

**SUPREME COURT OF NIGERIA**  
FRIDAY 1<sup>ST</sup> FEBRUARY, 2013. SC. 273/2012  
**CORAM:- I. T. MUHAMMAD, J. A. FABIYI, M. U. PETER-  
ODILI, O. ARIWOOLA, K. B. AKAHHS, JJSC**

RT. HON. (DR.) OLISA IMEGWU ..... APPELLANT  
AND  
MR. EUGENE UCHE OKOLOCHA  
& ORS ..... RESPONDENTS

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APPEALS - Right of appeal - By 1999 Constitution s. 233 - Every aggrieved party has right to challenge - Decision of C. A. in S.C. - And the right cannot be denied by any subsidiary legislation (H1)

APPEALS - Extension of time - Conditions - S.C. Rules O. 2 r. 31(2) - The affidavit evidence must disclose good & substantial reason for the delay - And proposed grounds of appeal must be arguable (H2)

RULES OF COURT - Compliance with - Applicant who seeks indulgence of court - Must comply with its rules - Otherwise his prayers do not deserve favour of court's discretion (H3)

APPEALS - Court - Academic issue - Courts do not decide on hypothetical cases - The result of which will not grant any benefit to applicant (H4)

**FACTS**

Appellant/applicant, Rt. (Hon (Dr.) Olisa Imegwu brought this application before the Supreme Court seeking for inter alia, an order of the court extending the time within which applicant may seek leave to appeal against the judgment of the Court of Appeal, Abuja Judicial Division in Appeal No.CA/A/195/2011 between Mr. Eugene Uche Okolocha v. RT. Hon. (Dr.) Olisa Imegwu & Ors. on grounds other than law alone, leave to appeal and extension of time within which to appeal.

The grounds of the application are among other things that the judgment of the Court of Appeal was delivered on the 15<sup>th</sup> December 2011 and that applicant promptly filed appeal on 16<sup>th</sup> De-

cember 2011 as well as Motion for leave of the Court of Appeal to appeal on grounds of mixed law and facts/facts alone. A 19 paragraph affidavit was deposed to by applicant in support of the application. 1<sup>st</sup> respondent on the other hand filed a counter affidavit to oppose the application. He urged the court to dismiss the application for the simple reason that the application seeks to engage the court in an academic and hypothetical issue.

**HELD** (Unanimously dismissing the application per **ARIWOOLA JSC**)

*Right of appeal - By 1999 Constitution s. 233*

**1. Now to the application. There is no doubt, every aggrieved party has Constitutional right of appeal to challenge the decision of the Court below in this Court. In other words, right of appeal to this Court is Constitutionally guaranteed and cannot be denied or removed by any subsidiary Legislation except by the same Constitution. See Section 233 of the 1999 Constitution (as amended). (p. 447 G)**

*APPEALS - Extension of time - Conditions*

**2. Before examining the facts deposed in support of this application, I shall restate the guiding principles.**

**(i) The discretion of the court to grant the extension of time within which to appeal will be exercised only when the two conditions circumscribed by Order 7 rule 10(2) of the Court of Appeal Rules, 2002 or Order 2 rule 31 (2) of the Rules of the Supreme Court, as amended in 2009, are satisfied conjunctively but not disjunctively. In other words, the affidavit evidence in support of the application must disclose and set forth good and substantial reasons for the failure to appeal or to seek leave to appeal within the prescribed period of time. And the proposed Notice of Appeal must contain grounds of appeal which prima facie show good cause why the appeal should be heard.**

**(ii) The length of time that has lapsed between the dates of the judgment sought to be appealed against and the filing of**

***the application is always a material to be considered in the decision whether or not to grant the application. However the court has held that the length of time notwithstanding, the time may still be extended once the court is satisfied with the reasons for delay.***

***(iii) In view of the settled principle of law that a litigant should not be punished for the mistake or inadvertence of his counsel, an application for extension of time to appeal ought to be granted if the court is satisfied that the failure to appeal within the period prescribed by law was due to the true and genuine mistake or error of judgment of counsel.***

***In other words, the court must be satisfied that the excuse is availing having regard to the facts and circumstances of the case. Where it appears to the court that the delay was actually occasioned by the genuine mistake of counsel, it will be up to the respondent to show in what respect he would be prejudiced if the indulgence sought is granted.***

***(iv) The grounds of appeal proposed must be drawn by the applicant to be arguable but not frivolous. He is however not expected to show that the appeal will succeed, yet he is expected to exhibit good grounds showing reasonable prospect of success in the appeal.***

***(v) In the determination of applications for enlargement of time to appeal each case is to be treated and decided on its own peculiar facts and circumstances. The reason being that the facts to be taken into consideration by the court are not exhaustive. (p. 448 A)***

#### ***RULES OF COURT - Compliance with***

***3. Rules of court are meant to be obeyed but not for nothing or there in the books as window dressing. Therefore whenever an applicant seeks an indulgence of the discretion of a court and he fails to comply with the required Rules of Court, he should not be expected to be indulged. His prayer(s) will certainly not deserve the favour of the court's discretion.***

***(p. 449 G)***

*APPEALS - Court - Academic issue*

**4. What is more, the appeal has become mere hypothetical and will only amount to academic exercise. This court or any other court should not be engaged in deciding on hypothetical cases, the result of which will not award or grant any benefit to the appellant.** (p. 450 G)

### **REPRESENTATION**

Chuba Ikpeazu, S.A.N. with Lynda Chuba Ikpeazu, for the applicant,  
for the Appellants

Chief Oma Ahonaruogho with Dr. O. Ayeni Morrison Onu Esq. James Ojeh, Esq., Miss M. I. Fadipe, O. Adeosun, Esq., Jacob Ubam, Mrs. Joy Umole, for 1st respondent.

Samuel N. Agweh, Esq. with G. E. Okojion Esq., for the 2nd respondent

Adeola Adedipe, Esq with Oluwatoyin Durosaro, (Miss), for 3<sup>rd</sup> respondent

### **CASES REFERRED TO**

Ikeme v. Anakwe (2000) 8 NWLR (pt. 669) 484

Odojin v. Agu (1992) 3 NWLR (pt. 229) 350

Opuioy v. Omoniware (2007) 16 NWLR (pt. 1060) 415

CBN v. Ahmed (2001) 11 NWLR (pt. 724) 369

Iroegbu v. Kwordu (1990) 6 NWLR (pt. 159) 643

Yesufu v. Cooperative Bank (1989) 3 NWLR (pt. 110) 483

Ugwu v. Bunke (1997) 8 NWLR (pt. 518) 527

Shanu v. Afribank (Nig.) Plc (2000) 13 NWLR (pt. 684) 392

PDP v. CPC (2011) 17 NWLR (pt. 1277) 485

ANPP v. Goni (2012) 7 NWLR (pt. 1298) 147

Olafisoye v. FRN (2004) 4 NWLR (pt. 864) 580

Adewumi v. A.G. Ekiti State (2002) 2 NWLR (pt. 751) 474

Mamman v. Salaudeen (2005) 18 NWLR (pt. 958) 478

Ntuka v. NPA (2007) 18 NWLR (pt. 1051) 394

R. Benkay Nig. Ltd. v. Cadbury Nig. Plc (2006) 6 NWLR (pt. 976) 338

### **STATUTES & RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria 1999, ss. 233(2)(3),

246(3), 285(7)

Supreme Court Rules 1985 (as amended), O. 2 r. 31(2)(a), O. 7 r. 4(i)

Court of Appeal Rules 2002, O. 7 r. 10(2)

Supreme Court Rules 2009 (as amended), O. 2 r. 31(2)

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**LEAD JUDGMENT BY ARIWOOLA JSC**

The applicant herein, Rt. (Hon. (Dr.) Olisa Imegwu brought the application for the following reliefs:

1. An Order of this Honourable Court extending the time within which the appellant/applicant may seek leave to appeal against the judgment of the Court of Appeal, Abuja Judicial Division in Appeal No.CA/A/195/2011 between Mr. Eugene Uche Okolocha v. RT. Hon. (Dr.) Olisa Imegwu & Ors. delivered on Thursday the 15th day of December, 2011 Coram: Hon Justices Jimi Olukayode Bada, JCA, D  
Husseini Mukhtar, J.C.A. and Regina Obiageli Nwodo, J.C.A. to the Supreme Court of Nigeria, on grounds other than law alone.

2. An Order of this Honourable Court granting leave to the appellant/applicant to appeal against the judgment of the Court of Appeal, Abuja Judicial Division in Appeal No:CA/A/195/2011 between Mr. Eugene Uche Okolocha v. Rt. Hon. (Dr.) Olisa Imegwu & Ors. delivered on Thursday the 15th day of December, 2011. Coram: Hon. Justices Jimi Olukayode Bada, JCA, E  
Husseini Mukhtar, J.C.A. and Regina Obiageli Nwodo, J.C.A. to the Supreme Court of Nigeria, on grounds other than law alone. F

3. An Order of this Honourable Court for extension of time within which the appellant/applicant may appeal against the Judgment of the Court of Appeal, Abuja Judicial Division in Appeal No.CA/A/195/2011 between Mr. Eugene Uche Okolocha v. Rt. Hon. (Dr.) G  
Olisa Imegwu & Ors. delivered on Thursday the 15th day of December, 2011 Coram: Hon. Justices Jimi Olukayode Bada, J.C.A, Husseini Mukhtar, J.C.A, and Regina Obiageli Nwodo, J.C.A. to the Supreme Court of Nigeria.

4. If prayers 1, 2 and 3 are granted, an Order departing from H  
the rules of the Supreme Court and for leave to file the Notice and Grounds of Appeal at the Supreme Court, time having elapsed and the applicant having compiled and transmitted Records of Appeal.

5. If prayers 1, 2, 3 and 4 are granted for an Order deeming

as properly filed, the Notice and Grounds of Appeal separately filed, copy of which is delivered with the Affidavit in support and marked Exhibit 2.

B 6. If prayers 1, 2 and 3 are granted an Order departing from the rules of the Supreme Court for the appeal to be heard based on the Certified True Copy of the Record of Proceedings of the Court of Appeal.

C 7. An Order departing from the Rules of the Supreme Court allowing the applicant to file the Notice of Appeal at the Supreme Court, in view of the fact, that the Records have already been transmitted. And for such further Order(s) as the Honourable Court may deem fit to make in the circumstances of this case.

The applicant gave the following as grounds of the application:

Grounds of the Application

D 1. The Judgment of the Court of Appeal was delivered on the, 15th of December, 2011

2. Applicant filed an appeal promptly on 16th December, 2011 as well as Motion for leave of the Court of Appeal on grounds of mixed law and facts/facts alone.

E 3. The Court of Appeal did not hear the Motion which was not fixed for hearing on any date, with the effect that the applicant has fallen out of time.

4. The failure to appeal is not the fault of the applicant.

F 5. Leave of this Honourable Court is also necessary due to the viability of the applicant to appeal within the statutory period and for the reason that the grounds of appeal and argument will touch on the facts.

G 6. This case is a pre-election matter which should be expeditiously determined.

7. Certified True Copies of the Record of Appeal has been delivered as Exhibit 3.

8. In view of the Exhibit 3, it will be more convenient to file the Notice and Grounds of Appeal at the Supreme Court.

H In support of the application is an affidavit of 19 paragraphs deposed to personally by the applicant himself. Attached to the affidavit as Exhibits are - Proposed Notice and Grounds of Appeal as Exhibit 1, Notice and Grounds of Appeal as Exhibit 2 and Record of Appeal as Exhibit 3.

To oppose this application, the 1st respondent filed a counter affidavit of 4 paragraphs. Attached to the Counter affidavit are three documents marked as Exhibits UO1, UO2 and UO3 respectively.

The 2nd and 3rd respondents did not file any counter affidavit to oppose the application. Both the applicant and 1st respondent filed their respective brief of argument. In the brief of argument in support of the application learned Senior Counsel for the applicant, Dr. Ikpeazu, SAN referred to the reliefs sought, grounds upon which the reliefs are sought and the facts of the application and submitted that the sole Issue for determination in the application is -

*“In the circumstance of this case, is the applicant entitled to the relief sought?”*

It was contended that, it is settled law that a litigant has a right of appeal which is guaranteed under the 1999 Constitution of the Federal Republic of Nigeria. He referred to Section 233 (2) and (3) of the Constitution which gives a party right of appeal from the decision of the Court of Appeal to the Supreme Court. That, by virtue of Section 233(2), a party who is aggrieved by the decision of the Court of Appeal, has a right of appeal as of right and grounds of law alone. But where the grounds of appeal are not of law alone, but of mixed law and fact or facts alone as in the instant case, the right of appeal can only be exercised where the aggrieved party has first sought and obtained the leave of either the Court of Appeal or the Supreme Court. Counsel submitted that the procedure has been held not to be matters merely cosmetic in nature as they are serious issues affecting the jurisdiction of the Supreme Court to hear the appeal. Also, non compliance with the requirement to obtain the requisite leave to appeal renders the appeal incompetent. He relied on *Ikeme v. Anakwe* (2000) 8 NWLR (pt. 669) 484, *Odojin v. Agu* (1992) 3 NWLR (Pt. 229) 350.

In urging the court to grant the application learned Senior Counsel referred to the proposed Notice of Appeal for the grounds of Appeal raised and submitted that apart from the fact that the grounds of appeal are not strictly grounds of law alone, the grounds raise substantial and arguable issues of law. Learned Senior Counsel submitted further that good and substantial reasons exist where the leave of this court was not sought earlier as shown in the affidavit in support of the application.

Learned counsel contended that where the grounds of appeal raise issues of mixed law and fact or of fact alone, leave of the Supreme Court to appeal on those grounds must be sought by virtue of Section 233 of the 1999 Constitution. He submitted that failure to comply with this requirement would render the grounds incompetent. He relied on *Opuiyo v. Omoniwari* (2007) 16 NWLR (pt. 1060) 415 at 443-444.

In the instant appeal, learned senior Counsel submitted that the grounds contained in the Notice of Appeal raise substantial and arguable issues of law, relying on *CBN v. Ahmed* (2001) 11 NWLR (Pt. 724) 369 at 393, *Iroegbu v. Kwordu* (1990) 6 NWLR (Pt. 159) 643; *Yesufu v. Cooperative Bank* (1989) 3 NWLR (Pt. 110) 483.

The applicant contended that the grounds of appeal contained in the Notice of Appeal complained as follows:

(a) That the Court of Appeal was in error when the court overruled the decision of the trial court which held that the action instituted by the applicant was meritorious as he was the candidate sponsored by the 2nd Respondent.

(b) That the documents relied upon by the applicant categorically established that the applicant was the duly sponsored candidate whose name was improperly jettisoned.

The applicant submitted that each of the grounds is not only sound and arguable but could be the basis for overturning the decision of the lower court in this case. He relied on *Chief Victor Ugwu & 3 Ors. v. Chief Mark Bunke* (1997) 8 NWLR (Pt. 518) 527 at 541. The applicant referred to the grounds again and paragraphs 7-13 of the affidavit in support of the application for what he considers the good and substantial reasons why the leave of court was not sought earlier. He gave some of the reasons as follows:

(i) The applicant promptly filed an appeal the day after the judgment through his lawyer who applied for leave to argue the grounds other than law alone. He was unaware that the application was not heard and had indeed ensured the compilation and transmission of record of appeal.

(ii) Applicant had all along expressed the desire to appeal and the failure cannot be attributed to him.

(iii) The grounds of appeal involve substantial issues of law.

(iv) The grounds of appeal are on grounds other than law

alone.

(v) The leave of this court is required to regularize the processes filed in this court.

It was submitted that sufficient materials have been placed before the court upon which the court may exercise its discretion as the grounds are genuine and substantial. He relied on *Shanu v. Afribank* (Nig.) Plc (2000) 13 NWLR (Pt. 684) 392 at 401. The applicant further contended that the length of time between the judgment appealed against and the application for extension of time will be immaterial, provided that applicant has shown good reasons justifying the delay. He relied on the cases of *Iroegbu v. Kwordu* (supra) and *Yesufu vs. Cooperative Bank* (Supra).

The applicant stated that the reasons he has given are reinforced by the fact that the grounds of appeal have raised issues of application of Section 87 of the Electoral Act as well as other Sections of the Law. He submitted that where the ground or grounds of appeal complained of error in law and it prima facie appear so, it may not be necessary to inquire into the reasons for the delay in lodging the appeal, the reason being that issues of law are always good and substantial reasons for an appeal to be heard. He relied on *Ugwu & Ors. v. Bunke* (Supra) at 543.

Learned Senior Counsel submitted that there is a special circumstance warranting the exercise of the discretion in favour of the applicant to enable him explore his Constitutional right of appeal to the Supreme Court. The applicant stated that in order to exhibit his good faith, he had compiled a duly Certified True Copy of the Record of Appeal and exhibited a proposed Notice and Grounds of appeal with a Notice and Grounds of Appeal separately filed. He urged the court to grant the application as he sought to abandon relief No.7 of the application.

As stated earlier, the 1st Respondent filed a counter affidavit to oppose this application and filed a brief of argument. In the said brief of argument, the 1st respondent distilled a sole issue for determination of the application as follows:

*“whether this application ought to be refused and dismissed having regard to the entire circumstances before the court”*

On the issue formulated, the 1st respondent urged the court to resolve same in the affirmative and in his favour against the appli-

cant for the following reasons:

(i) The application seeks to engage the court in an academic and hypothetical exercise of no useful purpose.

(ii) The application constitutes an abuse of the process of the court.

B (iii) The applicant has not satisfied the requirements for the exercise of the discretion sought in his favour.

(iv) The application is grossly incompetent.

On the application amounting to an academic exercise, the  
C learned counsel to the 1st respondent submitted that the application is one that has the effect of inviting this court to engage in an academic and hypothetical exercise which the court is urged to decline. It was contended that it is manifest, from the affidavit in support of  
D the application that the main issue in the case is one of which is lawful and or rightful candidate of the 2nd respondent for the Ndokwa/Ukwani Federal Constituency at the 2011 General Elections held on 9th and 26th April, 2011, which has since been concluded. He submitted that indeed all rights of appeal vide Sections 246(3) and 285(7) of the 1999 Constitution (as amended) are now constitutionally  
E barred, the Court of Appeal having decided the winner of the seat of Ndoka/Ukwani Federal Constituency at the 2011 General Elections vide Exhibit UO1. He relied on Peoples Democratic Party v. Congress for Progressive Change & Ors (2011) 17 NWLR (Pt. 1277) 485 at 508, All Nigeria Peoples Party (ANPP) Goni & Ors etc. (2012) 7 NWLR  
F (pt. 1298) 147 at 190.

Learned Counsel contended that the materials before the court clearly demonstrate that neither the 2nd respondent nor its candidate, occupy the seat of member representing Ndokwa/Ukwani Federal Constituency at House of Representatives following the 2011  
G Elections. He submitted that the effect is that the applicant has not shown any real or legally cognizable benefit to be derived from the present application and any appeal arising therefrom. He relied on Olafisoye v. FRN (2004) 4 NWLR (pt. 864) 580 at 654-655, Adewumi  
H & Anor v. A.G., Ekiti State & 6 Ors. (2002) 2 NWLR (Pt. 751) 474 at 525.

Learned counsel submitted that it is an essential quality of any proceedings fit to be disposed of by a court that there should exist between the parties a live issue seeking a resolution by the court.

Where the result of a judicial decision will eventually serve no useful purpose, then such judicial decision is a mere academic exercise. He relied on *Mamman v. Salaudeen* (2005) 18 NWLR (pt. 958) 478 at 500.

The 1st respondent contended that there cannot be said to be a live issue in an appeal as in the instant application, if the issue formulated for determination when decided will eventually not affect the position of the parties due to changed circumstances since the litigation started. It was contended further that the determination of this application will not have any effect on the applicant and/or any of the respondents herein. Learned counsel submitted that whoever is declared to be the rightful candidate sponsored by the 2nd respondent for election as member representing the Ndokwa/Ukwani Federal Constituency of the Federal House Representatives at the 2011 General Elections will have no effect on the current occupant of the seat, particularly in the light of Exhibits UO1 and UO2 which affirmed Hon. Ossai Nicholas Ossai of the Peoples Democratic Party (PDP) as the lawful winner and occupant of the seat. Learned counsel contended that neither the occupant of the seat. - Hon. Ossai nor the Peoples Democratic Party (PDP) is a party to the present appeal, or the judgment of the lower court. He submitted that any decision reached in the circumstance will at best only achieve the effect of agitating a moot point. He relied on *Attorney General of the Federation Vs. All Nigeria Peoples Party (ANPP)* (2003) 18 NWLR (Pt. 851) 182 at 215.

Learned counsel submitted that the effect of the decision of the Court of Appeal in Exhibit OU1 is that this court is divested of jurisdiction to entertain this application. Furthermore, learned counsel submitted that the application ought to be dismissed as it constitutes a gross abuse of the process of this court. He referred to the 1st respondent's counter affidavit to the effect that the application is intended to vex, annoy, irritate as well as overreach the 1st respondent after he filed his application seeking a dismissal order, the incompetent appeal lodged by the applicant on 16/12/2011 and went to sleep before filing this application on the 8th month thereafter.

It was also submitted that it is an abuse of the process of court to persist in agitating a dispute which is spent by reason of subsequent events. He relied on several authorities including *Ntuka v. Ni-*

geria Ports Authority (2007) 18 NWLR (pt.1051) 394 at 420, R. Benkay Nigeria Ltd. v. Cadbury Nigeria Plc (2006) 6 NWLR (Pt. 976) 338 at 361, Ojo & Ors v. A.G. Oyo State & Ors (2008) 15 NWLR (Pt. 1110) 309 at 323. He urged the court to hold that the proceedings amount to an abuse of process of court, hence dismiss same

B without any further ado

On the conditions to be met by an applicant seeking extension of time to appeal out of time, learned counsel submitted that the applicant has not fulfilled the conditions for the favourable exercise of the court's discretion in his favour by enlarging time for him to appeal. He relied on Isiaka & Ors Vs. Ogundimu & 17 Ors (2006) 3 C NWLR (pt. 997) 401 at 411, Long-John v. Iboroma & Ors. (1998) 6 NWLR (Pt. 555) 524 at 542. Learned counsel submitted that the reasons set forth by the applicant for his delay in appealing within D time, apart from being utterly incredulous, simply do not meet the quality of materials or evidence required in the eyes of the law or decided cases as constituting good and substantial reasons within the meaning of Order 2 rule 31(2) of this Court's Rules, 1985 as amended.

E Further still, learned counsel submitted that the application is grossly incompetent for failure to comply with the Rules of Court. He referred to Order 2 Rule 31(2) (a) of the Supreme Court Rules, 1985, as amended and contended that the judgment being sought to appeal against was not attached to the application as an exhibit as F required.

Learned counsel contended that the defect is not remedied by the applicant's reference to the Record of Appeal as in Exhibit 3 G attached to the application which he said was not attached to the affidavit served on the 1st respondent. He submitted that it is not sufficient for the applicant to dump the entire Record of Appeal on the court without, in any manner, inviting the attention of the court to the existence of the judgment sought to be appealed against. Learned counsel further contended that indeed there is no valid Record H of Appeal before the court as the purported record was transmitted more than six months from 16th December, 2012 when the Notice of Appeal on the basis of which it has been transmitted was filed, in violation of Order 7 rule 4 (i) of the Rules of this Court, 1985 as amended. He referred to paragraph 6 of the applicant's affidavit in

support of the application to show that the Record was transmitted in July, 2012.

Learned counsel contended that the record of appeal will still be incompetent even if the applicant seeks to rely on it with reference to the Notice of Appeal filed on 22/05/2012 as it will mean that the applicant compiled the Record of Appeal when there was no valid appeal upon which it is based. Learned counsel referred to the parties cited as 1st, 2nd and 3rd respondents respectively in the Notice of Appeal filed on 22/8/2012 as well as the present application as not being the same parties respectively cited as 1st, 2nd and 3rd respondents in the Record of Appeal. He submitted that the effect is that the Record of Appeal cannot be relied upon or utilized in the instant application as well as the Notice of Appeal.

Learned counsel finally urged the court to dismiss the application with substantial costs against the applicant but in favour of the 1st respondent.

Mr. Agweh of counsel for the 2nd respondent said he did not file any counter affidavit to oppose the application but align himself with the submissions of the learned counsel for the 1st respondent to urge the court to dismiss the application.

Mr. Adedipe also stated that he did not file any counter affidavit but in aligning with the submissions of the learned counsel to the 1st respondent, he referred to Order 7 rule 4 of this Court's Rules and the case of *Lawson Jack v. SPDC Nig. Ltd.* (2002) 13 NWLR (Pt.783) 180 to contend that no leave of court was sought to compile record of appeal by the applicant. He urged the court to dismiss the application.

In his reply on point of law, learned senior counsel, Dr. Ikpeazu, SAN submitted that the instant application itself is an initiating process and leave has been sought. He referred to Sections 246(3) and 285(7) of the 1999 Constitution and contended that they deal with election matters but not pre-election matters. He submitted that pre-election matter can never be an academic exercise as the court will always make consequential orders. As for example, as the applicant says he was being branded an usurper. He finally urged the court to grant the application.

As clearly stated on the application and alluded to in the argument in support, this application is primarily for the "trinity prayers".

That is, an order for extension of time to seek leave to appeal, leave to appeal and extension of time to file the Notice of Appeal. There is no doubt that the determination of the first three (3) prayers above will determine the fate of the other prayers in the application. The application is therefore primarily predicated on Section 233 (3) of the 1999 Constitution, (as amended) and Order 2 rule 31 of the Supreme Court Rules, 1985 (as amended). Indeed, the application is brought pursuant to the Constitutional provisions. Section 233(3) provides as follows:

*“Subject to the provisions of subsection (2) of this section, an appeal shall be from the decisions of the Court of Appeal to the Supreme Court with leave of the Court of Appeal or the Supreme Court.”*

However, having realized that he was already out of time within which he ought to have appealed and or sought leave to appeal, the applicant came up with the instant application.

For ease of reference, Order 2 rule 31 of the Supreme Court Rules provides thus:

*“31 (1) The Court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these Rules in any other way when this is required in the interest of justice.*

*(2) Every application for an enlargement of time in which to appeal or in which to apply for leave to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal or to apply for leave to appeal within the prescribed period. There shall be exhibited or annexed to such affidavit:-*

*(a) a copy of the judgment from which it is intended to appeal;*  
*(b) a copy of other proceedings necessary to support the complaints against the judgment.*

*(c) grounds of appeal which prima facie show good cause why the appeal should be heard.”*

I have carefully read both the affidavit in support of the application and the 1st respondent’s counter affidavit to oppose and, before I proceed further to consider this application on the merit, I believe I need to state certain facts that are clear from the affidavit evidence and various documents attached thereto as not being in dispute and therefore admitted needing no further proof:- The ap-

plication concerns and is about the judgment of the court below, Abuja division delivered on 15th December, 2011.

The said appeal was between the instant 1st respondent and the applicant herein as 1st respondent then. The said judgment of the court below against which leave is being sought to appeal is not annexed to this application. The subject matter of the action was who B between the applicant herein and the 1st respondent, both candidates of the 2nd respondent herein was the rightful and lawful candidate of the 2nd respondent put forward to contest the election of 2011 into the House of Representatives to represent Ndokwu/Ukwani C Federal Constituency of Delta state.

In the said judgment of the court below delivered on 15th December, 2011 the 1st respondent was declared the lawful and rightful candidate of the 2nd respondent.

The applicant was, in the judgment of 19th December, 2011 D of the court below of Benin Division removed as the member representing the said Ndokwa/Ukwani Federal Constituency in the House of Representatives of the National Assembly and one Hon. Ossai Nicholas Ossai of the Peoples Democratic Party (PDP) was declared E the winner of the said election, having been confirmed to have won the majority of lawful votes cast at the election, by the appropriate Election Petitions Tribunal of Delta State. See Exhibits UO1 and UO3 respectively.

The decision of court below which declared Hon. Ossai Nicholas F Ossai of the PDP as winner of the election was challenged by the 1st respondent before this court and the appeal was on 13th January, 2012 dismissed having been withdrawn by the appellant See Exhibit UO2.

That the seat then being contested is now presently occupied G by the candidate of Peoples Democratic Party - Hon Ossai Nicholas Ossai pursuant to the final decision of the court below in Exhibit No.1.

***Now to the application. There is no doubt, every aggrieved party has Constitutional right of appeal to challenge H the decision of the Court below in this Court. In other words, right of appeal to this Court is Constitutionally guaranteed and cannot be denied or removed by any subsidiary Legislation except by the same Constitution. See Section 233 of the***

**1999 Constitution (as amended).**

***Before examining the facts deposed in support of this application, I shall restate the guiding principles.***

***(i) The discretion of the court to grant the extension of time within which to appeal will be exercised only when the two conditions circumscribed by Order 7 rule 10(2) of the Court of Appeal Rules, 2002 or Order 2 rule 31 (2) of the Rules of the Supreme Court, as amended in 2009, are satisfied conjunctively but not disjunctively. See; N. A. Williams & Ors. v. Hope Rising Voluntary Funds Society (1982) All NLR (Pt.1) (1982) 1-2 SC 145 at 152; Yonwuren v. Modern Sighs Ltd. (1985) 1 NWLR (Pt. 2) 244; University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143. In other words, the affidavit evidence in support of the application must disclose and set forth good and substantial reasons for the failure to appeal or to seek leave to appeal within the prescribed period of time. And the proposed Notice of Appeal must contain grounds of appeal which prima facie show good cause why the appeal should be heard.***

***(ii) The length of time that has lapsed between the dates of the judgment sought to be appealed against and the filing of the application is always a material to be considered in the decision whether or not to grant the application. However the court has held that the length of time notwithstanding, the time may still be extended once the court is satisfied with the reasons for delay. See Alagbe v. Abimbola (1978) 2 SC 39; Ojora v. Bakare (1979) 1 SC 47; Shittu v. Osibanjo-In re Adewunmi (1988) 7 SC (pt.11) 1, (1988) 3 NWLR (pt.33) 483.***

***(iii) In view of the settled principle of law that a litigant should not be punished for the mistake or inadvertence of his counsel, an application for extension of time to appeal ought to be granted if the court is satisfied that the failure to appeal within the period prescribed by law was due to the true and genuine mistake or error of judgment of counsel.***

***In other words, the court must be satisfied that the excuse is availing having regard to the facts and circumstances of the case. See Iroegbu v. Okwordu (1990) 6 NWLR (pt. 159) 643. Where it appears to the court that the delay was actually occasioned by the genuine mistake of counsel, it will be up to***

***the respondent to show in what respect he would be prejudiced if the indulgence sought is granted.***

***(iv) The grounds of appeal proposed must be drawn by the applicant to be arguable but not frivolous. He is however not expected to show that the appeal will succeed, yet he is expected to exhibit good grounds showing reasonable prospect of success in the appeal.*** See Holman Bro. (Nig.) Ltd v. Kigo (Nig) Ltd. (1980) 8-11 SC 43.

***(v) In the determination of applications for enlargement of time to appeal each case is to be treated and decided on its own peculiar facts and circumstances. The reason being that the facts to be taken into consideration by the court are not exhaustive.*** See University of Lagos v. Olaniyan (1985) 1 NWLR (Pt.1) 156, C.C.B. (Nig.) Ltd v. Ogwuru (1993) 3 NWLR (Pt. 284) 630.

In the instant application, first and foremost, can it be said that the applicant has set forth in his supporting affidavit evidence, good and substantial reasons for his failure to apply for leave to appeal within the prescribed period? There is no doubt and it was not controverted that the said judgment of the court below against which leave is being sought to appeal is not exhibited or annexed to the affidavit in support of this application. Similarly, the applicant claimed to have earlier promptly filed an application on the 16th day of December, 2011 seeking leave to appeal. Copy of this earlier application was not exhibited. The applicant also claimed to have settled record of appeal and had since transmitted in July 2011 to this court by the Registrar of the court below, yet nothing is exhibited to confirm that these documents actually exist. He went further to state that he was not aware that his said application for leave to appeal was never fixed for hearing despite numerous efforts by his counsel. These numerous efforts of counsel were not stated or supported by documentary evidence in the supporting affidavit.

***Rules of court are meant to be obeyed but not for nothing or there in the books as window dressing. Therefore whenever an applicant seeks an indulgence of the discretion of a court and he fails to comply with the required Rules of Court, he should not be expected to be indulged. His prayer(s) will certainly not deserve the favour of the court's discretion.*** See;

Oyegun v. Nzeribe (2010) 7 NWLR (Pt. 1194) 577 (2010) SCM 233; Solanke v. Somefun (1974) 1 SC 141, Oforkire & Anor v. Maduike & Ors. (2003) 5 NWLR (pt. 812) 166; John v. Blakk (1988) 1 NWLR (pt.72) 648.

In this application, applicant cannot be said to have given good and substantial reasons for his failure to come up with this application earlier as prescribed. In the same vein, for his failure to annex or exhibit the judgment of the court below being sought to appeal against, he has failed to comply with the rules of court and this was not explained away in any form.

I have also examined the fifteen grounds of appeal proposed for the prosecution of the appeal when leave is granted to the applicant to appeal. I am of the firm view that, in the circumstances of the peculiarity of this case, the said grounds of appeal cannot be said to show good cause why the appeal should be heard.

As clearly shown in the uncontradicted affidavit evidence of the 1st respondent and exhibits, UO3, the matter originated from the National/State Legislative Houses Election Petitions Tribunal, Holden at Asaba in Delta State, from where it went before the court below of Benin Division wherein the seat being sought to occupy by the applicant was declared for a candidate of yet another political party but not that of the applicant.

Furthermore, the court below of Abuja Division had ruled on the grievance of the applicant on this same subject. As I stated earlier, neither the person on the seat in the House of Representatives, Hon. Ossai nor his political party - the PDP was made a party in the case before the court below nor here before us.

Even, assuming without holding that there are good and substantial reasons given for the delay in coming with this application, in the grounds of appeal, it has not been shown any good cause why the appeal should be given hearing.

***What is more, the appeal has become mere hypothetical and will only amount to academic exercise. This court or any other court should not be engaged in deciding on hypothetical cases, the result of which will not award or grant any benefit to the appellant.*** In *Olafisoye v. FRN* (2004) 4 NWLR (pt. 864) 580, at 654-655, this court, per Tobi, JSC opined as follows:

*"I do not think this court has the competence to go into the*

*above hypothetical point. Courts of law, as most serious and sacred institution do not build upon hypothesis... The adjective hypothetical means that which has not been proved or shown to be real. A theoretical hypothetical point is not for this court or any other Nigerian court for that matter."*

In Mamman v. Salaudeen (2005) 125 SCM 260 at, (2005) 18 B NWLR (Pt. 958) 478 at 500. This court per Onnoghen, JSC opined as follows:

*"It must be borne in mind that the court is not interested in determining academic question, a favourable resolution of which will have no effect..."*

On the main application therefore, the applicant has failed to show (a) good and substantial reason for failure to appeal within the prescribed period, and (b) the grounds of appeal which prima facie show good cause why the appeal should be heard. In which case, he is not entitled to discretion of the court to be exercised in his favour. See; Saidi Ogundimu & Ors. v. Bello Kasunmu & Ors. (2006) 10-11 SCM 350; (2006) 3 NWLR (Pt. 997) 401.

Indeed, the applicant seems to know that he does not have anything to gain in prosecuting this appeal other than to prove to the people of the political circle in his constituency that he is not an usurper as branded, which according to him "has drastically portrayed him in very negative light". There is no doubt, courts do not try or determine cases on sentiments or dead and buried issues. Cases are decided on live issues. See; Attorney General of the Federation v. All Nigeria People Party (ANPP) (2003) 18 NWLR (Pt.851) 182.

In the circumstance, prayers 1, 2 and 3 of this application lack merit and substance. They are accordingly refused. With regard to prayers 4, 5 and 6 as they are couched, their success is dependent on the success of prayers 1, 2 and 3 that have failed and refused. They certainly have no legs of their own to stand on. In the result, all the other prayers 4, 5, and 6 must go the same way of the preceding prayers.

In the final analysis, this application fails for lacking in merit and substance. It is liable to dismissal. Accordingly, it is dismissed with N50,000.00 costs to the 1st respondent only.

**MUHAMMAD JSC**

I read in advance the Ruling just delivered by my learned brother, Ariwoola, JSC. I agree with him in his reasoning and conclusion. I adopt same including all orders made therein.

B

**FABIYI JSC**

I have had a preview of the Ruling just handed out by my learned brother - Ariwoola, J.S.C. I agree with the reasons ably advanced therein to arrive at the conclusion that the application lacks merit and should be dismissed.

I adopt same and accordingly dismiss the application. I endorse the order relating to costs as contained in the lead Ruling.

D

**PETER-ODILI JSC**

I am in agreement with the Ruling just delivered by my learned brother, Olukayode Ariwoola, J.S.C. and to underscore my support of the decision and reasoning therefrom I shall make some remarks.

The Appellant/Applicant by a Motion on Notice filed on 22/8/12 prayed for the following reliefs:-

1. An Order of this Court extending the time within which the appellant/applicant may seek leave to appeal against the judgment of the Court of Appeal, Abuja Judicial Division in Appeal NO.CA/A/195/2011 delivered on the 15th December, 2011 Coram: Olukayode Bada, Husseni Mukhtar, Regina Nwodo JJCA.

2. Leave to appeal against the said judgment.

3. Extension of time within which to appeal.

4. If prayers 1, 2 and 3 are granted, an order departing from the Rules of Supreme Court for leave to file the Notice and Grounds of Appeal at the Supreme Court, time having elapsed and the Applicant having compiled and transmitted the Record of appeal.

5. If prayers 1, 2, 3, and 4 are granted for an order deeming as properly filed the NOTICE AND GROUNDS OF APPEAL separately filed.

6. If prayers 1, 2, and 3 are granted an order departing from the Rules of the Supreme Court, for the appeal to be heard based on the Certified True Copy of the Record of Proceedings of the Court of

Appeal.

7. An order departing from the Rules of the Supreme Court allowing the applicant to file the Notice of Appeal at the Supreme Court in view of the fact that the Records have already been transmitted.

On the 12th day of November, 2012, date of hearing, Dr. B Ikpeazu SAN withdrew prayer 7 of the motion paper for being a surplusage. He referred to their 19 paragraph supporting affidavit and a written address in which was formulated a single issue, viz:-

In the circumstances of this case, is the applicant entitled to the C relief sought.

For the 1st Respondent, Mr. Ahonaruogho of counsel referred to their counter affidavit filed on 3/9/12 and the three exhibits UO1, UO2, UO3 attached thereto. He adopted their Brief of argument wherein he distilled one issue for determination as follows:- D

Whether this application ought to be refused and dismissed having regard to the entire circumstances before the Honourable Court.

Mr. Agwe, learned counsel for the 2nd Respondent stated that they filed no counter affidavit and would align with the submissions E of the 1st Respondent's counsel.

Learned counsel for the 3rd respondent, Mr. Adedipe also said they filed no counter affidavit and would anchor on the submissions of learned counsel for the 1st respondent. He referred to Order 7, Rule 4, Rules of Court; Lawson-Jack v. Shell PDC (2002) 13 NWLR F (Pt. 783) 180.

In moving the motion in line with his written address, learned counsel for the applicant stated that the right of appeal of a litigant is guaranteed under Section 233 (2) & (3) of the 1999 Constitution. G That the right of appeal as of right is when the grounds are of law alone but where the grounds are not of law alone but of mixed law and fact or facts alone, the right of appeal is exercised where the aggrieved party has first sought and obtained the leave of either the Court of Appeal or the Supreme Court. That the leave they are now H seeking in the circumstances are that the grounds are being merely of law. He cited Ikeme v. Anakwe (2000) 8 NWLR (Pt. 669) 484; Odofin v. Agu (1992) 3 NWLR (pt. 229) 350; Opuiyo v. Omoniwari (2007) 16 NWLR (pt. 1060) 415 at 443-444.

Also that the grounds of this appeal raise substantial and arguable issues of law. He referred to *CBN v. Ahmed* (2001) 11 NWLR (Pt. 724) 369 at 393; *Iroegbu v. Okwordu* (1990) 6 NWLR (Pt. 159) 643; *Yusuf v. Co-Operative Bank* (1989) 3 NWLR (Pt. 110) 483.

B That the applicant has good reasons for the delay in seeking leave to appeal. He cited *Chief Victor Ugwu & Ors. v. Chief Mark Bunke* (1997) 8 NWLR (Pt. 518) 527 at 541.

C That they have placed before court sufficient materials upon which this court can exercise its discretion in applicant's favour. He said the length of time between the time of judgment appealed against and the application for extension of time is immaterial as in this instance where the applicant has shown good reason justifying the delay. He relied on *Shanu v. Afribank (Nig.) Plc* (2000) 13 NWLR (pt.684) 392 at 401; *Iroegbu v. Okwordu* (supra); *Yusuf v. Co-operative Bank* (supra).

D For the 1st Respondent it was contended by learned counsel on his behalf that what the applicant is calling upon this court to do is to engage in an academic hypothetical exercise which this court should refuse. The Court of Appeal having decided the winner of the seat of E Ndokwa/Ukwani Federal Constituency at the 2011 General Elections vide Exhibit UO1, no further proceedings to do anything relating or connected thereto can be entertained at this point. He relied on *People Democratic Party v. Congress for Progressive Change & Ors.* (2011) 17 NWLR (Pt. 1277) 485 at 508; *All Nigerian Peoples Party (ANPP) v Goni & Ors; Shettima & Anor. v Goni & Ors.* (2012) 7 NWLR (Pt. 1298) 147 at 190; *Olafisoye v. FRN* (2004) 4 NWLR (Pt. 864) 580.

F Learned counsel for 1st respondent went on to submit that there is no live issue upon which the energy of this court needs be G dissipated and so no jurisdiction. He cited Exhibits UO1 and UO2; *Attorney General Federation v. All Nigeria Peoples Party* (2003) 18 NWLR (Pt. 851) 182 at 215; *Olori Motors Ltd. v. Union Bank of (Nig.) Plc* (2006) 10 NWLR (Pt. 989) 586 at 606.

H Further canvassed for the 1st respondent is that the application should be dismissed for being an abuse of court process, and such that the application is meant to annoy, irritate as well as overreach the 1st respondent after he filed an application to dismiss an incompetent appeal lodged by the appellant/applicant since 16th December, 2011, after which applicant went to sleep for at lease 7

months before filing this current application. He cited *Ntuks v. Nigeria Ports Authority* (2007) 18 NWLR (Pt. 1051) 394; *N. V. Scheep & Anor v. MV 'S' Araz & Anor* (2000) 15 NWLR (Pt. 691) 622 at 664.

Going on, learned counsel for the 1st respondent said the applicant has not fulfilled the conditions for a favourable exercise of this Court's discretion for enlargement of time within which to appeal. He referred to *Isiaka & Ors. v. Ogundimu & Ors.* (2006) 3 NWLR (Pt. 997) 401 at 411; *Long-John v. Iboroma & Ors.* (1998) 6 NWLR (Pt. 555) 524. That the application is incompetent as it did not comply with Order 2 rule 31 (2) (a) of the Supreme Court Rules 1985 (as amended) as the supporting affidavit does not contain a copy of the judgment against which the appeal is intended and dumping the Record of Appeal would not suffice. That it is trite that Rules of Court are meant to be obeyed by the parties to a proceeding to ensure order in the judicial process. He cited *Afribank (Nigeria) Plc v. Akwara* (2006) 5 NWLR (Pt. 974) 619 at 655.

In reply on points of law, Dr. Ikpeazu SAN said the applicant sought the necessary leave and so Order 7, Rule 4, Rules of Court does not apply. Also inapplicable he said are Sections 246 (3) and 285 (7) of the 1999 Constitution.

The summary of the facts as captured in the supporting affidavit of the applicant particularly paragraphs 2, 3, 4 and 5 are as follows:-

*"2. I stood for the Primary Election of the Democratic Peoples Party (DPP) for the candidate to represent the Ndokwa/Ukwuano Federal Constituency for the 2011 general election and won.*

*3. Following the publication of the name of the 1st respondent by 3rd respondent as the candidate of the party, I was compelled to proceed to the Federal High Court in FHC/ABJ/CS/190/2011 RT (HON) (Dr.) OLISA IMEGWU & ANOR. v. INEC & ANOR. Judgment was delivered in my favour on 29th March, whereupon I contested and won the election.*

*4. Dissatisfied, the 1st respondent appealed to the Court of Appeal which by its judgment delivered on 15th December, 2011 set aside the judgment of the Federal High Court and declared the 1st Respondent the candidate of the political party."*

In brief the appellant/applicant appealed on the 15/12/11, a day after the Court of appeal decision. Through some administrative

errors, the motion for leave to appeal was not fixed for hearing and so the delay in appealing or seeking leave to appeal ensued. Also of note is that somewhere along the line the applicant discovered the grounds in the proposed Notice and Grounds of Appeal needed extra leave since the grounds were not of law alone but of mixed law and fact or of facts alone. This requirement for leave to appeal on those grounds of appeal other than based on law alone being Constitutionally provided for by virtue of Section 233 (3) of the 1999 Constitution must be complied with otherwise the applicant runs the risk of the process being incompetent and to be thrown out without more since there would be no jurisdiction on the Court to proceed. See *Opuiyo v. Omoniwari* (2007) 16 NWLR (Pt. 1060) 415 at 443 - 444 per Chukwuma - Eneh J.S.C.

The above principle settled then comes whether the court in considering the grounds of Appeal proposed by the applicant, the grounds are substantial and reveal arguable grounds.

I rely on *Iroegbu v. Okwordu* (1990) 6 NWLR (Pt. 159) 643; *Yusuf v. Co-Operative Bank* (1989) 3 NWLR (Pt. 110) 483; Chief Victor Ugwu v. Chief Mark Bunke (1997) 8 NWLR (Pt. 518) 527 (SC).

Going through the materials available, it is not difficult in accepting the position of the 1st Respondent that there is no longer a live issue. The seat is no longer vacant to talk of the person occupying the position not being a party before this Court or in the Court below. Therefore, a grant of the prayer would be tantamount to making orders in futility apart from granting reliefs against a person not party to the proceedings. See *Olori Motors Ltd. v. Union Bank of Nigeria Plc* (2006) 10 NWLR (Pt. 989) 586 at 606.

The provisions of Order 7, Rule 10 (2) of the Court of Appeal Rules or that of the Supreme Court Order 2 Rule 31 (x) as amended in 2009 have provided what must be present before are the reasons for the delay in filing the appeal thereby giving the applicant a leeway even if the delay could be seen as in this case lengthy being a period of 7 months and with the addition that the grounds in the proposed Notice of Appeal contain grounds which on the face of it show substantial and arguable points. The two arms aforesaid must co-exist, that is reasons for the delay and the arguability and substantiality of the grounds needing to be brought in.

Going through the affidavit in support and the proposed grounds of appeal, clearly the reasons for the delay which seemed to be tilting towards a mistake of counsel have not been canvassed in such a way that they could be so accepted to give sympathy to the Applicant. That coupled with the fact that there has not been satisfying that there is a live issue not a hypothetical or a dead matter such as this one where even there is an occupant of the seat in contention and who the Appellant/Applicant did not bring in as a party or even the political party of that occupant. This throws up the question as to what would be derived in allowing this appeal. The result if the application is granted would in my humble view be a merry-go-round, while the seat is occupied by someone else under another banner, both strangers to this appeal. In this kind of scenario clearly the Applicant cannot satisfy the court of an arguable substantial point on appeal. A definite waste of time which is another way of saying that there is no good cause. See *Victor Ugwu v. Chief Marke Bunke* (supra); *Long-John v. Iboroma & Ors.* (1998) 6 NWLR (pt. 555) 524; *Olori Motors Ltd. v. Union Bank of Nig. Plc* (2006) 10 NWLR (pt. 989) 586 at 606.

In the light of the foregoing and better articulated reasoning in the lead Ruling, I too dismiss this application. I abide by the consequential orders in the lead Ruling including the one on costs.

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### AKA'AH'S JSC

My learned brother, Ariwoola, JSC made available to me a draft of the Ruling he has just delivered. I entirely agree with him that the application is a worthless academic exercise. Apart from the reasons ably stated in the leading ruling, the success of this application and even the appeal will end up in a pyrrhic victory for the applicant because Hon. Ossai Nicholas Ossai of the Peoples Democratic Party who was declared the winner of the election for the Ndokwa/Ukwuani Federal Constituency seat in the House of Representatives contested the election against Eugene Uche Okolocha, the 3rd respondent who was sponsored by the Democratic Peoples Party (DPP). So even if the DPP wrongly substituted the applicant with 3rd respondent no court will order that the applicant was a candidate at the election or was wrongly excluded from the election with a view to nullifying the

election won by the candidate of the PDP.

The issue of who won the election having been finally decided by the Court of Appeal, it will be a waste of time and resources to grant the application. For this and the detailed reasons contained in the lead ruling, I too dismiss the application and abide by the order  
B on costs.

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