

SUPREME COURT OF NIGERIA
FRIDAY 31ST MAY, 2013. SC. 179/2012
CORAM:- I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH,
S. GALADIMA, C. B. OGUNBIYI, S. S. ALAGOA, JJSC

SENATOR ALPHONSUS

UBA IGBEKE

..... APPELLANT

AND

1. LADY MARGERY OKADIGBO

2. INDEPENDENT NATIONAL

ELECTORAL COMMISSION

..... RESPONDENTS

3. PRINCE JOHN OKECHUKWU EMEKA

4. PEOPLES DEMOCRATIC PARTY

APPEALS - Preliminary objection - Purpose - The success of such objection has the effect of terminating the litigation - But where it is dismissed - Appeal will be determined on merit (H1)

ESTOPPEL - Res judicata - Application - A plaintiff cannot relitigate an action that has been competently decided by court - Where parties - Issues and subject matter in previous proceedings are the same (H2)

COURT PROCESSES - Abuse - Characteristics - The action as constituted by appellant is abuse of process - As it is a multiplication of actions involving same parties and subject matter (H3)

FACTS

This matter borders on who is the authentic candidate of 4th defendant/ 4th respondent in the Anambra North Senatorial Election held in April 2011. Plaintiff/appellant had initiated this action before the Federal High Court Abuja, which in its judgment, made findings in his favour. 1st defendant/ 1st respondent appealed to the Court of Appeal against the judgment. Similar appeals were also filed by 3rd and 4th respondents against the judgment of the trial High Court. The appeals were however consolidated. The court allowed the appeal in its judgment. 1st respondent was thus declared as the authentic candidate of 4th respondent for the said election.

3rd respondent was dissatisfied with the judgment of the Court of Appeal. He appealed to Supreme Court in suit no SC.69/2012. The Supreme Court considered the issues raised in the matter and delivered its judgment on same. Appellant was also not satisfied with the judgment of the Court of Appeal. He therefore filed the present appeal before the Supreme Court in suit no SC.179/2012 challenging the same decision of the Court of Appeal of which the Supreme Court has competently adjudicated upon in suit no SC.69/2012. Meanwhile, 1st respondent has raised a preliminary objection to the hearing of the appeal on the ground that the appeal is an abuse of court process.

HELD (Unanimously dismissing the appeal per GALADIMA JSC)

APPEALS - Preliminary objection - Purpose

1. With due respect, the interpretation given to Rule 9 of Order 2 of the Rules of this Court is preposterous, weak and tenuous. The preliminary objection raised by a party to the hearing of a matter or appeal is a threshold issue. It is that the appeal ought not be heard as it has no basis. For the success of the objection to the hearing of an appeal is a pre-emptive step which has the effect of bringing the litigation to an end. On the other hand, if the objection is dismissed, the appeal will be determined on the merit. (p. 2361 H)

Res judicata - Application

2. Generally this principle of law has long been settled in a plethora of decisions of this Court notably FADIORA v. GBADEBO (supra) EBBA v. OGODO (supra). For the doctrine to apply, it must be shown that:

(i) The parties;

(ii) The issues; and

(iii) The subject matter in the previous Action were the same as those in the Action in which the plea was raised.

Once these ingredients of res judicata are established the previous judgment estoppes the party from making any

claim contrary to the decision in the previous case.

A Plaintiff cannot bring an action based on an issue that has been competently and conclusively determined by a court of competent jurisdiction with certainty and solemnity. This is because that will suggest that the action he has brought is abuse of the process of the court.

It is clear that Appeal SC. 179/2012, Appeal No.SC.69/2012 both arose from the same Judgment of the Court of Appeal which has been affirmed in its Judgment delivered on 6th July, 2012 in respect of the said Appeal No.SC.69/2012.

I do not agree with the contention of the Appellant that he (as 1st Respondent in SC.69/2012) was not heard in the matter. From the Records, he had all the opportunities to bring up any point he had wished or apply for consolidation of the appeals since both are complaining against just decision as well as knowing fully well that those issues raised in that appeal are the same as in his own appeal; but it would appear that the appellant herein decided to stand by and watch the 3rd Respondent herein who was the Appellant in that appeal to fight his battle for him. The Appellant herein did exactly that and he should be bound by the outcome of the case and cannot be allowed to reopen the case. There must be an end to litigation. (pp. 2363 B/2367 G)

COURT PROCESSES - Abuse - Characteristics

3. The Respondent has contended that this appeal, once found to be caught up by res judicata, it has become academic, and hypothetical, and an abuse of the process of court. The appeal will now bear endless appellations such as “lifeless” “spent” etc, that have made it a non-starter. The concept of abuse of judicial process is not precise. It involves some circumstances and situations such as in the instant case, but that can be of infinite varieties and conditions.

However its common feature is the improper use of judicial process (as in this case) by the Appellant/Respondent herein. This Court has said in a plethora of decisions that multiplication of actions on the same matter can constitute an abuse of the process of the court as long as parties to the actions and

the subject matter are the same. In the instant case, the parties to this appeal are the same as in SC.69/2012. The issues submitted for determination in this appeal are substantially and materially the same, and the subject matter has always remained the same; For this I am of the firm view the Appellant has not used the process of this Court bona fide and properly. This constitutes abuse of process of court.

Where an action (including appeal) is or becomes an abuse of process of court, this Court in numerous authorities has held that the process is liable to dismissal. (p. 2369 B)

REPRESENTATION

Chief Wole Olanipekun, SAN with Olugbenga Adeyemi Esq., Paulyn Abhulimen Esq. and Aisha Ali (Miss), for the Appellant/Respondent
 Yusuf O. Ali, SAN with Prof. W. Egbewole Esq., A. O. Ojo Esq., K. K. Eleja Esq., R. O. Balogun; S. A. Oke Esq., K. T. Sulyman (Miss) T. E. Akintunde (Miss) Esq., K. O. Lawal Esq., O. Ademiyiwa (Miss) Kayode Esq., N. Aniesonam Esq., E. A. Anchaver Esq., S. Lamidi (Miss) and S. O. Giwa Esq., for the 1st Respondent

Ibrahim K. Bawa Esq., with Tanimu Inuwa Esq., Alhassan A. Umar Esq., Rahima Aminu Esq., Abdulaziz, Sani Esq., Ruth Nelson-Ndu (Mrs.) and Linda Etuk (Miss), for the 2nd Respondent
 J. K. Mbanefo Ikwegbue Esq., with C. J. Chinwuba Esq., and Uchenna Ogunedo (Miss), for 3rd Respondent

Chief Olajide Ajana Esq. with Chief Olusola Oke Esq., Prince John Ola Mafo Esq. Owukori Akuyibo Esq., Promise Ogbadu Esq., Gbadebo Ikuesan Esq. and Mulikat Kilani Esq., for the 4th Respondent

CASES REFERRED TO

Fadiora v. Gbadebo (1978) 3 SC 49

Ebba v. Ogodo (2000) 6 SC (pt. 1) 133

Iyaji v. Eyigbe (1987) 3 NWLR (pt. 61) 532

Ogoejeofe v. Ogoejeofe (2006) 3 NWLR (pt. 966) 205

A-G Ondo State v. A-G Ekiti State (2001) 17 NWLR (pt. 743) 709

Saraki v. Kotoye (1992) 9 NWLR (pt. 264) 156

Dingyadi v. INEC (2011) 10 NWLR (pt. 1255) 347

Arubo v. Aiyeleru (1993) 3 NWLR (pt. 280)

Umeh v. Iwu (2008) 8 NWLR (pt. 1089) 225

Mohammed v. Olawunmi (1990) 4 SC 40

Maigoro v. Garba (1999) 10 NWLR (pt. 624) 555

Long John v. Blakk (2005) 10 SC 1

Ajiboye v. Ishola (2006) 6 - 7 SC 1

Balogun v. Ode (2007) 1 - 2 SC 230

Omnia Nig. Ltd. v. Dyk Trading Ltd. (2001) 7 SC 44

B

LEAD JUDGMENT BY GALADIMA JSC

This is an appeal against the decision of the Court of Appeal, Abuja Division delivered on 16th December, 2011 in the consolidated Appeal CA/A/166/2011; (Lady Margery Okadigbo v. Senator Alphonsus Uba Igbeke & Ors.) CA/A/243/2011; (Prince John Okechukwu Emeka V. Senator Alphonsus Uba Igbeke & Ors.) and CA/A/281/2011 (Peoples Democratic Party (PDP) v. Independent National Electoral Commission (INEC) & Ors.). The said Court of Appeal had allowed the appeal which was filed by the 1st Respondent herein based upon her appeal against the Judgment of the Federal High Court Abuja. In the said Judgment which was delivered on 17th day of March 2012, the trial court found in favour of the Plaintiff/Appellant.

C

D

E

The Appellant herein who was the Respondent before the court below has brought this appeal to challenge the decision of the Court of Appeal which set aside the trial court's decision, which recognized the Appellant as the 4th Respondent's candidate and the consequential Order of the court below declaring that 1st Respondent as the rightful candidate of the 4th Respondent for the Anambra North Senatorial seat at the April 2011 General Election.

F

From the 13 grounds of Appeal contained in the Amended Notice of Appeal the Appellant formulated the following 3 issues for determination:-

G

"1. Having regard to the clear provisions of section 15 of the Court of Appeal Act, vis-a-vis the reliefs sought by the Appellant at the trial court, whether the lower court was not in grave error and so acted without jurisdiction when it declared the 1st Respondent as the candidate of the PDP for the Anambra North Senatorial District in the April, 2011 General Elections. (Grounds 7, 10, 12, and 13).

H

2. Whether the lower court was not in grave error when it considered and countenanced the incompetent undated and unsworn

counter affidavits of the 1st Respondent, as well as the exhibits attached thereto, and consequently declared the 1st Respondent as the candidate of the PDP foraaaaa the Anambra North Senatorial District in the April, 2011 General Elections. (Grounds 1, 2, 3, 4, 5, 6 and 8).

B 3. Considering the questions presented for determination, as well as the reliefs sought, by the Appellant at the trial court, whether the lower court was not in grave error when it discountenanced exhibits C-C1 and D-D164, and placed undue reliance on exhibits PDP
C 3 in declaring the 1st Respondent as the candidate of the PDP for the Anambra North Senatorial District in the April, 2011 General Elections. (Grounds 9 and 11). ”

On the other hand the 1st Respondent in her Amended Brief of Argument, submitted the following 3 issues for determination:

D “1. Whether the Court of Appeal was not right in its decision that the trial court erroneously ignored the Counter affidavit filed by the 1st respondent and whether that decision of the Court of Appeal has occasioned any miscarriage of justice having regard to the totality of the facts and circumstances of this case?

E 2. Whether the Court of Appeal was not correct in upturning the decision of the trial Court that it failed to make proper use of the affidavit evidence before it to come to the decision that the appellant was a candidate of the 4th Respondent for Anambra North Senatorial district when all the facts and circumstances of the case is taken
F into consideration?

3. Whether the Court of Appeal in the circumstances was not right by invoking the provisions of Section 15 of the Court of Appeal Act, 2004 to declare the 1st respondent at the April, 2011
G General Elections having regard to the totality of all available evidence in the record of the appeal?”

The 2nd Respondent herein did not deem it necessary to file any brief of argument, hence no issue was raised by them for the determination of the appeal.

H On behalf of the 3rd Respondent his learned counsel in a brief filed originally on 5/3/2013 but deemed filed on 7/3/2013 has raised the following 3 issues for determination of the appeal:

“3.1. Whether the Court of Appeal was right in setting aside the Judgment of the lower court having regards to the court pro-

cesses before it (Grounds 1, 2, 3, 4, 5, and 6).

3.2. *Whether the Court of appeal properly invoked its power under Section 15 of the Court of Appeal Act, 2004 to condone abuse of its processes by conferring jurisdiction on itself in declaring the 1st Respondent candidate of 4th Respondent Grounds 7, 8, 9, 10 and 11).* B

3.3. *Whether the trial court, Court of Appeal and Supreme Court have the jurisdiction ab initio to declare any of the parties to the instant appeal candidates to the 4th Respondent, having regards to Electoral Act 2011 (Grounds 12 and 13)."* C

The 4th Respondent, on page 45 of their brief of Argument filed on 28/2/2013 but deemed validly filed on 7/3/2013, considers it necessary to adopt the issues set out by the Appellant at page 11 of the Appellant's brief of Argument and as reproduced above for determination: D

At the hearing of the appeal on the 7th March, 2013, learned counsel for the parties adopted their respective briefs of argument. It will be recalled that it was there and then that the learned senior Silk Yusuf O. Ali SAN drew our attention to the 1st Respondent's Motion on Notice dated 2nd November, 2012 but filed on 6th November, 2012 together with the written address in respect of the said Motion on Notice. Having been satisfied that the Motion and accompanying written address was duly served on all the parties, and it was for all intents and purpose, a preliminary objection to the hearing of the Appellant's appeal, the Learned Senior Silk for the 1st Respondent was allowed to move the motion. The argument and submissions of respective Counsel are set out and will be considered soon. E F

The said 1st Respondent's Motion on Notice is seeking the following relief: G

"1. AN ORDER of this Honourable Court dismissing and/or striking out this Appeal on the following grounds, among others:

i. The appeal has become academic and hypothetical, having regard to the decision of this Honourable Court in appeal No.SC.69/2012, delivered on 6th July, 2012. H

ii. The appeal herein is caught by the principles of estoppel per rem judicata, issue estoppel and/or estoppel by standing by, having regard to the final pronouncement of this Court in SC.69/2012 between the same parties.

iii. *The appeal herein is an abuse of court process and will not achieve any legal or useful purpose, having regard to the final judgment of this Court in Appeal No.SC.69/2012.*

iv. *The Appeal No.SC.179/2012 is, at all events, un-maintainable and a futile exercise.*

B 2. *AND FOR SUCH FURTHER OR OTHER ORDER(S) as this Honourable Court may deem fit to make in the circumstances of this case.”*

C The 10 Grounds upon which the application is predicated, adumbrated on the motion paper are as follows:

“1. *This Honourable Court delivered its Judgment in SC.69/2012 on 6th July, 2012 and resolved all the issues therein as it affects all the parties in that appeal, finally.*

D 2. *The issues resolved in SC.179/2012 are the same with the issues in this Appeal as the parties to the two appeals are the same, the subject matter the same and the questions for determination the same.*

E 3. *The appellant herein was the 4th Respondent in Appeal No.SC 69/2012 and proffered arguments in tandem with those contained in his Appellant’s Brief of arguments in this case, in the earlier appeal.*

F 4. *The Appeal of the appellant herein is an invitation to this Honourable Court to review its judgment in No.SC.69/2012 with a view to upturning same.*

5. *This appeal constitutes a gross abuse of the process of this Honourable Court in the circumstances.*

6. *This appeal has become an academic exercise and a waste of precious judicial time and resources of this Honourable Court.*

G 7. *The present appeal is caught by the principles of issue estoppel, estoppel per rem judicata and estoppel by standing by.*

8. *It is in the interest of justice to strike out and/or dismiss this appeal.*

H 9. *The appeal will not serve any useful legal or factual purpose.*

10. *The applicant had been issued with Certificate of Return by the 2nd Respondent and was sworn in as a Senator of the Federal Republic of Nigeria on 17th July, 2012.”*

The Motion is supported by a 13 - paragraph affidavit de-

posed to by a Counsel in the Law Firm of the 1st Respondent's Counsel.

Annexed to the affidavit in support of this application is Exhibit '1' which is the Judgment of this Court in Suit No.SC.69/2012 which was delivered on the 6th day of July, 2012.

On the 7th March, 2013, at the hearing of the appeal Learned silk Yusuf O. Ali SAN, moved the Motion, which he contended is clearly a preliminary objection to the hearing of the appeal; he though took abundant caution by filing and exchanging his brief on the hearing of the merit of the said appeal. He relied absolutely on his written address filed together with the motion, the 13 paragraphs of the supporting affidavit, the Record of appeal, his briefs of argument and most importantly the Judgment of this Court in SC.69/2012 delivered on the 6th July, 2012 now reported in (2012) 18 NWLR (Pt.1331) 55 at 89 - 94.

Referring to his written address in respect of the Motion on Notice, he said he has submitted two main issues for the determination of the application, namely:

"1. Whether having regard to the facts and circumstances of this case this appeal has not been caught by estoppel per rem judicata and issues involved have not become academic.

2. Whether as presently constituted, this appeal has not become an abuse of court process."

The issues were argued seriatim as formulated above. On the first issue, which he said borders on the principle of estoppel per rem judicata he submitted that it has long been succinctly explained and settled in a plethora of decisions of this Court, particularly in the cases of FADIORA v. GBADEBO (1978) 3 SC 49 at 155 - 156, EBBA v. OGODO (2000) 6 SC. (Pt.1) 133 at 148 - 154 and IYAJI v. EYIGEBE (1987) 3 NWLR (Pt.61) 532 at 533, that an issue that has been competently and conclusively determined by a Court of competent jurisdiction between a particular set of parties cannot be brought up again by the same parties before the same court or a court of co-ordinate jurisdiction. Learned Silk has submitted that in the case at hand, both appeals No.69/2012 and this appeal SC.179/2012 arose from the same Judgment of the Court of Appeal which has been affirmed by this Court in its Judgment delivered on 6th July, 2012, in respect of Appeal No.SC.69/2012. It is explained that

in the said SC.69/2012, the 3rd Respondent herein was the Appellant in which this Court considered all the issues raised in the entire suit. Learned Silk has submitted that the same parties from the trial court were all not only present but also took active part in the proceedings which culminated into the Judgment of 6th July, 2012, which
 B Judgment is final and conclusive on all the issues.

It is submitted that by his conduct, the Appellant herein is estopped from re-litigating these issues decided in SC.69/2012 wherein he was a Respondent. That it cannot be argued by the Appellant that in appeal SC.69/2012, he did not depend on the Judgment of the
 C Court of Appeal.

On the second issue, the learned silk has carefully reviewed the case law on the concept of abuse of court process. He relied particularly on the authorities of OGOEJEOFO v. OGOEJEOFO
 D (2006) 3 NWLR (Pt.966) 205 at 221. ATTORNEY-GENERAL ONDO STATE v. ATTORNEY-GENERAL EKITI STATE (2001) 17 NWLR (Pt.743) 709 at 771. He submitted that these cases have settled the law on this matter: that multiplicity of actions will amount to and remain an abuse of court process so long as parties to the actions and
 E the subject matter are the same.

It is finally submitted that even though this appeal, at the time of filing, was properly constituted but as from the 6th July, 2012 when the decision in SC.69/2012 was delivered, it has become spent and an abuse of process of court and as such the appellant is bound
 F by the decision of this Court in SC.69/2012.

In response to the 1st Respondent's application, Appellant has filed a counter affidavit of 27 paragraphs. Attached to the said affidavit are 3 Exhibits marked as Exhibits A, B and C. A written
 G address in opposition to 1st Respondent's Motion on Notice was also filed on 13/11/2012. At the hearing of the appeal the Learned Silk for the Appellant, Chief Wole Olanipekun SAN adopted the written address as his argument in opposition to the Motion on Notice. The Appellant submits that the issue that arises for determination in the
 H light of the Respondent's application is as follows:

"Considering the facts and circumstances of this appeal whether this Honourable Court would not refuse the respondent's application dated 2nd November, 2012."

The learned silk has argued, the lone issue for determination

under two sub-heads namely: firstly, that the Appellant's Appeal is not an abuse of Court process; secondly, that the Appellant's appeal is not academic or hypothetical. It is argued (under the first subhead) that if the description of what constitutes the term "abuse of court process" as given in a number of authorities is applied to this case at hand then the Respondent has failed to terminate this appeal in limine just on that ground. Reliance was placed on the cases of *SARAKI v. KOTOYE* (1992) 9 NWLR (Pt.264) 156, *DINGYADI v. INEC* (2011) 10 NWLR (Pt.1255) 347; *7UP BOTTLING CO. LTD. v. ABIOLA & SONS (NIG.) LTD.* (1995) (Pt.383) 257; *ARUBO v. AIYELERU* (1993) 3 NWLR (Pt.280) and *UMEH v. IWU* (2008) 8 NWLR (Pt.1089) 225 at 246. That if the element of "intention to irritate, harass and annoy and mala fide" are not shown to exist in this appeal, then the appellant must be allowed to exercise his constitutional right of appeal. That it cannot be said categorically that the Appellant abused or is abusing the process of this Court when he had duly and timeously exercised his right of appeal before the decision of this Court delivered on 6th July 2011 in SC.69/2012.

On the second subhead of the issue the learned silk for the Appellant has submitted that if this appeal is successful and the reliefs are granted, the outcome will confer practical utilitarian benefit on the Appellant. That in this wise it cannot be said that the appeal has become mere academic exercise. It is urged on us to note the nature of the complaints embodied in the grounds of appeal in Exhibit 'B' (the Amended Notice of Appeal to this Court) attached to the Appellant's Counter-Affidavit which bordered on the fundamental issue of the jurisdiction of the Court of Appeal vis-à-vis the provisions of Section 15 of the Court of Appeal Act and also the sacrosanct issue of the breach of the Appellant's Constitutional right to fair hearing.

Above is the summary of the objections raised to the hearing of the Appeal by the 1st Respondent and the submissions of learned counsel for the parties. In his brief, the learned silk for the Appellant has urged this Court to note that this application alleging abuse of court process is in itself an abuse of the process of this Court, relying on Order 2 Rule 9 of the Rules of this Court.

With due respect, the interpretation given to Rule 9 of Order 2 of the Rules of this Court is preposterous, weak and tenuous. The preliminary objection raised by a party to the

hearing of a matter or appeal is a threshold issue. It is that the appeal ought not be heard as it has no basis. For the success of the objection to the hearing of an appeal is a pre-emptive step which has the effect of bringing the litigation to an end.

On the other hand, if the objection is dismissed, the appeal will be determined on the merit. This Court has in a plethora of decisions considered the preliminary objection along with the hearing of the substantive appeal. See SULEIMAN MOHAMMED & ANOR. v. LASISI SANUSI OLAWUNMI (1990) 4 SC 40; MAIGORO v. GARBA (1999) 10 NWLR (Pt.624) 555. However, in an appropriate case, and depending on the circumstance, the step taken by the 1st Respondent in this matter is proper.

In the light of the foregoing before considering the two issues raised by the 1st Respondent in this application I shall be brief in stating the facts of this application. It is a fact that this appeal SC.179/2012 arose from the decision of the Court of Appeal, Abuja which set aside the decision of the trial Federal High Court in which the 3rd Respondent's suit was dismissed. Earlier this year, this Court heard and determined appeal No.SC.69/2012 between PRINCE JOHN OKECHUKWU EMEKA v. LADY MARGERY OKADIGBO & 4 ORS, in respect of the same Judgment of the Court of Appeal, Enugu, in this matter, and the Judgment was affirmed by this Court.

That appeal was brought by the 3rd Respondent herein, that is Prince John Okechukwu Emeka against all other parties including the Appellant/Respondent as 1st Respondent/Applicant herein.

The Judgment in the said Appeal SC.69/2012 was delivered on the 6th July 2012, where the instant appeal was pending before this Court. The two appeals arose from the same Judgment. Appellant here actively participated in Appeal SC.69/2012. He never thought it necessary to ask the Court to consolidate the two appeals, both of which have the same facts, and substance and issues. It would appear that the grounds of appeal as contained in the two Notices of appeal with which the two appeals were initiated are substantially the same. The issues distilled from the grounds of appeals are also substantially the same. Hence the similarities in the two appeals, to my mind are substantial and are added piquancy that urged the Respondent to file this application in opposition to the hearing of this appeal SC.179/2012.

Now to the two issues formulated by the Respondent which I shall consider seriatim. The 1st issue borders on whether the question involved in this appeal having been completely and conclusively dealt in SC.69/2012 are still live issue and/or triable before this Court. The Respondent has argued that the decision of this Court in SC/69/2012 Constitutes estoppel per rem judicata, issue estoppel and estoppel by standing by. B

Generally this principle of law has long been settled in a plethora of decisions of this Court notably FADIORA v. GBADEBO (supra) EBBA v. OGODO (supra). For the doctrine to apply, it must be shown that: C

(i) The parties;

(ii) The issues; and

(iii) The subject matter in the previous Action were the same as those in the Action in which the plea was raised. D

Once these ingredients of res judicata are established the previous judgment estoppes the party from making any claim contrary to the decision in the previous case. See: LONG JOHN v. BLAKK (2005) 10 SC 1; AJIBOYE v. ISHOLA (2006) 6 - 7 SC 1. BALOGUN I. ODE (2007) 1 - 2 SC. 230 OMNIA NIG. LTD. v. DYK TRADING LTD. (2001) 7 SC 44. ***A Plaintiff cannot bring an action based on an issue that has been competently and conclusively determined by a court of competent jurisdiction with certainty and solemnity. This is because that will suggest that the action he has brought is abuse of the process of the court.*** F
See AGHINKPA v. NDUKA (2001) 7 SC (Pt.111) 126; ABALOGU v. SPDC LP. (2003) 6 SC (Pt.1) 19. IYAJI v. EYIGEBE (1987) 3 NWLR (Pt. 61) 532 at 533.

It is clear that Appeal SC. 179/2012, Appeal No.SC.69/2012 both arose from the same Judgment of the Court of Appeal which has been affirmed in its Judgment delivered on 6th July, 2012 in respect of the said Appeal No.SC.69/2012. G

Paragraphs 4 - 12 of the Affidavit in support of the 1st Respondent's Motion make interesting reading and positively supports the said motion. These are reproduced as follows:

"4. That I know as a fact that this Honourable Court delivered its Judgment in SC.69/2012 between PRINCE JOHN

OKECHUKWU EMEKA v. LADY MARGERY OKADIGBO & 4 ORS.
On the 6th July 2012. A certified true copy of same is herewith attached as Exhibit '1'.

5. That I know as a fact that all the issues in contention between the parties to that appeal were finally resolved by this
 B Honourable court in the said judgment.

6. That I know as a fact that the appellant herein was the 4th Respondent in the said appeal No.SC.69/2012 which was decided by this Honourable Court in the Applicant's favour on 6th July, 2012.

7. That I know as a fact that the present appellant took very
 C active part in the Suit that culminated in this appeal at the trial court, in the court below and in Appeal No.SC.69/2012, in which Judgment was delivered on 6th July, 2012.

8. That I know as a fact that both appeals No.SC.69/2012
 D and this appeal, SC.179/2012 arose from the same Judgment of the Court of Appeal which has been affirmed by this Honourable Court in Appeal No.SC.69/2012.

9. That I know as fact that the appellant and, in fact, all the parties to this appeal herein, are bound by the decision of this
 E Honourable Court in SC.69/2012 being parties who also took active part therein.

10. That I was informed by Oke Sikiru Esq. on the 2nd November, 2012 at 2pm at our office Ghalib House No.4 Sakono Street,
 F Off Adetokunbo Ademola Crescent, Wuse II, Abuja and I verily believed same as follows:

(a) That this appeal is a gross abuse of the process of this court having regard to the Judgment of this Honourable Court of 6th July, 2012 in SC.69/2012.

(b) That the issues in this appeal are the same as the issues
 G resolved by this court in SC.69/2012 on 6th July, 2012.

(c) That since the issues have been resolved in the earlier appeal, this appeal has become an academic exercise and very hypothetical.

(d) That this appeal is a waste of the precious time and resources of this Honourable Court.

(e) That this Appeal is an attempt to draw this Honourable Court into sitting on appeal over its Judgment of 6th July, 2012 in SC.69/2012.

11. *That I know as a fact that the 2nd respondent herein had issued the 1st respondent with the certificate of return and that she was sworn in as a senator of the Federal Republic of Nigeria on 17th July, 2012 and has been representing the people of Anambra North Senatorial District in the Senate since then.*

12. *That I know as a fact that it is in the interest of justice to strike out or dismiss this Appeal.*”

I have equally taken some pain to consider the Appellants/ Respondent’s counter-Affidavit paragraphs 5 - 21, which are equally reproduced thus:

“5. *I know that most of the grounds of the said application as well as the paragraphs of the Affidavit of the said Alex Akoja are not correct and do not reflect accurately the facts of this appeal.*

6. *The Appellant was the 4th Respondent in suit number: SC.69/2012 in which judgment was delivered on 6th July, 2012.*

7. *Specifically, I know that paragraphs 5, 7, 10, 12 and 13 are not correct and do not reflect accurately the facts of this appeal.*

8. *The 1st Respondent was the 4th Respondent in appeal number: CA/A/243/2011 - Prince John Okechukwu Emeka v. Senator Alphonsus Uba Igbeke and others before the lower court.*

9. *The 1st Respondent was the Appellant in appeal number: CA/A/166/2011 - Lady Margery Okadigbo v. Senator Alphonsus Uba Igbeke and others.*

10. *I know that appeal number: CA/A/43/2011 was consolidated with appeal number: CA/A/166/2011 and appeal number: CA/A/281/2011 - PDP v. INEC & Ors. at the lower court.*

11. *On the 16th day of December, 2011, the lower court delivered its Judgment in respect of the consolidated appeals, wherein it gave a separate decision in respect of appeal number: CA/A/243/2011, identified as Appeal 2 by the lower court and in which the 1st Respondent was the 4th Respondent.*

12. *Being dissatisfied with the decision of the lower court, the 3rd Respondent to this appeal filed a Notice of Appeal in SC.69/2012, containing a narrow complaint against the decision of the lower court.*

Attached herewith and marked as Exhibit A is the Notice of Appeal in SC.69/2012.

13. *I know that the Appellant has filed its Amended Notice of*

appeal in this appeal which contains a complaint mainly against the decision of the lower court in CA/A/166/2011 - Lady Margery Okadigbo v. Senator Alphonsus Uba Igbeke and others which the lower court identified as Appeal 1.

B *Attached herewith and marked as Exhibit B is a copy of the Appellant's Amended Notice of Appeal.*

14. I know that prior to the filing of Exhibit 'B', the Appellant had filed within time, a Notice of Appeal dated 14th March, 2012.

C *Attached herewith and marked Exhibit C is a copy of the said Notice of Appeal.*

15. I know that Exhibit 'B' was filed in exercise of the Appellant's right of appeal.

16. I know that Exhibit 'B' raises fundamental jurisdictional issues, as well as constitutional issues bordering on fair hearing.

D *17. I know as a fact that Exhibit A and Exhibit B contain different complaints.*

18. I know as a fact that the Record of Appeal in this appeal was only served on the Appellant on or about the 30th day of May, 2012.

E *19. I know as a fact that the Appellant has filed his Brief of Argument in this appeal since 6th June, 2012.*

F *20. I know that in his Brief of Argument filed on 6th June, 2012, the Appellant formulated three issues for determination from the thirteen Grounds of Appeal contained in Exhibit 'B'.*

G *21. I have read the Judgment of this court in SC.69/2012, delivered on 6th July, 2012, and I know that the issues decided by this Honourable Court in the said judgment are different and distinct from the issues formulated for determination by the Appellant in this appeal.*

H *The 1st Respondent has for the umpteenth time argued that the decision of this Court in SC/69/2012 constitutes estoppel per rem judicata, and as a jurisdictional issue this Court is being asked not to assume jurisdiction by virtue of a previous Judgment. The appellant on the other hand has submitted that his appeal is not caught by the principles estoppel per rem judicata. It is not in dispute that this Court delivered its Judgment in SC.69/2012 on 6th July, 2012 and resolved all the issues therein as it affects all the parties in that appeal, finally.*

The 3 issues which this Court considered in determination of that appeal are as follows:

“1. Whether the Court of Appeal and or the trial court had jurisdiction to determine who is the Peoples Democratic Party candidate for the Anambra North Senatorial District in the April, 2011 general election from two parallel Primary Elections held on 8th January, 2011 and 10th January, 2011 respectively having regards to the provisions of the Electoral Act 2010 (as amended).” B

2. Who among the following:

(a) Prince John Okechukwu Emeka C

(b) Lady Margery Okadigbo

(c) Senator Alphonsus Uba Igbeke emerged as the winner of the PDP primaries conducted for the Senatorial Seat for Anambra North in the general elections held in April, 2011.

3. Whether the Court of Appeal was right in regarding the failure of the trial Judge to determine appellants pending motion filed on 16th March, 2011 as fresh issue that requires leave of Court of Appeal and it does not amount to denial of appellant’s right to fair hearing for the Court of appeal to deliver Judgment in the appellant’s appeal without determining the said Motion.” D E

In the instant Appeal SC.179/2012 Appellants issues set out in paragraph 30.0 PP. 11 - 12 of his brief distilled from the grounds of appeal are identical to those in appeal SC.69/2012 and are therefore substantially the same. The suit which culminated into both Appeal SC.69/2012 and this Appeal SC.179/2012 begun at the trial Federal High Court and the subject matter, parties as well as the cause of action were the same right from the Federal High Court through to the Court of Appeal up to this court. F

I do not agree with the contention of the Appellant that he (as 1st Respondent in SC.69/2012) was not heard in the matter. From the Records, he had all the opportunities to bring up any point he had wished or apply for consolidation of the appeals since both are complaining against just decision as well as knowing fully well that those issues raised in that appeal are the same as in his own appeal; but it would appear that the appellant herein decided to stand by and watch the 3rd Respondent herein who was the Appellant in that appeal to fight his battle for him. The Appellant herein did exactly G H

that and he should be bound by the outcome of the case and cannot be allowed to reopen the case. There must be an end to litigation. See OMOIYA v. MACAULAY (2009) 7 NWLR (Pt.1139) 592 at 618; AMENCO SANTOS v. IKOSI INDUSTRIAL LTD & ANOR (1942) 8 WACA 29.

B By this Appeal SC.179/2012 the Appellant seeks to set aside the Judgment of the Court of Appeal and in its stead restore the Judgment of the Federal High Court Abuja. This issue had been decided and the principle of issue estoppel clearly applies to this Appeal
C against the appellant having regard to the decision of this Court in SC/69/2012 delivered on 6th July, 2012, in which the present appellant, as a respondent canvassed similar issues to the ones he has been urging this Court in this appeal.

Learned counsel for the 1st Respondent has made some plausible suggestions as avenues opened to the Appellant in the quag-
D mire he (the Appellant) has created himself. He pointed that there was neither Cross-appeal nor Respondent's Notice filed in SC.69/2012 by the Appellant herein and as such he must be taken as having defended the Judgment of the Court of appeal in that Appeal.
E He rightly submitted that the Appellant herein will be and he is in the circumstance, actually estopped from raising any issue against the 1st Respondent conclusively in that appeal. See ELIOCHIN v. MBADIWE (1986) 1 NWLR (Pt.14) 47 at 68; ADEFULU v. OYESILE (1989) 5 NWLR (Pt.122) 377 at 417.

F In view of the foregoing, it is my humble view that hearing of this appeal will have the effect of inviting this Court to sit on its own decision having become functus officio, on the issue submitted and conclusively dealt with in SC.69/2012, which are on all fours as these
G in the present appeal. NIGERIAN ARMY v. IYELA (2008) 18 NWLR (Pt.1118) 115, BUHARI v. INEC (2008) 19 NWLR (Pt.1120) 246.

The determination of the first issue in favour of the 1st Respondent/Applicant leads us to his second issue which borders on whether or not this appeal as presently constituted is not an abuse of
H court process.

As I have stated before the success of objection to the hearing of an appeal is a pre-emptive step which in effect will bring the litigation to an end. A plea of res judicata is a jurisdictional issue by which a court of law is being asked not to assume jurisdiction. A

preliminary objection when successfully utilized is capable of determining the proceedings in limine. See AYUYA v. YONRIN (2011) 10 NWLR (Pt.1254) 135 at 160 - 161; UKAEGBU v. UGOJI (1991) 6 NWLR (Pt.196) 127 at 44 and KWARI v. RAGO (2000) FWLR (Pt.22) 1121 at 1142.

The Respondent has contended that this appeal, once found to be caught up by res judicata, it has become academic, and hypothetical, and an abuse of the process of court. The appeal will now bear endless appellations such as “lifeless” “spent” etc, that have made it a non-starter. The concept of abuse of judicial process is not precise. It involves some circumstances and situations such as in the instant case, but that can be of infinite varieties and conditions. See OGOEJEFO v. OGOEJOFO (supra). However its common feature is the improper use of judicial process (as in this case) by the Appellant/Respondent herein. This Court has said in a plethora of decisions that multiplication of actions on the same matter can constitute an abuse of the process of the court as long as parties to the actions and the subject matter are the same. In the instant case, the parties to this appeal are the same as in SC.69/2012. The issues submitted for determination in this appeal are substantially and materially the same, and the subject matter has always remained the same; For this I am of the firm view the Appellant has not used the process of this Court bona fide and properly. This constitutes abuse of process of court. See IKENE v. EDJERODE (2001) 18 NWLR (Pt.745) 446; CENTRAL BANK OF NIGERIA v. SAIDU AHMED & ORS. (2001) 7 NWLR p.1.

Where an action (including appeal) is or becomes an abuse of process of court, this Court in numerous authorities has held that the process is liable to dismissal.

In the light of the foregoing I have arrived at an inevitable conclusion that the preliminary objection of the 1st Respondent brought by way of Motion on Notice is sustainable, same is accordingly sustained. Consequently the Appeals No.179/2012 having been found to be abuse of process of court is adjudged un-maintainable and has become academic, spent, speculative and hypothetical. It is accordingly dismissed. I award costs of N100,000 to 1st Respondent.

MUHAMMAD JSC

My learned brother, Galadima, JSC sustained the Preliminary Objections raised by the 1st respondent and the appeal has been found to be an abuse of court process, academic and speculative. It has been dismissed by my learned brother, Galadima, J.S.C. I adopt his consequential orders given in the lead judgment including one on costs.

C

OGUNBIYI JSC

I read in draft the lead judgment just delivered by my learned brother Suleiman Galadima, JSC and concur that the appeal ought to be dismissed for the comprehensive reasons and conclusions arrived therein. I therefore adopt his judgment as mine and also dismiss the appeal in the like terms inclusive of the order made as to costs.

E

ALAGOA JSC

When this appeal came up to be heard on the 7th March, 2013, learned counsel for the 1st Respondent Yusuf Ali, SAN drew the attention of this Court to a pending motion which in essence was in the nature of a preliminary objection seeking to stop the appeal from being heard.

The normal practice and procedure is to file a Notice of Preliminary Objection and incorporate arguments thereto in the Respondent's Brief of Argument and hear both together as this makes for easier adjudication, but this practice is not exactly sacrosanct. In the present case, a written address accompanying the motion had not only been filed but also served on all the parties and this court found no reason not to hear the motion dated 2nd November, 2012 but filed on the 6th November, 2012 which sought the following reliefs:-

"AN ORDER of this Honourable Court dismissing and/or striking out this appeal on the following grounds among others:-

i. The Appeal has become academic and hypothetical having regard to the decision of this Honourable Court in Appeal No.SC.69/

2012 delivered on the 6th July, 2012.

ii. The appeal herein is caught by the principles of estoppels per rem judicata, issue estoppels and/or estoppels by standing by, having regard to the final pronouncement of this court in SC.69/2012 between the same parties.

iii. The appeal herein is an abuse of court process and will not achieve any legal or useful purpose having regard to the final judgment of this court in Appeal No.SC.69/2012.

iv. The Appeal No.SC.179/2012 is, at all events un-maintainable and a futile exercise.

AND FOR SUCH FURTHER OR OTHER ORDER(S) as this Honourable Court may deem fit to make in the circumstances of this case.”

The application was predicated upon the following grounds:-

1. This Honourable Court delivered its judgment in SC.69/2012 on the 6th July, 2012 and resolved all the issues therein as it affects all the parties in that appeal finally.

2. The issues resolved in SC.179/2012 are the same with the issues in this appeal as the parties to the two appeals are the same, the subject matter the same and the questions for determination the same.

3. The Appellant herein was the 4th Respondent in Appeal No.SC.69/2012 and proffered arguments in tandem with those contained in his Appellant's Brief of Arguments in this case in the earlier appeal.

4. The Appeal of the Appellant herein is an invitation to this Honourable Court to review its judgment in SC.69/2012 with a view to upturning same.

5. This appeal constitutes a gross abuse of the process of this Honourable Court in the circumstances.

6. The appeal has become an academic exercise and a waste of precious judicial time and resources of this Honourable Court.

7. The present appeal is caught by the principles of issue estoppels, estoppels per rem judicata and estoppels by standing by.

8. It is in the interest of justice to strike out and/or dismiss this appeal.

9. The appeal will not serve any useful legal or factual purpose.

10. The applicant has been issued with Certificate of Return by the 2nd Respondent and was sworn in as a Senator of the Federal Republic of Nigeria on the 17th July, 2012.

The Respondent countered these allegations.

B There is a long line up of judicial authorities showing the applicability of ‘Estoppel per rem judicatam.’ In NWOPARA OGBOGU & ORS v. NWONUMA NDIRIBE & ORS. (1992) 6 SCNJ, 301, this Court per Karibi-Whyte, JSC stated the principle that “*for a party to successfully invoke res judicata or the cause of action estoppels, namely C estoppels per rem judicatam, it must be shown that the parties, the cause of action and res (subject matter) are the same in the earlier as well as the case before the court in which the plea is raised.*”

On this same principle, this court per Uwais, J.S.C. (as he then was) in PRINCE YAYA ADIGUN & ORS v. THE GOVERNOR D OF OSUN STATE & ORS (1995) 3 NWLR (PART 385) 513; (1995) 3 SCNJ 1 stated that

“*where a final judicial decision has been pronounced by either an English or (with certain exceptions) a foreign judicial tribunal of competent jurisdiction over the parties to, and the subject matter E of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, and, in the case of a decision in rem, any person whatsoever, as against any other person, is stopped in any subsequent litigation from disputing or questioning such decision on F the merits whether it be used as the foundation of an action, or relied upon as a bar to any claim, indictment or complaint or to any affirmative defence, case, or allegation if but not less, the party interest raises the point of estoppels at the proper time and in the proper manner.*”

G In IGWEGO v. EZEUGO (1992) 6 NWLR (PART 249) 567, Ogundare, JSC, stated that -

“*a successful plea of estoppels per rem judicatam*” ousts the jurisdiction of the court before which it is raised.” See generally ODUOLA v. COKER (1981) 5 SC 120; FADIORA v. GBADEBO & H ANOR (1973) ALL NLR 42; ODJEVWEDE & ANOR v. ECHANOKPE (1937) 3 SC 47. It is being contended by learned Senior Counsel for the 1st Respondent that appeal No.SC.69/2012 and this appeal No.SC/179/2012 arose from the same judgment of the Court of Appeal which said judgment was affirmed in this Court’s judgment delivered

on the 6th July, 2012 as pertains Appeal No.SC.69/2072. Were this correct, this court would unwittingly be sitting on appeal over its own judgment. It can be gleaned from the Records that the two appeals earlier referred to emanated from the same judgment of the Court of Appeal. A close look at the Grounds of Appeal and the issues distilled from the grounds in both appeals show that they are substantially the same and all the parties to this appeal are bound by the decision of this Court in SC.69/2072. Learned Senior Counsel for 1st Respondent contends that this constitutes an abuse of process.

In *MRS. F. M. SARAKI v. N. A. B. KOTOYE* (1992) 11/12 SCNJ 26, this court in considering what constitutes an abuse of court process held that, *“the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse.”* See also *HARRIMAN v. HARRIMAN* (1989) 5 NWLR (PART 119) 6; *CENTRAL BANK OF NIGERIA v. AHMED & ORS* (2001) 11 NWLR (PART 724) 359; *ALADE v. ALEMULOKE* (1988) 1 NWLR 207; *ISHMAEL AMAEFULE & ANOR v. THE STATE* (1988) NWLR (PART 75) 238 where this court considered that even the reckless exercise of the very wide powers of the Attorney General of a State could be an abuse of court process.

It is for this and the fuller reasons given by my learned brother Suleiman Galadima, JSC in his lead judgment which I had the advantage of reading before now and which I completely agree with that I too dismiss the appeal while abiding by the order on costs made in the said lead judgment.

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