

SUPREME COURT OF NIGERIA

FRIDAY 14TH JUNE, 2013. SC. 211/2012

**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, J. A. FABIYI, B. RHODES-VIVOUR, N. S.
NGWUTA, O. ARIWOOLA, M. D. MUHAMMAD, JJSC**

1. CHIKA MADUMERE
2. CONGRESS FOR PROGRESSIVE
CHANGE APPELLANTS
AND
1. BARRISTER OBINNA OKWARA
2. INDEPENDENT NATIONAL RESPONDENTS
ELECTORAL COMMISSION

ELECTIONS - Legislative Houses election - Appeal - Specific provisions in 1999 Constitution s. 246(3) - Rather than general provisions in s. 233(2)(b)(c) - Donates and subscribes right to appeal - Against decision of CA arising from the election (H1)

ELECTIONS - Legislative Houses election - Appeal - Final court - By 1999 Constitution s. 246(3) - CA decision in such election is final - And there cannot be a further appeal against same (H2)

FACTS

1st plaintiff/1st appellants filed election petition at the National and State Houses of Assembly Election Petition tribunal sitting at Owerri, praying for a nullification of the election of 1st defendant/respondent on the ground inter alia, that 1st appellant should be the duly elected candidate. At the election conducted by 2nd defendant/2nd respondent on 26th April 2011 for the Nkwerre Constituency seat in the Imo State House of Assembly, 1st appellant was 2nd plaintiff/s/ 2nd appellant's candidate in the said election. After the election, 2nd respondent returned 1st respondent as the winner and duly elected member of the State House of Assembly. During the proceedings in the matter, 1st respondent filed a motion urging the tribunal to dismiss appellants' petition on the ground that appellants' application for the issuance of pre-hearing notice being by way of a letter was incompetent.

The tribunal upheld 1st respondent's preliminary objection and dismissed appellants' petition. Aggrieved, appellants appealed to the Court of Appeal Owerri Division. The court allowed the appeal and remitted the petition to the tribunal for trial on the merits. On the petition being so remitted, 1st respondent again raised a further preliminary objection praying the tribunal to strike out the petition because the 180 days permitted the tribunal to hear and determine the petition had expired thereby leading to the tribunal's loss of jurisdiction. In a considered ruling, the tribunal upheld the objection and struck out the petition. Appellants again appealed to the Court of Appeal against the striking out of their petition. The court dismissed the appeal and affirmed the decision of the tribunal. Appellants being dissatisfied, lodged appeal in Supreme Court.

HELD

(Unanimously striking out the appeal per

MUHAMMAD JSC)

ELECTIONS - Legislative Houses election - Appeal

1. It is glaring from the clear and unambiguous words of the two Sections that whereas the former Section 233, precedes the latter Section 246 (3), it furthermore provides generally for an appellant's right of appeal. On the other hand, the latter Section 246 (3), apart from being subsequent to the former Section 233, specifically provides for appeals against decisions of the Court of Appeal arising from the National and State Houses of Assembly election petitions.

It is instructive to restate here that this Court has held that where a specific provision of a statute is subsequent to a general provision, the specific provision of the statute will prevail.

The correct pick on the issue in the instant case, therefore, is that the specific provision under S. 246 (3) rather than the general provisions under S. 233 (2) (b) and (c) donates and subscribes the right of an aggrieved person to appeal against the decision of the court below arising from the National and State Houses of Assembly election petition.

(pp. 2961 G/2962 C)

ELECTIONS - Legislative Houses election - Appeal - Final court

2. By the clear and unambiguous words of the provision of Section 246 (3) which makes the court below the last port for any relief and its decision final as it were, there cannot be a further appeal against the lower court's decision. This court has stated this much in very many decisions and there is no feature in the present case which makes departure from that position legally permissible. (p. 2962 E)

NOTABLE POINT OF INTEREST

ARIWOOLA JSC

1. Court does not assume jurisdiction where there is none

Jurisdiction of courts is conferred by the Constitution and Statutes. The court can therefore not assume one where there is none. Otherwise, any proceedings embarked upon without jurisdiction is a nullity. (p. 2980 A)

REPRESENTATION

Appellants absent

P. U. Unodum, for the 1st Respondent

Ngozi Olehi, for the 2nd Respondent

CASES REFERRED TO

Onuaguluchi v. Ndu (2001) 7 NWLR (pt. 712) 309

Awuse v. Odili (2003) 18 NWLR (pt. 851) 116

Ugwa v. Lekwauwa (2010) 19 NWLR (pt. 122) 26

Sha'aban v. Sambo (2010) 19 NWLR (pt. 1226) 353

PDP v. CPC (2011) 17 NWLR (pt. 1277) 487

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

Nwora v. Nwabueze (2011) 17 NWLR (pt. 1277)

Tukur v. Govt. of Gongola State (1989) 4 NWLR (pt. 117) 517

PDP v. Onwe (2011) 4 NWLR (pt. 1236) 166

Awuse V. Odili (2003) 18 NWLR (pt. 851) 116

A-G Ogun State v. A-G Federation (2003) FWLR (pt. 143) 206

Akpan v. State (1986) 3 NWLR (pt. 27) 225

Dingyadi v. INEC (No 1) (2010) 18 NWLR (pt. 1224) 1

Sha'aban v. Sambo (2010) 19 NWLR (pt. 1226) 353

Esewe v. Gbe (1988) 5 NWLR (pt. 93) 134

STATUTE REFERRED TO

Constitution of Federal Republic of Nigeria 1999 (as amended), ss. 233(2)(b)(c), 246(1)(b)(3), 285(6)(7)

B

LEAD JUDGMENT BY MUHAMMAD JSC

This is an appeal against the decision of the Court of Appeal holden at Owerri delivered on the 19th April, 2012 in appeal No/CA/OW/EPT/2012. The appellants in the said appeal were the petitioners at the Election Petition Tribunal, the striking out of whose petition by the tribunal led to their appeal at the Court of Appeal, hereafter referred to as the court below. I shall state, briefly, the facts on which the appeal before us predicates.

D The 1st appellant was 2nd appellant's candidate in the election conducted by the 2nd respondent for the Nkwerre Constituency seat in the Imo State House of Assembly. The election held on 26th April, 2011. At the end of polls, the 2nd respondent returned the 1st respondent as the duly elected member of the Imo State House of
E Assembly representing the Nkwerre Constituency. Dissatisfied with the return, the appellants on 17th May, 2011 filed a petition at the National and State Houses of Assembly Election Petition tribunal sitting at Owerri praying that 1st respondent's election be nullified. On
F 3rd August, 2011, the 1st respondent filed a motion urging the tribunal to dismiss appellant's petition on the ground that the petitioner's application for the issuance of pre-hearing notice being by way of a letter was incompetent. By its decision of 15th September, 2011, the tribunal upheld 1st respondent's preliminary objection and dismissed
G appellant's petition. Aggrieved by that decision of the tribunal, the appellants appealed to the court below which decision of 11th November, 2011 allowed the appeal and remitted the petition to the tribunal for trial on the merits.

H On the petition being so remitted, 1st respondent again raised a further preliminary objection praying the tribunal to strike out the petition because the 180 days permitted the election tribunal to hear and determine the petition had expired thereby leading to the tribunal's loss of jurisdiction. In a considered ruling delivered on 23rd February, 2012, the tribunal upheld 1st respondent's objection and

struck out the petition.

The appellants challenged the tribunal's decision vide their Notice of Appeal at the court below filed on 13th March, 2012 containing four grounds. In its decision dated 19th April, 2012. The court below affirmed the decision of the tribunal to the effect that since the 180 days permitted by the Constitution for the hearing and determination of appellants' petition had lapsed and same could not be extended, the tribunal was without jurisdiction to hear and determine same. The lower court further held that consideration of the appeal that arose from the tribunal's decision is an academic exercise not worth its while and struck out appellants' appeal. That decision gave rise to the instant appeal.

At the hearing of the appeal, the respondents having filed their Notices of preliminary objection as to the competence of the appeal relied on arguments contained in their briefs in support of the preliminary objections.

Firstly, respondents contend that, given Section 246 (1) (b) and (3) of the 1999 Constitution (as amended), appellants have no right of appeal from the decision of the court below in respect of an election petition. The court below, learned respondents' counsel submit, is the final court that has the jurisdiction of entertaining appeals arising from election petitions.

Secondly, by Section 285 (6) and (7) of the very Constitution, learned counsel for both respondents submit, the 180 days and 60 days for the hearing and determination of appellants' petition and/or appeal arising therefrom having expired, the issues the appeal raises have become hypothetical. Learned respondents' counsel urges us to be bound by the record of appeal which clearly indicates that appellants' petition is in respect of the election for the Nkwerre Constituency of the Imo State House of Assembly. Both counsel urge that we maintain the position this Court already took in similar appeals by declining the jurisdiction to proceed and determine the instant appeal. They rely on inter-alia, *Onuaguluchi v. Ndu* (2001) 7 NWLR (part 712) 309 at 321; *Awuse v. Odili* (2003) 18 NWLR (part 851) 116, 151 - 152; *Ugwu v. Lekwauwa* (2010) 19 NWLR (part 122) 26 and *Sha'aban v. Sambo* (2010) 19 NWLR (part 1226) 353, 360 - 361.

In further argument, learned respondents' counsel submit

that this Court cannot legitimately direct the court below as required by appellants' relief (a) to hear and determine the appeal before it on the merits. Indeed, learned counsel further submit, by their relief (c), the appellants are urging this Court to remit petition No. ERT/IM/SHA/27/2011 to the tribunal. The relief if granted, it contended, cannot avail the appellants as the time within which the tribunal to hear and determine the petition has lapsed. Learned counsel rely on the decisions in *P.D.P. v. CPC* (2011) 17 NWLR (part 1277) 487; *ANPP v. Goni* (2012) 7 NWLR (part 1298) 147 and *Nwora v. Nwabueze* (2011) 17 NWLR (part 1277) in praying that the appeal be struck out.

Responding, in their reply brief, learned senior counsel for the appellants contends that respondents' argument that this Court lacks the competence to entertain the appeal because of the finality of the decision of the court below is misconceived. The argument, it submitted, limits the jurisdiction of the Supreme Court in a manner which is inconsistent with the provisions of the Constitution. Relying on the case of *Tukur v. Govt. of Gongola State* (1989) 4 NWLR (part 117) 517 at 561, learned counsel for the appellants contends that any limitation of the court's jurisdiction which is outside the purview of Section 246 (1) (b) (i) (ii) and (iii) of the 1999 Constitution as amended, is unavailing. The statute which creates the court, learned counsel however concedes, necessarily circumscribes and limits the jurisdiction and scope of the court. In the case at hand, where the decision of the court below being appealed against outside the purview of Section 246 (1) (b) (i), (ii) and (iii) of the 1999 Constitution, the decision is not, by virtue of Section 246 (3) of the same Constitution rendered final and unappealable. The decision being outside the purview of the restrictive provision of Section 246 (i) appealable and this Court enjoys general jurisdiction under Section 233 (2) (c) of the same Constitution. Section 246 (3) of the Constitution, it is submitted, does not affect this Court's jurisdiction as donated under Section 233 (2) (c) of the Constitution. Learned counsel relies on *P.D.P. v. Onwe* (2011) 4 NWLR (part 1236) 166 particularly at pages 173 and 174 of the report.

Learned appellants' counsel further contends that all the cases the respondents cited at paragraph 3.06 of their brief in support of their arguments are inapplicable to the case at hand. The issue in the

instant case, learned appellants' counsel submits, is a provision in the alteration Act No 2, that renders S. 285 (7) of the Constitution invalid. Besides, in none of the decisions the respondents rely upon, learned appellants' counsel further submits, was Section 233 (2) of the Constitution considered either separately or in addition to Section 246 (3) that informs the decision instantly appealed against. B
Learned counsel supports his position with the decision in Adegoke Motors Ltd. v. Adesanya (1989) 3 NWLR (part 109) 250 at 266 and urge us to dismiss respondents' preliminary objections.

Now, the first and most crucial issue to resolve in relation to the objection raised by the respondents against the instant appeal as to the source of appellants' right of appeal. It appears to me that both sides are one and correctly too that rights of appeal are statutorily provided for. I am unable to agree with the learned appellants' counsel though that in the case at hand, appellants' right of appeal to this court, beyond Section 246(3) of the 1999 Constitution, necessarily draws from Section 233(2) (b) and (c) of the same Constitution as well. Both Sections of the Constitution are hereinunder reproduced for ease of reference. C

"233 (2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases:-

(b) decisions in any civil or criminal proceedings on questions as to the interpretation or application of this Constitution

(c) decisions in any civil or criminal proceedings on questions as to whether any of the provisions of chapter IV of this Constitution has been, is being or is likely to be, contravened in relation to any person- F

"246 (3)

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

It is glaring from the clear and unambiguous words of the two Sections that whereas the former Section 233, precedes the latter Section 246 (3), it furthermore provides generally for an appellant's right of appeal. On the other hand, the latter Section 246 (3), apart from being subsequent to the former Section 233, specifically provides for appeals against decisions of the Court of Appeal arising from the National H

and State Houses of Assembly election petitions.

It is instructive to restate here that this Court has held that where a specific provision of a statute is subsequent to a general provision, the specific provision of the statute will prevail. In *A-G Ogun State & Ors v. AG Federation* (2003) FWLR (part 143) 206 at 246, Uwais, CJN (as he then was) restated the principle thus:-

“It seems to me that the provisions of Section 162 subsections (1) and (10) of the 1999 Constitution are general in nature while those of Section 163 (b) of the Constitution, which deal in particular with capital gains tax and stamp duties are specific. Therefore, the latter provisions override the former for generalibus specialia derogant (i.e. special things derogate from general things)” See also *Edet Akpan v. The State* (1986) 3 NWLR (Pt. 27) 225. **The correct pick on the issue in the instant case, therefore, is that the specific provision under S. 246 (3) rather than the general provisions under S. 233 (2) (b) and (c) donates and subscribes the right of an aggrieved person to appeal against the decision of the court below arising from the National and State Houses of Assembly election petition.**

By the clear and unambiguous words of the provision of Section 246 (3) which makes the court below the last port for any relief and its decision final as it were, there cannot be a further appeal against the lower court’s decision. This court has stated this much in very many decisions and there is no feature in the present case which makes departure from that position legally permissible. See *Onuaguluchi v. Ndu* (2001) 7 NWLR (part 712) 309 at 321; *Dingyadi v. INEC* (No 1) (2010) 18 NWLR (part 1224) 1 at 98-99; *Ugwa v. Lekwauwa* (2010) 19 NWLR (part 1226) 26 at 47 and *Sha’aban v. Sambo* (2010) 19 NWLR (part 1226) 353 at 360-361.

Respondents’ objections also hinge on S. 285 (6) of the 1999 Constitution (as amended). It is argued that were the appellants to have the right of appeal, which by virtue of S. 246 (3) of the 1999 Constitution (as amended), they do not, the reliefs they seek should the appeal succeed by the operation of Section 285 (6) and (7) of the 1999 Constitution (as amended), unavailing. A detailed consideration of that ambit of respondents’ objection is a luxury this Court

refuses to indulge in. After all, the right of appeal which is a sine qua non to any such exercise does not enure to the appellants.

As a whole, I find merit in the preliminary objections of the respondents and same are hereby upheld. Appellants' incompetent appeal is accordingly hereby struck out. Parties are to bear their respective costs.

B

ONNOGHEN JSC

This is an appeal against the decision of the Court of Appeal, Holden at Owerri, in appeal no. CA/OW/EPT/5/2012 delivered on the 19th day of April, 2012 in which the court struck out the appeal for lack of jurisdiction.

C

The appeal itself was based on the decision of the National and State Houses of Assembly Election Tribunal, Holden at Owerri delivered on 23rd February, 2012 in Petition No. EPT/IM/SHA/27/2011 in which the Tribunal struck out the petition on the ground of lack of jurisdiction.

There is no doubt that the 1st appellant was a candidate of the 2nd appellant, who contested the Imo State House of Assembly Election for Nkwerre State Constituency held on 26th April, 2011. The 1st respondent was the candidate who contested with 1st appellant and was declared the winner of the said election. The declaration of the 1st respondent as the winner resulted in the election petition aforesaid.

E

F

The decision of the election tribunal to strike out the petition was based on the provisions of Section 285(6) of the Constitution of the Federal Republic of Nigeria, 1999, as amended (hereinafter referred as the 1999 Constitution, as amended) in that the 180 days allowed by the said provision for the hearing and determination of an election petition from the date of filing had lapsed. That decision was affirmed by the lower court in its judgment now on appeal before this court.

G

Learned senior counsel for 1st respondent, J. T. U. NNODUM, SAN, has filed an objection to the appeal contending that the appellants have no right of appeal to this court, the Supreme Court of Nigeria in view of the provisions of Section 246(1)(b) and (3) of the 1999 Constitution, as amended. It is also the contention of learned

H

senior counsel that the 180 days and 60 days specified in Section 285(6) and (7) of the said 1999 Constitution, as amended, in which the tribunal should have heard and determined the election petition or appeal arising therefrom haven expired/lapsed, the instant appeal has thereby been rendered an academic exercise and consequently
B incompetent.

The same grounds of objection were raised and argued by learned counsel for the 2nd respondent. I do not intend to reproduce same herein to avoid unnecessary repetition as same would
C serve no useful purpose.

I have carefully gone through the submissions of both counsel for the parties, the record of processes, the authorities cited in support of their contending positions and the judgment of my learned brother M. D. MUHAMMAD, JSC, just delivered and I am in complete agreement with the submissions of learned senior counsel for
D 1st respondent and the lead judgment of my learned brother that the preliminary objection is meritorious and should be sustained.

The provisions of Section 246(3) of the 1999 Constitution, as amended is very clear and unambiguous. It enacts as follows:-

E *“3. The decisions of the Court of Appeal in respect of appeal arising from the National and State Houses of Assembly Election petitions shall be final”.*

By numerous decisions of the Supreme Court, the above
F provision and similar ones to the like effect have been interpreted to mean that no further appeal can be filed against the decision of the Court of Appeal in appeals on National and State Houses of Assembly Election Petitions. See the case of Esewe v. Gbe (1988) 5 NWLR (Pt. 93) 134 at 136-137; Onuaguluchi v. Ndu (2001) 7 NWLR (Pt. 712) 309 at 321; Dingyadi v. INEC (No.1) (2010) 18 NWLR (Pt. 1224) 1 at 98 - 99; Ugwa v. Lekwauwa (2010) 19 NWLR (Pt. 1226)
G 26 at 47 - 48; Sha’aban v. Sambo (2010) 19 NWLR (Pt. 1226) 353 at 360-361, etc,

As stated earlier in this judgment, it is not in dispute that the
H action resulting in the instant appeal is grounded on an election petition challenging the return/declaration of the 1st respondent as winner of Nkwerre State Constituency of the Imo State House of Assembly.

In the circumstance, it is demonstratively clear that appel-

lants have no right of appeal to this court neither has this court the jurisdiction to entertain any appeal against the decision of the Court of Appeal on National and State Houses of Assembly Election Petition as that court is by Constitutional provisions, the last bus stop in the matter.

In the circumstance, the instant appeal is a colossal waste of the time of this court which should not be encouraged under any guise. B

The appeal is clearly incompetent and same is consequently struck out for want of jurisdiction.

I abide by the consequential orders made in the said lead judgment including the order as to costs. Appeal struck out. C

MUNTAKA-COOMASSIE JSC

I have had the advantage of a preview of the judgment just rendered by my learned brother, Musa Dattijo, JSC. I agree with his lordship that this court lacks jurisdiction to entertain this appeal. I sustain the preliminary objection. The appeal is therefore struck out. I will however wish to chip in my own judgment in support of the leading judgment thus:- D

The Appellants in their petition dated 16/5/2011 and filed on 17/5/2011 before the National Assembly Election Tribunal, Owerri, prayed the Tribunal for the following reliefs:- E

a) An Order that 1st Petitioner was duly elected with a majority of lawful votes at the election and ought to be returned. F

IN THE ALTERNATIVE

b) An order of court that the election is invalid and a fresh election ordered in Nnanamo ward units Ukwuniyi 003 and 004, Onusa Ward and Owerri-Nkwoji ward II, Amaokpam ward, Unubidi/ Umuwafa Units, Umuduruimbo 001, Oferyi 004, Umuchohe 003, Umnefu 010, Nkwerre Urban ward units, Okwu Hall 001, and 003, Umununbo/Umunnachor Units Amarji Hall 1 and 2 008 and 009, National School 007, Eziana Ward Units Umunamu 001, Ndimbars 011, Ezemenaha 008 or in the entire State constituency. H

On the 15/9/2011 the Tribunal dismissed the petition for failure to comply with the provisions of paragraphs 18 (1) and 47 (2) of the 1st schedule of the Electoral Act, 2010 (as amended) in that the

petitioner failed to file an application for pre-hearing. The petitioners were dissatisfied with the decision of the Tribunal and they have as a result appealed to the Court of Appeal, Owerri.

On the 11/11/2011, the petitioners' appeal was allowed and the petition was remitted to the Election Tribunal for retrial. Thereafter the respondents filed a motion before the Election Tribunal in which they sought an order to strike out the petition on the ground that the 180 days constitutionally provided under Section 285 (6) of the 1999 Constitution for the hearing and giving judgment by the Tribunal has elapsed. In its ruling dated 23/2/2012, the Tribunal struck out the petition for lack of jurisdiction.

The petitioners were again dissatisfied with the decision of the Tribunal and therefore appealed to the Court of Appeal, Owerri Division, hereinafter called the lower court which in its judgment dated 19/4/2012 dismissed the appeal.

In its conclusion, the lower court held thus:-

"The Supreme Court has laid this matter to rest, that this court cannot extend the jurisdiction of the Tribunal beyond the 180 days. See the decisions in Shettima v. Goni, PDP and CPC (supra). This appeal is therefore academic and this court is without jurisdiction to entertain it". See page 404 of the record."

The petitioners were further aggrieved with the decision of the lower court. They appealed to the Supreme Court. In accordance with the rules of this court, both parties filed and exchanged their respective briefs of argument.

The Appellants in their brief of argument distilled two issues for determination as follows:-

1. Whether the court of Appeal's abdication of its Constitutional jurisdiction to hear appeals on decisions from the Election Petition Tribunal was proper in law; and

2. Whether Section 285 (6) of the 1999 Constitution (as amended) is a valid alteration of the Constitution.

The 1st Respondent, Barr. Obinna Okwara, also formulated two issues for determination in the following terms:-

1. Whether the Court of Appeal rightly upheld the preliminary objection to its jurisdiction.

2. Whether the Court of Appeal should have determined the validity of Section 285 (6) of the Constitution of Nigeria 1999 as

amended.

The 2nd Respondent, Independent National Electoral Commission, (INEC), also distilled two issues for determination from the grounds of appeal thus:-

(i) whether the court below was right in striking out the appeal;

(ii) whether the question of invalidity of Section 285 (6) of the 1999 Constitution (as amended) was proper before the court below to warrant a declaration in respect thereof.

However, both the 1st and 2nd respondents raised preliminary objection to the hearing of this appeal as follows:-

a) That the Appellants have no right of appeal to the Supreme Court from the decision of the Court of Appeal in respect of appeal arising from an election petition in view of the provisions of Section 246 (1) (b) and (3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

b) That the 180 days and 60 days as specified in Section 285 (6) and (7) of the 1999 Constitution as amended, within which the election tribunal should have heard and determined therefrom, having expired, the appeal has become an academic exercise.

The objection of the 2nd respondent to the hearing of the appeal was the same as that of the 1st respondent. In view of the fundamental nature of these objections as they relate to the jurisdiction of this court, they ought to be examined and determined first.

In arguing its preliminary objection it was pointed out that this appeal that arose out of the election petition challenging the validity of the election of the 1st respondent as the duly elected member of the House of Representative representing Nkwere Federal Constituency of Imo State. He cited Section 246 (a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and posited that in so far as the subject matter of the petition was one of those election in which the Court of Appeal is said to be the final court, the Supreme Court has no jurisdiction to hear any appeal from the decision of the Court of Appeal, cites the case of *Apostle Selede Esewe v. Chief Nelson T. Gbe & 4 Ors* (1988) 5 NWLR (pt.93) 134 at 136 per Obaseki JSC (as he then was) unanimously agreed by Uwais JSC (as he then was), Karibi-Whyte JSC (as he then was), Kawu JSC (as he then was), Belgore JSC (as he then was).

Again learned counsel for the 2nd respondent also cited *Dingyadi v. INEC* (no. 1) (2010) 18 NWLR (pt. 1224) 1 at 98 - 99; *Awuse V. Odili* (2003) 18 NWLR (pt. 851) 116 at 151 - 152 p. 157.

Therefore since this appeal falls within the purview of the provisions of Section 246 (3) of the 1999 Constitution (as amended),
B this court has no jurisdiction to hear an appeal arising from the decision of the Court of Appeal.

Learned counsel further contended that this appeal is an academic exercise in that the time (180 days) within which the Election
C Tribunal could hear and determine the petition has long expired, counsel refers to Section 285 (6) and (7) of the 1999 Constitution (as amended) and urged this court to strike out the appeal.

The arguments of the 2nd respondent are in the same vein as that of the 1st respondent. It would therefore not be necessary to
D reproduce them in this judgment.

In response to the preliminary objection. (i.e. P.O.), the learned senior counsel to the Appellants conceded that every statute creating a court or Tribunal provides and circumscribes and limits the extent and scope of its jurisdiction as stated in the case of *Tukur v. Government of Gongola State* (1989) 4 NWLR (Pt.117) 517 at 561. He
E further contended that Section 246 (1) (b) of the 1999 Constitution (as amended) spelt out the items in respect of which that Section applies, and by the principles of *Expressio unius exclusio alterius*, the
F decisions of the Court of Appeal that are final under Section 246 (3) are those on the items in sub-sections (b) (i) (ii) and (iii) of Section 246 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Any decision on any other item or issue the Supreme
G Court enjoys specifically expressed Constitutional jurisdiction, but which is ancillary or incidental to the main cause of action in the
election petition proceeding is not final before the Court of Appeal and would be appealable to the Supreme Court. This includes issue
pertaining to Section 233 (2) of the Constitution, particularly in this case, matters of appeals on interpretation and application of the
H provisions of the 1999 Constitution, Section 233 (1) (b) and appeals on matter relating to part IV of the Constitution, Section 233 (2) (1) which constitute part of the specific jurisdiction of the Supreme Court as provided in the Constitution.

Learned senior counsel further contended that the finality

provision of Section 246 (3) does not affect the jurisdiction of the Supreme Court as provided under Section 233 of the Constitution beyond the matters specifically mentioned in Section 246 (1) (b) of the Constitution. The case of PDP v. Onwe (2011) 4 NWLR (Pt.1236) 166 was cited. It was pointed out that the complaint for which the appellants brought this appeal is that the Tribunal abdicated its jurisdiction and the court of appeal wrongly upheld same by relying on Section 285 (6) of the 1999 Constitution, hence this court has the jurisdiction to entertain this appeal against the wrong abdication of jurisdiction. He distinguished the decision in Awuse V. Odili (Supra), Onuaguluchi v. Ndu (2001) 7 NWLR (pt. 712) p. 309. Esewe V. Gbe (Supra), Dingyadi V. INEC (supra) cited by the respondents and submitted that those decisions are inapplicable to this case. Learned senior counsel further submitted that a provision of finality of an appellate court or tribunal does not operate when one is complaining about breach of fundamental right. The case of FRN v. IFEGWU (2003) 15 NWLR (PART 842) 113 at 181 was cited.

Learned senior counsel refers to this court's decisions in PD.P. V. C.P.C. (supra) and ANPP V. Goni (supra) and submitted that the decisions represent argument against substantive appeal in which they are clearly in issue. He therefore contended that an issue regarding a judgment on the interpretation of the Constitution which rests on Section 234 of the Constitution cannot be called an academic exercise.

The appellants' response to the 2nd respondent's preliminary objection is substantially the same with his earlier arguments in response to the 1st respondent's preliminary objection; therefore it will be unnecessary to reproduce same here.

The provision, of the Constitution that is subject of controversy in this preliminary objection is the provision of Section 246 of 1999 Constitution (as amended) which provides thus:

"246 (1) An appeal to the Court of Appeal shall be as of right from -

a) decisions of the code of conduct tribunal established in the fifth schedule to this Constitution

b) decisions of the National Assembly Election Tribunals and Governorship and legislative Houses Election Tribunals on any question as to whether

(i) any person has been validly elected as a member of the National Assembly or of a House of Assembly of a state under this Constitution.

(ii) any person has been validly elected to the Office of Governor or Deputy Governor; or

B (iii) the term of office of any person has ceased or the seat of any such person has become vacant.

2. The National Assembly may confer jurisdiction upon the Court of Appeal to hear and determine appeals from any decision of
C any other court of law or tribunal established by the National Assembly.

3. The decision of the Court of Appeal in respect of appeals arising from election petitions shall be final.”

The learned senior counsel to the respondents submitted that
D such issue of the interpretation of the Constitution and an alleged infraction of paragraph iv of the Constitution are not included in the items listed under Section 246 (i) (ii) (iii) of the Constitution. This court, by virtue of Section 233 of the Constitution has the jurisdiction to hear this appeal. Applying this principle of *expressio Unius exclusio*
E *alterius*, the decisions of the Court of Appeal that are final are on the items listed under Section 246 (i) (ii) (iii) of the Constitution. He placed reliance on the decision of this court in *PDP v. ONWE* (Supra) and *FRN v. IFEGWU* (Supra).

F In *PDP v. ONWE* (Supra) the case arose out of the substitution of a candidate in an election. The complaint was brought before Election Tribunal. His lordship Tabai, JSC at page 173 held as follows:

“In conclusion, I allow the appeal. Both the trial election tribunal and the Court of Appeal had no jurisdiction and so the petition
G ought to have been struck out.

The proceedings including the judgment of both the tribunal and the Court of Appeal are null and void and same are hereby set aside. The originating petition is accordingly struck out for want of jurisdiction”.

H Making a distinction between the case cited and this case, His Lordship Rhodes-Vivour at page 1746 said:

“The fact that appeals on election petitions terminate in the Court of Appeal does not apply here as appeal on issues of substitution terminate in this court”.

It is clear that the issue in PDP v. Onwe is in respect of whether a candidate was lawfully substituted or not, which does not fall within the items stated in Section 246, of the Constitution. Issue of wrongful substitution of a candidate or otherwise is a pre-election matter, in which a challenge to it is commenced at the regular court, which eventually terminates in this court. If the parties decide to fight their cause before this court, undoubtedly under Section 233 of the Constitution, this court will have the jurisdiction and in fact possess the vires to entertain an appeal arising from the decisions of the Court of Appeal in such matter.

Learned counsel also referred to this court's decision in FRN V. IFEGWU (Supra) particularly at page 181 where this court held thus:

"I am fully aware that the decision of that Tribunal or the Appeal Tribunal is said to be final. I do accept that fact. But it is only final in regard to the proceedings which gave rise to the appeal. The appeal finally terminated those proceedings. But did not terminate the respondent's entitlement to seek appropriate redress for the breach of his fundamental right arising from those proceedings in a competent court". Per Uwaifo, JSC.

With tremendous respect, this decision does not support the position canvassed by the respondents. Thus, the Supreme Court recognized the fact that the Court of Appeal's decision on any items listed under Section 246 of Constitution is final.

Any breach of the provisions of paragraph IV can be challenged in a court of competent jurisdiction.

The question that calls for determination, in my candid view, in this objection is, what is the cause of action that gave rise to this appeal?

My lords, in this my judgment I have closely set out the prayers of the appellants by the Election Petition Tribunal in which they challenged the election of the 1st respondent as the duly elected member of the Imo State House of Assembly representing NKWERRE Federal Constituency without much ado, it is clear that the subject matter that gave rise to this appeal falls within the item listed in Section 246 of the Constitution.

I have no iota of doubt in my mind that this appeal is caught by the provisions of Section 246 (3) of the Constitution as amended.

This court in a number of cases have stated its positions on this issue in several of its decisions which included: a) ESEWE V. GBE (1988) 5 NWLR (pt 93) 134 – 151, b) ONUAGULUCHI V NDU (2001) 7 NWLR (Pt 712) 309, c) DINGYADI V. INEC (No.1) (2010) 18 NWLR (pt 1224) 1, 98 – 99, d) AWUSE V. ODILI (2003) 18 NWLR (pt 851) 116/151 at p.152, e) UGWA & Anor V. LEKWUWA & Anor (2010) 19 NWLR (Pt. 1226) 26 at 47 - 48.

In Ugwa V. Lekwauwa (Supra) this court at pages 38 - 39, His lordship Aloma Mukhtar JSC (as he then was) stated the position of the law as follows:

“Now, the pertinent question is, does the present appeal fall within the ambit of the decision envisaged by Section 246. Going by the above definition of the word ‘decision’, the judgment of the Court of Appeal, Owerri Division appealed against by the appellants came within the ambit of the provision of Section 246 (3) of the Constitution supra. On whether this court has jurisdiction to hear this appeal, the answer is obviously in the negative, in view of the said provision of Section 246 (3) of the Constitution supra and a plethora of this court’s decisions by which we are bound”.

With due respect, I am equally bound by the decision of this court as stated in the above mentioned decision. There is no amount of legal rhetoric that would make this court to assume jurisdiction over a matter that this court has been constitutionally barred from hearing. While Section 233 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) relates to general power of this court to hear appeals over the decisions of the Court of Appeal, Section 246 (3) specifically applied to Election Petition Tribunal, whose decision has been appealed against to the Court of Appeal. The decisions of the Court of Appeal on those issues become final and no matter arising from those decisions can be entertained by this court. My lords, in view of the above exposition of the law, I find tremendous merit in the preliminary objections and same are hereby sustained.

I hold that this court lacks the jurisdiction to hear this appeal. The appeal is accordingly struck out. I make no order as to cost. Each party to bear its own costs.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - M. D. Muhammad, JSC. I agree that the appeal deserves to be struck out for want of jurisdiction by this court.

It is not in dispute that this appeal rests on the decision of the Court of Appeal, Owerri Division in respect of State Assembly elections for the Nkwere State Constituency delivered on 19th April, 2012. Therein, the appellants' appeal was struck out. B

Both respondents raised preliminary objection to the jurisdiction of this court. They maintained that the appellants have no right of appeal to this court from the decision of the Court of Appeal in respect of an appeal arising from an election petition in view of the provision of Section 246 (3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). C

It is necessary to consider the purport and intendment of the provision of Section 246 (3) of the stated Constitution which provides as follows:-

"246 (3) - The decisions of the Court of Appeal in respect of appeals arising from election petitions shall be final."

The word 'decision', 'in legal parlance, is defined as 'a judicial determination after consideration of the facts and the law, especially a ruling, order or judgment pronounced by a court when considering or disposing a case'. The word 'shall', as employed in the stated section, denotes obligation or a command and gives no room for discretion. It imposes a duty and enjoins a peremptory mandate. See: *Bamaiyi v. Attorney-General Federation & Ors* (2001) 12 NWLR (Pt. 723) 468 - 497. F

Put briefly, the word 'final' as employed in the applicable Section 246 (3) connotes conclusiveness; point never to be re-visited. The provision of the law is not ambiguous and should be given its ordinary plain meaning. The decision of the court below handed out on 19th April, 2012 is rooted in election appeal which the law stipulates that it should end at the Court of Appeal. G

In *Alao v. ACB Ltd.* (2000) 9 NWLR (Pt. 670) 246, it was pronounced that although this court is the court of last resort, it is nevertheless, a court of appellate jurisdiction which is regulated by the Constitution. Its jurisdiction is basically appellate apart from first instance restricted matters. The court cannot confer jurisdiction on H

itself where none is given by the Constitution or by a statute. See: *Raymond S. Dongtoe v. CSC Plateau State* (2001) 9 NWLR (Pt. 717) 132 at 50.

It is clear that the decision of the court below, entered on 19th April, 2012, is final and not subject appeal to this court.

B I am of the considered view that this court is not invested with the requisite jurisdiction and competence to hear this appeal. Refer to *Madukolu v. Nkemdilim* (1962) 2 NSCC 374. This has been the consistent stance of this court in many cases. See: *Onuaguluchi v. Ndu* (2001) 7 NWLR (pt. 712) 309; *Awuse v. Odili* (2003) 8 NWLR (pt. 831) 116 at 153; *Okonkwo v. Ngige & Ors.* (2007) 12 NWLR (pt. 1047) 191 at 218; *Dangana v. Usman* (2012) All FWLR (pt. 627) 612.

I do not think that this court, will, in the foreseeable future, D accede to perennial requests by counsel made either directly or by subterfuge, to find otherwise. After all, in most Nigerian cultures, a senior brother should not grab what belongs to his junior on ground of morality.

E The salient point has been made. Counsel should take note of same. The preliminary objection is sustained. I join my learned brother in striking out the appeal for want of jurisdiction.

RHODES-VIVOUR JSC

F The 1st appellant and the 1st respondent contested the election for the Nkwerre Constituency in the Imo State House of Assembly. The election was held on the 26th day of April, 2011 and INEC, (the 2nd respondent) the regulatory body charged with conducting G elections in Nigeria declared the 1st respondent the winner. Dissatisfied with the results as declared by the 2nd respondent, the 1st appellant filed a petition which was heard by the National and State Houses of Assembly Election Tribunal Owerri. On the 23rd day of February, 2012 the Tribunal struck out the petition for lack of jurisdiction and on appeal the Court of Appeal on the 19th day of April, H 2012 struck out the appeal for lack of jurisdiction. This appeal is against the judgment of the Court of Appeal.

The simple straightforward issue for determination is:
Whether the Supreme Court has jurisdiction to hear appeals

from decisions of the Court of Appeal in respect of the National and State Houses of Assembly Election petitions, Section 246 of the Constitution states that: 246(1) An appeal to the Court of Appeal shall lie as of right from -

(a) decisions of the Code of Conduct Tribunal established in the fifth schedule of this Constitution. B

(b) decisions of the National and States Houses of Assembly Election Tribunals; and

(c) decisions of the Governorship Election Tribunals of any question as to whether - C

(i) any person has been validly elected as a member of the National Assembly or a House of Assembly of a State under the Constitution.

(ii) any person has been validly elected to the office of a Governor or Deputy Governor, or D

(iii) the term of office has ceased or the seat of any such person has become vacant.

2. The National Assembly may confer jurisdiction upon the Court of Appeal to hear and determine appeals from any decision of any other court of law or Tribunal established by the National Assembly. E

3. The decision of the Court of Appeal in respect of appeals arising from the National and State Houses of Assembly election petitions shall be final.

This court has explained the finality of decisions of the Court of Appeal in respect of appeals arising from National and State Houses of Assembly election petitions on more than one occasion. See *Dangana v. Usman* 2012 ALL FWLR pt. 627 p.612 *Udenwa & Anor v. H. Uzodinma & Anor* 2012 12 SC (pt. VII) p. 1. F G

My understanding is that by virtue of the provisions of subsection 3 of Section 246 of the Constitution, every appeal in relation to National and State Houses of Assembly election petitions come to an end with the decision of the Court of Appeal. The final court for such matters is the Court of Appeal, and the Supreme Court has no jurisdiction to hear appeals from the decision of the Court of Appeal on such matters even if the decision of the Court of Appeal is wrong. H

Once again I must observe that this is an election matter. This court has no jurisdiction to hear on appeal from the decision of the

Court of Appeal on who won election for the Nkwerre Constituency in the Imo State House of Assembly; such appeals terminate in the Court of Appeal in view of Section 246(3) of the Constitution.

For this and the fuller reasoning in the leading judgment delivered by M.D. Muhammad, JSC this court has no jurisdiction to
B hear this appeal. Appeal is hereby struck out for want of jurisdiction.

NGWUTA JSC

C I have had the opportunity of reading in draft the lead judgment delivered by My Lord, Muhammad, JSC, just now. I entirely agree with the reasoning and conclusion therein. I will, however, make a few observations by way of contribution.

I think that the appellants misunderstood, and so misapplied,
D the Court's decision in *PDP v. Onwe* (2011) 4 NWLR (Pt. 1236) 166. The issue in the case was one of substitution of one candidate with another after the primary elections. It was clearly a pre-election matter over which the Election Petition Tribunal had no jurisdiction but erroneously assumed jurisdiction to hear and determine.

E The Court of Appeal perpetrated the same error. Had it been election matter as opposed to pre-election matter, this Court would have declined jurisdiction to deal with the appeal. Unlike *PDP v. Onwe* (supra) which was a pre-election matter, the present appeal is an election matter over which this Court has no jurisdiction in view of
F the finality clause in Section 246 (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

The case of *FRN v. Ifegwu* (2003) 15 NWLR (pt. 842) 113 at 181 has been relied upon in some cases in attempt to persuade this
G Court to rely on one provision in refusing to apply another provision of the same 1999 Constitution (as amended). The fact that the Constitution made general provisions as in Section 233 thereof and special provision as in Section 245 (3) does not derogate from the sanctity of each provision of the Constitution.

H It should be noted that in *Ifegwu's* case, the finality clause was not in the Constitution but in the Failed Bank Decree No. 18 of 1994. The Court considered the proceedings under the Failed Bank Tribunal and found that they fell short of the provision of the Constitution and set aside the decision in spite of the finality clause. The

Constitution is the Supreme Law of the land and while the validity of the provision of any law is determined by reference to the Constitution, the reverse is not the case.

Also, same provision of the Constitution cannot be employed to call in question the validity of another provision. The supremacy of the Constitution in Section 1 thereof applies to the Constitution as well as each Section thereof. It is not for this Court or any Court for that matter to entertain any complaints about Section 295 or 240 of the Constitution without embarking on the Constitutional exercise of judicial legislation.

For the above and the fuller reasons in the lead judgment, I also sustain the preliminary objections and strike out the appeal for want of jurisdiction. Parties to bear their respective costs. Appeal struck out.

D

ARIWOOLA JSC

I was privileged to have a preview of the lead judgment of my learned brother, Dattijo Muhammad, JSC just delivered.

The appeal is against the decision of the Court of Appeal, Owerri Division, hereinafter referred to as the court below, delivered on the 19th day of April, 2012 in appeal No. CA/OW/EPT/5/2012.

The appellants had participated in the election of April 26th, 2011 conducted by the 2nd respondent. The 1st appellant was the candidate of the 2nd appellant for the seat of the Nkwere Constituency in the Imo State House of Assembly. At the conclusion of the election, the 1st respondent was returned and declared the winner of the election by the 2nd respondent. The appellants were dissatisfied with the declaration hence they filed their petition at the National and State Houses of Assembly Election petition Tribunal sitting at Owerri. They prayed in their petition, inter alia, that the election of 1st respondent be nullified.

What transpired at the Tribunal before the petition was due to be heard on the merit had been beautifully alluded to by my learned brother in the lead judgment. I need not repeat same. Just before the Tribunal could commence the hearing of the petition, the 1st respondent referred to his preliminary objection against the hearing of the petition, wherein, he had prayed that the petition should

be struck out, in effect because, as at that time by virtue of the Constitutional provisions the tribunal no longer had competence to try the matter, time within which so to do having elapsed or expired. The tribunal in its considered ruling delivered on 23rd February, 2012 upheld the preliminary objection of the 1st respondent, and struck
B out the petition. That led to the appeal to the court below.

In its decision handed down on 19th April, 2012, the court below affirmed the decision of the Election Tribunal, inter alia, that the tribunal no longer had the competence to consider the petition
C filed by the appellants, the time within which the Constitution prescribed for the hearing and determination of the petition by the tribunal having lapsed. The appeal was eventually struck out, leading to the instant further appeal before us.

The main issue for determination here is whether this court
D has jurisdiction to hear this appeal on the decision of the Court below in respect of appeals arising from the National and State Houses of Assembly Election Petitions.

Section 246 of the 1999 Constitution (as amended) provides as follows:

E *"1. An appeal to the Court of Appeal shall lie as of right from*
-

(a) decision of the Code of Conduct Tribunal established in the Fifth Schedule to this Constitution;

F *(b) decision of the National and States Houses of Assembly Election Tribunals; and*

(c) decision of the Governorship Election Tribunals on any question as to whether -

G *(i) any person has been validly elected as a member of the National Assembly or of a House Assembly of a State under this Constitution;*

(ii) any person has been validly elected to the office of Governor or Deputy Governor; or

H *(iii) the term of office of any person has ceased or the seat of any such person has become vacant.*

2. The National Assembly may confer jurisdiction upon the Court of Appeal to hear and determine appeals from any decision of any other court of law or Tribunal established by the National Assembly.

3. The decision of the Court of Appeal in respect of appeals arising from the National and State Houses of Assembly Election petitions shall be final.”

There is no doubt, by the Constitutional provisions on the jurisdiction of the court below on appeal on election matters, the court below is final and no further appeal shall lie against its decision on matters coming up from the National and State Houses of Assembly Election petitions. This court has in several cases interpreted the above provisions of the Constitution to mean that the decision of the court below as prescribed is final.

In Onuaguluchi V. Ndu (2001) 7 NWLR (pt.712) 309 at 321-332, this court held as follows;

“Where an appeal is actually in respect of National Assembly election or other relevant election, whatever errors of a procedural nature or of a procedural vice as to jurisdiction or competency, cannot be corrected by this court. They can only be corrected by the Court of Appeal or else they will remain uncorrected or unresolved as this court cannot intervene since it has no appellate or supervisory jurisdiction over the Court of Appeal in such circumstance. This court will not permit or encourage any subterfuge under which it may assume jurisdiction to hear an appeal in respect of which the Constitution has in clear and unambiguous language made the Court of Appeal the final court. It follows that an appeal in respect of a decision of the tribunal in an election petition when decided by the Court of Appeal cannot be taken on appeal to the Supreme Court but is final for all purposes.” See also Awuse v. Odili (2003) 18 NWLR (pt. 851) 116; (2003) 12 SCM 27; Ocheja Emmanuel Dangana v. Usman & Ors. (2012) 4 SCM 55; (2012) All FWLR (pt. 627) 612; (2012) 2 SC (pt.111) 103.

There is no controversy, that this court as the apex and the highest court in the land, has the final say on most legal matters, in particular, on the interpretation of the Constitution, but the same Constitution has been specific and categorical in the instant circumstance, as to make the Court of Appeal the court to have the final say on the appeals on the decisions of the National and State Houses of Assembly Election petitions. This provision as all other provisions of the Constitution must be respected by all, including this apex court, as not to assume jurisdiction and claim competence where the Con-

stitution does not give it one.

Jurisdiction of courts is conferred by the Constitution and Statutes. The court can therefore not assume one where there is none. Otherwise, any proceedings embarked upon without jurisdiction is a nullity. See *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341.

B In *Patrick Izuagbe Okolo & Anor v. Union Bank of Nigeria Limited* (2004) 3 NWLR (pt. 859) 87; (2004) 1 SC (pt. 1) 1; (2004) 13 WRN 62; (2004) 2 SCM 180; (2004) LPELR 2465 this court on the effect of lack of competence or jurisdiction of a court to entertain and determine a matter, states thus:

C *“Jurisdiction is the pillar upon which the entire case stands, filing an action in a court of law presupposes that the court has jurisdiction. But once the defendant shows that the court has no jurisdiction the foundation of the case is not only shaken but is entirely broken. The case crumbles. In effect, there is no case before the court for adjudication. The parties cannot be heard on the merit of the case.”* See also; *Lakanmi v. Adene & Ors.* (2003) 10 NWLR (pt. 828) 353.

E The Preliminary Objection raised by the 1st respondent to the competence of this court to entertain this appeal is sustainable. This court does not have the competence to consider the appeal filed by the appellants.

F For the above reason and the fuller and well articulated reasoning of my learned brother in the lead judgment, I too hold that this court is lacking in competence to hear this appeal, hence same is liable to striking out. Accordingly, it is struck out by me.

I abide by the consequential order on costs in the lead judgment.

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H