

SUPREME COURT OF NIGERIA
FRIDAY 25TH JANUARY, 2013. SC. 10/2012
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-
COOMASSIE, B. RHODES-VIVOUR, N. S. NGWUTA,
S. S. ALAGOA, JJSC**

SENATOR NKECHI JUSTINA NWAOGU APPELLANT
AND
1. HON. EMEKA ATUMA
2. INDEPENDENT NATIONAL
ELECTORAL COMMISSION RESPONDENTS
3. PEOPLES DEMOCRATIC PARTY

ELECTIONS - Senatorial districts - Division - Under 1999 Constitu-
tion s. 71 - Division of each State into three Senatorial districts - Is a
function assigned exclusively to INEC (H1)

ELECTIONS - Senatorial districts - Location of Local Govt. - This is a
sensitive constitutional geopolitical issue - Which cannot be admitted
or denied - At the whims and caprices of parties (H2)

APPEALS - Fresh evidence - Application - Appellate court will grant
leave if it was impossible to obtain such evidence at trial - And if the
evidence is credible as to influence judgment (H3)

AFFIDAVITS - False declaration - Allegation of - Proof - Invention
and fabrication of evidence - Should not be made against anyone -
Without proof (H4)

FACTS

The Peoples Democratic Party (3rd respondent) held its pri-
mary election on 8th January 2011 to nominate its Senatorial flag
bearer for the Abia Central Senatorial District in the then forthcom-
ing general Senatorial elections. Applicant and 1st respondent con-
tested the primary election. Applicant was declared winner of the
primary election.

After the primary election, 1st respondent commenced an ac-
tion by way of originating summons to challenge the nomination of

applicant for the election to represent the Abia Central Senatorial District in the National Assembly. The suit was dismissed by the court. Consequently, 1st respondent appealed to the Court of Appeal which set aside the judgment of the trial court and entered judgment for 1st respondent. Aggrieved, applicant appealed to Supreme Court and subsequently brought this application under Order 6 Rule 5(1)(B)(C) of the court, seeking for leave to adduce further evidence which was not tendered at the two lower Courts.

ISSUE FOR DETERMINATION

“Considering the material facts and circumstances of this application, whether this Honourable Court will not favourably exercise its discretion in granting leave to the appellant/applicant to adduce further evidence.”

HELD (Unanimously granting the application per **NGWUTA JSC**)
ELECTIONS - Senatorial districts - Division

1. The division of each State of the Federation into-three Senatorial Districts is a constitutional function assigned exclusively to the 3rd respondent (INEC). S.71 of the Constitution of the Federation 1999 as altered provides:

“S. 71: Subject to the provisions of section 72 of this Constitution, the Independent National Electoral Commission shall:

(a) divide each State of the Federation into three Senatorial Districts for purposes of elections to the Senate;”.

(p. 314 F)

ELECTIONS - Senatorial districts - Location of Local Govt.

2. The location of a Local Government Area in a particular Senatorial Zone in a State is a sensitive geopolitical issue of constitutional dimensions. It is not an issue that can be admitted or denied at the whims and caprices of anyone, not even parties to a suit. (p. 315 A)

APPEALS - Fresh evidence - Application

3. Appellate Court will grant leave to adduce fresh evidence on appeal if:

1. The fresh evidence is such that could not have been

obtained at trial if reasonable care and diligence had been taken:

2. The fresh evidence would have an important, although not necessarily a crucial effect on the case:

3. If the evidence is apparently credible:

4. If the evidence could have influenced the judgment of the trial Court had it been tendered:

5. If the evidence sought to be adduced is material and weighty, although not conclusive:

The additional evidence sought to be adduced in so far as has been demonstrated, is capable of adding to, and *ipso facto*, subtracting from, the weight of evidence one side or the other. It therefore has weight and is material to the appeal as it could have weighed in favour of one side had it been tendered at the trial. Whether or not it is conclusive cannot be dealt with at this stage. It will be determined on the totality of all relevant materials at the hearing of the appeal. (p. 315 C)

AFFIDAVITS - False declaration - Allegation of - Proof

4. The accusation of inventing and fabricating nonexistent documents for purpose of legal proceedings may seem on the surface to be directed at the applicant in this case but in reality, it is learned Counsel for the applicant who has been accused of the improper and criminal conduct of inventing and fabricating evidence for use in Court. Counsel may fight his client's case with all vigour but he cannot descend to rubbishing his colleague's image and hard earned reputation in the guise of espousing his client's case and protecting his interest. It reflects on the integrity of Counsel who stoops so low.

I am prepared to accept even before it is said, that the counter-affidavit was prepared by a junior and overzealous in chambers of the learned Silk. However, this does not diminish the learned Senior Counsel's duty to scrutinize every process emanating from his chambers for filing in Court. Invention and fabrication of evidence and false declaration on oath should not be made against anyone without proof. (p. 318 E)

REPRESENTATION

Olugbenga Adeyemi, with Kelechi Udeoyibo and Bukola Aranmi, for the Appellant

Chief Akin Olujinmi SAN with Olumide Olujinmi; Akinsola Olujinmi; Akinyemi Olujinmi and Olufemi Atetedaiye for the 1st Respondent

B Dr. Onyechi Ikpeazu SAN, OON with Ikechukwu Ogbogu; Linda Chuba-Ikpeazu and Ifeyinwa Nwabuoike, for the 2nd Respondent
Nnamdi Nwokocha, with Nenachi Henry (Mrs.) and Wole Odeloye, for the 3rd Respondent

C **CASES REFERRED TO**

Okpanum v. SGE (Nig) Ltd (1998) 5 SC 147

Ehinlanwo v. Oke (2008) 16 NWLR (pt. 1113) 383

Owata v. Anyigor (1993) 2 NWLR (pt. 276) 380

D Lawson-Jack v. SPDC of Nig Ltd (2002) SC (pt. 11) 112

Enekebe v. Enekebe (1964) NMLR 42

Asaboro v. MGD Aruwaji (1974) 4 SC 87

Obasi v. Onwuka (1987) 3 NWLR (pt. 61) 364

Uzodinma v. Izunaso (2011) 17 NWLR (pt. 1275) 30

E Egbuna v. Egbuna (1989) 2 NWLR (pt. 106) 773

Alagbe v. Abimbola (1978) 2 SC 39

STATUTES & RULES REFERRED TO

F Constitution of the Federal Republic of Nigeria 1999 (as amended), ss. 21, 71, 72

Supreme Court Rules, O. 2 r. 12, O. 6 r. 5(1)(B)(C)

Evidence Act, s. 86

G **LEAD JUDGMENT BY NGWUTA JSC**

This is yet another one in a plethora of motions filed in this appeal by parties herein as well as would-be parties.

In brief, the relevant facts are: The 3rd respondent, the Peoples Democratic Party (the PDP) held its primary election on 8th January, 2011 to nominate its Senatorial flag bearer for the Abia Central Senatorial District in the then forthcoming Senatorial elections. I shall hereunder refer to the appellant/applicant and respondent/respondent simply as applicant and 1st respondent.

The applicant and the 1st respondent contested the primary

election along with others not parties herein. The applicant was declared winner of the primary election, followed by the 1st respondent as the runner-up. After the primary election, the 1st respondent commenced an action by way of originating summons to challenge the nomination of the applicant for the election to represent the Abia Central Senatorial District in the National Assembly. Based on his anticipated favourable answers to the questions he raised for determination in the originating summons, and on the construction of Sections 21 and 72 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) the 1st respondent prayed the Court for the following reliefs:

i. A declaration of this Honourable Court that pursuant to the delineation of Senatorial Districts in Abia State of Nigeria by the 1st Defendant, Osisioma-Ngwa Local Government Area of Abia State of Nigeria, does not fall within the Abia Central Senatorial District.

ii. A declaratory order by this Honourable Court that the 3rd defendant is ineligible to aspire to be sponsored by the 2nd defendant to contest the 2011 general elections to represent the Abia Central Senatorial District.

iii. An order of this Honourable Court declaring as unconstitutional, null and void and of no legal effect whatsoever the nomination of the 3rd defendant by the 2nd defendant to run for and/or contest for the post of a Senator representing the Abia Central Senatorial District in the 2011 general election to be conducted by the 1st defendant, based on false information/declaration on oath submitted to the 2nd defendant.

iv. An order of this Honourable Court declaring the plaintiff the winner of the 2nd defendant's election primaries for the Abia Central Senatorial District held on Saturday, January 8, 2011 at the Umuahia Township Stadium, Umuahia, Abia State of Nigeria."

The trial High Court dismissed the suit whereupon the 1st respondent appealed to the lower Court which set aside the judgment of the trial Court and entered judgment for the 1st respondent. The applicant appealed to this Court and subsequently brought this application on 27/4/2012 "pursuant to Order 6 Rule 5 (1) (B) (C) of the Supreme Court Rules and under the inherent jurisdiction of this Honourable Court for the following relief:

"1. An order of this Honourable Court granting leave to the

appellant/applicant to adduce further or additional evidence which was not tendered at the two lower Courts to wit: A letter dated 30th January, 1998 captioned ‘APPROVED LISTS OF SENATORIAL DISTRICTS AND FEDERAL CONSTITUENCIES FOR THE NATIONAL ASSEMBLY ELECTIONS’.”

B The application was predicated on the following grounds:
“GROUNDS OF THIS APPLICATION”

1. *The additional documents sought to be adduced could not be obtained for use during proceedings at the trial court and the Court of Appeal even after the applicant had exercised due diligence.*

C 2. *If the additional documents sought to be tendered are admitted, they would have an important and crucial effect on the whole appeal.*

D 3. *The additional documents sought to be tendered are such that are apparently credible.*

4. *The additional documents sought to be tendered would have influenced the judgments of the two lower courts in favour of the applicant.*

5. *The documents are weighty and material.”*

E Applicant’s affidavit evidence consists of the following:

1. Eight (8) paragraph ‘Affidavit in Support’ deposed to by Abdulmaji Oniyangi of Wole Olanipekun & Co, counsel to the applicant. This was filed with the motion on 27/4/2012.

F 2. A further affidavit of 18 paragraphs deposed to by Olugbenga Adeyemi also of the law firm of Chief Wole Olanipekun SAN, lead Counsel for the applicant. This was filed on 5/5/2012.

G 3. Another further affidavit (perhaps it should have been headed “further further” affidavit to differentiate it from the further affidavit) filed on 4/7/2012 also deposed to by Olugbenga Adeyemi. Applicant also filed a written address in support of the motion on 1/6/2012.

H In a rather strong opposition to the application, the 1st respondent filed on 1/6/2012 a counter-affidavit of 18 paragraphs deposed to by Victor Onyeche, Esq of the law firm of Creeks & Shield, Counsel representing the 1st respondent.

On the 29th of June 2012, the 1st respondent deposed to and filed a further counter-affidavit of 38 paragraphs. He filed a written address also on 29/6/2012. None of learned Counsel for the 2nd

and 3rd Respondents filed a counter-affidavit or a written address. At the hearing of the motion on 1st November, 2012 learned Counsel for the applicant and the 1st respondent adopted the processes they filed and expatiated on their written addresses and each urged the Court to rule in favour of his client. Each of learned Counsel for the 2nd and 3rd respondents said he did not oppose the application but rather aligned with learned Counsel for the applicant and urged the Court to grant the application. B

The single issue for determination in the written address filed on behalf of the applicant is hereunder reproduced:

“Considering the material facts and circumstances of this application, whether this Honourable Court will not favourably exercise its discretion in granting leave to the appellant/applicant to adduce further evidence.” C

The learned Silk leading for the 1st respondent did not frame a specific issue for determination. Be that as it may, it is safe to assume that he adopted the single issue raised by his brother Silk for the applicant as his copious and well-researched address was directed at a denial of the application. D

I need to skirt around some of the points raised and argued in the written addresses, with particular reference to that of learned Senior Counsel for the 1st respondent in order not to delve into, and make a pronouncement on, the merit vel non of the appeal. E

In opposing the application, learned Senior Counsel for the 1st respondent contended that applications of this nature are not granted as a matter of grace and reminded us that people become wise after the event, an indication that the applicant did not consider it necessary to tender the fresh evidence she seeks to adduce at the trial but wants to tender it now to tilt the scale in her favour. F

I have to agree with the learned Senior Counsel that the grant or denial of this application is subject to a consideration of settled principles in the judicious exercise of the discretion of the Court. See *Okpanum v. SGE (Nig) Ltd* (1998) 5 SC 147. On the other hand, the cliché trotted out by the learned Senior Counsel that people became wise after the event is a general comment on the conduct of man in his affairs, to which this case, based on its facts, may constitute an exception. G H

It is left to be seen whether or not applicant was wise right at

the time she became aware of the suit instituted against her, or later. In paragraph 5 of the applicant's affidavit in support of this application deposed to by Abdulmaji Oniyangi Esq, it was averred that:

"That the appellant/applicant informed me while in our office on 20th February, 2012 at about 11 am of the following facts which I verily believe to be true:

i. That immediately after the 1st respondent instituted this action against the appellant at the Federal High Court, Abuja, she made frantic efforts to collate relevant documents and materials from INEC which would aid her in the prosecution of her defence.

ii. Pursuant to (i) supra, she approached INEC Headquarters, Abuja and requested to go through the file relating to her constituency to see which documents are relevant to her case.

iii. That after a diligent search on the file, the appellant discovered that all the relevant documents relating to the delineation of Abia Central Senatorial District could not be found in the file.

iv. That after the judgment of the lower Court was delivered on 13th December 2011 the leadership of the 2nd and 3rd respondents were so embarrassed and traumatized that the Chairman of the 2nd respondent called for the file relating to the delineation of both the Federal and Senatorial constituencies in Abia State.

v. That it was during the exercise stated in iv supra that the following documents which were hitherto not in the file were discovered:

(a) A letter dated 20th January 1998 captioned 'APPROVED LISTS OF SENATORIAL DISTRICTS AND FEDERAL CONSTITUENCIES FOR THE NATIONAL ASSEMBLY ELECTIONS' with two attached documents explaining the composition of the Federal Constituencies and Senatorial Districts in Abia State..."

Substantially and materially the above averments went unchallenged and uncontroverted. Applicant was aware of the importance of the document to her case but her effort to produce same at the trial was sabotaged within the office of the 3rd respondent who was not only the author but had custody of same. Also I find no basis for the claim that the fresh evidence sought to be tendered is the same as any document or exhibit in the case.

Learned Senior Counsel for the 1st respondent relied on the case of Senator Ehinlanwo v. Oke (2008) 16 NWLR (Pt. 1113) at

383 H to 384 ABC and learned Senior Counsel for the applicant relied on *Owata v. Anyigor* (1993) 2 NWLR (Pt. 276) 380 at 394 among many others for the principles laid down by the Supreme Court for the guidance of the appellate Court in the exercise of its discretion in application of this nature.

Learned Senior Counsel for the 1st Respondent argued that *Owata's* case is not applicable to the facts herein because in the earlier case, the document sought to be tendered was pleaded but this was not available at the trial whereas in this case the document was not pleaded. This is a distinction without a difference. In *Owata's* case, as in the case at hand, facts relating to the fresh evidence were pleaded. The fact that the document was pleaded in *Owata's* case cannot distinguish that case from the present case as documents, in contradistinction to facts relating thereto, need not be pleaded.

It was strenuously argued for the 1st respondent that the applicant had conceded that *Osisima-Ngwa* is not in Abia Central Senatorial District and in support of the alleged concession reference was made to page 515 of the record wherein it was stated that the applicant admitted paragraphs 22, 24 and 25 of the 1st respondent's affidavit in support of the originating summons.

The plaintiff's (now 1st respondent's) "Affidavit in Support of Originating Summons" runs from pages 6 to 10 of Vol. 1 of the record. In his written address, the learned Senior Counsel leading for the 1st respondent referred to page 515 of the record Vol. 1 and stated that the applicant, then 3rd defendant, in her counter-affidavit to the originating summons admitted that *Osisima-Ngwa* LGA is not part of Abia Central District. His words:

"The admission to the effect that Osisima-Ngwa Local Government Area of Abia State is not part of Abia Central Senatorial District. With this admission of the very issue in dispute between the parties, the applicant has deprived her Exhibits A, B and C of any credence."

The paragraphs said to have been admitted by the applicant are paragraphs 22, 24 and 25 of the affidavit in support of the originating summons. I hereunder reproduce them:

"22: That the 2nd defendant is hereby given notice to produce the originals of the said primaries at the trial of this Suit.

24. That I know as a fact that the 3rd defendant represented

the Osisioma/Obingwa/Ugwunabgo Federal Constituency at the Federal House of Representatives from 2003 to 2007.

25. *That I also know as a fact that Obingwa and Ugwunagbo Local Government Areas belong to the Abia South Senatorial District.”*

B My Lords, the facts averred in paragraphs 22 and 24 of the affidavit of 1st respondent in support of the originating summons admitted by the applicant have no bearing to the issue at stake that is whether or not Osisioma-Ngwa LGA is in Abia Central Senatorial District of Abia State. Applicant admitted the averment in paragraph C 24 that she represented Osisioma/Obingwa/Ugwunagbo Federal Constituency in the National Assembly from 2003 to 2007. She admitted the averment in paragraph 25 that Obingwa and Ugwunagbo D Local Government Areas of Abia State belong to the Abia South Senatorial District. The implication is logical, that since two of the Local Government Areas she represented are in Abia South Central Senatorial District, the 3rd Local Government Area would ordinarily be in the same South Senatorial District.

E But can the applicant or anyone for that matter make such admission and if made can such admission be relied on in the determination of rights and obligations of parties in legal proceedings. I appreciate, and agree with the submission of Dr. Ikpeazu SAN lead Counsel for the 2nd respondent to the effect that the composition of any Senatorial District in the country is not a matter that can be resolved on admission of any party to legal proceedings. F

The division of each State of the Federation into-three Senatorial Districts is a constitutional function assigned exclusively to the 3rd respondent (INEC). S.71 of the Constitution of the Federation 1999 as altered provides: G

“S. 71: Subject to the provisions of section 72 of this Constitution, the Independent National Electoral Commission shall:

(a) divide each State of the Federation into three Senatorial Districts for purposes of elections to the Senate;” H

Section 72 of the Constitution (supra) to which s.71 of same Constitution is made subject, provides:

“S.72: No Senatorial District or Federal Constituency shall fall within more than one State and the boundaries of each district or

constituency shall be as contiguous as possible and be such that the number of inhabitants thereof is as nearly equal to the population quota as is reasonably practicable.”

The location of a Local Government Area in a particular Senatorial Zone in a State is a sensitive geopolitical issue of constitutional dimensions. It is not an issue that can be admitted or denied at the whims and caprices of anyone, not even parties to a suit.

I have scrutinized the record. Having settled the peripheral matters in the application, I will proceed to determine its merit vel non. I will adopt the five principles enumerated by this Court in Owata’s case supra.

Appellate Court will grant leave to adduce fresh evidence on appeal if:

1. The fresh evidence is such that could not have been obtained at trial if reasonable care and diligence had been taken:

I have already reproduced the relevant paragraph of the affidavit in support of this application deposed to on behalf of the applicant. The averment was not challenged and the facts are not in their nature incredible. I will deem the facts relating to the applicant’s fruitless effort to obtain the document from the 3rd respondent’s file as admitted by the 1st respondent who had opportunity to, but did not controvert same. See *Lawson-Jack v. The SPDC of Nig Ltd (2002) SC (Pt. 11) 112.*

It is remarkable that even the 2nd respondent, the INEC who is the author of the document and in whose files the applicant could not see it did not challenge the averment that indicted its staff. I accept that the document was deliberately suppressed only to be returned to the file after the delivery of judgment by the trial Court.

Learned Counsel for the 2nd respondent INEC aligned with learned Senior Counsel for the applicant in urging us to grant the application. In my view, this is an admission of the involvement of 2nd respondent’s staff in the suppression of the document and no investigation has been carried out to bring the culprits to book if only to avoid a repeat performance. There should be very restricted access to files containing such important documents.

2. The fresh evidence would have an important, although

not necessarily a crucial effect on the case:

The issue in contention is the location of Osisioma - Ngwa Local Government Area of Abia State vis-a-vis the Central Senatorial District of the State. I will stop at saying that it will have an important effect on the appeal. Whether or not it is crucial will be
 B determined at the hearing of the appeal,

3. If the evidence is apparently credible:

In an effort to impugn the credibility and authenticity of the fresh evidence the 1st respondent swore in paragraph 4 (iv) and (ix)
 C of his counter-affidavit that:

“4 (iv) The documents sought to be adduced are documents which had existed as far back as 1998 before the commencement of the suit and the appeals. They were not documents arising ex improviso.

D *(ix) On the applicant’s own showing, these documents now sought to be adduced never existed. They came into existence by the invention of the applicant after the delivery of the judgment appealed from. The documents sought to be adduced by way of additional evidence were/are not part of the Abia delineation file. They were*
 E *fabricated for the purpose of this appeal.”*

My Lords, the sub-paragraphs of paragraph 4 of the counter-affidavit reproduced above are in irreconcilable conflict. In paragraph 4 (iv) of the counter-affidavit deposed to by one Victor Onyeche Esq, it was averred that the documents *“had existed as far back as*
 F *1998 before the commencement of the suit and the appeals. They were not documents arising ex improviso “.*

The last sentence here demonstrates a misunderstanding of the applicant’s case. She never claimed that the documents arose ex
 G improviso. She simply could not find them where they should have been and where they were eventually found after the delivery of judgment in the trial Court.

In paragraph 4 (ix), not only did the deponent present a different and conflicting case, he made criminal allegation against the
 H applicant. There is nothing in the entire affidavit evidence to support the assertion that *“these documents now sought to be adduced never existed.”* Not only that the 1st respondent accused the applicant of inventing the documents after the delivery of the judgment appealed from, he was more specific when he said that: *“They were fabricated*

for the purpose of this appeal.”

I will say more on this later in the ruling. Suffice it now to say that the 1st respondent offered no proof of the allegation of criminal offence he made against the applicant in the civil proceedings, not to speak of proof beyond reasonable doubt as provided in s.137 of the Evidence Act because the fate of the application could depend on whether or not the fresh evidence sought to be adduced on appeal was invented and/or fabricated by the applicant for the purpose of the appeal. B

Based on the affidavit evidence, the 1st respondent has not successfully challenged the credibility of the additional evidence sought to be adduced on appeal by the applicant. Above all, the 2nd respondent in the motion (the INEC) has not denied the authorship of the additional evidence sought to be adduced, nor did the Nation's Electoral Umpire deny having been the custodian of the documents at all material time. C
D

In the circumstances, it is the 2nd respondent who is in a better position than the 1st respondent to call the credibility and authenticity of the additional evidence sought to be adduced in question. INEC did not do so but rather vouched for the credibility of the fresh evidence by urging the Court to grant the application. E

4. If the evidence could have influenced the judgment of the trial Court had it been tendered:

Permit me to repeat, my Lords, that the applicant and the 1st respondent joined issue on the geopolitical location of Osisioma-Ngwa Local Government Area with respect to Abia State Senatorial Districts. The 1st respondent took a contrary position to that of the applicant that Osisioma-Ngwa was and is within the Central Senatorial District of Abia State. The fresh evidence sought to be adduced could have obviously tilted the scale of justice one way or the other had it been tendered at the trial. F
G

5. If the evidence sought to be adduced is material and weighty, although not conclusive:

The additional evidence sought to be adduced in so far as has been demonstrated, is capable of adding to, and ipso facto, subtracting from, the weight of evidence one side or the other. It therefore has weight and is material to the appeal as it could have weighed in favour of one side had it been ten- H

dered at the trial. Whether or not it is conclusive cannot be dealt with at this stage. It will be determined on the totality of all relevant materials at the hearing of the appeal.

I will now re-visit the 1st Respondent's affidavit evidence as indicated earlier that I would. I will do this for two reasons: (1) The counter-affidavit in the light of the relevant provisions of the Evidence Act, and (2) The effect of the allegations of criminal act made therein.

(1) Contents of affidavit - it cannot be said that 1st Respondent's counter-affidavits contain only a statement of facts and circumstances to which the witness deposes either from his own personal knowledge or from information which he believes to be true. See s. 86 of the Evidence Act. On the contrary it contains arguments, conclusions and speculations.

(2) To invent and fabricate evidence for the purpose of legal proceedings is an accusation of criminal act. Also making false information & declaration on oath (see relief No. IV) is a crime of perjury.

These are not statements of fact which must come from the deponent's personal knowledge or from disclosed source. Once Counsel has been instructed, he prepares the processes to be filed in Court in pursuit of his client's case. Counsel decides what processes to file. The affidavit is prepared by Counsel or at least he vets same before filing.

The accusation of inventing and fabricating nonexistent documents for purpose of legal proceedings may seem on the surface to be directed at the applicant in this case but in reality, it is learned Counsel for the applicant who has been accused of the improper and criminal conduct of inventing and fabricating evidence for use in Court. Counsel may fight his client's case with all vigour but he cannot descend to rubbishing his colleague's image and hard earned reputation in the guise of espousing his client's case and protecting his interest. It reflects on the integrity of Counsel who stoops so low.

I am prepared to accept even before it is said, that the counter-affidavit was prepared by a junior and overzealous in chambers of the learned Silk. However, this does not diminish the learned Senior Counsel's duty to scrutinize every process emanating from his chambers for filing in Court. Invention and

fabrication of evidence and false declaration on oath should not be made against anyone without proof.

In conclusion, it is my view that the fresh evidence sought to be adduced Exhibits A, B and C exhibited in paragraph 5(v) of the affidavit in support of this motion satisfy all the requirements for fresh evidence to be adduced on appeal. B

Motion is granted. It is hereby ordered that Exhibits A, B and C be and are hereby received as fresh evidence in this appeal. They are marked Exhibits A, B and C. Parties to bear their respective costs.

MOHAMMED JSC

I have been privileged before today of reading in draft the Ruling just delivered by my learned brother, Ngwuta, J.S.C. in this application by the Appellant/Applicant for leave to adduce further or additional evidence which was not tendered at the two lower Courts namely, A letter dated 30th January, 1998 captioned

“Approved lists of Senatorial Districts and Federal Constituencies for the National Assembly Elections.”

My learned brother has exhaustively dealt with all the issues relating to the principles of law guiding this Court or any Appellate Court for that matter, in exercising its discretion to grant or refuse such application to adduce further or additional evidence on appeal. I completely agree with the reasoning and the conclusion finally arrived at in deciding to grant the Appellant/Applicant’s application. I too grant the application in the same terms with the lead Ruling while abiding by all the orders made therein including the order on costs. F

MUNTAKA-COOMASSIE JSC

I have had the opportunity of reading in draft the leading ruling just delivered by my learned brother, Nwali Ngwuta, J.S.C.

I agree entirely with him and I adopt his reasoning and conclusions therein, with respect, as mine. For the reasons clearly stated by my learned brother in granting the motion I agree that the application be granted as prayed. I abide by all the consequential order carefully made by Ngwuta, J.S.C. in the lead ruling. I, too, make no order as to costs. H

RHODES-VIVOUR JSC

I have had the advantage of reading in draft the Ruling prepared by my learned brother Ngwuta, JSC. I am in full agreement with the Ruling. I propose though, to add only a few observations.

B The Supreme Court has jurisdiction to hear and determine an application to adduce fresh evidence on appeal by virtue of Order 2 Rule 12 of the Supreme Court Rules. In view of the fact that there must be an end to litigation fresh evidence will not be readily received on appeal except on special grounds.

C By virtue of the provisions of Order 2 Rule 12 of the Supreme Court Rules this court may in its discretion admit fresh evidence of witnesses (whether they were or were not called at the trial) or to order the production of any document or other thing connected with the proceedings on special grounds. The party seeking to adduce fresh evidence must plead it or depose to it in an affidavit supporting the application.

E Before this court exercises its discretion to grant leave to adduce fresh evidence the following principles must be taken into consideration:

(a) The evidence to be adduced must be such as could not been, with reasonable diligence, obtained for use at the trial or are matters which have occurred after judgment in the trial court.

F (b) The evidence should be such as if admitted it would have an important, not necessarily crucial effect on the whole case, and

G (c) The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible. See *Enekebe v. Enekebe* (1964) NMLR p.42 C. *Asaboro v. MGD Aruwaji & anor* (1974) 4 SC p.87, *Obasi v. Onwuka* (1987) 3 NWLR (pt. 61) p.364, *Hope Uzodinma v. Senator O.B. Izunaso & 2 Ors.* (2011) 17 NWLR (pt. 1275) 30.

The fresh evidence the applicant seeks admitted on appeal in this court is:

H 1. A letter dated 30th January 1998 captioned “*Approved Lists of Senatorial Districts and Federal Constituencies for the National Assembly Election*” with two attached documents explaining the composition of the Federal Constituencies and Senatorial Districts in Abia state...”

The issue in the main appeal is who between the applicant and the 1st respondent won the PDP primaries for Abia Central Senatorial District. To resolve that issue the document referred to above would be necessary to determine the correct delimitation of the said Senatorial District. Now, paragraphs 5 (i), (ii), (iii), (iv), (v) of the affidavit in support of the application alluded to in the leading Ruling is compelling evidence that the evidence to be adduced could not have been with reasonable diligence obtained for use at the trial court simply due to the fact that the 2nd respondent, (INEC) for some unexplained reason did not produce the said document before or during trial, but quickly produced it after trial. The court will generally exercise its discretion to allow fresh evidence on appeal in such circumstances.

By allowing such evidence on appeal, this court would be able to identify a defect in the judgment and correct it rather than deliver judgment in ignorance to facts which ought to have been known before rights are/were definitively decided.

For this and the fuller reasoning in the leading Ruling the application is granted.

ALAGOA JSC

The facts of this case have already been stated in the lead ruling of my learned brother. The sole issue for determination in this application is reproduced hereunder:-

“Considering the material facts and circumstances of the application, whether this Honourable Court will not favourably exercise its discretion in granting leave to the Appellant/Applicant to adduce further evidence.”

Applicant had deposed in paragraph 5 of the affidavit in support of her application that after the 1st Respondent had instituted this action against her at the Federal High Court, she approached INEC Headquarters at Abuja, her intention being to be appraised with relevant documents and information that would enable her put up a good defence. A search through the file relating to her constituency to see which documents would be relevant to her case revealed that all relevant documents relating to the delineation of Abia Central Senatorial District could not be found in the file. After her loss to the

1st Respondent at the Court of Appeal which was quite embarrassing to her and others which prompted the Chairman of the 2nd Respondent to call for the file relating to the delineation of both the Federal and Senatorial Constituencies in Abia State.

B It was during this exercise that the following documents which were hitherto not in the file were discovered:

(a) A letter dated 30th January 1998 captioned “*APPROVED LISTS OF SENATORIAL DISTRICTS AND FEDERAL CONSTITUENCIES FOR THE NATIONAL ASSEMBLY ELECTIONS*” with two attached documents explaining the composition of the Federal Constituencies and Senatorial Districts in Abia State were discovered in the file.

D These depositions were not controverted. The law is clear on unchallenged depositions. Such unchallenged facts are deemed admitted. See *Egbuna V. Egbuna* (1989) 2 NWLR (PART 106) 773 at 777; *Alagbe V. Abimbola* (1978) 2 S.C. 39 at 40. This is a serious indictment of INEC staff and it is interesting that INEC did not even see the need to challenge these depositions of fact.

E I think it is safe to say that the documents were quietly put away during litigation which may have involved their being tendered and relied on by the Applicant only to be put back in the INEC file after what was perceived to be an end to litigation by the Applicant and first Respondent. Learned Counsel for the 1st Respondent has only stated what is an obvious fact that granting of an application to adduce further evidence at the eleventh hour is hardly ever done and the court must be guided by certain laid down principles.

G Learned Counsel for the parties have cited the cases of *Ehinlawo V. Oke* (2008) 16 NWLR (pt.1113) at 383 against the grant and *Owata V. Anyigor* (1993) 2 NWLR (pt. 276) 380 at 394 in favour of the grant. Counsel for the 1st Respondent’s contention is that in *Ehinlawo* (Supra) the document was pleaded but not available to be relied upon at the trial whereas in *Owata* (Supra) the documents sought to be made use of like in the present case was not pleaded. H What I think is relevant is that facts of what may be considered relevant to the fresh evidence sought to be adduced were pleaded. *Owata* (supra) enumerated the following guiding principles for a court to follow in the grant of leave to adduce fresh or further evidence.

1. The fresh evidence must be such that could not have been

obtained at the trial if reasonable care had been taken.

2. The fresh evidence would have an important although not necessarily a crucial effect on the case.

3. Does the fresh evidence sought to be adduced appear credible?

4. Could the evidence have influenced the judgment of the trial court had it been made available and tendered-at the trial court?

5. Is the fresh or additional evidence sought to be introduced weighty?

Upon a careful consideration of these principles, I think the answer should be in the positive. It is for these reasons and the fuller reasons given in the lead Ruling of my learned brother, Nwali Sylvester Ngwuta, (JSC) which I was earlier privileged to read, and which I entirely agree with having been very thoroughly presented that I too grant the application. In so doing I abide by all the other order or orders contained in the lead Ruling including the order on costs.

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