DEMOCRATIC PARTY v. ABUBAKAR (NO. 2) (2007) 3 NWLR (pt. 1022) 515 at 544 - 545.

On the point that the Appellant's case contains no live issue because the main election has already taken place and that a pre-election matter cannot serve any useful purpose any longer, I am of the opinion that the Appellant's case as contained in his reliefs contains five issues. This is because the appellant's grouse is that the Respondent is not qualified to contest the primary election. The case of MOROHUNFADE V. ADEOTI (1997) 6 NWLR (Pt. 508) 326 cited by the 1st Respondent counsel is inapplicable because the declara-

tion being sought by the appellant has not ceased to be justiciable and maintainable by the appellant who has alleged that his mandate has been “stolen”.

#### ISSUE NO. TWO:

*“Whether the learned Justices of the Court of Appeal were right in law to have held that there exist conflicts in the affidavit evidence before them as far as the appellant’s originating summons was concerned.”*

By this issue the appellant seeks to question the decision of the two courts below that the proceedings were hostile and therefore not fit for originating summons. From the affidavit in support of the originating summons filed by the appellant as well as the nature of the claims, which was meant to determine who, between the appellant and the 1st respondent, was the eligible candidate of the 2nd respondent to contest the primary elections conducted to select who would represent the party in the election into the Rivers State House of Assembly, it is not in doubt, that by the nature of the claims and the depositions in the affidavits of the parties there was every likelihood of substantial dispute between the parties. The Appellant has rightly contended that pleadings ought to have been ordered instead of striking out the case. Order 3 Rule 8 of the Federal High Court confer on the learned trial Judge to make the appropriate order, if in his opinion the appellant’s cause ought not to be determined on originating summons. This is clear. However, the instant case when the court below found that the suit been wrongly commenced through originating summons, pleadings should have been ordered, given the peculiar nature of this case, I do not agree with the learned counsel for the Respondents that nothing useful would have been achieved, if pleadings were ordered. It is wrong to have struck out the Appellant’s suit given the facts and peculiar circumstances, of this case.

***The court below rightly declined to hear the matter because of the conflicting affidavit. Therefore since the issue in controversy pertains to determination of who was lawfully nominated candidate of the 2nd Respondent at the primary election, the trial court lacked the jurisdiction to entertain the appellant’s claim without pleadings. However, as a trial court, it has the jurisdiction to convert an Originating Summons and order pleadings in the matter since the originating***

***summons is found to be an improper procedure of commencing the instant case. The Learned trial Judge failed to do exactly that on seeing that the affidavits of the parties were conflicting and irreconcilable.*** See further P.D.P V. ABUBAKAR (No.2) 2007 3 NWLR (Pt.1022) 815 at 544 - 545 DAPIALONG V. LALONG (supra) and FAMFA OIL LTD. V. ATTORNEY-GENERAL OF THE FEDERATION (supra).

Consequently the court below could not have had jurisdiction to entertain the Appellant's claims by invoking section 15 of the Court of Appeal Act. The Appellant has urged this court not to remit the case to the court below for retrial as this is a pre-election matter which deserves urgent attention. I have equally taken note of this but in the peculiar circumstance of this matter, it is only appropriate to remit the case to the trial Federal High Court, Port Harcourt before another judge for trial on pleadings duly filed and exchanged by the parties and I so order. I do not make order as to costs in the circumstance of the case. Parties are to bear their respective costs.

### E **MOHAMMED JSC**

In the action at the trial court began by the Appellant Originating Summons, the 1st and main relief sought is -

*"A declaration that the 1st Defendant is not a qualified registered member of the PDP as required by the Constitution of the Party and it guideline for conduct of Primary Election into the Rivers State House Assembly not withstanding his purported as such."*

From the reliefs sought in the Originating Summons and affidavit in support of the claims, the facts are in dispute and are hostile substantially which can not be resolved on affidavit in the originating Summons: See cases Doherty V. Doherty (1964) NMLR 144. The question is whether the trial court and Court of Appeal were right in holding that the appellant's case being a pre-election matter cannot be heard and determined on pleadings before the election and therefore may become a dead issue after election? The answer to this question of course is in negative. This is because in the absence of time limited for hearing pre-hearing matters under 1999 constitution and Electoral Act, 2010 as Amended, the trial court having found that the case ought not to have been began by origination Sum-

mons, should have ordered the parties to file pleadings and hear the case on the same, the time the case could be heard and concluded is of no moment to affect the hearing on the merit.

I have been privileged before today of reading in draft the Judgment just delivered by my learned brother Galadima, JSC., in this appeal. I entirely agree that the appeal deserves to succeed and I also allow it. Having regard to the nature of the dispute between the parties in this pre-election matter, the case was not suitable for hearing and determination under the Originating Summons Procedure of the trial Federal High Court. However, since the case was heard and determined before the election, the Plaintiff now Appellant's case ought not to have been struck-out on the face of the provisions of Order 3 Rule 8 of the Federal High Court Rules 2009 which gave the trial Court clear discretion to order such a case to be heard on pleadings. See *Emezie Vs Osuagwu* (2005) 12 NWLR (Pt.938) 340 at 420. The court below was therefore wrong in failing to rectify the error of the trial Court in refusing to order the hearing of the Plaintiff, now appellant's case on pleadings.

Accordingly, for the above and fuller reasons contained in the leading Judgment, I also allow this appeal, set aside the Judgment of the Court below and remit the case to the federal High court Port-Harcourt for hearing by another Judge. I am not making any order on costs.

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### **MUNTAKA-COOMASSIE JSC**

This is another pre-election matter. The Federal High Court Port-Harcourt was approached by filing an originating summons claimant among other things thus:

*"1. Declaration that the 1st Defendant is not a qualified registered member of the P.D.P. as required by the constitution of the party and its guidelines for the conduct of the primary election into the Rivers State House of Assembly notwithstanding his purported registration as such.*

*2. A declaration that the 1st Defendant by the combined effect of the provisions of the 1999 Constitution of the Federal Republic of Nigeria as Amended, the constitution and guidelines of the Peoples Democratic Party (PDP) and enabling laws, Rules and Regu-*

*lation in Nigeria, was not qualified to contest the primaries election in PDP in Ahoada East Local Government Area River State of Nigeria on the 4th of January 2011 not being a qualified registered member of the party constitution and guidelines.*

B 3. *A declaration that the participation of the 1st Defendant in the PDP primary election held on the 4th January 2011 at Ahoada Town in Rivers State to elect the PDP flag bearer for the Ahoada East Local Government Constituency two (2) seat into the Rivers State House of Assembly is illegal, unlawful and unconstitutional and therefore null and void and of no effect whatsoever.*

C 4. *A declaration that the subsequent inclusion and forwarding of the name of the 1st Defendant in the list of candidates of the PDP in Rivers State by the 2nd Defendant to the 3rd Defendant as the party's flag bearer and as the party's candidate to be sponsored D by the party to contest the Ahoada east Local Government Constituency Two (2) seat for the Rivers State House of Assembly in 2011 is illegal, unlawful and unconstitutional and therefore null and void of no effect whatsoever.*

E 5. *An order of court setting aside and or expunging the name of the 1st Defendant from the list of candidates of the PDP in Rivers State forwarded to the 3rd Defendant to be sponsored to contest the House of Assembly Election in 2011 and in its place enlist, replace and or substitute the name of the 1st defendant with the name F of the plaintiff as winner of the primary election of the PDP on the 4th of January, 2011 at Ahoada Town to be sponsored by the PDP as its candidate to contest the Rivers State House of Assembly constituency two (2) seat in the 2011 general election having won the highest number of votes cast amongst the other qualified registered G PDP candidates".*

The 1st Respondent, Mr. Ibiso Nwuche, filed a counter affidavit of 24 paragraphs and after the addresses of both counsel were received by the trial Federal High Court Judge, the application was struck out on the ground that the said application is incompetent. H The Court of Appeal Port-Harcourt Division upheld the trial court's decision. The appellant is clearly attacking the unanimous decision of the Court of Appeal. The appellant distilled three (3) issues for the determination of this appeal before us. The 1st respondent, Mr. Ibiso Nwuche formulated two (2) issues for determination. The 2nd re-



spondent, Peoples Democratic Party, adopted and relied on the two issues as formulated by the Appellant herein. The appellant decided to file the Appellant's reply brief of argument, However the third respondent, Independent National Electoral commission INEC) distilled two (2), issues for determination.

1. Whether the learned Justices of the Court of Appeal were not right in law upholding the decision of the Federal High Court that the Appellant's case was wrongly commenced by way of originating summons? B

2. Whether the learned Justices of the Court of Appeal were not right in law to have held that there exists no legal reason for the Court of Appeal to interfere with the trial court's refusal to try and determine appellant's suit as commenced and constituted by way of originating summons? C

Learned Counsel for the parties respectively adopted their respective brief of argument before us on 20/9/2012. I have had the privilege of reading in draft the lead judgment of my learned brother Galadima JSC. I agree entirely with his Lordship's reasoning and conclusion. This is the perennial problem associated with approaching a Court with originating summons especially when there are conflicting affidavits. The best way in approaching the Court under the present circumstances is by way of civil summons. I think I shall wholeheartedly agree that the court below was perfectly right in declining jurisdiction. See *Famfa Oil Limited v. Attorney-General of the Federation* (2003) 18 NWLR (pt.852) 453 – 454, *PDP v. Abubakar* (No.2) 2007 3 NWLR (Pt.1022) 815 at 544-545 per my learned brother Adekeye JCA as she then was. The appeal I think deserves to be allowed. The matter is therefore remitted back to the trial court, Federal High Court Port-Harcourt to be heard by another judge of the Federal High Court on pleadings duly filed and exchanged but never on originating summons. No order as to costs. D  
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**OGUNBIYI JSC**

The suit in this matter was taken out on an origination summons before the Federal High Court Port Harcourt wherein the appellant sought for four declarative reliefs which are reproduced in the lead judgment. H

All parties contested the suit by filing affidavits and counter affidavits. In its considered judgment delivered on the 14th day of April, 2011, the learned trial judge found and concluded thus:-

*“From the facts and circumstance of this case as presented by the plaintiff in his affidavit, I am of the humble view that the proceeding is hostile and as facts are substantially in dispute and cannot be resolved vide this originating summons.”*

The trial court accordingly struck out the suit and hence appeal lodged to the Court of Appeal which also affirmed the judgment of the learned trial judge. The appellant has now appealed to this court from which three issues were formulated. The three issues in my view are all related and which question the propriety of the lower court in upholding the decision of the Federal High Court that the appellant’s case was wrongly commenced by way of originating summons. Also following closely from the main issue is whether the lower court was therefore right in not interfering with the trial court’s refusal to try and determine the appellant’s suit as commenced. The determination of the issue was predicated on Order 3 Rules 7 and 8 of the Federal High Court Rules 2009 which provide for the procedure of commencing action by way of originating summons.

From the foregoing provisions thereof it is clear that originating summons procedure is invoked only where the issue for determination is or likely to be one of construction of a written law, a deed, will, contract or such other documents. In other words, it presupposes that the facts upon which the construction would be made are either ascertained or unlikely to be substantially in dispute. The issue in controversy is questioning which of the candidates between the appellant and the 1st respondent was lawfully nominated and forwarded to the 3rd respondent as a flag bearer of the 2nd respondent for the election. The determination I hold, calls for oral evidence by witnesses with the affidavits of parties so extremely conflicting on the issue. In other words, it is on record that the affidavit in support of the appellant’s originating summons had been sufficiently challenged by the counter affidavits. The trial court for this reason could not have properly exercised its discretion by forming an opinion on the basis of the conflicting affidavits evidence before it. There was certainly a need to call oral evidence. The subject at hand is a pre-election matter and time does not run against it. The justice of the case

demanded that the trial court ought to have ordered for pleadings. The exercise of discretion under Order 3 Rule 8 of the Rules of the Federal High Court was not judicial and judicious. The court which rightly observed that the affidavits are conflicting ought to have seen the need for evidence on the pleadings of parties. In the case of Emezi v. Osuagwu (2005) 12 NWLR (Pt.939) P.340 at 367 this court per Oguntade, JSC in this wise had this to say:-

*“When a suit is commenced by an originating summons instead of a writ of summons, the appropriate order to be made by the court is to direct the suit to proceed with the filing of pleadings.”*

The principle in this case was derived from the earlier case of National Bank of Nig. Ltd. v. Alakija (1978) 9 - 10 SC. 59. The Federal High Court as the court of trial had the discretion to order pleadings under Order 3 Rule 8 of the Rules of that court but it did not deem it fit to do so. It is further unfortunate that the lower court also goofed and fell into the same trap by affirming the wrong discretion exercised by the trial court. The suit ought to have been commenced by Writ of Summons. Be that as it may, the defect which only relates to Procedure, does not however, affect the competence of the case. The legal effect is to order pleadings and not a striking out.

For the foregoing reasons and more particularly on the comprehensive and fuller reasoning by my brother GALADIMA, J.S.C. in his lead judgment, I also concur that the appeal be allowed and the matter should be remitted back to the Federal High Court for hearing on the merit. The decisions of the Court of Appeal and that of the trial Federal High Court are both set aside.

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